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The Role of Collective Redress Actions to Achieve Full Compensation for Violations of European Union Competition Law

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GLOSSARY

ACr	Actual compensation rate
<i>Ad hoc</i>	Public authority appointed for representing victims (usually consumers) in the particular collective action
<i>Acquis communautaire</i>	The accumulated legislation, legal acts, and court decisions of the European Union
CAT	Competition Appeal Tribunal
CCP	Centre for Competition Policy
Cir	United States courts of appeals
CLr	Claiming rate
Cr	Compensation rate
CDC	Cartel Damage Claims SA
CFPB	Consumer Financial Protection Bureau
CJEU	Court of Justice of the European Union
DG Comp	Directorate-General for Competition
DOJ	Department of Justice
ECHR	European Convention on Human Rights
EEA	European Economic Area
EJLR	European Journal of Law Reform
EJLS	European Journal of Legal Studies
FTC	Federal Trade Commission
Fed. R. Civ. P	Federal Rules of Civil Procedure
HFCS	High fructose corn syrup

IIC	International Review of Intellectual Property and Competition Law
NPC	National Pensioners Convention
NCA's	National Competition Authorities
OFT	Office of Fair Trading
OJ	Official Journal
SCC	Supreme Court of Canada
SME's	Small and medium-sized enterprises
SPV	Special Purpose Vehicle
TFEU	Consolidated Version of the Treaty on European Union
WCAM	The Dutch Act on Collective Settlement of Mass Damage Claims

1 GENERAL INTRODUCTION

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

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

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

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

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

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

The first two objectives can be primarily attained by public enforcement. Both detection and punishment have been pursued by a multi-layered setting of public enforcers: the European Commission at the EU level, and national courts and national competition authorities (NCAs) at the national level. The role of the national actors has been significantly increased after the adoption of Council Regulation 1/2003.³ The key measures included, *inter alia*, the following: (a) stimulating national courts' activity in the enforcement of EU competition law; (b) decentralising the enforcement of EU competition rules; and (c) strengthening the possibility for individuals to seek redress before national courts. To that extent, national authorities have been empowered to enforce EU antitrust rules alongside the Commission. After more than a decade, the new system can be described as a success surpassing expectations; around 85% of all the enforcement decisions are taken by NCAs.⁴ Another aim of the joint enforcement model was to move some of the workload to

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

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

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

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

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

The main tool for achieving the objective of compensation appears to be private enforcement, and more specifically private actions for damages. However, even if many attempts have been made to facilitate private enforcement, it remains underdeveloped across the EU. Private enforcement was largely expected to grow to a well-functioning and well-developed system after the adoption of Regulation 1/2003.⁷ However, the number of damages actions did not increase. During the same period, the objective to facilitate antitrust damages actions was reinforced by the Court of Justice of the European Union (CJEU). In its decision in *Courage v. Crehan*,⁸ the Court asserted that the full effectiveness of Articles 101 and 102 TFEU would be put at risk if individuals were not allowed to claim damages caused by competition law violations.⁹ Furthermore, actions for damages can contribute to the maintenance of effective competition in the EU.¹⁰ The ruling in *Courage* was subsequently clarified in *Manfredi*,¹¹ where the CJEU noted that a claim for compensation should be allowed when there is a causal link between the harm suffered and the anticompetitive conduct.¹² Following the CJEU rulings, the Commission aimed at identifying key barriers to the further promotion of antitrust damages actions in its policy proposals in the Green Paper¹³ and the White Paper.¹⁴ Both documents identified problems needing to be addressed; however, private enforcement in the EU has remained underdeveloped in compensating antitrust victims, especially if they suffered low value harm (typically consumers) or if they were indirect purchasers. Nevertheless, the EU expects that the failure in compensating victims will be remedied by the adoption of the Directive on damages actions.¹⁵ Its main objective is to ensure that any victim who has suffered harm caused by antitrust infringement can effectively exercise the right to claim *full*

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

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

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

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

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

⁹ *ibid* para. 26.

¹⁰ *ibid* para. 27.

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

¹² *ibid* para. 61.

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

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

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

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

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

1.1.2 Public Enforcement: The Real Enforcement Mode of Antitrust Enforcement

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

¹⁶ *ibid* arts. 1, 3.

¹⁷ *ibid* art. 14.

¹⁸ Commission Recommendation of 11 June 2013 on common principles for collective redress mechanisms in the Member States for injunctions against and claims on damages caused by violations of EU rights COM(2013) 3539/3.

¹⁹ Commission Staff Working Document Executive Summary of the Impact Assessment Damages actions for breach of the EU antitrust rules accompanying the proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union COM (2013) 404 final, para. 29.

²⁰ White Paper (n 14) sec. 1.3.

²¹ See, for example, Komninos (n 2) 9; Spencer W Waller, 'Towards a Constructive Public-Private Partnership to Enforce Competition Law' (2006) 29(6) *World Competition* 367, 367; Clifford A Jones, 'Private Antitrust Enforcement in Europe: A Policy Analysis and Reality Check' (2004) 27(1) *World Competition* 13, 13.

²² Wouter PJ Wils, 'Should Private Antitrust Enforcement Be Encouraged in Europe?' (2003) 26(3) *World Competition* 473, 481; Richard A Posner, *Antitrust Law* (2nd edn, University of Chicago Press 2001) 266.

²³ See, for example, Sonja E Keske, 'Group Litigation in European Competition Law: A Law and Economics Perspective' (2009) Erasmus University Rotterdam, 22
<[https://repub.eur.nl/pub/17790/Sonja%20Keske%20Thesis\[lr\].pdf](https://repub.eur.nl/pub/17790/Sonja%20Keske%20Thesis[lr].pdf)> accessed 22 October 2018.

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

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

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

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

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

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

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

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

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

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

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

the recent European Commission's fines shows their potential to contribute to both specific and general deterrence: for example, truck producers were fined 3.8 billion euros for participation in a cartel under Article 101 TFEU³³, and Google 2.4 billion euros for abusing its market dominance under Article 102 TFEU.³⁴ Fines are significantly lower in member states, but they may also bring positive impacts on deterrence.³⁵

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

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

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

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

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

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

³⁷ *ibid.*

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

³⁹ *ibid.*

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

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

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

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

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

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

All these points will be debated in the dissertation.

