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

Juska, Z.

5 THE EUROPEAN COMMISSION'S APPROACH TO COLLECTIVE REDRESS: A MISMATCH WITH PROACTIVE EU MEMBER STATES[*]

Abstract:
The European Commission assessed the implementation of the 2013 Recommendation on collective redress, yet with a delay. On the one hand, it should be welcomed that the Commission remains ambitious regarding an EU-wide collective redress mechanism. On the other hand, it should be highlighted that the Commission is concentrating too much on the American system, which significantly differs in terms of rationale, design, and stated goals. Indeed, utilising one or another American element does not inevitably lead to the perceived issue of "blackmail settlement". This is further qualified by positive experiences in pro-active EU member states, which have experimented with US-oriented tools in order to facilitate collective actions in their jurisdictions. This article explores how insights from the EU countries and the US should influence the debate on EU-style collective antitrust redress, when the time arises to take the legally binding step in the field.

Keywords: collective actions, competition law, private enforcement, damages claims, compensation

5.1 INTRODUCTION

Five years have passed since the European Commission adopted the reform on damages actions in June 2013. The reform sought to facilitate antitrust damages actions across the European Union. The most important milestone was reached in November 2014, when the EU adopted the Directive on antitrust damages actions.[1] Its main objective is to ensure that victims can effectively exercise their right to claim full compensation. However, the achievement of full compensation is highly distorted for victims who suffered low value harm (such as consumers and purchasers). The Directive does not include provisions on collective redress; instead, the horizontal Recommendation on collective redress was adopted for this purpose.[2] It is not a legally binding document, and as such cannot force member states to take action; it only urges it. However, the Recommendation still represents the latest and the most concrete EU proposal, under which the preparation of legislation has been made for a coherent European framework for antitrust collective redress. This document has two main goals. The first is one is to facilitate access to justice, and to enable compensation in mass harm situations. The second one is to prevent the same kind of litigation abuses that have

[*] This material was peer-reviewed and published by BRILL in Žygimantas Juška, 'The Potential of Antitrust Collective Litigation in 2017: Beyond the Recommendation and the Directive' (2017) 4(4) European Journal of Comparative Law and Governance 337.
This Chapter is a revised version of the original published article. In order to address new developments, Chapter 5 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 thesis. As regards 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 with 'Chapter'. 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.

[2] Commission Recommendation of 11 June 2013 on common principles for collective redress mechanisms in the Member States for injunctions against and claims on damages caused by violations of EU rights COM(2013) 3539/3.

occurred in class actions in the United States. On 25 January 2018, the European Commission finally assessed the practical implementation of the Recommendation.[3] The outcome is that the Recommendation has had little real impact on the development of collective actions in the EU and that collective redress schemes are getting more and more divergent across the member states. An even more important factor is that antitrust collective claims have been brought in states which disregard some of the proposed principles of the Commission, and instead allow for US-oriented tools in some fashion.

The evaluation of the 2013 Recommendation has been a basis for the new legislative package "New Deal for Consumers", adopted on 11 April 2018. Another basis was the Volkswagen emissions scandal, which shown that it is problematic to enforce consumer rights across the EU. Therefore, collective redress mechanisms appear to be an attractive tool for allowing a better enforcement of consumer rights. As a result, the European Commission published two proposals for the directives in order to facilitate the opportunities for consumers to enforce their rights:

- Directive on better enforcement and modernisation of EU consumer protection rules[4]; and
- Directive on representative actions for the protection of the collective interests of consumers.[5]

In light of these observations, this Chapter discusses both the 2013 Recommendation and the new proposals, and suggests possible amendments.

A. Research question and scope

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

The following steps are taken to address this question. In the first place, Chapter 5 examines the European Commission's approach on collective redress by evaluating the criticisms surrounding it and comparing the EU compensation-oriented scheme with the US deterrence-based mechanism. This analysis gives a more insightful picture whether the Commission's approach, which is also strongly against the US system, is the most suitable for ensuring an effective right for victims to seek compensation. The assessment is deepened through scrutinising the experiences of the EU member states, which ignore some provisions of the Commission's approach, and instead allow US deterrence-oriented measures in order to achieve success in collective litigation.

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

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

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

As regards the scope, Chapter 5 does not include the assessment of the Directive on damages actions; it only analyses the proposed provisions of the Recommendation on collective redress. To sum up, the assessment concentrates on providing an initial comparison between the EU and US collective action schemes: the former aimed at compensation (examining the Commission's approach and respective mechanisms in proactive member states), and the latter aimed at deterrence (examining the US-style deterrence-based measures).

B. Methodology and limitations

In this Chapter, the comparative research method primarily combines structural and analytical approaches. Structuralism, for its part, compares a set of components that distinguish the EU compensation-based collective actions from the US deterrence-oriented class actions. An analytical approach is used to isolate the US-style collective actions elements in the EU member states in order to assess the interplay between them and with the Commission's approach.

The research limitation is that there is a lack of research objects in the EU context. The reality is that the few chosen examples reflect the most prominent antitrust collective actions that have been brought to national courts.[6] Regardless of the practical shortcomings in the field, the available experiences are juxtaposed with US class actions, which have a long-lasting practice in antitrust litigation. Therefore, the selected comparative research leaves no other choice than to rely on own assumptions and common sense about antitrust collective actions. Despite the shortcomings, this analysis gives a better understanding about collective actions in the EU, and what impact US-style remedies may have.

C. Overview of research material

This research primarily analyses the European Commission's Recommendation on collective redress. The general overview is provided by examining the most important policy documents on antitrust collective redress.[7] Regarding the surrounding criticisms of the Commission's approach, the useful works are of Hodges and Van den Bergh. Authors whose works are important for assessing the US mechanism include Davis and Lande, Crane, and Landers. When exploring the insights from EU member states, the writings of Biard and Kortmann are of particular importance as regards the Dutch system, and Veljanovski and Peyer as regards the UK system.

D. Structure

The structure of this Chapter is as follows. Following this introduction, section 2 provides an overview of the development of collective redress, ranging from the 2005 Green Paper to the 2013 Recommendation. The study of the Commission's proposed approach is outlined in section 3, underlying the surrounding controversies and the relationship with the US class action system.

[6] The period encompasses the time after two unsuccessful opt-in collective actions in France and the UK: *Mobile Cartel* collective litigation and *Replica Football Shirts* collective action respectively. Both cases faced significant obstacles in collecting victims: much less than 1% of victims joined the actions.

[7] This includes, *inter alia*: Directive 2014/104/EU on actions for damages; Communication on a European Horizontal Framework for Collective Redress COM(2013) 401/2; Public Consultation on a Coherent European Approach to Collective Redress SEC (2011) 173; White Paper on Damages Actions COM (2008) 165; Green Paper on damages actions COM (2005) 672 final.

Section 4 gives an overview of the schemes of member states that disregard some principles of the Commission's approach, and instead experiment with the US-style remedies to achieve success in collective litigation. Section 5 gives a perspective of the abusive litigation in the US and in the EU.

5.2 AN OVERVIEW OF THE COMMISSION'S APPROACH ON COLLECTIVE REDRESS: RECOMMENDATION, ITS REPORT AND PROPOSALS FOR NEW DIRECTIVES

The Commission's efforts to introduce an EU-wide private antitrust enforcement may be traced back to the 2005 Green Paper on damages actions.[8] The main objective was to identify barriers to the further promotion of antitrust damage actions.[9] Furthermore, collective redress actions were proposed as a tool for protecting consumers and purchasers with small claims. Despite the Commission proposing a number of options to facilitate damages claims, the efforts were highly criticised.[10] Building on these initial efforts, the Commission published the 2008 White Paper on damages actions.[11] In order to stimulate damage claims, the document included a broad range of suggestions: 1) the availability of full compensation (actual loss plus and the loss of profit); 2) the judge-controlled disclosure; 3) binding effect on NCA's decisions; 4) single damages rather than multiple damages. In addition, the White Paper recognized a clear need for collective redress mechanisms, as the existing means for the aggregation of individual claims were often limited and the harm caused by competition infringement was typically scattered among a large number of injured parties.[12] As a result, two type collective actions were suggested: i) representative actions; and ii) opt-in collective actions.

