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

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8 GENERAL CONCLUSION

8.1 RATIONALE OF RESEARCH

This PhD dissertation has evolved together with the implementation aspects of the EU's private antitrust reform. Work on the thesis was started in July 2013, a month after the adoption of the Commission's package on private antitrust enforcement, comprising the Draft Directive on damages actions and the horizontal Recommendation on collective redress. At the end of the PhD research, with delay, but the European Commission finally assessed the practical implementation of the Recommendation by issuing the Report. In addition, the European Commission issued two proposals for directives on consumer protection.

The aim of this dissertation has been to assist in the development of an appropriate approach of antitrust collective redress for better achievement of full compensation. As regards the Directive, it has become a benchmark for assessing the collective redress mechanism and for proposing possible developments in the field, as being so far the only binding instrument in the EU private antitrust reform. Through analysing the rationale of full compensation, it has been shown that collective redress schemes are vital for accomplishing the EU's reform compensation goal.

8.2 GENERAL FINDINGS

Chapter 2 presented the existing obstacles and shortcomings in antitrust enforcement. With regard to public enforcement, it was found that the deterrent effect of the European Commission's antitrust fines and leniency policy is insufficient. As regards private enforcement, it was determined that private parties face significant obstacles when bringing antitrust damages actions. A collective redress mechanism was suggested as an attractive solution to facilitate the objectives of compensation and deterrence. By examining the failures in France and the UK, it was found that opt-in collective actions are practically unworkable in antitrust collective litigation. Regardless, the Recommendation has proposed an opt-in principle as the primary approach to collective redress. When combined with other careful measures (the 'loser pays' principle, limited funding possibilities and strict standing rules), the European Commission's approach on collective redress significantly diminishes the possibilities for antitrust collective actions to ever be brought. Consequently, opt-out collective actions appeared to be the main solution to achieve effectiveness in compensating antitrust victims.

Chapter 3 assessed the controversies underlying the understanding of class actions in the United States: both in compensating class members and deterring wrongdoers. The debate over compensation focused on three major controversies: (1) the effectiveness of victims' compensation, (2) the size of attorneys' remuneration, and (3) the efficiency of *cy pres* distributions. As regards the first controversy, it was found that antitrust class actions provide low proportional compensation to a small number of victims. This is because identifying class members, administrating the case and distributing damages entails substantial costs, meaning that case-related costs typically consume a large proportion of the recovery. With regard to the second controversy, it was determined that class counsels reap disproportionately high rewards. As to the third one, a high potential for abusive *cy pres* distributions was detected in antitrust cases. Given that the analysis confirmed the criticisms

regarding each controversy, it can be concluded that US class actions largely fail to accomplish the goal of compensation.

The failure of compensating victims does not negatively affect the compensation for the antitrust plaintiff bar. Attorneys commonly obtain compensation based on the aggregate value of the entire class, regardless of how many victims actually received damages. The compensation of class counsel is ensured by a set of deterrence-based remedies: contingency fees, opt-out schemes and treble damages. Furthermore, the additional measures—the one-way-fee-shifting rule, the joint and several liability, and broad discovery rules—ensure a plaintiff-friendly climate for the private attorney general. The combination of these measures incentivises attorneys to enforce antitrust rules aggressively, and thus to enhance deterrence through bringing a high number of class actions.

In order to assess the impact of class actions on deterrence, the theory of optimal deterrence was applied. It clearly emerges that optimal deterrence should be a function of three equal components acting together: corporate fines, damages claims and personal fines. However, under the current mechanism, the class action device (in the form of damages actions) serves only a *secondary* function when compared to the other elements. Due to the lack of investigatory tools, the private attorney general mechanism has a low impact on the probability of detection. Moreover, the conviction rate is significantly diminished for at least two reasons: first, judges utilise very strict standards of class certification; second, most antitrust class actions are settled, and for amounts closer to actual damages rather than treble damages. Therefore, class action lawsuits have a small impact on ensuring optimal deterrence.

