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

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2 OBSTACLES IN EUROPEAN COMPETITION LAW ENFORCEMENT: A POTENTIAL SOLUTION FROM COLLECTIVE REDRESS[*]

Abstract:
The primary focus of this Chapter is to review the main obstacles in competition law enforcement in the European Union and to investigate how the development of collective redress could effectively facilitate enforcement of EU competition law. Arguably, antitrust enforcement remains sub-optimal due to the insufficient deterrent effect of EU antitrust fines and obstacles facing victims of competition law infringements in bringing damages actions. Central to my work, therefore, is the belief that collective actions constitute an attractive vehicle to solve, or at least diminish, the inefficiencies of antitrust enforcement. The Chapter explores some options as to how to design collective redress mechanisms in order to influence the ability to bring successful collective claims. This would, in turn, consider the advantages of opt-out collective actions in tackling the issues related to low participation rates, lack of funding and sub-optimal deterrence. From this perspective, the Chapter moves on to propose collective actions as a potential remedy to facilitate access to justice, to deal with a wide range of legal and economic issues and to mitigate dysfunctional compensatory mechanism of EU antitrust enforcement.

2.1 INTRODUCTION

European competition law is primarily enforced by public authorities – the European Commission at the EU level, and courts and competition authorities (NCAs) at the national level. However, private enforcement is gaining popularity in Europe. Increased importance attributed to a more favourable legal regime of private enforcement has created more incentives for the European Commission to facilitate damages actions by removing perceived obstacles for victims of anticompetitive conduct. And yet, the discovery of the merits of private antitrust enforcement has culminated in the European Commission eventually concluding a package on private damages actions in antitrust cases in June 2013. The most important milestone was reached on 26 November 2014 when the EU adopted a Directive on antitrust damages actions[1] for breaches of EU

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This Chapter is a revised version of the original published article. In order to address new developments, Chapter 2 includes amendments, summarised in the Appendix to this Chapter. Few changes are not shown in the Appendix. First, the introduction and conclusion have been changed to maintain the common approach of the PhD dissertation. As regards the introduction, it includes additional sections: A. Research question and scope; B. Methodology and limitations; C. Overview of research material; D. Structure. With regard to the conclusion, it is amended to answer the research question of the Chapter. Second, few structural amendments are not shown in the Appendix. The words 'article' and 'paper' have been changed to 'Chapter' and sections 3 and 4 in a published article have been merged in the dissertation. In addition, the numbering of sections has been changed in accordance with the common structure of the thesis. To conclude, it should be stressed that the revised Chapter maintains the original journal standards: citation, style, punctuation and consistency.

[1] 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. Previously, together with the draft of the Directive, it was published: European Commission documents 'Communication from the Commission on quantifying harm in actions for damages based on breaches of article 101 or 102 of the Treaty on the functioning of the European Union' [2013] OJ C167/07 and the Staff Working Document 'Practical Guide on quantifying harm in actions for damages based on breaches of article 101 or 102 of the Treaty on the functioning of the European Union' [2013] SWD 205, 11.06.2013.

competition law in order to facilitate damages actions in the national courts of the EU's Member States. The Directive seeks to ensure that victims of antitrust infringements can obtain compensation and to optimise the interaction between public and private enforcement of EU competition rules while at the same ensuring the protection of investigation tools, such as passing on, access to evidence and discovery rules, interaction with leniency. Surprisingly, the collective redress mechanism is not envisaged by this Directive. With a view to remedy this situation, the European Commission published a Recommendation on collective redress[2] in relation to establishing a European horizontal framework for collective redress mechanisms. It is clear, however, that the Recommendation is not very helpful, particularly given that it does not incentivize Member States to take actions in practice. Indeed, the future of collective litigation depends on to what extent local legislators are willing to provide effectives tools for collective redress procedures. In turn, truly effective compensation directly depends on whether collective redress schemes provide sufficient opportunities for ordinary consumers to aggregate claims, especially for the ones who suffered low value harm.

A. Research question and scope

The research question of this Chapter is as follows:

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?

The following steps are taken to address this question. In the first place, this Chapter overviews the existing obstacles and shortcomings in competition law enforcement. As regards public enforcement, the deterrence effect of EU antitrust fines is assessed by taking into account the current statistics of the European Commission, as well as the findings of law and economics literature.[3] With regard to private antitrust enforcement, it looks at whether private parties are well equipped to bring damages claims by analysing the common obstacles to private enforcement that exist in EU Member States. Indeed, examination in this Chapter gives a preliminary indication about the role that collective redress actions can serve in antitrust enforcement.

As regards its scope, Chapter 2 is introductory and sets the background for a more detailed assessment in the subsequent chapters. It should be stressed that Chapter 2 progressed and was finished during a specific time period: after the European Commission adopted the draft Directive on damages actions (June 2013), which was accompanied by the Recommendation on collective redress, but prior to the final adoption of the Directive by the European Council (November 2014).

[2] European Commission, 'Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law' [2013] OJ C3539/3. Together it was published with the 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Towards a European Horizontal Framework for Collective Redress"' COM (2013) 401/2.

[3] M Mariniello, 'Do European Fines Deter Price Fixing?' [2013] Bruegel Policy Review 4; F Smuda, 'Cartel Overcharges and the Deterrent Effect of EU Competition Law' (2012) Centre for European Economic Research No. 12-050; M Boyer and R Kotchoni 'How Much Do Cartels Typically Overcharge?' (2012) CIRANO Scientific Series 15, Montreal.

Therefore, it does not analyse the impact of collective actions on full compensation. Instead, it discusses whether collective actions can serve as a potential remedy to solve, or at least diminish the inefficiencies in the enforcement of competition law.

B. Methodology and limitations

In this Chapter, the prevailing research method is functional comparative. Functionalism, for its part, focuses on the following points. First, the research regards that private antitrust enforcement is underdeveloped in EU Member States. More specifically, it relies on the idea that damages actions are not functional in all countries - they largely fail to compensate victims of antitrust violations. Second, collective redress mechanism is seen as one of the main, if not the main tool to mitigate the issue of compensation. The solutions that Member States have taken to enhance collective actions are overviewed. Third, based on the preceding analysis, it compares the functionality of two claim aggregation models: opt-in and opt-out.

The comparison of empirical data and analytical approach are used as additional research tools in this Chapter. As regards the former, the available quantitative sources are analysed to assess whether EU antitrust fines are sufficient to deter wrongdoers. With regard to the latter, it isolates different elements of collective actions in EU Member States, and assesses their potential role in framing effective collective redress schemes. In this regard, Chapter 2 overviews the appropriate model for aggregating claims (opt-in vs. opt-out). Other elements relating to the financing model (contingency *or* conditional fees) and to the representation model (public authorities *or* private organisations) are as well examined, but to a lesser degree. In addition, Chapter 2 examines the legislative framework for antitrust collective redress by including three comparative studies: a) horizontal versus sector-specific approach; b) directive versus regulation; c) dual versus single legal basis. The Directive on damages actions is used as a benchmark for proposing a possible legislative instrument in antitrust collective redress, as it has been the only binding instrument in the EU private antitrust reform until now.

However, there are some limitations. Important shortcoming is that the study examines only on two practical examples (in France and the UK) regarding opt-in antitrust collective actions, yet this is because of a lack of opt-in antitrust collective action in the EU context. Furthermore, the EU's opt-out collective actions are discussed only from a theoretical point of view. This is because the original paper has evolved during the time when there was almost no practice in the EU Member States. This research gap is addressed in the following chapters where a comprehensive analysis is provided, analysing opt-out experiences both in the EU and the US. As regards the potential legislative instrument for antitrust collective redress, the reliance on the Directive on damages actions is risky, as the outcomes of this tool are still unknown.

C. Overview of the research material

The sources include general literature on enforcement of competition law (public and private) and collective actions. The analysis of private enforcement, and related collective actions, is inspired by and builds on the reflections of Camilleri, Van den Bergh and Visscher. Works by Buccirossi, Carpagnano, Leskinen and Abele also guided the discussion. Regarding the criticism that EU antitrust fines are insufficient in deterring wrongdoers, the most useful publications are those of

Mariniello, Smuda, Boyer and Kotchoni, and Allain. Connor and Miller's work is presented as a counterargument to critics. Regarding the case law, only two opt-in cases are discussed: *Mobile Cartel* in France and *Replica Football Shirts* in the UK. The pioneer CJEU's case of private enforcement (*Courage*) is not discussed in this Chapter, and the subsequent case (*Manfredi*) is analysed only as regards punitive damages. Both rulings are extensively examined in the subsequent chapters (especially in Chapter 6).

D. Structure

This Chapter is structured as follows. Section 2 provides an overview of major obstacles and shortcomings in competition law enforcement. Section 3 determines the added value of collective redress for improving private damages claims. Furthermore, it suggests that EU-style collective redress should be formed on an opt-out basis or at least on a hybrid of opt-out/opt-in, while the pure opt-in measure should be avoided. Section 4 intends to demonstrate that collective redress is a potential remedy to mitigate deficiencies of competition law enforcement. The Chapter ends with a short conclusion summarizing key insights.

2.2 THE EXISTING OBSTACLES AND SHORTCOMINGS IN COMPETITION LAW ENFORCEMENT

This section provides an overview of the major obstacles of two enforcement models of competition law: on the one hand, public enforcement principally aimed at deterrence, and, on the other hand, private enforcement principally aimed at compensation. By drawing arguments from the current statistics from the European Commission and from the empirical results of law and economics, it is possible to identify first an insufficient deterrent effect of EU antitrust fines and to argue that these fines should be complemented with other measures to increase deterrence, in particular with more effective and more forceful approach to private claims for damages. From this perspective, this Chapter develops a better understanding of the reasons why private individuals are not well equipped to bring claims for damages.