In both papers, the European Commission failed to find a consensus for an EU-wide legislation on antitrust collective redress. This is mainly because member states were against a sector-specific measure in the field. However, these failures incentivised the Commission to carry out a public consultation in February 2011.[13] This time the proposal supported a horizontal approach, which allows for all types of collective redress actions. In particular, it set out the core principles for a coherent European horizontal framework for collective redress in the subsequent Recommendation on collective redress.[14] The main principles that the Commission expects the member states to abide by are the following[15]:

[8] European Commission, "Green Paper - Damages actions for breach of the EC antitrust rules", COM (2005) 672 final.
[9] At this point, the Commission identified 6 main obstacles to creating a more effective system of antitrust damages actions. They relate to the following areas: (i) access to evidence (ii) damages (iii) defending consumer interests (iv) Effect of damages claims on the leniency programme (v) Defending consumer interests (possibility of collective actions) (vi) The passing-on defence and indirect purchaser's standing.
[10] See, e.g. Editorial comments, "A little more action please! – The White Paper on Damages Actions for Breach of the EC Antitrust Rules" *Common Market Law Review* 45(3) (2008) 609-615; Office of Fair Trading, "Response to the European Commission's Green Paper, Damages Actions for Breach of the EC Antitrust Rules" (2006), available at, http://ec.europa.eu/competition/antitrust/actionsdamages/files_green_paper_comments/office_of_fair_trading.pdf.
[11] European Commission, "White Paper on Damages Actions for Breach of the EC antitrust rules", COM (2008) 165.
[12] *Ibid.*, sec 2.1.
[13] European Commission, "Public Consultation: Towards a Coherent European Approach to Collective Redress", SEC (2011) 173 final.
[14] Together with the Recommendation, it was issued 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.
[15] The following discussion is based on the Recommendation, *op.cit* note 2; Communication *op.cit* note 14.

- Depending on the type of claim, collective redress can take two forms: injunctive relief (claims seeking to stop unlawful practice) and compensatory actions (claims seeking compensation for damage suffered).
- An opt-in principle should be the only approach to aggregate victims in collective redress claims. Under this model, the group includes victims who express consent to join the action.
- A clear distinction is made between public enforcement and compensatory damages actions: both instruments remain institutionally independent of each other. Public enforcement focuses on the punitive objective-function. This function is pursued through the imposition of fines. Compensatory collective redress actions should serve the objective of full compensation, i.e. the compensation model that sets the background for the Directive on damages actions.[16] Therefore, punitive damages, multiple or other damages, which lead to overcompensation, should be prohibited in a European collective redress mechanism.
- The Recommendation allows for both group actions and representative actions. The provisions on group actions are not widely discussed in the Recommendation. It can be argued that the Commission's main objective is to facilitate representative actions. This representation model better achieves the interests of victims, because public authorities are bound by their organisational mission to represent them in their best interests. Accordingly, legal standing can only be granted to entities designated in advance or by entities which have been certified on an ad hoc basis.
- Member States should not permit contingency fees, as this risks creating an incentive to conduct abusive litigation. The Commission establishes strict safeguards on third party funding. The funders are to be scrutinised in order to guarantee that there are no conflicts of interest, and that they have sufficient funds to support the legal action. Finally, the 'loser pays' principle should be predominant for reimbursing legal costs to winners.

The principles outlined in the Recommendation are non-binding, and states are only encouraged to follow them. The Recommendation represents the preliminary Commission's position, according to which an initial action has been made for the preparation of legislation for a coherent European framework for collective redress. Logically, it should share the best practices that would incentivise member states to reconsider the available collective redress schemes and to incentivise their development in states that have not yet adopted them.

On 26 January 2018, the European Commission assessed the practical implementation of the Recommendation by issuing the Report.[17] It was found that compensatory collective actions are available in 19 EU member states, while 9 states still do not provide any possibility to claim compensation collectively.[18] After the adoption of the Recommendation, a new legislation on compensatory collective redress has been adopted in 4 EU member states (Belgium, France, Lithuania, the United Kingdom), yet only two of them (Belgium and Lithuania) have followed the Recommendation's proposals to a large extent. Concerning all these factors, the Commission stated

[16] According to article 1 of the Directive, *op.cit* note 1, anyone who has suffered harm by antitrust infringement can effectively exercise the right to claim full compensation. The Directive reaffirms the EU acquis communautaire: White Paper, *op.cit* note 11 and the judgements of the Court of Justice of the European Union in Case C-453/99 *Courage Ltd.* v. *Bernard Crehan* [2001] ECR I-6297and Joined Cases C-295/04 to 298/04 *Vincenzo Manfredi and Others v Lloyd Adriatico Assicurazioni SpA and Others* [2006] ECR I-6619.
[17] Report, *op.cit* note 3.
[18] *Ibid*., at 2.

that there has been a limited follow-up of the Recommendation.[19] On this Report, the European Consumer Organisation has made 2 claims: one is that where collective redress is available, it is not very effective; another is that only 5 EU states have a working scheme of collective redress.[20]

Following this, on 11 April 2018, the European Commission published two proposals for the directives as part as of a Commission's legislative package "New Deal for Consumers": one regards a better enforcement and modernisation of EU consumer protection rules; another concerns representative actions for the protection of the collective interests of consumers. Quite disappointingly, the Commission did not propose a Directive on antitrust damages. It is important to stress that the 2013 Recommendation was published together with the draft of the Directive on damages actions, showing a particular interest (at that time) to increase the chances for victims to claim damages for harm resulting from infringements of competition law. Therefore, it was reasonable to expect for a progress in antitrust.

The Commission's proposals will be discussed by the European Parliament and the Council. Therefore, it remains unclear what the final version of the directives will be. At this point, the main proposals are the following[21]:

1. *Strengthening consumer rights online*: more transparency in online market places and on search results on online platforms.
2. *The possibility of representative actions*: a qualified entity, such as a consumer organisation, will be empowered to seek redress, such as compensation, replacement or repair, on behalf of a group of consumers that have been harmed by an illegal commercial practice.
3. *Penalties for violations of EU consumer law*: national consumer authorities will have the power to impose maximum fine of at least 4% of the trader's annual turnover, particularly on businesses functioning cross-border and on a wide scale.
4. *Tackling dual quality of consumer products*: stricter penalties for illegal practices, individual remedies for misled consumers and collective redress mechanisms for traders who mislead consumers by marketing "dual quality" goods.

It can be seen that these provisions are mostly relevant for strengthening EU consumer rights, but they do not seem to enhance private antitrust enforcement or antitrust collective actions. In the absence of amendments in antitrust, the 2013 Recommendation remains the proposal that best reflects Commission's approach on antitrust collective redress. Therefore, the analysis of the 2013 Recommendation is the principal subject of the following discussion.

5.3 A STUDY OF THE COMMISSION'S APPROACH

Even if it may sound paradoxical, the failure of the Commission in convincing member states to follow the provisions of the Recommendation should be welcomed. This is notable because the

[19] Report, *op.cit* note 3, 20.
[20] A. Maciulevičiūtė, "Has the Commission Convinced EU Countries to Introduce Collective Redress?" BEUC (2018), available at <http://www.beuc.eu/press-media/news-events/has-commission-convinced-eu-countries-introduce-collective-redress>.
[21] The following discussion is based on the European Commission, "A New Deal for Consumers: Commission Strengthens EU Consumer Rights and Enforcement" Press Release of 11 April 2018, available at <http://europa.eu/rapid/press-release_IP-18-3041_en.htm>; Proposal for directives, *op.cit* note 4-5.

Commission's proposed measures/safeguards are too robust for collective actions (especially in antitrust) to ever be brought to the courts. The strong safeguard mechanism is rather a reflection of the Commission's careful approach, which seeks to avoid any relationship with the American system. However, the experiences in the EU member states have shown that antitrust collective actions have been brought in countries that disregard some Commission measures and instead experiment with US-oriented tools. All these points will be discussed below.

5.3.1 The Surrounding Controversies

The stated goal of the Recommendation is to provide better means of access to justice, and to enable compensation in mass harm situations. In order to achieve this goal, the Recommendation combines tools that are based on the careful approach. First, there is a predominance of the 'loser-pays' principle and an opt-in measure. Second, the Commission's model prohibits contingency fees and punitive damages - also, third party funding is subject to strict limitations. Third, the representative entities need to meet strict requirements for bringing representative actions: a non-profit making character, a direct relationship between the activities of entity and the violation, and sufficient capacity in terms of financial and human resources.[22] Together, these tools act as robust safeguards against abusive litigation. However, these safeguards simultaneously reduce the incentives of bringing compensatory collective actions to a minimum.[23] In essence, a defeat in a case would entail having to compensate the other side's costs, which may be significant. Moreover, opt-in schemes are accused of attracting a too low participation rate, which absolutely diminishes the financial viability of collective actions.[24] Finally, the prohibition of contingency fees lessens the possibilities of reaping awards outweighing the risks of litigation. Under these conditions, few rational actors would have willingness or the capacity to bring costly antitrust collective actions. As such, the objective of compensating victims in mass harm situations is likely to fail to a large extent, as collective actions are unlikely to be brought. As such, a large majority of victims will remain uncompensated.

Another concern is that the Recommendation fails to lay down clear requirements on how the EU policy should be formed. The proposed principles are poorly defined, and create legal uncertainty by including many exemptions.[25] Table 1 below explains these exemptions.