Chapter 4 elaborates on a background for comparing class actions between the EU and the US. The specific focus was on the role of attorneys in achieving the objectives of compensation. Starting with a comparative analysis between Lithuania and Poland on the one side, and the United Stated on the other, it was discovered that lawyers are vital for the facilitation of the compensation objective. The logic behind is that attorneys have more capacity and willingness to bring complex antitrust actions than public authorities, which lack the financial capacity to bring collective actions, or are restrained by their organisational objectives. Lithuania and Poland were chosen for a discussion, because both countries have granted a relatively active role to a group lawyer in comparison with the few other EU states where attorneys are allowed to participate in collective actions. Moreover, Lithuania and Poland permit contingency fees seemingly with the least limitations among these countries.

Chapter 5 gives an overview of the schemes of pro-active EU member states where collective actions have been brought to courts. These countries ignore some principles of the European Commission's approach, and instead utilise some US-style provisions in order to achieve effectiveness in compensating victims. It was found that an opt-out aggregation model is crucial for ensuring an effective victim's right to compensation, yet this litigation model needs to be combined with tools of deterrence, like third party funding and/or contingency fees. In addition, it was found that the occurrence of the American issue of 'blackmail settlement' is limited in the EU context, even if contingency fees, the joint and several liability, and opt-out schemes were combined. This phenomenon occurs in the US because these measures are reinforced by the liberal party-initiated discovery, the one-way fee shifting rule and treble damages. When the defendant considers the risk of class actions ending in jury trials, plaintiffs are empowered to pressure defendants to settle cases

lacking merit. But the EU should be aware that there is always likelihood that group representatives will represent group members inadequately. This may occur when representatives structure a case in a way that allows reaping disproportionally high compensation for the expense of group members.

Chapter 6 further analysed whether and to what extent private enforcement, and collective actions more specifically, can contribute to achieving the objectives of full compensation in the European Union. Consequently, three major observations have been drawn from this principle. First, achieving the objective of full compensation requires following the harm downstream to the ultimately injured parties (usually numbering in the thousands or even millions of victims) who suffered low value harm. This inevitably demands a collective redress mechanism with far-reaching tools, since downstream victims have little to no incentives to join the action. Second, multiple damages are necessary to ensure the compensation standards (actual loss and expectation loss) and to recompense high administrative costs in collective actions. Third, indirect purchasers need broader discovery rules than direct purchasers, since downstream purchasers have less awareness about the infringer's anti-competitive practices. To that extent, collecting claims of indirect purchasers and those of small-harm victims is only possible if an opt-out measure and forceful funding tools are allowed. Following these observations, the claim has been made that the achievement of full compensation in the EU system (to compensate any victim down the distribution chain) demands deterrence-based remedies more than the US deterrence-oriented system, which bars actions by indirect purchasers and thus has a lower threshold for compensating victims. Otherwise, the EU's grand compensation goal is determined to fail to a large extent.

On this ground, Chapter 7 explored three ambitious scenarios, each combing two deterrence-based measures. Each scenario was claimed to have a ground; either it is within the borders of full compensation, or in line with legal traditions (at least in some member states). The principal aim of Chapter 7 was to assess the chances of these scenarios in achieving compensation, and the potential effect on deterrence. The first scenario combines double damages and contingency fees. The second one encompasses both broad discovery rules and contingency fees. The third one unites opt-out schemes and contingency fees. It was discovered that the case for full compensation is weak in all scenarios. It is determined that either very few victims would receive compensation, or that many victims would obtain a very low proportional award. The third scenario, with an opt-out measure, would succeed the most in compensating victims and bringing a side effect on deterrence.