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

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

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

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

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

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

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

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

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

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

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

⁴⁹ Directive (n 15) art. 3

⁵⁰ White Paper (n 14) sec. 1.2.

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

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

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

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

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

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

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

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

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

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

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

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

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

⁶¹ Wils (n 22) 11.

⁶² *ibid* 16.

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

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

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

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

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

In June 2013, it was decided that the implementation of the Recommendation will be assessed by 26 July 2017, and further legislative measures will be proposed if found necessary. With delay, the European Commission assessed the practical implementation of the Recommendation by issuing the Report on 26 January 2018.⁶⁶ The findings of the Report have been included in the subsequent legislative package “New Deal for Consumers”, which aims at increasing the possibilities for consumers to defend their rights. On 11 April 2018, the European Commission published two proposals for the directives:

- Directive on better enforcement and modernisation of EU consumer protection rules⁶⁷; and
- Directive on representative actions for the protection of the collective interests of consumers.⁶⁸

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

⁶⁵ Recommendation (n 18).

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

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

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

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

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

1.2 RESEARCH APPROACH: PHD DISSERTATION CONSISTING OF ARTICLES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1.3 SCOPE AND RESEARCH QUESTION

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

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

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

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

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

⁷² Komninos (n 7) 1.

⁷³ Recommendation (n 18) art. 3.

⁷⁴ Directive (n 15) arts. 1,3.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1.4 METHODOLOGY AND LIMITATIONS

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

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

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

⁷⁶ See, for example, Mathias M Siems, ‘Bringing in Foreign Ideas: The Quest for “Better Law” in Implicit Comparative Law’ (2014) 9 *Journal of Comparative Law* 119, 120-24.

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

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

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

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

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

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

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

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

These approaches of comparative law are applied directly or indirectly in all chapters of the thesis, with the exception of the comparison of empirical data.⁸² Indeed, the combination of the functional, structural and analytical methods is desirable when the comparison is made at different levels⁸³, and in this thesis it is a three-level comparison. The research approach in each chapter is chosen on its research aims. Chapter 2 primarily utilises the functional method, especially when analysing the common obstacles of public and private enforcement of EU competition law. A comprehensive comparison of available empirical data is performed in Chapter 3 in order to assess the effectiveness of US antitrust class actions in compensating victims and deterring wrongdoers. The analytical approach is taken in Chapter 4, in particular when analysing the relationships between the different

⁷⁹ See, for example, Kingsley Davis, 'The Myth of Functional Analysis as a Special Method in Sociology and Anthropology' (1959) 24 *American Sociological Review* 757, 757.

⁸⁰ See, for example, Geoffrey Samuel, *An Introduction to Comparative Law Theory and Method* (Hart Publishing 2014) 81-82. Michaels (n 78) 340-43.

⁸¹ Robert B Johnson, and Larry B Christensen, *Educational Research: Quantitative, Qualitative, and Mixed Approaches* (4th edn, SAGE Publications, 2010) 429.

⁸² The comparison of empirical data is applied to greater or lesser degree in chapters 2, 3, 7.

⁸³ Hoecke (n 78); Renaud Dehousse, 'Comparing National EU Law: The Problem of Level of Analysis' (1994) 42(4) *American Journal of Comparative Law* 761, 770-772.

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

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

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

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

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

⁸⁴ Zweigert and Kötz (n 75) 35.

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

⁸⁶ Zweigert and Kötz (n 75) 33.

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

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

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

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

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

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

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

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

Third, economics in competition law deals with the so-called welfare standard: total welfare versus consumer welfare.⁹² The total welfare is a broad approach that seeks to maximise the aggregate value of the consumer and producer surplus. However, there is a possibility that consumer welfare decreases, because the profits (surplus) of producers outweigh this decrease, resulting in a positive total welfare.⁹³ As regards consumer welfare, it is a narrow approach that aims at maximising consumer surplus, but prevents producers from receiving offsetting gains. The comparison between total welfare and consumer welfare is often associated with merger control⁹⁴, analysis that is not part of this thesis. Consumer welfare appears to be one of the most important goals of EU competition policy.⁹⁵ However, the issue is that the definition of consumer welfare has not been much developed by the European Commission; its scope is unknown. In economic terms, consumer surplus occurs when the price that consumers actually pay for goods or services is less than the price they are willing or able to pay. Consumer welfare in law and economics is undoubtedly an interesting topic. However, this analysis is excessive in the context of this thesis, as it goes beyond its objectives, examining various policy measures for improving antitrust collective actions.

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

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

⁹⁰ See, for example, Oles Andriychuk 'The Concept of Perfect Competition as the Law of Economics: Addressing the Homonymy Problem' (2011) 62(4) Northern Ireland Legal Quarterly 523, 525-526.

⁹¹ See, for example, Johannes Paha, 'The Economics of Competition (Law)' (2012) Justus-Liebig-University, 19-25 <<http://www.uni-giessen.de/fbz/fb02/fb/professuren/vwl/goetz/kontakt/mitarbeiter/pahaordner/WPuS%20Begleittext>> accessed 7 February 2019.

⁹² Keske (n 87) 14-19; Mark Glick, 'The Unsound Theory Behind the Consumer (and Total) Welfare Goal in Antitrust' (2018) Roosevelt Institute Working Paper <<http://rooseveltinstitute.org/wp-content/uploads/2018/11/The-Unsound-Theory-Behind-the-Consumer-and-Total-Welfare-Goal-in-Antitrust-final.pdf>> accessed 7 February 2019.

⁹³ For further discussion on a surplus, see Svend Albæk, 'Consumer Welfare in EU Competition Policy' (2013) 70-71 <http://ec.europa.eu/dgs/competition/economist/consumer_welfare_2013_en.pdf> accessed 7 February 2019.

⁹⁴ *ibid* 72-74.

⁹⁵ Joaquín Almunia, 'Competition and Consumers: The Future of EU Competition Policy' speech at European Competition Day, Madrid, 12 May 2010.