Table 1. The policy exemptions in the Commission's Recommendation on collective redress

Measure	The Commission's aspiration	Exemption
Opt-in	Each collective redress action should be based on an opt-in measure.	An opt-out measure may be duly 'justified by reasons of sound administration of justice.'

[22] Recommendation, *op.cit* note 2, para. 4.
[23] Some commentators argue that the EU approach on collective redress faces the 'Catch 22' problem, under which safeguards are in fact working as barriers. See C. Hodges, "Collective Redress: A Breakthrough or a Damp Sqibb?" *Journal of Consumer Policy* 37(1) (2014), 67-89, at 83.
[24] For the discussion on low participation rates, see R. Van den Bergh, "Private Enforcement of European Competition Law and the Persisting Collective Action Problem" *Maastricht Journal* 20(1) (2013), 12-34, at 21. For the discussion on the financial viability, see Which?. 'Response to European Commission Consultation on Collective Redress' (2011), available at <http://ec.europa.eu/competition/consultations/2011_collective_redress/which_en.pdf>.
[25] For a discussion, see also Hodges, *op.cit* note 23, at 78.

"Loser pays" principle	The losing party should reimburse the other side's legal costs.	The "loser pays" principle should be subject to national legal provisions.
Contingency fees	Member states should not permit contingency fees in collective actions.	Such fees may be allowed if they are regulated by national law.
Private third-party funding	It is prohibited to base funders' compensation on the amount of the settlement, or on the compensation granted.	Funding agreement can be regulated by a public authority.
The court's role	A judge should manage the case effectively and detect abuses as early as possible.	The judge should carry out the necessary examination by his or her own initiative.

The issue is that the Commission urges member states to implement the proposed principles, yet there is a lot of space for interpretations. But the European Commission has already observed that a lack of clarity in the soft law may lead to further fragmentation in the national systems.[26] As a proof of this, it can be observed that the development of collective redress mechanisms has resulted in a number of uncoordinated initiatives during 2013-2016. Collective redress schemes were introduced in Lithuania in 2015, with the possibility for attorneys to sign a contingency fee agreement.[27] The UK amended its Consumer Rights Act in 2015, thereby allowing opt-out antitrust collective proceedings.[28] To the same extent, opt-out actions are allowed in Belgium from 2014, yet this possibility is only available to Belgian residents.[29] In 2014, opt-in collective actions were introduced in France, but some procedural measures do not fit in the EU context.[30] Finally, none of the countries that allow for opt-out collective actions in some fashion (Denmark, Portugal, and the Netherlands) have changed their schemes into opt-in actions.

Indeed, the discrepancies between the legal systems create an uneven playing field in the internal market as regards antitrust damages. As a result, undertakings that have violated articles 101 and 102 of the TFEU are facing different levels of risk of being exposed to private claims from all potential antitrust victims, including the ones with smaller claims (typically consumers and small businesses). Indeed, the infringers can be exposed to such a wide-ranging collective actions if they are established in a claimant-friendly state, which allows for aggregating claims on the basis of an opt-out. It consequently leads to a so-called 'competitive advantage' for undertakings that have breached competition rules.[31] In that regard, the opportunity for victims to claim compensation depends on whether they are located in a state with favourable rules on collective litigation.

[26] Commission Staff Working Document accompanying document to the White Paper on damages actions for breach of the EC antitrust rules - Impact assessment, SEC (2008) 405, para. 147.
[27] In order to allow group actions, the Code of Civil Procedure was amended by introducing article 441^1. Also article 49(6) of the Code was withdrawn. Contingency fees are allowed under article 50 of the Law on Advocacy.
[28] Major amendment is set out in Schedule 8, entitled "Private Actions in Competition Law". See Consumer Rights Act 2015, available at <http://www.legislation.gov.uk/ukpga/2015/15/contents/enacted>.
[29] Act of 28 March 2014, Official Gazette on 29 April 2014, 35201.
[30] Class action proceedings were introduced by Law No. 2014-344 of 17 March 2014. Consumer actions are governed by Consumer Code, arts 423-1. One of the exceptional measure is that collective actions are only possible when the court asserts the defendant's liability. Another is that the Court needs to rule on the admissibility of the action and on the defendant's liability in the same court decision. For further discussion, see C. Gateau and A. Diallo, "How Does the New French Class Actions Law fit in the EU Framework?" (2014). Hogan Lovells, available at <http://www.lexology.com/library/detail.aspx?g=5d60d9ff-261a-49fc-975c-363e1124c80e>.
[31] Commission, 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, pp. 9-10.

Another issue is that an uneven playing field encourages "forum shopping" - plaintiffs choose the most favourable forum for bringing their claims. Indeed, "forum shopping" should be understood both from the negative and positive sides. As regards the negative perspective, victims with smaller claims lack the financial resources to choose a more favourable jurisdiction.[32] Therefore, the European Commission considers that "forum shopping is a privilege for the happy few."[33] Both from negative and positive perspectives can be considered the possibility for defendants to select the most favourable forum for defending their claims. On the one hand, "forum shopping" may bring uncertainties for national courts on whether they have jurisdiction. In addition, it may lead to a flood of claims (including the claims that lack ground) to states with favourable rules, such as the Netherlands.[34] On the other hand, it allows for defendants to choose a country that may solve the proceedings in the most efficient way, also allowing to save litigation costs. As such, the extended right to bring damages claims is likely to ensure that more meritorious as well as unmeritorious actions will reach the courts. Another viewpoint is that EU member states with effective collective redress schemes may encourage other states with underdeveloped laws to amend their systems in order to facilitate litigation opportunities in their respective forums. Nonetheless, no one can ensure that the competition between national systems and their various litigation landscapes will not make the playing field even more uneven.

Indeed, the divergence across the EU makes the possible introduction of a coherent European framework for collective redress highly complicated. A legally binding instrument would require intervention in national laws that have already schemes in own fashion. Obviously, it would be very complicated to define balance between the different mechanisms of member states. But if the Commission decided to adopt a legally binding instrument, it would be advisable to adopt a sector-specific antitrust Directive on collective redress rather than issue a horizontal instrument. Under a sectorial measure, minimum standards could be set that would prevent harsh intervention in national laws.[35] Moreover, it would allow better adjustment to the unique nature of antitrust litigation, which requires compensating victims through different distribution chains. However, the provisions in the Directive should be set with extreme precision, because even a small lack of clarity may lead to uneven implementation. As the EU practice has shown, this issue may even occur due to the ordinary development of competition.[36]

If the EU truly seeks to achieve success in compensating victims in mass harm situations, there is a need to reconsider its strict approach to the American system. The introduction of one or another US element would not necessarily lead to abusive litigation. On the contrary, there are arguments that some American elements may have positive effects in safeguarding against abuse.

---

[32] Commission, 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, pp. 9-10.

[33] J. Almunia, "Antitrust Damages in EU Law and Policy" College of Europe GCLC Annual Conference (2013), available at <http://europa.eu/rapid/press-release_SPEECH-13-887_en.htm>.

[34] S. Beeston and A. Rutten, "The Dutch Torpedo Case" *Competition Law Insight* (2015) 14-15, at 14.

[35] Consolidated Version of the Treaty on European Union [2008] OJ C115/13, Article 288. A directive shall be binding, but shall leave to the national authorities the choice of form and methods. Therefore, a directive shall set minimum standards that would allow for member states to introduce more stringent measures.

[36] See, e.g. Directive 2009/12/EC of the European Parliament and of the Council of 11 March 2009 on airport charges [2009] OJ L 70. For further discussion, see European Commission, "Aviation: Commission reports increased transparency in setting of airport charges, but uneven implementation of rules by the Member States" Press Release of 19 May 2014, available at <http://europa.eu/rapid/press-release_IP-14-567_en.htm>.

5.3.2 A Relationship with US Class Actions

Throughout history, US antitrust class actions have become one of the most, if not the most important tool for enforcing antitrust rules. Yet, this is mainly because the American system combines remedies that are aimed at achieving deterrence: an opt-out measure, contingency fees, treble damages, the one-way fee shifting (the absence of the 'loser-pays' principle), joint and several liability, and wide-ranging discovery rules. But the American system is considered to create incentives for abusive litigation. This phenomenon mainly occurs if unmeritorious collective actions are brought to the courts, and if these actions force law-abiding defendants (especially businesses) to settle in order to avoid reputational and financial damage.[37] In the US context, this issue is called as a "blackmail settlement."[38] In order to prevent the perceived American problem, the European Commission warns against four tools:

- *An opt-out system*, which may jeopardize the freedom of claimants to decide whether they want to litigate or not.
- *Third-party funding*, which are seen as a potential factor driving frivolous actions.
- *Contingency fees*, which may create a risk for incentives to abuse the litigation.
- *Punitive damages*, which may lead to overcompensation of claimants.

However, the Commission's approach is one-sided: these measures are shown only from the negative perspective, while positive aspects are ignored.