8.3 SPECIFIC FINDINGS

- *The EU's public enforcement of competition law fails in ensuring effective deterrence*

Without doubt, public enforcement has improved the level of enforcement during the last years: the leniency policy has substantially increased the number of cartel decisions, and fines imposed by the European Commission have reached record high levels. Despite this success, public enforcement has not achieved effective deterrence. According to optimistic estimations, only up to 30% cartels are revealed in the EU. The latter calculations are however not very reliable for two reasons: the data is based on some, mainly older studies, and in general there is a lack of estimations about the rates of cartel detection. Despite the lack of conclusive data about detection rates, the shortcomings of public enforcement were confirmed by other indicators. First, recidivism remains an issue in

antitrust violations. Second, many cartels (both small and large) have been detected in recent years, proposing that public enforcement fails to effectively deter infringers.

- *The new Directive on damages actions does not fulfil the objective of full compensation*

In spite of its grand goal of achieving full compensation, the Directive imposes limitations on discovery in order to protect the public enforcement's leniency policy. By ordering protection from disclosure of leniency statements and settlement submissions (i.e. inherently incriminating evidence), and providing no alternatives, the Directive raises crucial evidence gathering problems when claimants bring follow-on cartel cases. Certain facilitation can be considered the introduction of two rebuttable presumptions: one being that cartels cause harm and the other being that overcharges are passed on to indirect purchasers. However, this improvement is more theoretical than practical, as it does not ease the burden of proving the harm suffered. Proving damages is of particular concern for victims who are situated more remotely from a violation, such as indirect purchasers. Even more disappointing is that the Directive has brought little improvement for stand-alone actions. Certain facilitation can be regarded the provision for courts to decide on a disclosure. However, this measure is likely to have no impact on increasing the incentives for claimants to bring cumbersome stand-alone actions. Therefore, by not actually facilitating follow-on and stand-alone actions, the EU not only reduces the compensatory effectiveness of damages actions, but also brings no real contribution to solving the shortcomings of public enforcement. A better involvement of private actors may increase the detection rate of competition law infringements and would increase the cost of violation to infringers when damages were awarded to victims.

Another issue is that the EU's private antitrust reform fails to maintain a balance between the claims of direct purchasers and indirect purchasers. Standing for indirect purchasers may reduce the motivation for direct purchasers to sue, as the defendants can invoke the passing-on defence. At the same time, the right for indirect purchasers to seek compensation is significantly distorted, as the Directive does not include provisions on collective redress actions. The most concerning aspect is that the most vulnerable victims (direct purchasers who suffered low harm and indirect purchasers who incurred loss down the supply chain) will refrain from bringing damages actions, as there is no real facilitation for these actions. The chances for these claims to be brought depend on whether or not victims are based in a member state with workable rules on antitrust collective litigation. Indeed, the EU reform cannot be considered successful if vulnerable victims are not granted access to compensatory justice across the EU, leading to actual compensation awards. Under the current provisions, the reform is primarily helpful for large companies, which have already been quite active in suing for damages even before the adoption of the Directive. The difference is that these actions are likely to become common throughout the EU.

- *The Recommendation on collective redress has brought little impacts in EU member states, and the proposed principles diminish the compensatory effectiveness*

The Report of the 2013 Recommendation has shown that only two EU member states (Belgium and Lithuania) have followed the Recommendation's proposals to a large extent, while two other countries (France and the UK) have disregarded many provisions of the Recommendation. A concerning factor is that 9 states still do not have collective redress mechanism in place. Ironic as it

sounds, the failure to implement the Recommendation should actually be welcomed. If EU countries followed the Commission's guidance, the compensatory effectiveness would be significantly diminished. The proposed measures would prevent rational actors from bringing collective actions to courts. Another concerning factor is that a number of uncoordinated developments have taken place in member states during the last years. Consequently, a potential adoption of the EU's Directive on antitrust collective actions has become problematic.