⁹⁶ See, for example, Peter van Wijck and Jan Kees Winters, 'The Principle of Full Compensation in Tort Law' (2001) 11(3) European Journal of Law and Economics 319; Ram Singh, 'Full Compensation Criteria in the Law of Torts: An Enquiry into the Doctrine of Causation' (2012) Centre for the Study of Law and Governance Jawaharlal Nehru University <<https://www.jnu.ac.in/sites/default/files/u63/02-Full%20Compensation%20%28Ram%20Singh%29.pdf>> accessed 16 February 2019.

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

1.5 RESEARCH STRUCTURE

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

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

Abstract:

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

2.1 INTRODUCTION

European competition law is primarily enforced by public authorities – the European Commission at the EU level, and courts and competition authorities (NCAs) at the national level. However, private enforcement is gaining popularity in Europe. Increased importance attributed to a more favourable legal regime of private enforcement has created more incentives for the European Commission to facilitate damages actions by removing perceived obstacles for victims of anticompetitive conduct. And yet, the discovery of the merits of private antitrust enforcement has culminated in the European Commission eventually concluding a package on private damages actions in antitrust cases in June 2013. The most important milestone was reached on 26 November 2014 when the EU adopted a Directive on antitrust damages actions¹ for breaches of EU

* This material was peer-reviewed and published by the European University Institute in Zygimantas Juska, ‘Obstacles in European Competition Law Enforcement: A Potential Solution from Collective Redress’ (2014) 7(1) European Journal of Legal Studies 125.

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

¹ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349. Previously, together with the draft of the Directive, it was published: European Commission documents ‘Communication from the Commission on quantifying harm in actions for damages based on breaches of article 101 or 102 of the Treaty on the functioning of the European Union’ [2013] OJ C167/07 and the Staff Working Document ‘Practical Guide on quantifying harm in actions for damages based on breaches of article 101 or 102 of the Treaty on the functioning of the European Union’ [2013] SWD 205, 11.06.2013.

competition law in order to facilitate damages actions in the national courts of the EU's Member States. The Directive seeks to ensure that victims of antitrust infringements can obtain compensation and to optimise the interaction between public and private enforcement of EU competition rules while at the same ensuring the protection of investigation tools, such as passing on, access to evidence and discovery rules, interaction with leniency. Surprisingly, the collective redress mechanism is not envisaged by this Directive. With a view to remedy this situation, the European Commission published a Recommendation on collective redress² in relation to establishing a European horizontal framework for collective redress mechanisms. It is clear, however, that the Recommendation is not very helpful, particularly given that it does not incentivize Member States to take actions in practice. Indeed, the future of collective litigation depends on to what extent local legislators are willing to provide effective tools for collective redress procedures. In turn, truly effective compensation directly depends on whether collective redress schemes provide sufficient opportunities for ordinary consumers to aggregate claims, especially for the ones who suffered low value harm.

A. Research question and scope

The research question of this Chapter is as follows:

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

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

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

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

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

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

B. Methodology and limitations

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

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

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

C. Overview of the research material

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

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

D. Structure

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

2.2 THE EXISTING OBSTACLES AND SHORTCOMINGS IN COMPETITION LAW ENFORCEMENT

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

2.2.1 Public Enforcement

In the European Union, the leniency program and the imposition of fines are the principal means of increasing effectiveness of cartel prosecution and deterring infringers from engaging in anticompetitive behaviour. For those companies involved in a cartel—and who self-report and hand over evidence—the leniency policy offers either total immunity from fines, or a reduction of the fines which the Commission would otherwise impose on them. The current EU leniency policy is set out in the 2006 Leniency Notice⁴ and continues the work of the successful 2002 Leniency Notice; both of these replaced their less successful predecessor from 1996. This is notably because the 2002 Leniency Notice facilitated conditions for full immunity from fines and set out to grant automatic immunity from fines for the first reporting cartel, while the 2006 Notice introduced the discretionary marker system. After more than a decade, it can be observed that the leniency program has increased the detection rate and deterrence: a large majority of all detected cartels are because of leniency. Wils, for example, found that out of 23 European Commission cartel decisions

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

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

The fines guidelines were introduced by the European Commission in June 2006.⁹ The major factor which concerns the deterrent effect of the fines imposed by the Commission is to set the fine based on firm's annual sales and the duration of its alleged participation in the cartel. Under this mechanism, the Commission indicates that the maximum fine can only amount to up to 10% of the infringing undertaking's worldwide turnover of the preceding business year.

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

⁵ W Wils, 'The Use of Leniency in EU Cartel Enforcement: An Assessment after Twenty Years' (2016) King's College London Centre of European Law, 9, <<http://ssrn.com/author=456087>> accessed 9 August 2018.

⁶ T Carmeliet, 'How Lenient is the European Leniency System? An Overview of Current (dis)incentives to Blow the Whistle' (2011–2012) 48 *Jura Falconis* 3, 463.

⁷ F Smuda, 'Cartel Overcharges and the Deterrent Effect of EU Competition Law' (2012) Centre for European Economic Research, No. 12-050, 19, <<http://ftp.zew.de/pub/zew-docs/dp/dp12050.pdf>> accessed 9 August 2018.

⁸ Mariniello (n 3).

⁹ European Commission, 'Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2) of Regulation No 1/2003' [2006] OJ C210/2.

¹⁰ European Commission, 'Cartel Statistics' <<http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>> accessed 1 August 2018. The fine statistics are not adjusted for Court judgments.

mind that this legal maximum was attained in 4 large cases out of 13 during 2003-2013.¹¹ The resulting problem is that the fines calculated by the Commission had to be reduced.

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

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

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

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

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

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

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

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

Simply put, sub-optimal deterrence could be remedied by increasing the size of competition fines. However, it is very difficult to implement this in practice, because the Commission’s fining policy restricts the fine up to 10% of undertakings turnover. Therefore, the current fining policy should be complemented with other measures to enhance deterrence. In fact, a more effective private enforcement should be considered. This may include a rule similar to the US’ trebling of antitrust damages under the Clayton Act¹⁹, or opt-out collective redress mechanisms. Before delving into the details of these alternatives, it is both necessary and instructive to review the existing obstacles in private antitrust enforcement.