With regard to an opt-out approach, the counterclaim to the Commission's position is the Court of Justice of the European Union's decision in *Eschig*.[39] The Court ruled that opt-out actions are potentially in line with legal traditions as long as victims can effortlessly opt-out. Therefore, the claimant's freedom to litigate or not to litigate can be respected even in opt-out actions.

Moreover, it should be stressed that contingency fees and third party funding may have positive effects in facilitating meritorious litigation when they are combined with the 'loser pays' rule. A lawyer or a funder (hereafter both regarded as "investors") bringing unmeritorious claims should assume the risk of being hit with the other side's costs, if the case is lost. These costs may be substantial in antitrust cases, which are typically complex, and hence the costs of legal representation may generate substantial expenses. For example, in Germany—one of the most plaintiff-friendly jurisdictions—antitrust damages actions can generate significant costs to the other side.[40] Another point is that investors should consider the fact that bringing antitrust claims will require extensive evidences, but the EU discovery is subject to many conditions and limitations.[41] Furthermore, performing the proportionality test of disclosure is the responsibility of national courts, which are unpredictable in their execution. In addition, judges are responsible for the

[37] Communication *op.cit* note 14, at 7-8.
[38] See, e.g. J.M. Landers, "Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma", *Southern California Law Review* 47 (1974), 842–890, at 843.
[39] Case C-199/08 *Erhard Eschig v.UNIQA Sachversicherung AG* [2009] ECR 1-8295, para. 64.
[40] Oberlandesgericht Düsseldorf (Higher District Court), judgment of 18 February 2015, VI-U (Kart) 3/14, NZKart 2015, 201.The Court calculated that if the defendant won the case, the other side's claim would generate more than €5 million euros to the claimant.
[41] Directive, *op.cit* note 1, Article 5.

screening of whether collective actions pass the test of commonality and suitability.[42] Under such circumstances, investors are mainly interested in taking meritorious cases, which will generate strong evidences for passing the certification and for proving damages. In contrast, speculative claims are weak in their nature, as they lack merit.

Punitive damages do not inherently lead to overcompensation of the claimant party. The European Commission does not specify how expensive antitrust collective actions can be. In reality, the litigation costs (administrative, expertise, etc.) can be so high that they consume a large portion of the recovery, thereby leaving small amounts to victims.[43] Therefore, the award of punitive damages may be needed to counterbalance the enforcement costs of the compensation objective. But if the case generates overcompensation to claimants, the surplus can be distributed on a cy-pres basis, under which unclaimed funds are provided to non-profit beneficiaries.[44] This compensation distribution model can be well illustrated through the Rover case in the UK.[45] The European Commission detected price fixing by Rover and hence required to pay £1million in compensation to consumers.[46] It proved impossible to define customers to whom the antitrust violation caused harm. Therefore, *Which?*—the UK consumer organisation—received the majority of money to spend on information projects: one regarded informing people about car safety and another regarded informing about the accessibility of cars for disabled people.[47]

On the basis of these points, it can be argued that the Commission missed the opportunity to suggest a more forceful approach. This approach should be understood as crossing the borders of the Commission's compensation model, which combines a number of precautionary measures. If there was flexibility in utilising one or another American element, there would be more possibilities to seek a better means of compensation. However, the US system should not be understood as the best fit for the EU mechanism, as it much differs in terms of rationale, design, and stated goals. Instead, the Commission should take a closer look at member states, which do not fully rely on the proposals by the Recommendation, but where antitrust collective actions have been working in practice.

5.4 EU MEMBER STATES' EXPERIMENTS WITH FORCEFUL TOOLS

So far, antitrust collective litigation has been viable in three EU member states: Portugal, the Netherlands and the UK. The main reason is that collective proceedings can be brought on an opt-out basis. However, this Chapter only analyses the systems of the Netherlands and the UK, while

[42] See, e.g. Ž. Juška "The Impact of Contingency Fees on Collective Antitrust Actions: Experiments from Lithuania and Poland", *Review of Central and East European Law* 41(3-4) (2016) 368-395, at 377-380 (tbl. 1).

[43] For high expenses in opt-in cases, see UFC–Que Choisir "Consultation de la Commission Europenne sur les Recours Collectifs Contribution De L UFC-Choisir" (2011). For high expenses in opt-out cases, see D.A. Crane, "Optimizing Private Antitrust Enforcement", *Vanderbilt Law Review* 63 (2010), 675-723, at 682-83.

[44] In favour of a cy-pres remedy is the UK consumer organization, see Which?, *op.cit* note 24. A cy pres remedy has been very popular in the US. However, it has been criticized for distributing a surplus to the beneficiaries who are not related with the violation. See, e.g. J. Johnston, "Comment, Cy Pres Comme Possible to Anything Is Possible: How Cy Pres Creates Improper Incentives in Class Action Settlements", *The Journal of Law, Economics & Policy* 9 (2013) 277-304, at 292-93.

[45] European Commission, "Commission Decision on Rover Case" Press Release, available at <http://europa.eu/rapid/press-release_MEMO-90-31_en.htm>.

[46] A. Maciuleviciute. 'Litigation Funding in Relation to the Establishment of a European Mechanism of Collective Redress' 2012. BEUC position. Retrieved 22 April 2017, http://www.beuc.org/publications/2012-00074-01-e.pdf.

[47] A. Maciuleviciute, 'Re-directing Justice' (2012) BEUC position. Retrieved 1 August 2018, http://www.beuc.eu/publications/2012-00561-01-e.pdf.

the Portuguese mechanism is disregarded. In the latter country, the first opt-out antitrust damages claim was filed in 2016.[48] However, it seems to be an incidental tentative action. The claim has been filed by the Portuguese Competition Observatory, a non-profit association of academics from a number of universities. The collective action seems to be brought due to academics' professional curiosity to experiment with the first of this type of action. It is hard to imagine that a second lawsuit can be brought on the same basis in the absence of private funding tools, such as attorney's contingency fees or third party funding.

5.4.1 The Netherlands

Collective actions are governed by article 3:305a of the Dutch Civil Code (DCC). This provision allows for foundations or associations (not an individual claimant) to seek a declaratory relief, but DCC does not establish a possibility for a representative entity to claim compensatory damages.[49] Therefore, injured persons need to bring claims individually in order to obtain monetary damages. Another option, which makes the Dutch jurisdiction unique in the EU, is the possibility of collective settlements. The Act on Collective Settlement of Mass Damage Claims (WCAM) allows for the Amsterdam Appeal Court to declare a binding collective settlement on all of the allegedly injured persons, unless someone declares to opt out.[50] Interestingly enough, collective settlements are different from collective actions. The WCAM is codified in sections 7:908-7:910 of the Dutch Civil Code and articles 1013-1018 of the Dutch Civil Procedure Code, and not in article 3:305a of the DCC. It is considered that a declaratory relief may incentivise the alleged infringer to enter into a settlement agreement with victims for compensating damages under the WCAM. As regards the scope, WCAM has often been used for international settlements.[51] In addition to the availability of opt-out collective settlement, the Netherlands is exceptional for in its favourable rules on the 'loser pays' principle.[52] Furthermore, the Netherlands is one of few countries (together with Austria, Germany and the UK) where third party financing is allowed in practice.[53] This type of financing is primarily attributed to the assignment model, where a special vehicle assigns the claims. Only on this basis cartel damages claims have been brought in the Netherlands.

---

[48] Lisbon Judicial Court, case no. 7074/15.8T8LSB. The claim was filed against Sport TV, which held illegal monopoly in the field of paid premium sports channels. The action seeks to compensate over 600,000 customers for damages directly arising from the anticompetitive conduct, and to compensate 3,000,000 customers for damages indirectly occurring due to the inflation of prices and the reduction of competition. For further discussion, see M.S. Ferro, "Collective Redress: Will Portugal Show the Way?" *Journal of Euro Competition Law & Practice* 6(5) (2015), 299-300, at 300.

[49] For the discussion, see J.E. Richman, 'United States: Dutch Collective Actions vs. Collective Settlements' (2016), available at <http://www.mondaq.com/unitedstates/x/536358/Shareholders/Dutch+Collective+Actions+vs+Collective+Settlements>.

[50] The Law of 23 June 2005, Stb. 340.

[51] For example, WCAM collective settlements were used in 2009 Royal Dutch Shell, 2012 Converium Holding AG, 2016 Ageas and Fortis Shareholders.

[52] See, e.g. Frank van Alphen, 2010. "Luchtvrachtkartel Krijgt Reuzeclaim van Verladers." *De Volkskrant*. September 30 (citing Pierre Bos, the former counsel in the case of *Equilib vs. KLM,* who claimed that the Dutch courts were chosen because of the favourable rules on the "loser pays" principle, as plaintiffs do not have to pay for the actual costs incurred by the defendants).