- *The US class action mechanism is appealing, but with closer scrutiny fails to deliver sufficient results*

The US antitrust mechanism has relied heavily on class actions as means of ensuring compensation and deterrence. The major advantage is that this device enables the negative expected value claims to be heard in courts. If not class actions, these claims would be financially illogical for litigating individually, as the expected litigation costs outweigh the expected awards. Although this device seems sensible, the reality is that antitrust class actions provide low proportional compensation to a small number of victims. In spite of class members remaining highly undercompensated, the private attorney general usually obtains disproportionately high compensation. As regards deterrence, class action lawsuits only serve a *secondary* function in deterring wrongdoers. This is because the class action system lacks tools for detecting cartels, and because the probability of conviction is significantly diminished due to strict class certification standards, and also because of the determined settlement generating low awards.

- *Full compensation is unrealistic in the private enforcement of EU competition law*

The objective of fully compensating every victim is unrealistic for the following reasons. First, administrating and litigating the case and later distributing damages consume a substantial amount of damages awards, thereby leaving low awards to group members. Second, antitrust violation causes a widespread harm, often spread through different distribution chains. Therefore, detecting and compensating victims of all types, especially indirect purchasers, is highly difficult, if not impossible at times.

- *Collective actions can facilitate full compensation, but it depends on how they are designed and incorporated in the antitrust enforcement mechanism*

The success of a collective redress mechanism depends on what provisions are chosen. At the same time, more forceful measures may attract litigation abuses. The following results were found by comparing different provisions of collective actions.

1. Aggregation model of victims: opt-in vs. opt-out. Opt-in collective actions largely fail in collecting victims. The experiences in EU member states have shown that much less than 1% of victims join the action. On a positive point, opt-in actions respect the victim's choice to be part of collective litigation or not. Opt-out collective actions are the most effective in collecting victims, both direct and indirect purchasers. Despite the criticism that these actions may infringe the party disposition principle, an effective information mechanism

may be sufficient to respect claimant's freedom to litigate or not. It allows informing victims about their rights to opt out.

2. Type of damages: single damages vs. damage multipliers. The European Union considers single damages to be in line with the principle of full compensation, which prohibits any overcompensation. However, the EU does not take into account that the case related costs consume a large portion of the recovery, meaning that single damages inherently undercompensate victims. Double damages were proposed as a solution, because treble damages have a high probability for overcompensation.

3. Representation model: representative (public) organisations vs. attorneys. The European Commission considers representative actions brought by public authorities as the most appropriate tool for collective redress. However, public authorities are often understaffed and lacking financial resources to take the lead in collective litigation, and they may be restrained by their organisational mission. Law firms have more resources and experience in litigation and from a quantitative perspective there is a large number of attorneys who could potentially bring collective actions.

4. Financing model: hourly fees vs. contingency fees. An antitrust litigation in the EU predominantly uses hourly fees. The European Commission regards contingency fees as having a high potential for litigation abuses and for infringing the principle of full compensation. However, contingency fees are one of the main tools that may ensure lawyers' interest in collective litigation. By providing a possibility to receive substantial award in case of successful litigation, this financing model may outweigh the underlying risks related to complex litigation. This is surely a risk of contingency fees attracting abusive litigation, but national ethical rules, a public tender system for legal services and an *ad hoc* monitoring body may prevent, or at least diminish the risks related to such litigation.

5. Level of disclosure: no access to leniency and settlements submissions vs. access to such documents. The Directive on damages actions prohibits the disclosure of leniency statements and settlement submissions. This material provides inherently incriminating evidence, meaning that its protection diminishes claimants' motivation to bring follow-on actions. Despite that, it would be highly unjustifiable if leniency statements were allowed for disclosure. First, the well-functioning leniency programme would be put at risk, while the facilitation of compensation to victims would be minimal, at best. Second, the incriminating material can potentially be disclosed under the current system, as it allows access to explanatory evidence, such as prices, sales volumes, profit margins, or costs.