2.2.1 Public Enforcement

In the European Union, the leniency program and the imposition of fines and are the principal means of increasing effectiveness of cartel prosecution and deterring infringers from engaging in anticompetitive behaviour. For those companies involved in a cartel—and who self-report and hand over evidence—the leniency policy offers either total immunity from fines, or a reduction of the fines which the Commission would otherwise impose on them. The current EU leniency policy is set out in the 2006 Leniency Notice[4] and continues the work of the successful 2002 Leniency Notice; both of these replaced their less successful predecessor from 1996. This is notably because the 2002 Leniency Notice facilitated conditions for full immunity from fines and set out to grant automatic immunity from fines for the first reporting cartel, while the 2006 Notice introduced the discretionary marker system. After more than a decade, it can be observed that the leniency program has increased the detection rate and deterrence: a large majority of all detected cartels are because of leniency. Wils, for example, found that out of 23 European Commission cartel decisions

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

with fines during 2011-2015, immunity was granted under the EU leniency program in 21 cases (around 90%).[5] Carmeliet is less optimistic and estimates that almost 60% of cartel infringements are discovered by the European Commission and the NCA's.[6] It does not change the fact that leniency policy is the key tool for detection of cartels and arising deterrence. Despite the success, it does not mean that leniency is very effective. Some findings estimate that the detection rate of cartels can be up to 33% in the EU,[7] but it is most likely lower in practice. For example, Mariniello argues that 15% is the highest possible detection rate of cartels.[8] Relying on these findings, it can be stated that public enforcement faces significant obstacles in enforcing EU competition law. However, the truth is that there is a lack of estimations about the rates of cartel detection and the above-mentioned findings are based mainly on older studies. Therefore, one should be careful when drawing conclusions about the effectiveness of public enforcement, because there is no conclusive data about the detection rates. Regardless of what the actual rates are, it can be argued that the detection mechanism is far from optimal. This reasoning further illustrated through the prism of fines.

The fines guidelines were introduced by the European Commission in June 2006.[9] The major factor which concerns the deterrent effect of the fines imposed by the Commission is to set the fine based on firm's annual sales and the duration of its alleged participation in the cartel. Under this mechanism, the Commission indicates that the maximum fine can only amount to up to 10% of the infringing undertaking's worldwide turnover of the preceding business year.

At the same time, useful insights regarding the deterrence may be derived from the current statistics of the European Commission. There is evidence that the amount of fines imposed on convicted cartels has dramatically increased in the recent years. For example, from 1990 up until March 2014, the European Commission imposed fines totalling 22.02 billion euros on companies engaged in cartel violation within the European Economic Area.[10] The total amount of fines imposed on convicted cartels rose from 832 million euros over the period 1990 - 1999 to 12.8 billion euros over the period 2000 – 2009. The increasing trend in fining policy is also evident in the last 4-year period (2014 – 2017) during which the European Commission fined of the total amount of 7.7 billion euros. Even at their unprecedented high level, the insufficient deterrent effect of the EU antitrust fines should be observed. During the last decade, the number of discovered cartels is increasing tremendously without any indication of slowing down. This is demonstrated by the fact that recently imposed fines are based on the new fine guidelines, which concern the aim for higher fines and thus deterrence. To make the discussion more fruitful, it should be observed that 9 of the top 10 fines (until 2014) were issued during 2007-2013. As regards the 10% threshold, it must be borne in

[5] W Wils, 'The Use of Leniency in EU Cartel Enforcement: An Assessment after Twenty Years' (2016) King's College London Centre of European Law, 9, <http://ssrn.com/author=456087> accessed 9 August 2018.
[6] T Carmeliet, 'How Lenient is the European Leniency System? An Overview of Current (dis)incentives to Blow the Whistle' (2011–2012) 48 Jura Falconis 3, 463.
[7] F Smuda, 'Cartel Overcharges and the Deterrent Effect of EU Competition Law' (2012) Centre for European Economic Research, No. 12-050, 19, <http://ftp.zew.de/pub/zew-docs/dp/dp12050.pdf> accessed 9 August 2018.
[8] Mariniello (n 3).
[9] European Commission, 'Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2) of Regulation No 1/2003' [2006] OJ C210/2.
[10] European Commission, 'Cartel Statistics' <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf> accessed 1 August 2018. The fine statistics are not adjusted for Court judgments.

mind that this legal maximum was attained in 4 large cases out of 13 during 2003-2013.[11] The resulting problem is that the fines calculated by the Commission had to be reduced.

Furthermore, a majority of law and economics literature estimates fine levels to be structurally below the adequate level to achieve optimal fine.[12] Key parameters for calculating the deterrent effect of current fines are therefore the price increase (cartel overcharge) compared with the maximum possible fine. Relying on the results estimated by Smuda (given the upper limits of fine and probability of detection), the expected fine can sum up to a maximum of 11.46% of affected sales per year in comparison with a mean of overcharge rate of 21.9%.[13] Under the estimated results, the overcharge rate is higher than the maximum possible fine; also, it demonstrates that the gain from collusion outweighs expected punishments. Furthermore, Connor finds a mean of overcharge rate of 50.4% for very successful cartels (so-called 'Connor database'). To that extent, Boyer and Kotchoni amended the Connor database in order to determine more accurate results, whereby the estimation was reduced up to 45.5%.[14] In both scenarios, however, cartels are not deterred from the collusion even if the probability rate would be 100%.[15] Other estimations found that in the period between 2001-2012 cartels caused 18.4 billion euros worth of harm to the European Economy, which seems extremely low in comparison with €209 billion of the total affected EEA sales.[16] Despite a variety of calculations showing the sub-optimal effect of EU administrative (public) fines, Connor and Miller claim that the EU guidelines on the method of

[11] M Allain, M Boyer, R Kotchoni and J Ponssard, 'Are Cartel Fines Optimal? Theory and Evidence from the European Union' (2013) CIRANO 2013s -24, 2 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2342180> accessed 11 September 2018; for further discussion see also A Riley, 'The Modernisation of EU Anti-Cartel Enforcement: Will the Commission Grasp the Opportunity?' CEPS Special Report/January 2010 <http://aei.pitt.edu/14570/1/Modernisation_Final_e -version.pdf> accessed 1 September 2018.

[12] See for a thorough discussion Mariniello (n 3); Allain, Boyer, Kotchoni and Ponssard (n 11); Boyer and Kotchoni (n 3); Smuda (n 3); JM Connor and RH Lande, 'Cartel Overcharges and Optimal Cartel Fines' (2008) 3 Competition Law and Policy 2203.

[13] Smuda (n 3). To consider whether the collusion outweighs expected punishments author provides the following equation: $OvRate(1) \cdot (Pcollusion \cdot x) < \pi \cdot \gamma (Pcollusion\ x)$. Here, π – the probability of detection, Pcollusion - the price during collusion, x – the amount of sold goods, OvRate(1) – the average overcharge rate over the entire cartel period, γ – maximum possible fine (30% + (25%: cartel duration). The upper limits of fine and probability of detection is 33% (0,33) while the average duration of cartel is 5,7 years. As such, the average cartel can amount up to of maximum $0{:}33 \cdot [30\% + (25\% : 5{,}7)] = 11{:}46\%$ in comparison with a mean overcharge rate of 21.9% of selling price per year.

[14] For further discussion on Connor database and its amendment, see Boyer and Kotchoni (n 11).

[15] Connor and Lande (n 12) estimate state probabilities of detection ranging between 10-33% in economic theory, while E Combe, C Monnier and R Legal calculate a range between 12.9 and 13.2% for the European market (see E Combe, C Monnier and R Legal, 'Cartels: the Probability of Getting Caught in the European Union' (2008) Bruges European Economic Research papers 12). Essentially the probability of detection takes on a major role in estimating the deterrent effect of EU antitrust policy. The magnitude of detection probability guides how the optimal sanction should be structured. This value is of particular importance for directors and/or managers who are willing to join or create a cartel. In addition, public authorities are better suited to design an optimal policy regarding the fight against cartels, if approximate probability rate is known. It seems clear that excluding the choice of detection from the EU antitrust enforcement would negatively affect the overall discussion on deterrent effect of current fines. This is notably because the determinants of deterrence include: i) the probability of detection ii) price during collusion iii) the amount of sold goods iv) the average overcharge rate. These elements are interchangeable; without one of them, the fine and deterrence estimation is impossible. Particularly, the introduction of leniency programs in the European Union has contributed to reinforce the probability of detection. Given the fact that full immunity is granted only to the first applicant, it causes lack of assurance within the cartel if slight deviations appear from the cartel plan, for instance the 'empty chair example'. For further discussion, see JA Chavez, 'The Carrot and the Stick Approach to Antitrust Enforcement' [2006] Practising Law Institute Corporate Law and Practice Course Handbook Series, May PLI Order No. 8736

[16] Mariniello (n 3). The author observes that affected sales include sales by all market members (that is not necessarily cartel members).

setting fines 'generally follow the precepts of the optimal deterrence theory.'[17] According to the authors, even though the elasticity of the expected fine is around 0.32 (the optimal number would be 1), fines are also related to 4 proxies that affect the probability of antitrust detection of cartels, and thereby suggesting that the Commission's fining policy corresponds fairly well with the principles of optimal deterrence. To a similar extent, the European Commission considers EU competition fines as an effective mechanism of deterrence.[18] However, the Commission admits that administrative fines alone cannot fully deter wrongdoers.