[53] Report, *op.cit* note 3, 9; K. Daly, "The Growth of Collective Redress in the EU: A Survey of Developments in 10 Member States" (2017) Prepared for the U.S. Chamber Institute for Legal Reform, at 22, available at <http://www.instituteforlegalreform.com/uploads/sites/1/The_Growth_of_Collective_Redress_in_the_EU_A_Survey_of_Developments_in_10_Member_States_April_2017.pdf>.

In September 2010, the antitrust collective claim was instituted by Claims Funding International (Equilib) on behalf of victims all over Europe against KLM, Air France and Martinair.[54] Equilib filed a claim exceeding 400 million euros in relation to the Commission's decision in the air cargo cartel.[55] Notably, the case was brought on behalf of direct purchasers and indirect purchasers (including Phillips and Ericsson). In January 2015, Equilib brought a subsequent claim against British Airways and Lufthansa on the same factual and legal basis as in the first case.[56] However, it should be understood that neither case is a typical collective damage claim. In practice, Equilib buys claims from victims and brings an antitrust damage claim as its own. This financing model is later discussed in this Chapter. So far, Equilib's actions have not raised concerns regarding abusive litigation.

However, it does not mean that the Dutch mass litigation model is free from abuses in other fields. The U.S. Chamber Institute for Legal Reform (ILR) underlined the action where the claim foundation started a claim on behalf of almost 200,000 consumers against the Dutch State Lottery.[57] The alleged violation concerned misleading information about the chances of winning. ILR Report stresses that the foundation's director has been accused of distributing millions of euros of consumers' financial contributions to his own pocket. However, the Report has been criticised for neglecting important facts.[58] More specifically, the Report disregards that the participants of the foundation successfully replaced the foundation's board. Moreover, ILR remains silent on the fact that the case was successfully settled, which allowed around 2.5 million class members to successfully recover their financial claims.

In the near future, the Dutch jurisdiction should become even more plaintiff-friendly for opt-out collective actions. In November 2016, the Ministry of Security and Justice submitted the Bill to the Dutch Parliament, aiming to make collective damages actions more effective.[59] The principal purpose is to remove the limitation of the current collective litigation regime that does not allow a collective action for monetary damages. After many formal and informal consultations, the Bill has been amended in January 2018 to address the previous criticisms of the 2016 proposal. The amended law on collective litigation is expected to be enacted in due time. In its current form, the key provisions, *inter alia*, are the following:[60]

[54] Claims Funding International plc. Press Release (30 September 2010).
[55] *Airfreight* (Case COMP/39258) Commission Decision C(2010) 7694 [2010] OJ C 371.
[56] See Amsterdam District Court, 7 January 2015 (C/13/561169 / HA ZA 14–283). In the decision, it was asserted that the District Court of Amsterdam has jurisdiction over antitrust follow-on claims instituted by Equilib against British Airways and Lufthansa.
[57] Daly, *op.cit* note 53, at 22-23.
[58] A. Biard and *etc*, "Dutch Collective Redress Dangerous? A Call for a more Nuanced Approach" (2017), available at <http://conflictoflaws.net/2017/dutch-collective-redress-dangerous-a-call-for-a-more-nuanced-approach/>.
[59] See the database of the Ministry of Security and Justice, available at <https://www.rijksoverheid.nl/ministeries/ministerie-van-justitie-en-veiligheid/documenten>. For further discussion, see also I. Tzankova, "New Dutch Bill on Collective Damages Action," (2016), available at <http://conflictoflaws.net/2016/new-dutch-bill-on-collective-damages-action/>; J. Kortmann. "Overview of Legislative Proposal on Collective Action (NL)." Stibbe (2017), available at <https://www.stibbe.com/en/news/2017/february/overview-of-legislative-proposal-on-collective-action-nl>.
[60] The assessment is based on the work of J. Kortmann, "Overview of Legislative Proposal on Collective Action (NL) - As Amended by the Amendment Bill of 11 January 2018" Stibbe (2018), available at <https://www.stibbe.com/en/news/2018/january/overview-of-legislative-proposal-on-collective-action-nl---as-amended-by-the-amendment-bill-of-11-j>.

- Collective action can be brought before any District Court in the Netherlands, but only if it has a sufficiently close relationship to the Dutch jurisdiction.
- The opt-out aggregation model only applies to class members who are domiciled in the Netherlands, and the ones who are domiciled outside are allowed to join the action only by opting in.
- The representative entity needs to meet the suitability criteria: a) not-for-profit; b) strong governance standards; c) sufficient financial means; d) it needs to prove that reasonable efforts were taken to settle the case.
- The class should include claims that are sufficiently common as regards fact or law;
- The class can be denied by the court if it is too small, or if the combined financial interests are too insignificant.

Despite the draft having high potential, it has been criticized by some attorneys.[61] This criticism should be received with great caution, as law firms typically defend the interests of their clients in all forums, including policy papers. Nevertheless, there is no reason why this criticism should not be taken into consideration in this Chapter. The first criticism tells that the pure opt-out model may lead to negative outcomes, as in the US, where class action settlements bring little or no financial benefits to class members. Instead, it should include an opt-in model or a hybrid of opt-in/opt-out. Second, the provision for a not-for-profit entity stating that a representative body should not make a profit "through the representative entity" leaves too much space for interpretation, allowing to make profit outside the representative body. This criticism is line with the above-mentioned ILR Report, which asserts that the Dutch third-party funding is unregulated and therefore vulnerable to abuse.[62] It is obvious that these criticisms have ground, but critics overlook two important factors. First, the potential EU problems regarding an opt-out model should not be juxtaposed with the US scheme. American class action claims are litigated intensively and at a high cost to litigants and taxpayers, because an opt-out scheme is combined with other elements: treble damages, broad discovery rules, contingency fees, the one-way-fee shifting, jury trials, and joint and several liability. Indeed, the absence of one or another tool may reduce the potential of abusive litigation. This point will be discussed later in this Chapter (see Section 5.5). Second, other Dutch commentators observed that the existing safeguards function well against litigation abuses.[63] For example, the courts have started applying more rigorous standards for representative entities to obtain standing. Furthermore, there is no proof that the increasing number of Dutch collective actions is related with entrepreneurial parties. In addition, the threshold for representative bodies to obtain admissibility has been increased, as it requires including high standards of the governance, financial capacity, expertise, representativeness, and experience in the decision-making process. To conclude, it is probably correct to say that there is no safeguard(s) that would fully prevent abusive litigation. What is clear is that the Dutch jurisdiction is one of the best forums for testing the potential of abusive litigation in the EU context, and this possibility will even rise if the Dutch Parliament will agree on the legislative amendment regarding collective litigation. More importantly, this amendment would enhance the incentives for bringing collective actions to the courts. The second forum, in which opt-out collective actions are in place and have been tested in practice, is the UK's collective action system.

[61] *Ibid*.
[62] Daly, *op.cit* note 53, at 20.
[63] Biard, *op.cit* note 58.

5.4.2 The United Kingdom

In the UK, opt-in and opt-out collective actions are allowed on behalf of groups of claimants. Previously only opt-in schemes were allowed, but this changed in 2015 when the new Consumer Rights Act was adopted. Its Schedule 8 included the amendments to the Competition Act 1998 to provide possibilities for opt-out collective proceedings in the context of competition law infringements. However, both opt-in and opt-out collective actions have been unsuccessful so far.

The only one opt-in collective action was the *Replica Football Shirts* litigation.[64] This case clearly showed the reluctance of consumers to join opt-in proceedings. The collective action was organised by *Which?*, a UK consumer association. Despite a broad awareness raising campaign, only 130 consumers participated in the action, while the violation had potentially caused harm to 2 million consumers. After the failure, *Which?* claimed that they would participate in antitrust collective actions only if an opt-in measure was allowed.[65]

Under the new Consumer Rights Act, the opt-out collective action mechanism enables claimants (such as, consumers or SMEs) to claim damages for the harm caused by the competition law violation. In that regard, a class representative is entitled to bring collective proceedings in the Competition Appeal Tribunal (CAT) on behalf of victims who have not left (opted out of) the group. The key provisions are the following:[66]

- The group certification model requires that claims raise common issues.
- The suitability of the potential action needs to be demonstrated before it is allowed to proceed to the court.
- The Act contains a number of limitations to prevent abusive litigation: i) the class representative has to meet strict conditions; ii) the 'loser pays' principle is predominant; iii) exemplary or punitive damages are not available; iv) contingency fees are not allowed.
- Law firms and litigation funders are not allowed to act as group representatives.
- Opt-out collective actions can only be brought by claimants domiciled in the UK, and foreign claimants are required to opt for the action.

Other key amendments include the following:

- An opt-out collective action mechanism allows for both follow-on and stand-alone claims.
- The CAT is empowered to approve collective settlements. The representative body is not permitted to agree a settlement.
- The CAT is permitted to cap claimants' exposure to defendants' costs.