2.2.2 Private Enforcement

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

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

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

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

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

²⁰ European Commission, ‘Staff Working Document Impact Assessment Report: Damages actions for breach of the EU antitrust rules Accompanying the proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union’ [2013] SWD 203 final, para. 52.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.2.3 Tort Remedies and Deterrence in European Private Antitrust Enforcement

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

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

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

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

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

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

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

³⁶ Commission Staff Working Document Executive Summary of the Impact Assessment Damages actions for breach of the EU antitrust rules accompanying the proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union COM (2013) 404 final, para. 29.

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

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

³⁹ *Pfleiderer AG v Bundeskartellamt* (C-360/09) [2011], Opinion of Advocate General Mazák delivered on 16 December 2010. para. 40. In 2010, Mazák, prior to the adoption of the Directive on damages actions, asserted that the Commission and national competition authorities had much more powers than damages actions in ensuring compliance with Articles 101 and 102 TFEU. However, after the adoption of the Directive, not much has changed, as the role of damages actions remains significantly reduced: private enforcement is dependent on public enforcement, damages multipliers have been prohibited, leniency statements are unavailable to victims, and the Directive contains no provisions on collective redress actions.

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

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

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

⁴⁰ See Directive (n 1), art. 3.

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

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

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

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

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

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

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

2.2.4 Synopsis

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

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

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

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

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

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

2.3.1 Legal Design of Collective Redress Mechanisms

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

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

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

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

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

organizations and harmed persons (Bulgaria, Italy, and Spain), public authorities and associations. A third option involves funding of legal costs that may affect the ability and the incentives of claimants to initiate collective actions. A potential solution concerns the availability of contingency and conditional fees. This mechanism represents the American solution to the funding problem. Under this mechanism, the necessary means of funding are well ensured because client pays contingent fees to a lawyer only if there is a favourable result. However, it is equally true that contingency fees bring incentives for unmeritorious claims. Despite this fact, contingency fees have increased its popularity, utilized in some fashion in around half of Member States (even if not in a pure US version) and now form permit arrangements between some claimants and their lawyers on the basis of some form of success fee.⁵² England and Wales, for instance, have adopted conditional fee arrangements under which lawyers can obtain a success fee in addition to the initial legal fee, which is usually around 25-50% of an awarded judgment if they win.⁵³ Lawyers do not get anything if they lose and only get a normal fee indexed on the hourly billing plus a success fee which cannot exceed the normal fee. These conditional fees are linked to an ‘after-the-event insurance’, which would pay the adversarial party’s costs in the event of losing the case. Another solution includes third-party funding (a company, bank or hedge fund), which could pay all or a part of the expenses of an action in exchange to retain a share of successful claims.⁵⁴ In England and Wales, external financial options are being offered by diverse investors. In 2012, there were ten active dedicated TPLF investors operating in the United Kingdom, with three additional investors, Juridica, Burford, and IMF, making occasional investments. Most funders operating in the UK are relatively new, with the exception of Allianz, which has been funding claims since 2002.⁵⁵

2.3.2 Assessment: Opt-In vs Opt-Out

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

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

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

⁵² Buccirosi and Carpagnano (n 35), 6.

⁵³ CEPS, EUR and LUISS, ‘Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios’, Report for the European Commission DG COMP/2006/A3/012, Final Report, Brussels, Rome and Rotterdam, 208 <http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf> accessed 1 August 2018. Recent reports in the UK support the need for an effective funding mechanism for litigation. For further debate on this topic, see further the recent report ‘Review of Expenses and Funding of Civil Litigation in Scotland’ (2013) <<http://scotland.gov.uk/About/Review/taylor-review/Report>> accessed 1 August 2018.

⁵⁴ Leskinen (n 42), 95-96.

⁵⁵ C Veljanovski, ‘Third-Party Litigation Funding in Europe’ (2012) 8(3) J of L, Economics & Policy, 410-413.

⁵⁶ European Commission Recommendation 2013/396/EU (n 2); Articles 21-25 stress the need to form claimant party by ‘opt-in’ principle.

Several cases in national jurisdictions regarding the experiences of consumer organisations clearly indicate that opt-in collective actions are practically unworkable. Taking the example of the UK, the *Replica Football Shirts* case⁵⁷ demonstrates the reluctance of consumers to take part in opt-in proceedings. The consumer association (*Which?*) brought an action in the collective interest of consumers who overpaid for football shirts due to a price-fixing cartel. Despite its efforts, *Which?* managed to collect claims for only 600 consumers, which was considered a very low proportion of victims who suffered harm by the anti-competitive behaviour. After this failure, *Which?* announced they would not take part in collective actions in the future if it is based on the opt-in measure. In France, the finding of a price-fixing agreement among three mobile operators (Orange France, SFR, and Bouygues Telecom) had a potentially negative impact on 20 million consumers.⁵⁸ However, consumer association *UFC Que Choisir* only managed to collect claims for 12,350 consumers. Hence, in countries where consumer associations have standing to bring damages claims, an opt-in model seems to be inappropriate to ensure sufficient participation rate for victims, in particular for cases involving multiple claims of low value (such as the harm caused by price fixing). In addition, in large-scale cartel agreements it is impossible in practice to get the consent of all harmed consumers, in particular when consumers cannot be easily identified. Due to low participation rate, consumer organizations pose a considerable obstacle of limited financial resources, thus limiting themselves to bringing damages actions due to uncertain financial perspective.

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

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

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

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

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

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

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

Despite the positive aspects, opt-out proceedings also have two potential disadvantages. First, this measure might jeopardize the right of access to the courts under Article 6 of the European Convention for Human Rights (ECHR).⁶² Second, the opt-out measure may increase the number of unmeritorious claims. For these reasons, the introduction of an EU-style collective redress mechanism could also be combined with the flexible hybrid of the opt-in/opt-out systems. The inspiration might be drawn from the examples of the UK and from the Danish model. The new Consumer Rights Act⁶³ extended the jurisdiction of the Competition Appeal Tribunal (CAT) in the UK. First and foremost, the CAT has exclusive jurisdiction to determine whether a collective action should proceed on an opt-out or opt-in basis.⁶⁴ Second, the CAT is permitted to authorize a person or entity to commence collective actions regardless of being a public or a specified body. However, opt-out collective actions are not permitted to be brought by law firms. Another innovative provision is that the Act established a collective settlement procedure in the CAT which encourages settlements.⁶⁵ If the settlement is reached, it has a binding effect on consumers, unless they opt-out. Besides the UK, another inspirational example of an opt-out class action system includes the one in Denmark. Opt-in group actions can be brought either by individual claimants, by any representative organization or by the Consumer Ombudsman. However, the judge may be granted, on a case-by-case basis, the discretion as to whether the opt-out model is necessary to guarantee that a significant proportion of injured parties are compensated for the damages suffered.⁶⁶ The Danish rules