8.4 THE ANSWER TO THE RESEARCH QUESTION

This thesis has sought to answer the following research question:

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

Three studies were performed to answer this question. The first examined the effectiveness of available EU-style collective action mechanisms to contribute to achieving full compensation. Because of their failure to achieve this objective, the second study designed more forceful antitrust collective redress mechanisms and assessed their impact on full compensation. The third study scrutinised the potential of collective redress actions to contribute to deterrence through an increased effect of detection and liability.

With regard to the first point, the thesis encompassed two levels of research: 1) the European Commission's approach on collective redress; 2) collective action mechanisms in the EU member states. It was found that the Commission's approach on collective redress is based on a too careful approach, which imposes too many obstacles for compensatory collective actions to ever be brought. As regards the EU member states, the primary emphasis has been on the Netherlands and the UK - the most pro-active countries where antitrust collective actions have the highest potential. However, the actions brought have had little impact on compensating victims, especially the vulnerable ones. In the Netherlands, antitrust collective actions have been brought mainly on the basis of the SPV model, which aggregates large claims of corporations. Nevertheless, collective actions—especially for victims who suffered low value harm—should become the norm after the planned amendments, aiming to introduce measures for compensatory opt-out collective actions. In the UK, first two opt-out antitrust collective actions have failed in the certification stage. Analysis of two other countries—Lithuania and Poland—has revealed that contingency fees alone have so far had no effect on the increase in antitrust collective litigation. In general, the experiences in member states have shown that antitrust collective litigation has a future in states that allow an opt-out model, but the latter needs to be reinforced by other forceful tools of deterrence. To sum up, collective redress actions can contribute to achieving the objective of full compensation, but only if deterrence-based measures were allowed in the EU context.

Considering the failure of EU-style collective actions to achieve the objective of compensation, the second study designed three hypothetical scenarios and examined their impact on compensation. The first combined double damages and contingency fees. The second combined broad discovery rules and contingency fees. The third combined opt-out schemes and contingency fees. The results showed that the contribution to full compensation is low in all scenarios – either a small number of victims would obtain compensation, or many victims would receive compensation, but low proportionally. If the EU is inclined to shape private antitrust enforcement under the principle of full compensation (or at least closer to that level), the above-discussed scenarios should be combined. For this reason, the best possible EU's style collective redress mechanism (Proposal) was designed to assess its potential effectiveness for compensating victims, especially the vulnerable ones. In theory, the Proposal could contain four deterrence-based measures: contingency fees, opt-

out schemes, double damages and a party-initiated disclosure scheme (but only for stand-alone actions). At first glance, the Proposal seemed to have a lot of potential, but deeper analysis showed that its contribution to full compensation would not be as big as expected. First, rational claimants would continue to focus on lower-risk follow-on actions, as the Proposal gives little incentive to bring stand-alone actions. Second, the Proposal does not solve the issue related with a widespread antitrust overcharge that often makes detecting and compensating all types of victims highly complex. Third, most Proposal's collective actions would be settled, and typically for an award lower than single damages. When case costs were deducted from this award, victims would receive low compensation proportionally. However, the problem of effectively compensating victims is not related with the Proposal itself. The real issue is that the required high standards for achieving full compensation mostly makes attaining that goal in practice very difficult, if not impossible at times. Lessons from US antitrust class actions exacerbate this concern. The American system—being much more forceful than the Proposal—fails to effectively compensate victims. The assessment has shown that antitrust class actions provide low proportional compensation to a small number of victims.

As for the last study, it was asserted that available EU-style collective actions have brought no impact on deterrence, because there is a lack of collective actions. With regard to the Proposal, it has the potential of contributing to deterrence, but only to a small extent. As regards the probability of detection, the impact would only be marginal, as stand-alone actions would be rare. With regard to the magnitude of liability, its extent would be undercut due to low settlement awards and low rates of certification. To sum up, collective redress schemes (in any form possible) are determined to have little impact on deterrence at best, regardless of how forceful they are.