[64] The consumer organisation *Which*? brought antitrust collective action on the basis of a cartel violation that fixed the price of football kits. A collective claim was based on the following decisions: OFT decision of 1 August 2003 No. CA98/06/2003; Allsports Limited, JJB Sports plc v. Office of Fair Trading [2004] CAT 17; Umbro Holdings Ltd, Manchester United plc, Allsports Limited, JJB Sports plc v. Office of Fair Trading [2005] CAT 22; and JJB Sports plc v Office of Fair Trading [2006] Court of Appeal, EWCA Civ 1318.

[65] Which?, "Public Consultation: Towards a Coherent European Approach to Collective Redress" (2011) Consultation Response.

[66] The following assessment is primarily based on the Consumer Rights Act 2018, Schedule 8 and the Competition Appeal Tribunal Rules 2015, Rule 79.

Under the new possibility, two follow-on antitrust collective actions have been brought, albeit both have failed in the class certification stage.

In May 2016, the first one was brought by the National Pensioners Convention's general secretary, Ms. Dorothy Gibson (the group representative), against Pride Mobility Products Limited (the defendant).[67] The follow-on collective proceedings were based on the decision of the Office of Fair Trading (OFT), finding that Pride Mobility Products violated competition law through a form of resale price maintenance between 2010 and 2012.[68] Around 30,000 victims were included in the class on an opt-out basis, alleging an overpayment for mobility scooters. Class members were entitled to compensation of around 7.7 million pounds, or around 200 pounds each. During the class certification hearing in December 2016, the CAT issued a decision that the proposed subclasses were not well associated.[69] As a consequence, Gibson requested to reformulate her claim. In March 2017, the CAT objected to the proposed class of purchasers.[70] The Tribunal asserted that the class representative could only bring claims on behalf of consumers who bought scooters from the eight infringers found by the OFT, and not from other retailers whose prices were affected by Pride's violations. Upon the request of Gibson, the CAT gave a second chance to file an amended application, yet with the condition that stronger economic evidence quantifying the alleged consumer losses would be provided. In May 2017, however, Dorothy Gibson ultimately withdrew her action against mobility scooters.[71] One of the reasons for dropping the case could also be the issue related with funding. This case was not funded by the third-party litigation funders. Instead, lawyers were paid on the basis of a conditional fee agreement and the after-the-event insurance was used to cover experts' fees and adverse costs. [72] It does not change the fact that claimants still need to pay hourly fees to attorneys, which can become an insurmountable burden. As mentioned before, the Consumer Rights Act prohibits the use of contingency fee agreements in opt-out collective actions, which would shift the financial burden from plaintiffs to law firms.

In September 2016, the second collective action was brought by Walter Merricks, a former Financial Services Ombudsman, in the case *Merricks v MasterCard.*[73] A claim has been filed on behalf of 46 million British consumers (including indirect purchasers) against MasterCard, which imposed illegal charges from 1992 to 2007. The collective action was brought on behalf of victims who used Mastercard for purchasing goods or services in the UK within the violation period. The claim was based on a finding made by the European Commission in 2007.[74] The value of the claim

[67] *Dorothy Gibson v Pride Mobility Products Ltd* [2017] CAT 9.
[68] Office of Fair Trading, decision of 27 March 2014, CE/9578-12. Retrieved 22 April 2017, https://www.gov.uk/cma-cases/investigation-into-agreements-in-the-mobility-aids-sector.
[69] Competition Appeal Tribunal, Dorothy Gibson v Pride Mobility Products Limited, Case No. 1257/7/7/16. Retrieved 1 September 2018, http://www.catribunal.org.uk/237-9255/1257-7-7-16-Dorothy-Gibson.html.
[70] Competition Appeal Tribunal, Judgment of Dorothy Gibson v Pride Mobility Products Limited of 31 March 2017, available at http://www.catribunal.org.uk/files/1257_Dorothy_Gibson_Judgment_CPO_CAT_9_310317.pdf.
[71] Competition Appeal Tribunal, Order of Dorothy Gibson v Pride Mobility Products Limited of 25 May 2017. Retrieved 1 September 2018, http://www.catribunal.org.uk/files/1257_Dorothy_Gibson_Order_250517.pdf
[72] A. Rodgers and etc., "Emerging Issues in Third-Party Litigation Funding: What Antitrust Lawyers Need to Know", *The Antitrust Source* (2016) 1-16, at 9, available at <http://www.nortonrosefulbright.com/files/20161201-emerging-issues-in-third-party-litigation-funding-what-antitrust-lawyers-need-to-know-145438.pdf>; C. Veljanovski, "Collective Certification in UK Competition Law – Commonality, Costs and Funding" *Case Associates* (2018) at 12, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3191027>.
[73] *Walter Hugh Merricks v Mastercard Inc* [2017] CAT 16.
[74] *MasterCard/ EuroCommerce/Commercial Cards* (Case COMP/34.579—COMP/36.518—COMP/38.580) Commission Decision of 17 December 2007 [2009] OJ C 264/8.

was around 14 billion pounds, making it the largest legal claim in the UK's history. The litigation funder (the Chicago-based company Gerchen Keller Capital) agreed to provide funding (up to 40 million pounds) to finance the lawsuit. However, the CAT refused an application for an opt-out collective proceedings order in July 2017.[75] The Tribunal found that the claims were adjudicated inappropriately for collective proceedings. More specifically, the methodology put forward was unsuitable for quantifying the aggregate award of damages for the whole class.[76] In that regard, the CAT asserted that the claim lacks a 'plausible way of reaching even a very rough-and-ready approximation of the loss suffered by each individual claimant.'[77] In order to succeed, the claimants are required to use an effective methodology for estimating an aggregate value of individual damages claims and a 'reasonable and practicable' method for calculating individual loss.[78] A very concerning factor is that the CAT may have reduced the optimism for bringing indirect purchasers' actions, because a narrow interpretation relating to the methodology for estimating aggregate losses was provided.[79] Despite the negative aspects, the positive point is that the Tribunal approved both the class representation and third-party funding.

In both judgements, the CAT has proved to be strict when evaluating the suitability for class certification, regardless if the claim is big or small. In other words, the Tribunal is prepared to carefully look at the credibility of the methodology utilised to prove the commonality and feasibility of potential collective claims.[80] In spite of failure, these cases should not be understood as the early death of collective actions in the UK. Instead, they should be seen as important guidance for future claimants on how opt-out collective actions should be structured to be able to meet the criteria for class certification. Claimants should focus on smaller and more homogenous groups, and, if not, it is better to prevent the bringing of such actions.[81] Indeed, a smaller group will enable the class representative to deliver a better approximation of aggregated damages and individual losses. Another and more inspiring lesson is that the Tribunal is more lenient as regards the approval of the group representative and the flexibility for third-party funders to finance collective actions.

5.4.3 Third Party Funding and Contingency Fees

These cases show that mass claims (with the unique exception in Portugal) should be reinforced by third party funding and opt-out schemes. Another form of third party funding for financing antitrust collective claims has been the so-called Special Purpose Vehicle. Under this model, the operations are limited to the purchase or the assignment of claims (varying from several to dozens), thereby

[75] Competition Appeal Tribunal, Judgment of Merricks v MasterCard of 21 July 2018. Retrieved 6 February 2018, http://www.catribunal.org.uk/files/2.1266_Walter_Hugh_Judgment_CAT_16_210717.pdf.
[76] *Ibid*. para. 76-78. It should be stressed that the Tribunal applied the Pro-Sys test for establishing the commonality requirement, set out in the Canadian case *Pro-Sys Consultants Ltd v Microsoft Corporation* [2013] SCC 57. However, there was criticism that the *Pro Sys* test was not set out in the CAT Rules and Guide and was applied too strictly in this case. For additional discussion, see Veljanovski, *op.cit* note 72, at 6-7.
[77] *Ibid*., 84.
[78] *Ibid*., 67.
[79] S. Peyer, "Has the CAT's Mastercard Decision Killed off Opt-Out Class Actions by Indirect Purchasers?", *Competition Policy Blog* (2017), available at <https://competitionpolicy.wordpress.com/2017/08/10/has-the-cats-mastercard-decision-killed-off-opt-out-class-actions-by-indirect-purchasers/>.
[80] T. O'Leary, "New Competition Class Action Regime off to a Slow Start" (2017), available at <http://www.allenovery.com/publications/en-gb/Pages/New-competition-class-action-regime-off-to-a-slow-start.aspx>/.
[81] Peyer, *op.cit* note 79; C. Stockford and Z. Frediani, "Merricks v MasterCard: What Went Wrong", *Global Competition Review* (2017), available at <https://globalcompetitionreview.com/article/1151133/merricks-v-mastercard-what-went-wrong>.

taking the hassle of subsequent enforcement. As a consequence, the assignment of claims is limited to cases that individually generate significant damages, usually after the European Commission's DG Competition's decision in cartel cases. So far, the most prominent private litigator has been the Cartel Damage Claims SA (CDC), a company incorporated under Belgian law but with its main activities being performed in Germany. However, the future of the CDC (and other SPV) has become very unclear after the Düsseldorf District Court's decision.[82] In that case 36 damaged companies purchased the cartel-related claim to the CDC. The Court dismissed the claim because the CDC was found to have insufficient funds to cover the other side's costs if the defendant won the case.[83] This case shows what the 'loser pays' principle can act as an effective deterrent against abusive litigation, but it also can serve as a device for significantly reducing the investor's possibilities to bring damages claims. However, some countries (as for example mentioned in the Netherlands) have more lenient rules on the 'loser pays' principle. Therefore, the magnitude of deterrence depends on a country-by-country basis.