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

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

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

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

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

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

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

2.3.3 Legal Framework for Collective Redress in Antitrust

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

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

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

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

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

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

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

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

1. The deadline for implementing the provisions of the Directive was 27 December 2016, but it took more time for most Member States to incorporate into national schemes. Empirical study found that only 10 Member States informed the European Commission of their full transposition of the Directive by 20 February 2017, while Bulgaria and Greece implemented the Directive in early 2018, and Portugal was the last implementing in June 2018.⁷⁷ This study analysed four Member States: two “old” ones (Belgium and Luxembourg) and two “newer” ones (Latvia and Lithuania). It was found that the reason for delays (at least in

⁶⁹ Lear Study (n 50); Buccirossi and Carpagano (n 35) 8-9.

⁷⁰ Amaro (n 68) 68-69.

⁷¹ Amaro (n 68) 69.

⁷² See for instance, Case C-242/87 *Commission v. Council (ERASMUS)* [1989] ECR 1425.

⁷³ See for instance, Case C-130/10, *Parliament v. Council* [2012] ECR I-0000

⁷⁴ Directive (n 1), rec. 8.

⁷⁵ See, for instance, Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights [2004] OJ L 157, rec. 3. There, it is clarified that the enforcement aspect of IP rights is ‘paramount for the success in internal market’.

⁷⁶ Directive (n 1), rec. 8.

⁷⁷ J Malinauskaite and C Cauffman, ‘The Transposition of the Antitrust Damages Directive in the Small Member States of the EU—A Comparative Perspective’ (2018) 9 *Journal of European Competition Law & Practice* 8, 496.

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

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

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

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

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

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

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

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

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

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

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

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

⁸⁰ Abele, Kodek, Schaefer (n 28), 851.

⁸¹ Van den Bergh and Visscher (n 79), 19.

⁸² Abele, Kodek, Schaefer (n 28), 854.

⁶⁰ The Law Society of England and Wales, ‘Towards a Coherent European Approach to Collective Redress’ (2011) ETI Registration number: 24118193117-34, 13; ‘Cooperation between Member States for Consumer Protection’ (*Europa Website*) <http://europa.eu/legislation_summaries/consumers/protection_of_consumers/1320_47_en.htm> accessed 1 August 2018.

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

Measure	Potential facilitation
A better exercise of their right across borders	<ul style="list-style-type: none"> • Victims located in one Member State can seek collective redress in another country. • Victims are able to pool their efforts to litigate collectively, where the infringement caused harm across borders. • There is a less need for ‘forum shopping’.
Expanded possibilities for follow-on actions	<p>Victims or representative organizations can take a ‘free ride’ on the efforts of public actors from their own and other Member States (national courts and national competition authorities).</p> <ul style="list-style-type: none"> • Designated entities for bringing collective actions (either public or private) would be in closer cooperation across the EU.
Better information sharing	<ul style="list-style-type: none"> • Cooperation may be achieved through allocation of the cases and exchanging information about the on-going or potential collective actions.

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

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

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

⁸⁵ Ibid.

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

2.5 CONCLUSION

The research question of this Chapter was the following:

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

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

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

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

- 2) Private enforcement is largely underdeveloped in compensating victims.

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

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

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

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

2.6 APPENDIX: SUMMARY OF AMENDMENTS

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

3 THE EFFECTIVENESS OF PRIVATE ENFORCEMENT AND CLASS ACTIONS TO SECURE ANTITRUST ENFORCEMENT IN THE UNITED STATES*

Abstract:

The US system has relied heavily on antitrust class actions as a means of ensuring compensation and deterrence. Although this tool seems sensible in theory, the reality is that it remains highly controversial. On the one hand, commentators argue that class actions force defendants to settle cases lacking merit. Even if a settlement agreement is assumed to have a merit, class actions are accused of doing a poor job in compensating victims and deterring wrongdoers. On the other hand, the proponents of class actions claim that there is no reliable empirical evidence proving that class action schemes caused negative effects on antitrust litigation. The public debate about the effectiveness of class actions illustrates the controversial nature of American class actions fairly well. Therefore, using comparative insights from the predominant controversies, this Chapter will determine how well antitrust class actions fulfil compensation objectives, and to what extent they can facilitate deterrence.

Keywords: antitrust, class actions, enforcement, compensation, deterrence, controversy

3.1 INTRODUCTION

Private litigation has always played a major role in the antitrust enforcement of the United States. Even though private enforcement was meant to only complement public enforcement, in reality private claims far outstrip governmental actions. Private remedies are aimed at achieving either compensation or deterrence goals. When the American class action mechanism emerged, it became a very potent fixture to bridge the gap between both objectives. A primary purpose of the class action device is to enable large groups of victim to aggregate their claims and hence to claim damages or to seek injunctive relief as a result of the alleged violation. Throughout the development of these sorts of proceedings, the Supreme Court has given a broad remedial function for class actions to assure that the antitrust objectives are achieved. Yet the approach has recently changed in *Twombly*.¹ There, it was alleged that antitrust class actions can incentivize defendants to settle cases that lack merit.² Some critics characterize this phenomenon as a ‘blackmail settlement.’³ Despite the

* This material was peer-reviewed and published by SAGE in Žygimantas Juška, ‘The Effectiveness of Private Enforcement and Class Actions to Secure Antitrust Enforcement’ (2017) 62(3) The Antitrust Bulletin 603.

This Chapter is a revised version of the original published article. In order to address new developments, Chapter 3 includes amendments, summarised in the Appendix to the Chapter. Few changes are not shown in the Appendix. First, the introduction and conclusion have been changed to maintain the common approach of the PhD dissertation. As regards the introduction, it includes additional sections: A. Research question and scope; B. Methodology and limitations; C. Overview of research material; D. Structure. With regard to the conclusion, it is amended to answer the research question of the Chapter. Second, few structural amendments are not shown in the Appendix. Furthermore, 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 Bell Atlantic Corp. v. Twombly 550 U.S. 544 (2007).