To conclude, the Proposal looks feasible in theory, but its actual implementation is unrealistic in practice. Only a more lenient approach, for example combining opt-out schemes and forceful funding tools (third-party funding and/or contingency fees), could be realistically expected in the EU context for better achievement of full compensation. The reasons are discussed in the last section of the dissertation.

8.5 WHAT SHOULD THE FUTURE OF COLLECTIVE REDRESS IN THE EUROPEAN UNION BE?

The essential question that needs to be answered is the following: which collective redress mechanism is more preferable in the EU - a more careful one that prevents negative outcomes, but leaves little chance for antitrust collective actions to ever be brought; or a more risky one that brings *some* benefits to compensating victims, but also has potential for litigation issues?

The latter option should be preferable for the following reasons.

Despite the determined failure to effectively compensate victims, collective actions should not under any circumstances be denied in the private enforcement of EU competition law. Arguably, the most important factor in assessing the effectiveness of private enforcement is how effectively vulnerable victims (such as, direct purchasers with small claims and indirect purchasers) can exercise their right to claim and obtain compensation. Typically, vulnerable victims generate a large majority of victims in antitrust violation. Wrongdoers target these victims, because they suffer low

value harm, making individual litigation irrational and financially illogical. Therefore, in the absence of collective redress schemes, violators will evade responsibility for the harm caused to vulnerable victims, as these actors are unlikely to bring claims to courts.

Another point is that a collective redress mechanism should contain wide-ranging tools in order to reach and compensate any type of victims. This goal can only be achieved by in some fashion combining forceful measures of deterrence. A counterclaim would undoubtedly arise, saying that this combination would allow for entrepreneurial lawyers to obtain disproportionately high compensation and it would attract abusive litigation. Moreover, critics would say that this proposal is futile, because it is determined that only a small number of victims would receive compensation, which is as well proportionally low. Another criticism would be based on the experiences in the US system, namely that very forceful antitrust class actions largely fail in effectively compensating victims. So, why to introduce less forceful collective actions in the EU, which would be even less effective in compensating victims? Indeed, these criticisms are a good basis for discussing the future of collective redress, but they overlook important factors about EU-style collective actions. First, the perceived issues of US class actions would not necessarily occur in the EU, if compensatory collective actions would be supported with some measures of deterrence. Second, a wide-ranging collective redress mechanism, even if not fully effective, would bring some benefits to group members. One of the reasons is that new technologies (such as online and electronic databases) give more efficiency in identifying victims and distributing damages. Another reason is that not every competition law violation generates a harm that cannot be identified, even if it is widespread. Furthermore, there have been positive examples of class members receiving rational compensation in the US, despite large litigation costs. Still, these observations do not justify the necessity to introduce a wide-ranging collective redress mechanism at the EU level. There is another viewpoint that this litigation model would be the only way for respecting the right of vulnerable victims to claim and obtain compensation, even if it cannot be effectively exercised in all cases. In the absence of a wide-ranging collective redress mechanism, the EU's private antitrust enforcement will always be blamed for not facilitating the right to claim damages for victims, who need that right the most. Finally, given that vulnerable victims form the majority of victims in antitrust violation, a wide-ranging collective redress mechanism appears to be the main way of an actual implementation of full compensation.

Nevertheless, is it realistic to introduce a wide-ranging collective redress mechanism at the EU level? One option would be a Directive on antitrust collective actions. In order to succeed, the following factors should be taken into consideration:

a. Having difficult discussions with member states and stakeholders about the inclusion of highly criticised American measures in a legally binding document: contingency fees, multiple damages and opt-out schemes;
b. Modifying tort and civil procedure rules in EU member states;
c. Bearing in mind that collective actions under no circumstances will achieve full compensation;
d. Waiting for some time until the effects of the new Directive on damages actions will be known;
e. Considering the fact that the development of collective redress schemes has already resulted in a number of uncoordinated actions in EU member states.