The major problem is that third party funding is quite unpopular or unavailable in EU states, except for the ones mentioned before. Another funding option for collective actions is contingency fee agreements, where fees (a percentage of the class recovery) are paid only if the case was won. However, contingency fees are prohibited in most states; legal standing is typically limited to public authorities.[84] Few countries allow contingency fee agreements in the event of collective actions, but these agreements have not been utilised in case of antitrust collective litigation.[85] Another option is conditional fee agreements, under which attorneys/litigators receive an hourly fee, but a success fee is also paid if the case won. However, this funding option is highly limited in collective actions, because claimants are still required to pay hourly legal fees for attorneys, which may be substantial.

5.5 LITIGATION ABUSES: A PERSPECTIVE ON THE US AND THE EU

The experiences and initiatives discussed above show that combining third-party litigation and opt-out schemes does not attract the perceived issue of 'blackmail settlement'. This is not surprising, given that the occurrence of this phenomenon in the EU context is highly unlikely. Even if contingency fees (accused of attracting 'a "fishing expedition"'[86]) were combined with opt-out schemes, there is a low likelihood of plaintiffs being able to compel businesses to settle cases lacking merit. Still, there would be significant differences in the private antitrust enforcement systems of the US and the EU, which are illustrated in Table 2.

[82] Oberlandesgericht Düsseldorf *op.cit* note 40.
[83] In case of the ultimate loss, the other side costs for CDC would be around 5 million euros. Therefore, the Court concluded CDC is financially incapable of leading the case.
[84] See, e.g. M. G. Warren III, "The U.S. Securities Fraud Class Action: An Unlikely Export to the European Union" *Brooklyn Journal of International Law* 37(3) (2012) 1075-1114, at 1089. According to the author, the standing is established for governmental authorities (e.g. Finland), consumer associations (e.g. Greece, France) and to other specified organizations (e.g. Portugal).
[85] Contingency fees are allowed in collective actions in Germany, Lithuania, Poland, Spain, and Sweden. However, there have been no antitrust collective actions on the basis of a contingency fee agreement.
[86] Communication *op.cit* note 14, at 8.

Table 2. A comparative analysis between the US and the EU

Measure	United States (deterrence-oriented)	European Union (compensation-oriented)
Damages award	Permits an award of treble damages	Allows the award of full compensation, which prevents the overcompensation of claimants
Discovery	Liberal party-initiated discovery	The discovery is only possible when the court approves the proportionality of the request
Cost allocation method	One-way-fee shifting rule	'Loser pays' principle
Liability	Joint and several	Joint and several
Final outcome	Jury trials	Court decision
Claims' aggregation model	Opt-out	Opt-in

It can be seen that deterrence-based measures are particularly unique for the US mechanism, except for the joint and several liability. In the first place, federal antitrust laws allow automatic awards of treble damages to plaintiffs.[87] Indeed, this measure can expose the defendant to significant potential costs.[88] The extent of damages can be even more significant considering that defendants in class actions may also face joint and several liability for all damages caused by the violation, with no possibility to contribution from co-infringers.[89] This means that even small players are potentially subject to significant damages. For example, assume the hypothetical situation that the class action has been brought against 10 co-violators, and as a result 9 of them settle. If the case is lost, the unsettled violator would face the combined treble damages for all defendants' actions (potentially 3 times the combined infringers' damages) without a possibility of contribution from the other 9 violators. This forces the wrongdoers to settle as early as possible to avoid the trebled liability for all the violators' anti-competitive actions.[90] To make plaintiffs' claims even stronger, the liberal party-initiated discovery permits plaintiffs to propound broad discovery request that entail substantial expenses.[91] Another unique measure is that the US antitrust law is based on the one-way fee shifting rule, according to which plaintiffs are entitled to attorney's fees, but this provision does not apply to defendants.[92] In addition, antitrust class actions should end in jury trials, thereby conferring a component of "unpredictability."[93] When also combined with opt-out and contingency fees, plaintiffs may force defendants (in cases with favourable conditions) to even settle cases

[87] Clayton Act, 15 U.S.C. §§ 15(a).
[88] J.P. Davis and R.H. Lande, "Defying Conventional Wisdom: The Case for Private Antitrust Enforcement" *Georgia Law Review* 48 (2013) 1-81, at 37-39.
[89] *Texas Industries, Inc., Petitioner, v. Radcliff Materials, Inc., et al*. 451 U.S. 630, 645-46 (101 S.Ct. 2061, 68 L.Ed.2d 500).
[90] T. Hittson and J.H. Hatch , "Multi-Defendant Antitrust Litigation: Lessons Learned from In re: Automotive Parts Antitrust Litigation" Antitrust Law Blog (2017), available at <https://www.pbwt.com/antitrust-update-blog/multi-defendant-antitrust-litigation-lessons-learned-from-in-re-automotive-parts-antitrust-litigation>.
[91] See, e.g. *Boeynaems v. LA Fitness International, LLC* 285 F.R.D. 331, 334–35, 341 (E.D. Pa. 2012).
[92] Clayton Act, 15 U.S.C. §§ 15(a).
[93] A. Jones, "Private Enforcement of EU Competition Law: A Comparison with, and Lessons from, the US" in M. Bergström, M. Iacovides and M. Strand (eds.), *Harmonising EU Competition Litigation: The New Directive and Beyond* (Portland: Hart Publishing, 2016) p. 20.

lacking merit. Further assessment of the criticism of the US rules on class actions through empirical observation can be found in Chapter 3.

Under the EU approach, only the concept of joint and several liability—embedded in Article 11 of the Directive on damages actions—can be considered a sort of deterrence-based measure; however, its forcefulness depends on what measures are combined. Under this provision, violators (with the exception of leniency applicants) are jointly and severally liable for all the loss caused by antitrust violation, until victims fully recover the harm. On this point, it should be stressed that the Commission's approach on collective redress does not specify whether joint and several liability should be allowed in collective actions. However, given that Article 1 of the Directive allows for anyone who has suffered harm caused by antitrust infringement to claim compensation, it is most likely that this concept is also in line with antitrust collective actions. Some American measures listed in Table 2 are contrary to the EU legal traditions, at least in theory. As regards trebling of damages, it may lead to the unjust enrichment of claimants. Broad discovery rules may jeopardise the effectiveness of the leniency system. The 'loser pays' principle is one of the central safeguards against abusive litigation in collective actions. As regards jury trials, they are predominantly allowed in US antitrust class actions. It therefore remains questionable whether blackmailing would be possible in the absence of the all American elements listed in Table 2, and only if opt-out schemes, contingency fees and the concept of joint and several liability were combined. What is clear is that other crucial elements that cause blackmail are not included. First, one of the major issues is the wide discovery rules, which require a responding party to bear the costs of the other side's requests. It therefore may generate massive costs for defendants (typically a corporation) as it holds a number of documents and items, while claimants have relatively small number of responsive discovery material.[94] Also, there is a high risk of an unsuccessful outcome in the US context, because jury members are likely to view the defendant (usually a large corporation) negatively, regardless of whether it abides by the law or not. When this risk is combined with the possibility of trebling of damages, opt-out aggregation model and joint and several liability, defendants are incentivised to settle the case rather than risking going to final proceedings. Therefore, it can be observed that the potential of blackmail settlement is high when all measures of deterrence are pooled. But, after all, determining the potential of abusive litigation is very complicated, because the combination of opt-out schemes, contingency fees and the concept of joint and several liability has been untested in the EU context.