Simply put, sub-optimal deterrence could be remedied by increasing the size of competition fines. However, it is very difficult to implement this in practice, because the Commission's fining policy restricts the fine up to 10% of undertakings turnover. Therefore, the current fining policy should be complemented with other measures to enhance deterrence. In fact, a more effective private enforcement should be considered. This may include a rule similar to the US' trebling of antitrust damages under the Clayton Act[19], or opt-out collective redress mechanisms. Before delving into the details of these alternatives, it is both necessary and instructive to review the existing obstacles in private antitrust enforcement.

2.2.2 Private Enforcement

The Commission estimates that only 25% of the final cartel and antitrust prohibition decisions taken by the Commission in the period 2006-2012 were followed by private damages actions.[20] Moreover, far from reaching all victims, the majority of these actions were brought by large companies or public entities whereas SMEs and consumers normally did not engage in legal actions for reparation of their harm. It can thus be stressed that the lack of effective compensation has created a considerable cost for the European consumers and businesses. Simple estimates that the cost of ineffective right to damages (so called 'foregone compensation') for consumers and SMEs from hard-core cartels between 2006 and 2012 was in the range of 25 - 69 billion euros.[21]

To enable a better understanding of the shortcomings of private enforcement, this discussion would reveal reasons why private parties are not well equipped to bring claims. There are indeed three main obstacles facing victims of competition law infringements in bringing damages actions: (i) cost and (legal) uncertainty, (ii) complexity of causality, and (iii) disclosure rules. Each of these factors will be discussed in turn.

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[17] JM Connor and DJ Miller, 'Determinants of EC Antitrust Fines for Members of Global Cartels' (2013) 32-34 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2229358> accessed 1 August 2018.

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

[19] The entirety of the Clayton Antitrust Act of 1914 is codified at 15 U.S.C. §§ 12 –27 (2009). Section 4 of the Clayton Act is codified at 15 U.S.C. § 15 (2009). See for a thorough discussion CL Sagers, *Examples & Explanations: Antitrust* (Aspen Publishers 2011); RJR Peritz, *Competition Policy in America: History, Rhetoric, Law* (Oxford University Press 2001).

[20] European Commission, 'Staff Working Document Impact Assessment Report: 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' [2013] SWD 203 final, para. 52.

[21] CE Mosso, 'The Commission's Proposal for a Directive on Antitrust Damages Actions' (Conference on 'Antitrust Damages: the European Commission's proposal', Bruegel, Brussels, 20 June 2013).

First, it is generally assumed that private individuals will only commence legal actions if they expect a positive cost-benefit ratio. With respect to antitrust damages claims, it is easy to recognize that private parties face large legal costs to start and develop their case, thereby legal proceedings often exceed the expenses of their claims, creating the so-called 'rational apathy' problem. Further complicating the picture, in the European Union there is a predominant 'loser pays' principle.[22] A crucial issue, in this respect, is that the judge applies the 'loser pays' principle on a case-by-case basis, meaning that the final decision is less predictable for the claimants. If the claim is unsuccessful, individual claimants face significant exposure to the other side's costs.[23] Furthermore, private parties stand isolated against large companies because large and powerful companies have better legal support, resources and broader investigative powers. From this perspective, it should be observed that in less developed and smaller countries, for example in the Eastern Europe, business relations are more formal, meaning that private parties might be afraid to start a lawsuit against powerful firms because of potential retaliation. As regards consumers, they are often unaware that they are being, or have been, harmed by hard-core cartels (price-fixing, quantity limits or bid rigging). Even if consumers are aware of the infringement, the harm caused by price-fixing cases, for example, often produce scattered and low-value damage to a multitude of consumers. As a consequence, only few of them can afford taking a legal action since the expected benefits outweigh the expected costs.

Typically, antitrust damages actions are brought after the enforcement decision taken by competition authorities.[24] In these so-called *follow-on* actions for damages plaintiffs free-ride on the efforts of public enforcers. It means that claimants can rely on the findings of the public enforcer as proof of violation to establish liability in their action. Such an advantage encourages private parties to wait until a public decision is made by a competition authority.[25] In other words, private follow-on actions are largely dependant on how active public enforcement is. These actions should bring some benefits to deterrence, as they increase the costs of violation when they are litigated successfully against wrongdoers. However, given that follow-on actions have little or no impact on detection, deterrence can be facilitated only minimally. *Stand-alone* actions for damages are another type of claims, which are brought without a prior finding of antitrust violation. In these actions, it is up to the claimant to prove that the infringement has indeed taken place; a task which can sometimes be very complicated.[26] Stand-alone claims can contribute to deterrence by raising the number of detected violations that, if successful, can increase the cost of violation to infringers by

[22] The 'loser-pays' principle is the most widely adopted allocation method for legal costs in the EU Member States. According to this principle, the losing party should pay the other party's legal costs (court and lawyers' fees). Although this instrument is an effective safeguard against unmeritorious claims, but it actually exacerbates the problem of funding in private damages actions. The 'loser pays' principle is currently applied in all of the EU Member States, as well this principle is predominant in collective action mechanisms, if presently exists in the State.

[23] P Collins, 'What are the Problems with EC Antitrust Damage Actions in Europe? Does the Private Pillar Require Reinforcement?' (2007) unpublished, <http://vartotojuteises.lt/content/download/412/2587/file/Philip%20Collins%20Paper.pdf.> accessed 9 August 2018.

[24] See, for example, JF Laborde, 'Cartel Damages Claims in Europe: How Courts Have Assessed Overcharges' (2017) 4 Concurrences 1, 2; Joaquín Almunia, 'Public Enforcement and Private Damages Actions in Antitrust' (2011) European Parliament, ECON Committee <http://europa.eu/rapid/press-release_SPEECH-11-598_en.htm?locale=en> 9 August 2018.

[25] K Hüschelrath and S Peyer, 'Public and Private Enforcement of Competition Law – A Differentiated Approach' (2013) Centre for European Economic Research, Discussion Paper No. 13-029, 18, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2278839> accessed 9 August 2018.

[26] A Jones and B Sufrin, EU Competition Law: Text, Cases & Materials (4th edn, Oxford University Press 2011), 1216-17.

forcing them to pay damages. However, the main issue is that stand-alone actions are rare in the EU context.[27]

The second characteristic feature of typical private antitrust cases is the fact-intensiveness and confrontation with complex causality assessments, both legal and economic. The principal purpose is to prove the causality between the antitrust infringement and the harm suffered by the claimant. The burden of proof typically lies with the claimant, who has to demonstrate that the infringing conduct has resulted in the damage claimed. This is a daunting task, particularly given that a majority of the Member States require proving causation with near certainty (99.9% probability).[28] This burden is even more complicated, given the fact that claimants stand isolated against antitrust violators who generally are much more aware of the infringement. Even if damages actions were followed-on by a previous public antitrust decision, claimants still need to adduce clear evidence of causation and loss to recover damages.[29] Another issue that concerns assessing causation is the 'but-for' test. The test examines the hypothetical scenario if the infringement of Article 101 or 102 TFEU had not occurred: the assessment of the position of the injured party with the position in which this party would have been but for antitrust infringement (often referred as 'counterfactual scenario'). Developing an actual counterfactual scenario requires evaluation of how the market evolved without the antitrust infringement. Estimation has to rely on a number of determinants: (i) market context; (ii) type of harm; and (iii) types of claimants. Conducting such an analysis requires a thorough understanding of economic variables (such as prices, sales volumes, profits, costs or market shares). This is certainly not an easy task, given the fact that the results rely on many assumptions.[30] Furthermore, the analysis of causation is an essential element for the quantification of actions for damages. Claimants often face difficulties in quantifying precisely the harm caused by the infringement of the competition law as a result of numerous factors, such as evidentiary obstacles, lack of access to information or robust estimation of damage.[31] Furthermore, legal provisions for proving damages and causality are too general to be directly applicable to a private antitrust case.[32] A separate standing issue is that the claimants are put off by the complex economic analysis; something which is a significant burden for private parties. The economics and financial literature has developed a wide array of methods and models for quantifying damages. For example, in the OXERA study prepared for the European Commission, the methods and models are classified into three broad groups: comparator-based, financial-performance-based, and market-structure-based.[33] For these reasons, it is argued that the whole causation procedure requires more resources and expenses to elaborate legal proceedings than is expected.

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[27] Laborde (n 24), 2. Until 2017, out of 98 cartel damages claims, 71 were cases following the decisions of NCAs, 23 following the decisions of the European Commission, and only 4 were stand-alone actions.

[28] HA Abele, GE Kodek, GK Schaefer, 'Proving Causation in Private Antitrust Cases' (2013) 7 J of Competition Law & Economics 4, 848-49.

[29] See for example, case *Enrol Coal Services Ltd v English Welsh & Scottish Railway Ltd* [2010] EWCA Civ 2.

[30] See for example, Joined Cases C-104/89 and C-37/90 *Mulder and others v Council and Commission* [2000] ECR I-203. The Court assessed the hypothetical scenario: 'the loss of earnings is the result not of a simple mathematical calculation but of an evaluation and assessment of complex economic data. The Court is thus called upon to evaluate economic activities which are of a largely hypothetical nature. Like a national court, it therefore has a broad discretion as to both the figures and the statistical data to be chosen and also, above all, as to the way in which they are to be used to calculate and evaluate the damage', para 79.

[31] I Lianos, D Geradin, Handbook on European Competition Law: Enforcement and Procedure (Edward Elgar Pub 2013), 255.