² *Id.* at 558-559.

³ See e.g. John T. Rosch, Fed. Trade Comm’r, Designing a Private Remedies System for Antitrust Cases-Lessons Learned from the US Experience, Remarks before the 16th Annual EU Competition Law and Policy Workshop, 10 (June 17, 2011) (stating that treble antitrust class actions “can put tremendous pressure on the defendant to settle a case regardless of its merit, and can lead to extortionate settlements.”); Jonathan M. Landers, *Of Legalized Blackmail and*

Court's criticism, some commentators argue that the decision has no merit itself: it relies on the 'unsupported opinion of another appellate court judge' and no empirical study was performed.⁴ The public debate between these opposing views well illustrates the controversial nature of private antitrust enforcement in the United States. Ironically, even if the phenomenon of blackmail settlement would be assumed to have no ground, a series of additional controversies underlie the understanding on class actions, both in compensating class members and deterring the wrongdoers.

A. Research question and scope

The research question of this Chapter is as follows:

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

The following steps are taken to address this question. The principal purpose is to assess the effectiveness of antitrust class actions in achieving antitrust enforcement in the United States. Using comparative insights from the predominant controversies, it examines the effectiveness of compensation and deterrence. The debate over compensation focuses on three major controversies: 1) class members obtaining little or no compensation; 2) the compensation mechanism being framed to (largely) overpay attorneys; 3) class actions failing to compensate the real victims. The discussion on deterrence analyses one major controversy: that class actions give little or no weight to deterrence. To give an additional nuance to the debate between critics and proponents, the optimal deterrence theory is applied to assess the role of class actions in deterring infringers.

As regards the scope, Chapter 3 does not analyse the EU approach, contrary to other chapters. Instead, it examines the US deterrence-based private antitrust enforcement mechanism, and more specifically antitrust class actions. Even if deterrence is not the primary goal of the EU's private antitrust mechanism, the analysis of the American mechanism is essential for two reasons. First, the US system—being much more forceful than EU-style collective actions and having much more experience in the field—gives a better response about the effectiveness of class actions in compensating victims. Second, it gives an overview about the potential of collective actions in contributing to antitrust enforcement through increased deterrence.

B. Methodology and limitations

In the first place, Chapter 3 performs a comparison of the empirical data, mainly quantitative sources. This approach was chosen with the expectation that the US class action system—counting more than 50 years of experience—will provide comprehensive data about the effectiveness of antitrust class actions. This expectation has been reinforced by the fact that legal empirical analysis has deeper roots in the US than in the EU.

Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma, 47 S. Cal. L. Rev. 842, 843 (1974) (asserting that plaintiffs' attorneys are using class actions to "blackmail" businesses).

⁴ See Joshua P. Davis & Robert H. Lande, *Defying Conventional Wisdom: The Case for Private Antitrust Enforcement*, 48 Ga. L. Rev. 1, 67 (2013) (noting that the Court in *Twombly* cites Frank H. Easterbrook, Comment, *Discovery as Abuse*, 69 B.U. L. Rev. 635, 638 (1989)).

The comparison of quantitative sources is best suited in testing and validating the controversies mentioned above. It provides statistical analysis which helps to measure patterns of antitrust collective actions, for example what compensation on average class members receive. Therefore, by evaluating the comparative insights of quantitative data, the first part of the Chapter aims to assess the effectiveness of class actions in achieving compensation objectives. The second part deals with the impact of antitrust class actions on deterrence. The analytical approach is used as additional tool to analyse the contrasting views of critics and proponents of class actions and to assess the impact of different measures of class actions on deterrence. It also includes the evaluation of law and economics standards, such as the probability of detection and the probability of conviction.

Some limitations should be noted. In theory, the quantitative study is limited for at least two reasons: first, the hypothesis testing may not fully assess the generation of the phenomenon; second, the data provided may be too abstract to apply in specific situations.⁵ In this Chapter, the following shortcomings have been encountered. Even if the US has a longstanding practice of class actions, surprisingly just a few empirical studies have been conducted, and they provide a mere handful data about the compensatory effectiveness of antitrust class actions. This Chapter also associates the compensatory effectiveness with attorneys' compensation; in particular whether they are paid proportionally in the context of class recovery. On the one hand, empirical studies provide important data about class attorneys' total compensation in antitrust class actions. On the other hand, these studies provide limited and inaccurate data regarding the case-related costs of private attorney general and how often cases lead to a successful outcome. The latter information would allow estimating the actual ratio between attorney's risks and awards. Furthermore, the *cy pres* award (another form of compensation) is considered as an important element in assessing the compensatory effectiveness. However, only one relevant study has been found, which gives only a preliminary benchmark about the number of fraudulent *cy pres* distributions in antitrust settlements. As regards the assessment of deterrence, there are two main limitations. First, there is no reliable data for precisely defining the impact of antitrust class actions on the probability of detection. Second, there is no reliable data about the certification rates of class actions. More precise information would allow evaluating the role of antitrust class actions in the context of optimal deterrence.

Considering these limitations, there is no possibility to draw evidence-based conclusions about the compensatory effectiveness of US antitrust class actions. Nevertheless, the available material is sufficient for determining the existing patterns about the effectiveness of class actions. It may sound bold to say, but the conclusions made in this Chapter are unlikely to change, even if more precise and reliable data was available for antitrust cases. As will be shown, antitrust class actions are by their nature determined to produce much lower effects on compensating victims and deterring wrongdoers than is envisaged.

C. Overview of research material

At the outset, it should be underlined that this research was performed at Stanford University and the University of Michigan under the EU Fulbright Schuman scholarship during the academic year

⁵ Robert B Johnson, and Larry B Christensen, *Educational Research: Quantitative, Qualitative, and Mixed Approaches* (4th edn, SAGE Publications, 2010) 429.

of 2015-2016. The research material was chosen on the basis of recommendations from hosting supervisors prof. Deborah Hensler and prof. Daniel Crane, as well as from respective US scholars and practitioners in the research field. The research databases of hosting universities were of great value as they provided material that cannot be found in European libraries. In order to make analysis as broad as possible, additional material has been added during the revision of this Chapter. Even if an attempt to include every available literature has been made, surely some is missing. The experience in the US has taught that a comprehensive analysis about American (antitrust) class actions cannot be performed during a research stay of a few months. This is especially true for an EU academic/lawyer coming from the continental/civil law system. Nevertheless, it was sufficient to get insights for answering the research question in the PhD dissertation.