Indeed, all these factors make the introduction of a Directive on antitrust collective litigation highly unlikely in the next few years. This is also because the European Commission recently adopted two proposals for the directives on consumer protection. Therefore, it seems quite unrealistic that the Commission will take the same step in antitrust any time soon. Under these circumstances, the Proposal seems even more unrealistic, as only a more lenient proposal could pass the EU's legislative procedure.

Another, more realistic but as well complicated option is a Recommendation for collective redress in antitrust sector, but this time giving more space for the right elements: opt-out schemes, the availability of double damages, contingency fees, third party funding and a party-initiated disclosure scheme for stand-alone actions. This would be possible only if the European Commission admits that its current approach on collective redress is determined to have no impact on full compensation. As a consequence, it would be more space for considering more forceful, but more risky measures. Inspiration may be found in the pro-active EU member states where collective actions have been brought to courts or in the ones that have a higher potential for being so. It follows from the above that a potential Commission's Recommendation could propose the following principles:

- Flexibility/encouragement for opt-out schemes when the court decides;
- Flexibility/encouragement for private funding tools (third party funding, contingency fees);
- Allowing for double damages when they serve the compensatory objectives;
- Encouraging stand-alone cartel actions with the help of broader discovery rules.

In general, a Recommendation is an instrument of EU soft law. According to Article 288 of the TFEU, it "shall have no binding force". In European competition law, soft law instruments have been used to interpret hard law provisions, such as Article 102 of the TFEU, as well as to model certain tools, such as the leniency policy or the de minimis rule. The suggestion is that a new Recommendation on collective redress would serve as a tool for interpreting the Directive on damages actions (hard law) and for modelling effective compensatory damages claims. Primary emphasis should be put on the following provisions of the Directive:

- ✓ *Article 3: Right to full compensation*
- ✓ *Article 11: Joint and several liability*
- ✓ *Articles 12-15: The passing-on of overcharges*

These provisions are crucial for defining the scope and complexity of the principle of full compensation, i.e. the main goal of the Directive on damages actions. Most importantly, a Recommendation should give an explanation about the potential impact of forceful measures of collective actions on full compensation on the basis of the pro-active EU member states and the US. The increased risks of abusive litigation should be explained as well. On the other hand, the potential safeguards to prevent, or to diminish abusive litigation should be presented. It is also important to show that collective actions have been brought in EU member states that disregard some proposals of the European Commission's primary approach. Finally, the American system should be presented not only from a negative perspective, as has been done by the European

Commission so far. In this case, a Recommendation would present an actual picture of collective redress: its potential if it was more forceful and its potential problems if it was riskier.

This type of soft law instrument would urge member states to take more forceful steps in the field, while the ones not interested would be given the chance to simply opt out. Given that the primary Recommendation has failed to a large extent—both in choosing the right litigation tool and in encouraging states to take action—the second proposal would arguably be more compatible with the latest developments in member states, where more risky measures have been introduced. If a new Recommendation was successful in incentivising member states to follow these principles, it would set the scene for a following legislative instrument on antitrust collective litigation, either a Directive on antitrust collective actions or amending the Directive on damages actions. If not, it would be a proof that antitrust collective litigation should remain the domain of national jurisdictions. From a practical perspective, EU member states may be interested in introducing an opt-out mechanism, third-party funding and contingency fees into their national schemes, because these measures have shown a potential in few other states. At the same time, double damages and broader discovery rules seem to be one step too far. Obviously, without these tools the role of collective redress actions would be diminished, but the other measures would still have the ability to contribute to the achievement of full compensation.

To conclude, the European Commission needs to decide soon whether antitrust collective redress actions will be regulated at the EU level or not. Otherwise, national collective redress schemes will deviate too far from each other. For an explanation, see Chapter 5 (Section 5.5). As a result, any type of measure (binding or not) will become very complex at the EU level, if not impossible in the future.