[32] Abele, Kodek and Schaefer (n 28), 853.

[33] Oxera, *Quantifying Antitrust Damages*, Study Prepared for the European Commission, December 2009 <http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf> accessed 1 August 2018.

The third characteristic concerns issues related with disclosure rules. As a general rule, much of key evidence is often held exclusively by the allegedly infringing undertakings, making it difficult for a claimant (if aware of the evidence at all) to obtain disclosure of documents. These materials are crucial in successful antitrust damages actions in which infringing conduct tends to be secretive. From the domestic perspective, the rules on disclosure vary between States making it difficult to assess whether and under what conditions the State is willing to give access to documents. In civil law countries (such as Germany, Lithuania or Austria) the rules on disclosure provides only limited access for the plaintiffs to the internal information of the defendants. Contrary to current shift in civil law countries, the disclosure rules in English courts have rigorous disclosure regimes in place, yet it requires parties to disclose documents that may help for claimants to prove the alleged overcharge they paid.

In order to mitigate these deficiencies of private enforcement, the EU eventually adopted the Directive on antitrust damages actions in November 2014. One of the most important developments was an attempt to protect the discovery of cartel material.[34] First, legislators agreed that absolute protection from disclosure should be granted for immunity and leniency statements and settlement submissions (the so-called 'black list'). Second, the information contained in the file of a national competition authority shall only be available when the investigations have been concluded (the so-called 'grey list'). Third, other documents are available at any time (the so-called 'white list'). On the one hand, the Directive has brought clarity as to which evidence is available in cartels proceedings. On the other hand, the crucial material of cartels (leniency statements and settlement submissions) is unavailable. Therefore, the EU clearly demonstrates that the priority is to safeguard the leniency policy, while private actions are in an inferior position.

To conclude, as already pinpointed at in the introduction, from the perspective of consumer protection it is rather disappointing that the adopted Directive's text does not include any provisions on collective redress. In the area of antitrust where illegal behaviour may generate scattered and low-value loss to a number of consumers and where the individual proceedings may not be proportionate, the added value of a binding approach on collective redress would be a significant event.

2.2.3 Tort Remedies and Deterrence in European Private Antitrust Enforcement

An effective private antitrust enforcement mechanism can complement public enforcement. The underlying logic is that if more private actions are brought and thus more victims are compensated, the cost of the infringement is increased for violators. As regards the costs of litigation, private actions force wrongdoers not only to pay the amount of damages, but also the case-related costs: attorneys and experts fees, and administrative expenses. Indeed, when public enforcement is combined with effective private enforcement, the aggregate mechanism may serve as a firm

According to this study: 1) Comparator -based approaches use data from sources that are external to the infringement to estimate the counterfactual (cross-sectional comparisons, time-series comparisons and combination of both models); 2) Financial-analysis-based approaches use financial information on comparator firms and industries, benchmarks for rates of return, and cost information on defendants and claimants to estimate the counterfactual; 3) Market-structure-based approaches use a combination of theoretical models, assumptions and empirical estimation.

[34] Disclosure rules are enshrined in art. 6 of the Directive (n 1).

deterrent against antitrust infringers. It is also clear that preventing anticompetitive conduct is the best way to ensure the welfare of consumers, competitors and other market participants. Even if we assume that the EU has developed 'a perfect private enforcement system, such a system cannot restore all the social benefits that stem from well-functioning competitive markets and that are lost when competition is lessened or distorted'.[35] To sum up, if an infringement has taken place, a well-functioning private enforcement mechanism can facilitate the achievement of compensation, but it is unlikely that the situation which existed before a violation would be fully restored.

The European Commission considers private enforcement to be part of the overall antitrust enforcement scheme. In that regard, public and private enforcement are complementary mechanisms for ensuring effective enforcement of Articles 101 and 102 TFEU: while public enforcement is aimed at prevention, detection and deterrence of violations, private enforcement is designed to compensate victims.[36] Given that both instruments are regarded equally important (but pursuing different objectives) in enforcing EU competition law, a very broad role is given to damages actions—being tort remedies—in the enforcement mechanism. Commentators observe few concerns in this respect. First, private antitrust enforcement (i.e. a remedy in tort) is not well suited to 'play such a unprecedented strategic role' in achieving antitrust goals.[37] It is because a right to compensation demands compensating any victim down the supply chain, including end-consumers. Second, regulating tort actions traditionally remains the domain of domestic jurisdictions. However, national tort actions have proved to be ineffective in antitrust enforcement. Basedow observes, in this respect, that 'the remedies provided by private law have turned out to be insufficient or even totally inadequate for the protection of competition.'[38] Third, Advocate General Mazák in his opinion in the *Pfleiderer* case asserted 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. Therefore, he hesitated to label damages actions as enforcement as such.[39] Mazák's opinion remains relevant nowadays, as the Directive on damages actions preserves strong public enforcement by introducing strong limitations on damages actions, such as no access to leniency documents, no damages multipliers or no collective actions.

In order to achieve the effectiveness of private enforcement, there is a need to relax damage claims, especially as regards rules on standing, funding, discovery and proving causality. However, the borders of the compensation principle, which seeks to prevent overcompensation, should never be

[35] P Buccirossi and M Carpagnano, 'Is it Time for the European Union to Legislate in the Field of Collective Redress in Antitrust (and how)?' (2013) 4 Journal of European Competition Law & Practice 1, 13.

[36] 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.

[37] E Camilleri, 'A Decade of EU Antitrust Private Enforcement: Chronicle of a Failure Foretold?' (2013) 34 Eur Competition L Rev 10, 533.

[38] J Basedow, *Private enforcement of EC Competition Law* (Kluwer International 2008), 1.

[39] *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.

crossed.[40] Otherwise, this mechanism may infringe the fundamental principle of unjust enrichment of civil law.

One option may include a rule similar to the US' trebling of damages for infringements of antitrust law under the Clayton Act.[41] Under this system, the successful plaintiffs are able to recover compensatory damages as much as three times of actual damages. As such, both deterrence and compensation functions are effectively pursued. It seems clear that awarding civil plaintiffs treble damages is a fuel for more active litigation in the EU. On this point it ought to be recalled that private damage action is an economic activity for which funding is crucial to success or failure of any proceedings. Because of the predominance of the 'loser pays' principle in the Member States, feasible alternatives are required so as to incentivise private parties to start a claim. If successful claimants are able to recover compensatory damages as much as three times of actual damages, it definitely acts as an incentive to start a private claim. Furthermore, punitive damages are of particular importance in collective actions, where the total costs for bringing collective damages actions can be extremely high because of the complexity of legal and economic assessments in such cases, the involvement of multiple parties, and the difficulty in allocating the proceeds.[42]

Regarding these factors it should be recalled that the European Commission also previously attempted to introduce double damages (a form of punitive damages) for horizontal cartels in the 2005 Green Paper on damages, but it was severely criticized by the Member States and was no longer included as a proposal in the 2008 White Paper. As a matter of EU jurisprudence, the CJEU acknowledged that the imposition of punitive damages in response to harm caused by antitrust violations would not be contrary to European public order. In *Manfredi*, the Court allowed punitive damages in competition law, provided that the principles of equivalence and effectiveness are respected and unjust enrichment is prevented.[43] Despite the positions taken by the Court, punitive damages still seem to be an alien concept to the legislators of the EU. First and foremost, punitive damages are in conflict with the fundamental principle of damages actions in the EU; that is to compensate for injury actually suffered.[44] Second, punitive damages are also not in line with the general principles of Civil Law in the Member States, which prevent any unjust enrichment.[45]

[40] See Directive (n 1), art. 3.

[41] The US Supreme Court has repeatedly stated that the private right of action for treble damages under the antitrust laws serves two purposes: compensating injured victims of unlawful conduct and attracting enforcement resources to supplement the government's deterrence-oriented efforts. Further discussion of the treble damages regarding the objectives of compensation and deterrence, see Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 US 630, 636 (1981); Brick Co. v. Illinois, 431 US 720, 746 (1977).

[42] C Leskinen, 'Collective Actions: Rethinking Funding and National Cost Rules' (2011) 8 CMLR 1, 95.

[43] Joined Cases C-295/04 to 298/04 *Vincenzo Manfredi and Others v Lloyd Adriatico Assicurazioni SpA and Others* [2006] ECR I-6619, paras 97-99.

[44] The Commission's 2008 White Paper on damages for breach of EU competition law (COM (2008) 165) ruled that all victims of infringements of EC competition law have access to effective redress mechanisms so that they can be fully compensated for the harm they suffered. Full compensation is, therefore, the first and foremost guiding principle. The Commission welcomes the confirmation by the Court of Justice of the types of harm for which victims of antitrust infringements should be able to obtain compensation. In the *Manfredi* case (n 43), the Court emphasised that victims must, as a minimum, receive full compensation of the real value of the loss suffered. The entitlement to full compensation therefore extends not only to the actual loss due to an anti-competitive price increase, but also to the loss of profit as a result of any reduction in sales and encompasses a right to interest, [95] and [97].

[45] As regards national jurisdictions, see, for instance, sec. 812 -822 of German Civil Code; sec. 6.242 of Lithuanian Civil Code; sec. 1145 and 1158 of Spanish Civil Code.

Third, the award of punitive damages breaches the fundamental principle of *ne bis in idem*.[46] Finally, in the United States where punitive damages are a motivating power in private enforcement, damages actions are intended to at least partly substitute for public enforcement actions while in the EU there is a clear distinction between the roles public and private enforcement. Public enforcement serves the punitive objective-function. This function is pursued through the imposition of fines, which punish the infringers and deter them from breaching the law in the future. Conversely, private enforcement and more specifically damages actions primarily serve the objective of compensation, while deterrence can only be seen as a welcome side-effect.