What is clear is that two factors may reduce the incentives for wrongdoers to abuse the litigation. One factor is that the "loser pays" principle is reinforced by the lawyer's disciplinary liability rules in the national context. For example, an attorney can be removed from the bar if he or she acts contrary to professional conduct.[95] Another factor is that courts are closely involved in the proceedings, especially in the discovery, thereby allowing for the judge to decide whether disclosure requests are proportional or not.[96] It also requires closer monitoring of group interests, especially in the certification stage. Nevertheless, it is clear that the phenomenon of abusive litigation may occur in different forms in the EU member states: first, each jurisdiction has introduced collective redress schemes in its own fashion; second, different safeguards have been

[94] See, e.g. *Boeynaems v. LA Fitness International*, LLC 285 F.R.D. 331, 334–35, 341 (E.D. Pa. 2012).
[95] Juška, *op.cit* note 42, at 391-392.
[96] Directive, *op.cit* note 1, Article 5.

introduced in order to prevent litigation abuses. When the abovementioned provisions are combined, an even more important factor should be observed, in particular the possibility of litigation abuses appearing in different forms. Given the large financial interests at stake, group representatives (the lead plaintiff and the group advocate) may represent the group members inadequately in order to maximise their own benefits. The first possibility is that they will set disproportionally high contingency fees. The second one is that group members will not be properly informed about their rights to leave the group. The third option is that group representatives will make early settlements with defendants, generating low awards. The fourth one is that the undistributed awards of the group would be distributed in an abusive way.[97] When compared to the 'blackmail settlement', these abuses are more realistic in the EU context. Indeed, victims with small claims are not well aware of the case or its foundations. Typically, the group members give complete freedom to the group representatives, who can structure the case for their own benefit.

To sum up, when shaping the future of collective litigation, EU legislators should pay particular attention to the member states' schemes (even if they differ to some extent) rather than relying on the US system, which is different in its stated objectives and legal traditions. Then again, the introduction of certain American elements does not necessarily lead to the perceived American problems, as proved by experiences in the EU states. It is probably unrealistic that the European Commission will adopt a Directive for antitrust collective redress any time soon. An incremental step forward would be if the EU issued a sector-specific recommendation on compensatory collective actions in the field of antitrust, but this time including provisions (in some fashion) on opt-out schemes, contingency fees and third party funding. Hopefully, the European Commission will take positive actions in the following few years. Otherwise, national schemes will deviate too far from each other. The study commissioned by the European Parliament found significant divergences among member states in 2018, especially as regards: a) the scope of national collective redress schemes (horizontal versus sectoral approach); b) claims aggregation system (opt-in versus opt-out); c) standing (representative entities versus class members); d) financial issues (costs of proceedings, lawyers' fees and the application of the "loser-pays" rule).[98] Indeed, the existing divergences make the creation of a harmonised collective redress mechanism a complicated matter. Therefore, the study calls for an immediate European legislature to ensure access to justice and sound administration of justice.[99] Furthermore, it should be recalled that the European Commission found that 9 member states still do not provide possibilities for collective claims. If individual actions were taken to introduce collective redress mechanism into national schemes, there is a high potential of divergences becoming even broader and deeper. In turn, creating a common approach for antitrust collective litigation (or any other sectoral field) will become very complex, if not impossible in the future.

[97] Juška, *op.cit* note 42, at 390.
[98] R. Amaro, "Collective Redress in the Member States of the European Union", Study for the European Parliament's Committee on Legal Affairs, October 2018, 20-38 <http://www.europarl.europa.eu/RegData/etudes/STUD/2018/608829/IPOL_STU(2018)608829_EN.pdf> accessed 8 February 2019.
[99] *Ibid*., 63.

5.6 CONCLUSION

The research question of this Chapter was the following:

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

When addressing this question, it was found that the success of EU compensatory collective actions is directly related with the American style measures. The European Commission should decide soon whether antitrust collective redress should be regulated at the EU level. If a positive decision is taken, the suggestion would be to rely on the schemes of proactive member states, and hence to allow some flexibility in using US-style remedies. But the current Commission's approach on the basis of a careful approach should be denied, as it will have little or no impact on compensating victims. Following this basis, the following findings were made.

1) The 2013 Recommendation has failed to incentivise member states to adopt or amend the existing collective redress schemes on the basis of the proposed principles

The development of collective redress mechanisms has resulted in a number of uncoordinated initiatives, mainly disregarding the Commission's proposals to a greater or lesser degree. Furthermore, none of the countries that allow for opt-out collective actions have replaced their schemes with the opt-in aggregation model.

2) If the Recommendation on collective redress ever takes a binding form, the incentives for bringing compensatory collective actions would be reduced to a minimum

The proposed safeguards against abusive litigation are so robust that collective actions are highly unlikely to be brought. Furthermore, opt-in schemes attract a small number of participants, making collective actions unprofitable. In addition, rational actors are unlikely to be willing to invest in antitrust collective actions.

3) The European Commission missed the opportunity to suggest a more forceful approach on collective redress

Contrary to the European Commission's reasoning, the US class action mechanism should not be understood as only bringing negative impacts on antitrust litigation. The criticism rather depends on whether deterrence-based measures are included, and how many of them are combined. The American system includes various remedies aimed at ensuring deterrence: an opt-out measure, contingency fees, treble damages, the one-way fee shifting (the absence of the 'loser-pays' principle), joint and several liability, and broad discovery rules. However, the US mechanism should not be considered as the best fit for the EU model, as both have different goals. Instead, the European Commission should look more carefully at member states, which do not entirely follow the suggestions of the Recommendation, but where antitrust collective actions have been brought to courts. An increase in antitrust collective litigation can be found in the Netherlands and the UK. These states clearly demonstrate that an opt-out measure is the key element in ensuring

compensation in antitrust mass actions, yet it still has to be reinforced by additional incentives to sue, like third party funding. Therefore, these proactive states send a clear message to the EU legislators: compensatory collective actions are possible in the EU context, but only if there is a possibility to utilise one or another American element.

In addition, it was determined that the American issue of "blackmail settlement" has a much lower potential in the EU context, even if opt-out schemes were combined with contingency fees and/or third-party funding. This is notable because "blackmail settlement" occurs due to a combination of American style remedies, including broad discovery rules, one-way-fee shifting and jury trials. Nevertheless, the European Commission should be aware of other types of litigation abuses. One of the main possibilities is that group representatives will represent group members inadequately. It means that they can structure the case in a way that they will obtain disproportionally high compensation at the expense of group members. Even though this behaviour is realistic, its possibility is diminished due to available safeguards (such as the "loser pays" principle and national ethics rules). In any case, no one can ensure that litigation abuses would not appear in some fashion in the EU states. Nonetheless, it is preferable to have workable collective redress schemes with a minimal possibility of abusive litigation than to have schemes without a future, as it is foreseen under the proposed principles of the Recommendation on collective redress.

5.7 APPENDIX: SUMMARY OF AMENDMENTS

Page	Description of amendment	Explanation
115	The original title of the article is changed.	The need to change arises from the fact that at the time when publishing the article, the 2013 Recommendation was under the review by the European Commission. During the revision of Chapter 5, the analysis of the Report of the 2013 Recommendation, also other relevant points were added. Therefore, the primary title lost its rationale.
115	Amendment in Abstract of the Chapter.	The need to change arises from the fact that at the time when publishing the article, the 2013 Recommendation was under the review by the European Commission and in 2018 its Report was published.
116	Discussion about the European Commission's Report on the 2013 Recommendation on collective redress and the legislative package "New Deal for Consumers".	This was not included in the published article, because the Report was published in January 2018, while the legislative package "New Deal for Consumers" in April 2018. Additional references are added, numbered 3-5.
118	The amendment of the wording in the title of Section 5.2.	This was needed, because the European Commission recently adopted policy documents, which were yet not available when the article was published: Report and proposals for directives.
119-120	Discussion about the European Commission's Report on the 2013 Recommendation on collective redress.	This was not included in the published article, because this policy document was adopted in January 2018. Additional references are added, numbered 17-21.
125-126	The analysis of the Portuguese collective action system is shortened.	The antitrust class action that has been brought in Portugal seems to rather be an exception than the rule. Therefore, the inclusion of the Portuguese system would be excessive in the context of the PhD research.
126-128	Additional analysis on the collection action system in the Netherlands.	The proposal for amending the Dutch Bill was proposed, aiming to facilitate collective actions. In addition, the 2018 Commission's Report and the 2017 ILR Report were published. These amendments demands further thoughts. Various references are added.
129-131	Additional analysis on the collective action system in the UK.	The comparison between opt-out and opt-in antitrust collective litigation practices was lacking in the original published article. New developments occurred in the first opt-out antitrust collective actions: both cases were dismissed in the certification stage. Various references are added.
133	The amendment in Table 2.	The point on "claims' aggregation model" is added to make a comparative analysis more insightful between the EU and the US.
133	Additional discussion about the joint and several liability in the context of the American system.	It gives a broader picture about the impact of deterrence-based measures on abusive litigation. Additional references are added, numbered 89-90.
134	Discussion about the joint and several liability in the EU Directive on damages actions.	It gives a broader picture about the role of the joint and several liability on collective actions in the EU context.
135	Amendment regarding the potential developments in antitrust collective redress.	The changes are needed because of the latest European Commission's publications: 1) the Report of the 2013 Recommendation; 2) the proposals for the directives on consumer protection. Moreover, a study was published by the European Parliament in October 2018, which overviews the divergences in EU member states. Additional references are added, numbered 98-99.