To sum up, Chapter 3 focuses on examining the contrasting views between the proponents and critics of class actions. As regards the positive side, the most prominent works are of Davis and Lande. With regard to the critical side, the publications of Cavanagh and Crane are of particular relevance. Other mutually opposing works are published by Gramlich, Hensler, Fitzpatrick, Gilbert, Pace and Rubenstein. The non-academic works Mayer Brown LLP and Consumer Financial Protection Bureau are also important. As regards the analysis of deterrence, the contrasting views are primarily compared with Davis and Lande on the one side, and Crane on the other. Works by Rubenstein, Schwartz, Ulen and Connor also guides the discussion. Furthermore, a lot of effort has been made to include all relevant court decisions, but some case-law may be missing due to a very extensive practice in the field. The most important decisions for framing the background of private antitrust enforcement (and class actions) are the following: *Pfizer v. Government of India*, *Hawaii v. Standard Oil*, *Coleman v Cannon Oil*, *Illinois Brick Co. v. Illinois*. Additionally, for a comparative perspective, the most important decisions of the Supreme Court of Canada are analyzed to assess the potential issues of indirect purchasers' actions in the US context.

D. Structure

The structure of this Chapter is as follows. Section 1 discusses the rationale for private enforcement and class actions in antitrust enforcement. Section 2 examines three key controversies underlying the compensation objective in small-stakes antitrust class actions. Section 3 considers the impact of class actions on deterring the wrongdoers ('rational actors') by applying the standards of optimal deterrence theory.

3.2 THE RATIONALE FOR PRIVATE ENFORCEMENT AND CLASS ACTIONS IN ANTITRUST ENFORCEMENT

The US policy of promoting competition is based on the Sherman Act of 1890⁶ and the Clayton Act of 1914.⁷ Section 1 of the Sherman Act prohibits any agreement in restraint of trade, while Section 2 forbids monopolistic behavior.⁸ The Clayton Act is far more detailed than the Sherman Act, expanding the provisions on price discrimination, exclusive dealings, and the ability for individuals to sue for damages.⁹ At the Federal level, the US Department of Justice ('DOJ') and the Federal

⁶ Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (1890).

⁷ Clayton Act, 15 U.S.C. §§ 12–27 (1914).

⁸ Sherman Antitrust Act, 15 U.S.C. §§ 1, 2.

⁹ Clayton Act, 15 U.S.C. §§ 13, 14, 15.

Trade Commission ('FTC') have the authority to enforce antitrust laws. On the private side, US antitrust law permits enforcement by victims of antitrust infringements. In enacting the antitrust laws, private enforcement was meant to supplement public enforcement, which lacks sufficient resources to detect and prosecute antitrust violations. However, private claims have become much more prominent and far outpace government claims. Over 90 percent of antitrust litigation was filed by private plaintiffs between 1975 and 2004.¹⁰ More recently, in 2013, it was indicated that 98 percent of antitrust cases in federal courts were private actions.¹¹ In fact, private enforcement has become so powerful that private enforcers indeed fill in gaps of public enforcement of low detection and sub-optimal fines.

3.2.1 Two Interrelated Goals of Private Antitrust Enforcement: Compensation and Deterrence

The US Supreme Court has repeatedly held that the private right of action under the antitrust laws serves two purposes: compensation and deterrence.¹² As regards the first objective, the enactment of both the Sherman and Clayton Acts appreciated the compensation role of private claims. In order to facilitate the objective of compensation, federal antitrust law authorizes the award of *automatic* treble damages.¹³ In fact, treble damages are the main tool to provide compensation to antitrust victims.¹⁴ However, considering the complexities in compensating antitrust victims, treble damages are considered to provide only 'rough justice' to sufferers.¹⁵ Indeed, an overcharge can be so widespread that the estimation of actual harm may be an insurmountable burden.

Another viewpoint holds that private suits are necessary to deter potential wrongdoers.¹⁶ This concept is based on the idea that public authorities have insufficient time and resources to prosecute all the unlawful conduct and hence private litigators can secure additional layer of antitrust enforcement. Trebling ensures that infringers internalize the sufficient cost of the harm caused by anti-competitive behavior. In that regard, the Supreme Court noted that the 'treble-damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme',

¹⁰ Sourcebook of Criminal Justice Statistics Online, *Table 5.41* (Antitrust Cases filed in U.S. District Courts, By type of case 1975-2004) (Aug. 01, 2016), <http://www.albany.edu/sourcebook/pdf/t5412004.pdf>.

¹¹ Federal Judicial Caseload Statistics, *Table C-2: U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During 12-month Period Ending March 31, 2012 and 2013*, <http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/caseload-statistics-2013.aspx> (last visited Aug. 1, 2018) (indicating that out of 776 antitrust cases in federal courts 762 were private actions).

¹² See, e.g., *Pfizer, Inc. v. Gov't of India*, 434 U.S. 308, 314 (1978) (stating that "[the Clayton Act] has two purposes: to deter violator and deprive them of 'fruits of their illegality', and "to compensate victims of antitrust violators for their injuries.") (citations omitted); *Am. Soc. of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556, 575-76 (1982) (asserting that "treble damages serve as a means of deterring antitrust violations and of compensating victims").

¹³ 51 Cong. Ch. 647, Jul 2, 1890, 26 Stat. 209, part 7 (1890). The private right of action provision was slightly modified in 1914 in Section 4 of the Clayton Act. 63 Cong. Ch. 323, 38 Stat. 73, part 4 (1914).

¹⁴ See, e.g. *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472 (1982) (noting that treble damages "would provide ample compensation to victims of antitrust violations."). For further discussion, see, e.g. Steven C. Salop & Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 Geo. L.J. 1001, 1051 (1986).