However, the legislators of the EU should also consider the fact that punitive damages (such as double damages) do not necessarily lead to overcompensation of victims. After all, there are many additional costs to the case (administrative, expertise, etc.) that may consume a large portion of the recovery, thereby leaving low awards to victims. This is probably one of the reasons as to why the CJEU in *Manfredi* leaves discretion for the Member States to decide on the issue. The experiences in France and Germany have shown that both states leave space for punitive damages, even though they are generally considered to be against public order. According to the French Court de Cassation, punitive damages are not *per se* contrary to public policy.[47] To the same extent, the German Federal Court of Justice generally considers punitive damages against public policy, but has made the exception that such 'damages may be enforceable if they serve legitimate compensatory purposes'.[48]

2.2.4 Synopsis

In formulating the concept of antitrust enforcement, it has been observed that current fine levels are sub-optimal to ensure deterrence. A logical implication of this remark would seem to be that since private antitrust actions for damages constitute the tort remedies and given that the recovery of punitive damages is problematic in the EU, the unified model of collective redress is the most realistic alternative for a more forceful and effective approach of private enforcement. Another problem concerns procedural and legal obstacles due to which private parties are not well equipped to enforce their rights. From this perspective, it seems that collective redress is also a potential remedy to mitigate the deficiencies of private antitrust enforcement by individual parties.

[46] The legal principle of *ne bis in idem* restricts the possibility of a defendant being prosecuted repeatedly for the same cause of action. The English Court in case, *Devenish etc. v. Sanofi -Aventis etc.*, [2007] EWHC 2394 (Ch), held that the principle of *ne bis in idem* precludes the award of exemplary or punitive damages. For further discussion, see W Wils, 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages' (2009) World Competition 32(1), 21-22; W Wils, 'The Principle of *Ne Bis in Idem* in EC Antitrust Enforcement: A Legal and Economic Analysis' (2003) 26 World Competition, 131.

[47] On December 1st 2010 The French Court de Cassation in case, *Schlenzka v SA Fountain Pajot*, case n°1090, held that 'an award of punitive damages is not, per se, contrary to public policy, adding however that this principle does not apply when the amount awarded is disproportionate with regard to the damage sustained and the debtor's breach of his contractual obligations'

[48] See RE Lutz, A Lawyer's Handbook for Enforcing Foreign Judgments in the United States and Abroad (Cambridge University Press 2006), 429 (citing the German Federal Court of Justice Judgement of June 4, 1992, BGH Sen. Z.).

2.3 COLLECTIVE REDRESS IN THE EUROPEAN UNION: A POTENTIAL VEHICLE TO MITIGATE OBSTACLES IN ANTITRUST ENFORCEMENT

This section aims to provide arguments as to why collective redress is an attractive alternative to solve, or at least diminish, the inefficiencies of antitrust enforcement. First, it explains the particular milestones that affect the ability to bring successful collective claim. Furthermore, it aims to provide an initial characterization of the ability of collective claims to act as an incentive for deterrence. Finally, it demonstrates that collective redress is a potential remedy to mitigate deficiencies of private antitrust enforcement by individual parties.

2.3.1 Legal Design of Collective Redress Mechanisms

From the European standpoint, the last few years have seen rapid developments in the area of collective redress in the Member States. Currently, at least twenty two states have had their own collective redress schemes.[49] However, even where it is available, the implemented systems have not been very successful because the number of collective actions is very low. Based on the results provided by the Lear Study,[50] in 2012 there have been collective redress cases for antitrust infringements in only eight countries while the trial stage has been reached in Austria, Spain, France, Portugal, the Netherlands and the UK. It emerges clearly that the ability to bring a successful collective claim depends on the type of collective actions introduced, particularly whether it provides sufficient incentives to bring collective action and possibilities for funding.

The first and foremost feature in antitrust regards how precisely claimants need to be identified for an action before the court: on an opt-in or an opt-out basis. Most of the countries have adopted opt-in mechanisms which require explicit consent from the victims to join the action. The major reason that inspired the Member States to choose an opt-in model is that there are advantages of limiting the risk of unmeritorious actions. Furthermore, an opt-in measure respects an individual right to be part of the litigation or not (so-called 'party disposition principle'), whereby this measure is under the Article 6 of the ECHR. However, few countries (the UK, Portugal, Denmark and the Netherlands) have adopted 'opt-out' measure, whereby victims are deemed included in the action unless someone declares himself or herself not to be involved. A second feature concerns legal standing for the entities that might be allowed to start a collective action.[51] In some countries group actions can be commenced by public authorities, for instance in Finland (Ombudsman) and Hungary (Hungarian Competition Authority), whilst in other jurisdictions, such as France, Sweden and Greece, representation is provided by national private organizations, such as consumer associations. Other countries have legal standing for a combination of a mixed approach: private

[49] In 2013, Buccirossi and Carpagnano (n 35) observed that 20 countries have collective redress actions in at least some fashion. During the last years, collective actions were additionally introduced in Belgium and a new Act on collective redress was adopted in Slovenia.

[50] Lear Study, *Collective Redress in Antitrust,* Study for the European Parliament DG Internal Policies department, June 2012,<http://www.europarl.europa.eu/document/activities/cont/201206/20120613ATT46782/20120613ATT46782EN.pdf> accessed 1 August 2018.

[51] Under the Commission Recommendation 2013/396/EU (n 2), the Member States should designate representative entities to bring representative actions on the basis of clearly defined conditions of eligibility. These conditions should include at least the following requirements: (a) the entity should have a non-profit making character; (b) there should be a direct relationship between the main objectives of the entity and the rights granted under Union law that are claimed to have been violated in respect of which the action is brought; and (c) the entity should have sufficient capacity in terms of financial resources, human resources, and legal expertise, to represent multiple claimants acting in their best interest.

organizations and harmed persons (Bulgaria, Italy, and Spain), public authorities and associations. A third option involves funding of legal costs that may affect the ability and the incentives of claimants to initiate collective actions. A potential solution concerns the availability of contingency and conditional fees. This mechanism represents the American solution to the funding problem. Under this mechanism, the necessary means of funding are well ensured because client pays contingent fees to a lawyer only if there is a favourable result. However, it is equally true that contingency fees bring incentives for unmeritorious claims. Despite this fact, contingency fees have increased its popularity, utilized in some fashion in around half of Member States (even if not in a pure US version) and now form permit arrangements between some claimants and their lawyers on the basis of some form of success fee.[52] England and Wales, for instance, have adopted conditional fee arrangements under which lawyers can obtain a success fee in addition to the initial legal fee, which is usually around 25-50% of an awarded judgment if they win.[53] Lawyers do not get anything if they lose and only get a normal fee indexed on the hourly billing plus a success fee which cannot exceed the normal fee. These conditional fees are linked to an 'after-the-event insurance', which would pay the adversarial party's costs in the event of losing the case. Another solution includes third-party funding (a company, bank or hedge fund), which could pay all or a part of the expenses of an action in exchange to retain a share of successful claims.[54] In England and Wales, external financial options are being offered by diverse investors. In 2012, there were ten active dedicated TPLF investors operating in the United Kingdom, with three additional investors, Juridica, Burford, and IMF, making occasional investments. Most funders operating in the UK are relatively new, with the exception of Allianz, which has been funding claims since 2002.[55]

2.3.2 Assessment: Opt-In vs Opt-Out

The European Commission recommends that collective redress in the EU should be based on the opt-in model, while the opt-out should be 'justified by reasons of sound administration of justice'.[56] According to the Commission, the opt-in measure should be preferred because it:

- limits the risk of abusive litigation and unmeritorious claims;
- preserves the principle of party disposition; and
- ensures that the judgment will not bind other potentially qualified claimants who did not join

On the other hand, the opt-in measure tends to result in a low participation rate because the victims must express their wish to join the collective action, thus requiring them to spend time and money to start and develop the case. As such, it is unlikely that all victims will participate in collective action under the opt-in measure; as such, the compensatory objective is not achieved effectively.

[52] Buccirossi and Carpagnano (n 35), 6.
[53] CEPS, EUR and LUISS, 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios', Report for the European Commission DG COMP/2006/A3/012, Final Report, Brussels, Rome and Rotterdam, 208 <http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf> accessed 1 August 2018. Recent reports in the UK support the need for an effective funding mechanism for litigation. For further debate on this topic, see further the recent report 'Review of Expenses and Funding of Civil Litigation in Scotland' (2013) <http://scotland.gov.uk/About/Review/taylor-review/Report> accessed 1 August 2018.
[54] Leskinen (n 42), 95-96.
[55] C Veljanovski, 'Third-Party Litigation Funding in Europe' (2012) 8(3) J of L, Economics & Policy, 410-413.
[56] European Commission Recommendation 2013/396/EU (n 2); Articles 21-25 stress the need to form claimant party by 'opt-in' principle.

Several cases in national jurisdictions regarding the experiences of consumer organisations clearly indicate that opt-in collective actions are practically unworkable. Taking the example of the UK, the *Replica Football Shirts* case[57] demonstrates the reluctance of consumers to take part in opt-in proceedings. The consumer association (*Which*?) brought an action in the collective interest of consumers who overpaid for football shirts due to a price-fixing cartel. Despite its efforts, *Which?* managed to collect claims for only 600 consumers, which was considered a very low proportion of victims who suffered harm by the anti-competitive behaviour. After this failure, *Which?* announced they would not take part in collective actions in the future if it is based on the opt-in measure. In France, the finding of a price-fixing agreement among three mobile operators (Orange France, SFR, and Bouygues Telecom) had a potentially negative impact on 20 million consumers.[58] However, consumer association *UFC Que Choisir* only managed to collect claims for 12,350 consumers. Hence, in countries where consumer associations have standing to bring damages claims, an opt-in model seems to be inappropriate to ensure sufficient participation rate for victims, in particular for cases involving multiple claims of low value (such as the harm caused by price fixing). In addition, in large-scale cartel agreements it is impossible in practice to get the consent of all harmed consumers, in particular when consumers cannot be easily identified. Due to low participation rate, consumer organizations pose a considerable obstacle of limited financial resources, thus limiting themselves to bringing damages actions due to uncertain financial perspective.

In such circumstances, this Chapter argues that opt-out collective actions are better suited to tackle the issues related with low participation rates, lack of funding and sub-optimal deterrence. In the first place, an opt-out scheme generally ensures that the group of claimants will be sufficiently large since the action is brought on behalf of the whole group, unless someone declares not to be involved. Taking the example of the US, an average opt-out rate is very low (less than 0.2%) in consumer class actions, since in any case these claims cannot be litigated individually.[59] In other words, opt-out collective actions increase access to justice, in particular for consumers involved in multiple claims of low value. It must be added, however, that the ones who are likely to opt-out are individual entities or the individuals who have suffered significant harm.[60] As such, an opt-out model seems to be a more realistic alternative to ensure the action for damages financially viable due to a larger group of claimant.

Furthermore, the preference given to opt-out schemes is likely to score better in terms of deterrence. As it is clear, the deterrence of collective redress depends on the size of the group of victims. If only a limited number of victims joined the proceedings, the deterrence will remain sub-optimal. Since the group of victims is larger under the opt-out measure, the size of the sanction expected under an

[57] Case No 1078/7/9/07 *Consumers Association* v. *JJB Sports Plc* [2009] CAT 2.

[58] C Hodges, *The Reform of Class and Representative Actions in European Legal Systems. A New Framework for Collective Redress in Europe* (Hart Publishing 2008), 84.

[59] For further discussion on opt-out rates, see T Eisenberg and G Miller, 'The Role of Opt-outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues' (2004) New York University Law and Economics Research Paper No. 04 –004; S Issacharoff, 'Preclusion, Due Process and the Right to Opt-out' (2002) 77 Notre Dame L Rev 1057, 1060.

[60] Compared to end-consumers, individual entities may have more interest in leading the case on their own. First, these entities may have more direct and more frequent relationship with the infringer. For example, there is an option that they were buying the same goods as end-consumers, but in much larger quantities. In that case, the financial stake is predetermined to be higher than in end-consumer cases. Second, when large entities bring a single action, they can expect a faster dispute resolution than in collective actions. Third, these companies can easier provide evidences, because the relationship with the infringer is better documented.

opt-out system will be larger than under an opt-in system. As such, collective redress actions, based on an opt-out measure, can more effectively influence the potential companies' willingness to violate competition rules in the future. But if a company has already become part of a cartel, it can influence their tactics and negotiations as well as the amounts to be obtained in a settled action.[61] Whatever approach is taken giving the right to consumer associations to claim damages on behalf of end-consumers gives impetus for the substantial deterrent effect. The potential cartelist will know that he might face private actions from consumers and the expected cost of the infringement will increase, and this combination of factors might act as an incentive for cartelists to contemplate twice before violating the competition rules. For further discussion on how opt-out collective actions may improve public enforcement, see Chapter 3 (especially sections 3.4.2 and 3.5). For the criticism regarding their deterrence value, see Chapter 3 (Section 3.4.1).

Despite the positive aspects, opt-out proceedings also have two potential disadvantages. First, this measure might jeopardize the right of access to the courts under Article 6 of the European Convention for Human Rights (ECHR).[62] Second, the opt-out measure may increase the number of unmeritorious claims. For these reasons, the introduction of an EU-style collective redress mechanism could also be combined with the flexible hybrid of the opt-in/opt-out systems. The inspiration might be drawn from the examples of the UK and from the Danish model. The new Consumer Right Act[63] extended the jurisdiction of the Competition Appeal Tribunal (CAT) in the UK. First and foremost, the CAT has exclusive jurisdiction to determine whether a collective action should proceed on an opt-out or opt-in basis.[64] Second, the CAT is permitted to authorize a person or entity to commence collective actions regardless of being a public or a specified body. However, opt-out collective actions are not permitted to be brought by law firms. Another innovative provision is that the Act established a collective settlement procedure in the CAT which encourages settlements.[65] If the settlement is reached, it has a binding effect on consumers, unless they opt-out. Besides the UK, another inspirational example of an opt-out class action system includes the one in Denmark. Opt-in group actions can be brought either by individual claimants, by any representative organization or by the Consumer Ombudsman. However, the judge may be granted, on a case-by-case basis, the discretion as to whether the opt-out model is necessary to guarantee that a significant proportion of injured parties are compensated for the damages suffered.[66] The Danish rules

[61] DL Tzakas, 'Effective Collective Redress in Antitrust and Consumer Protection Matters: a Panacea or a Chimera?' (2011) 48 Common Market L Rev, 1136; R Korobkin and C Guthrie, 'Psychological Barriers to Litigation Settlement: an Experimental Approach' (1994) 93 Michigan L Rev, 107.

[62] Article 6 para. 1 ECHR establishes that 'in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'. On the contrary, the opt-out mechanism requires that a deliberate action is taken to withdraw from a judicial action. Therefore uninformed people may find themselves bound by a judgment they did not even know was about to be issued. For further discussion, see Lear Study (n 50).

[63] The UK Consumer Rights Act 2015. Online version is available here: <http://www.legislation.gov.uk/ukpga/2015/15/contents/enacted.> accessed 1 August 2018.

[64] Schedule 8 of the Consumer Rights Act. The Competition Appeals Tribunal (CAT) can already hear opt-in collective actions under the existing section 47B of the Competition Act 1998 (CA 98). Schedule 8 replaces section 47B of the Competition Act 1998 so as to provide space for opt-out collective proceedings, as well as continuing to provide for opt-in collective proceedings.

[65] The function of a collective settlement regime is to introduce a procedure for infringements of competition law, where those who have suffered a loss and the alleged infringer may jointly apply to the CAT to approve the settlement of a dispute on an opt-out basis. The collective settlement regime operates on the same opt-out principles as the opt-out collective proceedings.

[66] The Danish Administration of Justice Act (2007). For further discussion, see E Werlauff, *Class Actions in Denmark*, (2009) 622 Annals of the American Academy of Political & Social Science 202. Opt-out class actions are only

prescribe that only a public authority (the Consumer Ombudsman) can take opt-out cases to court.[67] In the light of these statements, it can be argued that the EU-style collective redress could be formed on the opt-out basis or at least on the hybrid of opt-out/opt-in, while the pure opt-in measure should be avoided.

2.3.3 Legal Framework for Collective Redress in Antitrust

Bearing in mind the diversity of national antitrust rules, collective actions (regardless they are opt-out or opt-in) should apply at national level that follow the same basic principles throughout the EU, taking into account the legal traditions of the Member States and safeguarding against abuse. Contrary to a horizontal Recommendation on collective redress, this Chapter argues that a sector-specific measure should be considered for adopting collective redress in antitrust. A sector-specific measure ensures better uniformity among the Member States in relation to Articles 101 and 102 TFEU. The critical idea underlying the horizontal instrument is that it requires specific sector-specific implementation for antitrust litigation, such as legal standing and aggregation of different victims, as well as alignment with the provisions adopted in the Directive on damages actions, such as disclosure to evidence, full compensation and indirect purchasers. Moreover, when the horizontal instrument is implemented, it may lead to discrepancies among Member States. For further discussion on discrepancies, see Chapter 5 (sections 5.3.1 and 5.5). Finally, the experiences in Member States show that the sectoral approach prevails in the European Union, while competition law and consumer law are the most common fields for sectoral approach on collective redress.[68] In order for the legislative measure not to be too restricted, competition law could be included in a larger sectoral approach, which would encompass violations that generate small but widespread harm, such as consumer protection.

As regards legal instrument, a directive seems to be a more suitable tool for a sector-specific initiative in EU competition law rather than a regulation. A sector-specific mechanism laid down in a directive would better comply with the principles of subsidiarity and proportionality and it would be more respectful for national procedural autonomy. A directive, furthermore, would be a flexible instrument for introducing a minimum standard and avoiding intervention in domestic provisions. This is of particular importance for the functioning of damages actions, ensuring common minimum guarantees all across the EU while leaving to the Member States the choice of the most appropriate

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permitted as an exception to the main rule stipulated in Section 254 e, subs. 5 of The Administration of Justice Act: 1) the constituent claims must be so small that they are unlikely to be brought as individual actions because the risk or cost of litigation is disproportionate to the size of the individual claims; 2) the court must deem an opt-in structure to be unfit for the action at hand. If the conditions are met, then the Administration of Justice Act Section 254 e, subsection 8 grants the possibility of using the opt-out mechanism. The legislative history indicates that the number of opt-out cases was expected to be very limited, and practice to date in Denmark has also shown this prediction to be correct. The major case, against Bank Trelleborg Sagerne 356/2010 og 28/2011 (online version in Danish is available here: http://www.domstol.dk/hojesteret/nyheder/Afgorelser/Pages/DomibankTrelleborg-gruppesgsmlet.aspx) failed in the Supreme Court after several years. It was thus emphasized that it must be clear that the claims would not otherwise be pursued, and they must be of modest size, as noted, less than 2,000 kroner.

[67] Cf. Section 28(1) of the Marketing Practices Act, under which, if a majority of consumers have the same claim for compensation in connection with a breach of the Marketing Practices Act, the consumer ombudsman can, on request, group the claims under one. Section 28(2) provides that the ombudsman can be appointed group representative in a class action lawsuit (cf. Ch. 23a of the Administration of Justice Act).

[68] R. Amaro, *Collective Redress in the Member States of the European Union*, Study for the European Parliament's Committee on Legal Affairs, October 2018, 21-22 <http://www.europarl.europa.eu/document/activities/cont/201206/20120613ATT46782/20120613ATT46782EN.pdf> accessed 8 February 2019. In 10 countries discussed, 7 have sectoral approach, while 3 have a horizontal one.

tools to do so.[69] Furthermore, given the fact that collective redress is a highly debatable and sensitive topic at the EU and national level, a regulation seems one step too far, because it might interfere with domestic systems. However, the study commissioned by the European Parliament supports the adoption of a "hybrid Regulation", such as the General Data Protection Regulation.[70] It is claimed that this approach would allow defining the common rules throughout the EU, but still leaving "a margin of appreciation" to Member States. However, the study also notes that most Member States support a Directive, because it leaves more flexibility to Member States. The ones which favour a Regulation are in agreement that this instrument should have a limited extent of optionality.[71] This Chapter supports a Directive. A "hybrid Regulation" seems too untested for putting inherently different violations under the same approach, for example, competition versus employment or labour.

As regards the legal basis, the Article 103 TFEU appears to be the most suitable Treaty provision with the CJEU case law in antitrust, which requires that every legislative act should be based on one single legal basis.[72] The CJEU ruled that dual legal bases can be only used in exceptional circumstances.[73] Quite surprisingly, this exception has been used in the Directive on damages actions, which rests on dual legal bases, combining Articles 103 TFEU and 114 TFEU. It was justified on the basis that there is a need to balance uneven enforcement of the right to compensation for infringements of competition law in the Member States.[74] In can be also noted that the EU sought to include the internal market aspect in the EU private antitrust reform, and thus to increase consumer involvement.[75] Logically, the Directive on antitrust collective redress, if it would ever become reality, should also keep the same legislative framework. As a result, it would allow balancing the disparities in the antitrust regimes applicable in the Member States.[76]

Another possibility is amending the damages Directive by including provisions on collective redress schemes. This alternative should be welcomed for keeping the same legislative tool for antitrust damages reform. However, when considering the implementation process of the damages Directive, it is highly unlikely that this amendment could see the light of day in the near future:

1. The deadline for implementing the provisions of the Directive was 27 December 2016, but it took more time for most Member States to incorporate into national schemes. Empirical study found that only 10 Member States informed the European Commission of their full transposition of the Directive by 20 February 2017, while Bulgaria and Greece implemented the Directive in early 2018, and Portugal was the last implementing in June 2018.[77] This study analysed four Member States: two "old" ones (Belgium and Luxembourg) and two "newer" ones (Latvia and Lithuania). It was found that the reason for delays (at least in

[69] Lear Study (n 50); Buccirossi and Carpagnano (n 35) 8-9.
[70] Amaro (n 68) 68-69.
[71] Amaro (n 68) 69.
[72] See for instance, Case C-242/87 *Commission v. Council* (*ERASMUS*) [1989] ECR 1425.
[73] See for instance, Case C-130/10, *Parliament v. Council* [2012] ECR I-0000
[74] Directive (n 1), rec. 8.
[75] See, for instance, Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights [2004] OJ L 157, rec. 3. There, it is clarified that the enforcement aspect of IP rights is 'paramount for the success in internal market'.
[76] Directive (n 1), rec. 8.
[77] J Malinauskaite and C Cauffman, 'The Transposition of the Antitrust Damages Directive in the Small Member States of the EU—A Comparative Perspective' (2018) 9 Journal of European Competition Law & Practice 8, 496.

countries studied, such as Latvia) was the need for a "robust transposition" into national schemes. Considering significant delays in the implementation process, the consensus for amending the Directive is unlikely to be achieved among Member States in the near future, especially given that many countries will need some time to get acquainted with the new litigation tool.

2. The Directive will require *ex post* evaluation before getting any type of amendment. However, such an evaluation cannot be foreseen soon without some practice in the field.

It is true that a sector-specific Directive on collective redress would be criticised as loudly as a possible amendment in the Directive on damages actions. But it can be argued that it would be easier to set minimum standards that are appropriate for Member States in a separate legislative act than amending the current Directive. This is because the current Directive is primarily concentrating on the protection of public enforcement (leniency in particular), also emphasis is on specific issues, such as, limitation rules and joint liability. However, there are no specific provisions on collective redress, meaning that it would require robust interventions into the Directive on damages actions. Indeed, a new directive on collective redress would be more opened for flexibility as it would start from a new page.

2.4 COLLECTIVE REDRESS AS A POTENTIAL REMEDY TO MITIGATE DEFICIENCIES OF EU COMPETITION LAW ENFORCEMENT

In the following section, it is demonstrated that collective redress is a potential remedy to mitigate some deficiencies of competition law enforcement. At least three interrelated objectives can be facilitated: i) access to justice; ii) proving causation; and iii) insufficient public enforcement of EU competition law.

First, the availability of collective actions in national legal systems may facilitate access to justice by creating measures which simplify and help access to the courts. Collective actions would ensure a fundamental right for victims, namely in that legal representation is provided for a group of victims in order to ensure equality of arms.[78] This is notable because of the potential to reduce the organisational costs and to handle the financial risks attached to private litigation. The costs of the lawsuit decrease because the financial risk is spread over a group of injured persons participating in the collective procedure. It means that plaintiffs no longer run the risk of having to bear extensive costs of the lawsuit. Furthermore, the probability of winning the case increases since multiple plaintiffs have larger financial means to pay for experienced and highly competent lawyers in the relevant fields of law, while individual consumers may not be able to afford on representatives with such a level of expertise.[79]

Second, collective redress provides an attractive ability to bundle multiple individual claims and thus to gain efficiencies by tackling common legal, factual and economic issues collectively (and giving the claimants more clout against the defendants). For example, when a consumer association files a claim on behalf of its members, it might reverse the insurmountable burden of proof from the

[78] See for instance, Case C-305/05 *Ordre des barreaux francophones et germanophone and others v Conseil des ministers* [2007] ECR I-5305, [31]. The European Court of Justice ruled that the right to be represented by a lawyer is indispensable for a fair civil proceeding according to Article 6 of the European Human Rights Convention.

[79] R Van den Bergh and L Visscher, 'The Preventive Function of Collective Actions' (2008) 1 Erasmus L Rev 2, 19.

plaintiff to their own hands.[80] It is clear that consumer associations have larger financial means to start and develop antitrust cases, for example, to cover legal fees and potential expert fees. Furthermore, the availability of representative actions could greatly solve, or at least diminish, information asymmetry, meaning that plaintiffs are in a better position to provide proof with sufficiently high probability. Therefore, representative action may have the informational advantages of the applicable laws in comparison with individual consumers, such that designated bodies are able to assess better whether certain behaviour of firms constitutes an infringement.[81] In addition, it is argued that public entities may facilitate the analysis of the but-for test. In order to conduct such an analysis, the claimant has to have thorough understanding of the relationship between prices and their determinants, including the potential impact of the antitrust violation.[82] It is clear that the complexity of methods and models for assessing the but-for test might be too complicated for private parties, especially for consumers. As such, collective actions are attractive alternative to determine the real damage value.

Third, collective redress is a potential tool to mitigate dysfunctional compensatory mechanisms of EU competition law. It should be observed that public authorities alone are not able to enforce competition law effectively because they lack resources and competence to secure compensations for victims. As mentioned before, truly effective compensation by the way of private enforcement is limited, because private parties face significant obstacles in bringing damages actions. In such circumstances, the collective redress mechanism seems a useful aid to antitrust enforcement through creating the enlarged group of enforcers able to claim their rights granted under EU law. Moreover, if a common collective redress mechanism is established, then it has to increase the part played by national competition authorities and national courts in implementing EU and national competition law while guaranteeing its effective and uniform application. In addition, the common collective redress would facilitate cross-border antitrust enforcement cooperation between national courts and national competition authorities (for example, through the European Competition Network). Indeed, the common collective redress would bring much needed facilitation to access to justice and consumer protection across the EU. The potential possibility is illustrated in Table 1 below:

If all factors in Table 1 were combined, victims or representative organizations would have more incentives to invest in antitrust collective actions for increased possibilities of: 1) a larger group; 2) enforcing judgements from other Member States; 3) sharing best practices; and 4) taking ‘free rides’ on the efforts of others. Consequently, it will enhance the consumer protection against antitrust violators across borders, since consumer bodies and national enforcement authorities would be based upon judicial cooperation between different Member States.[83] If such a system were to be developed, cases with cross-border elements would be easier resolved.

[80] Abele, Kodek, Schaefer (n 28), 851.
[81] Van den Bergh and Visscher (n 79), 19.
[82] Abele, Kodek, Schaefer (n 28), 854.
[60] The Law Society of England and Wales, ‘Towards a Coherent European Approach to Collective Redress’ (2011) ETI Registration number: 24118193117-34, 13; ‘Cooperation between Member States for Consumer Protection’ (*Europa Website*) <http://europa.eu/legislation_summaries/consumers/protection_of_consumers/l320 47_en.htm> accessed 1 August 2018.

Table 1. The impact of common collective redress on access to justice and consumer protection

Measure	Potential facilitation
A better exercise of their right across borders	• Victims located in one Member State can seek collective redress in another country. • Victims are able to pool their efforts to litigate collectively, where the infringement caused harm across borders. • There is a less need for 'forum shopping'.
Expanded possibilities for follow-on actions	Victims or representative organizations can take a 'free ride' on the efforts of public actors from their own and other Member States (national courts and national competition authorities).
Better information sharing	• Designated entities for bringing collective actions (either public or private) would be in closer cooperation across the EU. • Cooperation may be achieved through allocation of the cases and exchanging information about the on-going or potential collective actions.

Finally, it should be stressed that the European Commission and national competition authorities may have significant impact on follow-on collective actions in the way they formulate their decisions. The key factor for a successful collective action is the availability of evidence. According to Articles 5-6 of the Directive on damages actions, national courts have to decide on the disclosure of the facts and evidence pleaded by claimants, yet evidence should be defined as precisely and narrowly as possible for a court to approve the proportionality of the disclosure. Therefore, the quality of decisions made by competition authorities is decisive for a claimant in defining the key components of disclosure. It follows that clear and effective disclosure allows for a better assessment of the real harm caused to victims and how this harm can be quantified. These factors are crucial for a national court in deciding whether to approve class certification or not. For further discussion on class certification, see Chapter 5 (especially Section 5.4.2), analysing the reasons for the first two unsuccessful opt-out antitrust collective actions in the UK. To sum up, the competition authorities stand at the beginning of collective litigation, in a way that the precision and quality of their decisions may be pivotal for claimants in deciding whether to bring antitrust collective actions or not.

Another factor that may influence the final outcome of antitrust collective actions is the DG Competition's programme of training national judges, which is part of the EU's Justice Programme 2014-2020. In 2016, the Study on judges' training needs in the field of European competition law identified 6 training profiles and 2 apply to private enforcement: 1) specialised judges dealing with private enforcement; 2) non-specialised judges dealing with private enforcement.[84] More specifically, it was identified that the focus of judicial training should be on providing updates on relevant case law, exchanging experiences among judges, and dealing with specific provisions such as the quantification of damages.[85] A new training program was launched by the Academy of European Law dedicated to the Directive of damages actions. Its goal is to provide an overview about the application of Articles 101 and 102 TFEU and the relevant secondary legislation. The positive aspect of training programs is that they contribute to a coherent application of competition rules among different states. Judges also share best practice. However, (informal) discussions among judges may inspire some judges located in less developed countries regarding private enforcement to apply the practices of more experienced countries, which may not necessary work.

[84] European Commission, 'Study on Judges' Training Needs in the Field of European Competition Law' (2016) <http://ec.europa.eu/competition/publications/reports/kd0416407enn.pdf> accessed 12 February 2019.
[85] Ibid.

This may lead to misinterpretation of local antitrust rules. As regards collective redress, the 'copy-paste' option is unlikely to work. For example, it is quite complicated to apply opt-out practices in countries where opt-in schemes are predominant, or where collective actions are led by public authorities or class members.

2.5 CONCLUSION

The research question of this Chapter was the following:

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?

When addressing this question, it was found that both public enforcement (principally aimed at deterrence) and private enforcement (principally aimed at compensation) fail to a large extent to achieve their objectives. It was also determined that collective redress actions have a potential to serve as a remedy to reduce the shortcomings of antitrust enforcement. On this basis, the following findings were made.

1) The EU's public antitrust enforcement is sub-optimal: the cartel detection mechanism does not seem very effective and antitrust fines are insufficient to fully deter wrongdoers.

The leniency policy has significantly increased the detection rates of cartels, but a large majority of cartels remain undetected. Some estimation finds that at least 2 out of 3 cartels remain undetected. However, these findings should be received with great caution, as there is a lack of studies on cartel detection rates and the available ones are grounded mostly on older estimations. As regards fines, they seem to be insufficient to ensure optimal deterrence even at their unprecedented high levels. First, the high number of discovered cartels and increasing fines show that existing fining policy may not be enough to persuade cartelists to abide the law. Second, the law and economics literature estimates that the gain from collusion by far outweighs the expected punishment. Considering these shortcomings, the current fine levels should be complemented with other measures to enhance deterrence. In this Chapter, private enforcement was regarded as an attractive option.

2) Private enforcement is largely underdeveloped in compensating victims.

The right to claim damages was very ineffective in the period 2006-2012: a large majority of victims (especially if they were SMEs and consumers) did not engage in legal actions for reparation of their harm. As such, the cost of ineffective right to damages was in the range of 25 - 69 billion euros between 2006 and 2012. From this perspective, three common obstacles facing victims of competition law infringements in the EU Member States were observed: (i) cost and (legal) uncertainty; (ii) complexity of causality; and (iii) disclosure rules.

3) Collective actions can contribute to achieving the objectives of antitrust enforcement, but their effectiveness depends on their design.

An effective collective redress can contribute to solving the shortcomings of public and private enforcement, yet its effectiveness depends on the type of mechanism introduced. One of, if not the most important feature in antitrust regards how claimants are aggregated for collective actions: on an opt-in or opt-out basis. It was found that opt-in collective actions are in practice unworkable in France and the UK. In such circumstances, opt-out collective actions are better suited to tackle the issues related with low participation rates, lack of funding and sub-optimal deterrence. However, opt-out proceedings may jeopardise the right of access to the courts under Article 6 of the ECHR, and may increase the number of unmeritorious claims. Despite the potential drawbacks, the EU-style collective redress should be based primarily on the opt-out basis or at least on the hybrid of opt-out/opt-in, while the pure opt-in measure should be avoided.

Furthermore, as regards the deficiencies of private enforcement, it was demonstrated that collective actions in national legal systems may therefore facilitate access to justice by creating measures which simplify and help access to courts. Furthermore, collective redress provides an attractive vehicle to deal with a wide range of legal and economic methods for proving causation. For example, when a consumer association files a claim on behalf of its members, it might reverse the insurmountable burden of proof from the plaintiff to their own hands. Finally, collective redress is a potential tool to facilitate enforcement by public authorities. This is remarkably because the collective redress mechanism may create an enlarged group of enforcers able to claim their rights granted under EU law.

2.6 APPENDIX: SUMMARY OF AMENDMENTS

Page	Description of amendment	Explanation
29	Additional discussion on the effectiveness of leniency policy.	The amendment better explains the effectiveness of public enforcement. Additional references are added, numbered 5-8.
29	Accompanying data on cartel statistics.	The information is provided for 2014-2017, while in original paper the relevant data was until March 2014.
30-31	Additional discussion on the effectiveness of EU administrative (public) fines.	The approach of Connor and Miller is presented as a counterargument to critics that claim that current fines are below the adequate level to achieve optimal deterrence. In addition, the approach of the European Commission on fines is presented. Additional references are added, numbered 17-18.
32-33	Additional discussion on stand-alone and follow-on actions.	It gives a more insightful picture about the shortcomings of private enforcement. Additional references are added, numbered 24-27.
34	Additional discussion on the disclosure rules in the Directive on damages actions.	This was not included in the published article, as it was concluded prior to the final adoption of the Directive (November 2014). Therefore, there was no intention to provide an overview on disclosure. It also seeks to show that private antitrust reform primarily seeks not to jeopardise public enforcement (primary leniency), while the victims' right to claim compensation is a goal of secondary importance. Additional reference is added, numbered 34.
35-36	Additional clarification on the relationship between effective compensatory private actions and deterrence.	Clarification helps to better explain the importance of damages claims in antitrust enforcement mechanism. Furthermore, it shows that private enforcement, being a tort remedy, is given a very broad power in the enforcement mechanism. Additional references are added, numbered 36, 39-40.
37	Additional explanation on the role of punitive damages in the EU context.	This idea has arisen after the additional *Manfredi* case review. The amendment provides a clarification that punitive damages do not necessarily over-compensate victims. Furthermore, additional discussion is added on the German Federal Court of Justice and the French Court de Cassation decisions regarding punitive damages. Additional references are added, numbered 47-48.
40	Clarification that individual companies cannot be inherently equated to consumers in collective actions.	Highlights the different (financial) interests at stake. Additional reference is added, numbered 60.
42	Additional clarification on the EU's sector-specific legal instrument.	New publication by the European Parliament was found, which overviews the adoption and of implementation of collective redress. Additional reference is added, numbered 68.
43	Overview of the European Parliament's proposal for the legislative tool on collective redress.	The European Parliament published a new study on collective redress in October 2018, which gives additional flavour to the discussion in the dissertation. Additional references are added, numbered 70-71.
43	Discussion on the legal basis for the potential Directive on collective redress.	A discussion on dual legal bases better reflects the EU position on making damages claims more coherent across the EU. Additional references are added, numbered 73-76.
43-44	Proposal is suggested for amending the current Directive on damages actions for including collective actions.	On the basis of the European Parliament's study, the amendment explores the possibility of collective redress in amending the Directive on damages actions. Additional reference is added, numbered 77.
46	Additional discussion on the positive effects of the common EU's collective redress.	It gives an overview on the potential outcomes for access to justice and consumer protection. Explanation is provided in Table 1.
46	Discussion on the potential impact of the European Commission and national competition authorities in affecting the potential of collective redress.	It gives a more insightful picture about the roots of follow-on collective actions.
46-47	Discussion on the impact of the DG Competition's programme of training national judges.	It gives a more insightful picture about the process of judges' training and a potential impact on decision-making. Additional references are added, numbered 84-85.