¹⁵ Edward D. Cavanagh, *The Private Antitrust Remedy: Lessons from the American Experience*, 41 Loy. U. Chi. L.J. 629, 632 (2010) (citing Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages?*, 54 Ohio St. L.J. 115, 118 (1993)). Cavanagh provides a monopolization example where the difficulties occurred in reconstructing the "but for" test in the case *LePage's, Inc. v. 3M Co.*, 324 F.3d 141, 164-66 (3d Cir. 2003) (en banc), cert.denied, 542 U.S. 953 (2004)).

¹⁶ *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472 (1982). On this point see, e.g. Antitrust Modernization Commission, *Report and Recommendations*, 246-247 (2007), http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf (last visited Aug. 1, 2018).

because the fear of treble damages creates ‘a crucial deterrent to potential violators.’¹⁷ Moreover and most importantly, when trebling is combined with contingency fees, the attorney’s incentive to sue is raised to a maximum: there is a guarantee that he or she will reap a large award if the case is won or settled. In addition, the one-way-fee-shifting rule and broad discovery rules ensure a plaintiff-friendly climate. Together, these measures provide the necessary incentives for private attorneys to invest time and money in prosecuting lengthy, complicated, and expensive antitrust suits (the so-called ‘private attorney general’).

In case of a conflict between the antitrust goals, the Supreme Court seems to prioritize deterrence over compensation.¹⁸ One of the notable case was *Pfizer v. Government of India*¹⁹, in which the Court ruled that consumers benefited from the ‘maximum deterrent effect’ if trebling was applied to all infringers.²⁰ The other case is *Hawaii v. Standard Oil*²¹ where the Supreme Court ruled that the Congress’ incentive of trebling encourages potential private litigants to serve as ‘private attorneys general.’²² To sum up, the American system can justify the failures of compensation (for example, undercompensation of class members), given that the primary objective is to deter wrongdoers.

3.2.2 The Role of Class Actions in Antitrust Enforcement

In the United States, private actions can be brought on behalf of a class of plaintiffs under Rule 23 of the Federal Rules of Civil Procedure. The class action rule allows to consolidate multiple claims of victims who allegedly suffered harm from the alleged violation. Throughout the history, the antitrust enforcement mechanism has relied on antitrust class actions as means of securing compensation and deterrence. The US Supreme Court held that allowing these claims to proceed collectively enhanced ‘the efficacy of private actions, by permitting citizens to combine their limited resources and to achieve a more powerful litigation posture.’²³ Indeed, the consolidation is very effective when antitrust infringement causes scattered harm among a large number of injured parties. In turn, it facilitates economies of scale in relation to the savings in litigation and court administrative costs.²⁴ The actual benefits of class actions can emerge from two different types of claims.

First, there are classes with positive value claims (‘positive expected value claims’). In such groups, the potential award outweighs the anticipated expenses of litigation even if the plaintiff leads the case on his own. But with larger financial means, the class can litigate in a more efficacious way by employing more competent lawyers than victims would be able to do in individual cases. Therefore, the probability of winning the case increases exponentially. The aggregation is likely to also be beneficial for the defendants, where there might be a series of individual claims alleging the same

¹⁷ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985) (citations omitted).

¹⁸ The priority of deterrence was stressed in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). See, e.g. Barak D. Richman & Christopher R. Murray, *Rebuilding Illinois Brick: A Functionalist Approach to the Indirect Purchaser Rule*, 81 S. Cal. L. Rev. 69, 90 (2007); William H. Page, *The Scope of Liability for Antitrust Violations*, 37 Stan. L. Rev. 1445, 1452 (1985).

¹⁹ 434 U.S. 308 (1977).

²⁰ *Id.* at 315.

²¹ 405 U.S. 251 (1972).

²² *Id.* at 262.

²³ *Id.* at 266.

²⁴ See, e.g. *Northwest Wholesale Stationers*, 472 U.S. 284, 295-297 (1985).

injuries. From a practical point of view, the defendant has an easier time in organizing the defense and investing in winning the sole case.

Second, there is a situation where the plaintiffs suffered harm but the cost of litigation exceeds the expected recovery ('negative expected value claims'). Therefore, these claims would not normally lead to litigation if not pursued by class actions. According to the US Supreme Court, class action litigation allows for low value claims to be heard.²⁵ In addition, class actions may be the only possibility to aggregate claims of small worth, especially when suing the wrongdoer individually would not be 'economically rational.'²⁶ In the end, class action litigation can be beneficial both for class members and for private litigators, who perform under a contingency fee agreement. An illustrative example:

Suppose that potential antitrust victims suffered an average harm of \$100 due to a price-fixing cartel. The resulting individual claims are economically worthwhile, because litigation costs would most likely exceed the expected award from positive judgment. But if there were 1 million class members, in theory the expected recovery could be up to \$300 million after trebling. Thus, the lawsuit would have significant financial strength. If we consider that contingency fees range between 20 and 33 per cent, there is great interest for an attorney to invest in the litigation, since his potential compensation can result in tens of millions.

This example would be very attractive for private litigants if the cartel was discovered by public enforcers. Therefore, plaintiffs can 'free-ride' on the efforts of government actors and use their findings in a subsequent private litigation. According to Chieua, the most popular antitrust class actions are follow-on price fixing cartel cases.²⁷

Although class action litigation allows for aggregating lawsuits that would otherwise be financially infeasible, the negative expected value claims remain highly controversial to this day. The main criticism is centered on the fact that very few cases go to trial, because defendants are pressed to settle cases lacking merit.

3.2.3 The Major Criticism of US Class Actions

Arguably, the certification is an essential part of the class action lawsuit. For the case to proceed as a class action, four threshold requirements must be met under Rule 23(a) of the Federal Rules of Civil Procedure: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy.²⁸ A court must

²⁵ *Blue Shield of Virginia v McCready*, 457 U.S. 465, 472 (1982).

²⁶ *Coleman v Cannon Oil*, 141 F.R.D. 516, 520 (1992).

²⁷ See Tiffany Chieua, *Class Actions in the European Union?: Importing Lessons Learned from the United States' Experience into European Community Competition Law*, 18 *Cardozo J. Int'l & Comp. L.* 123, 137 (2010).

²⁸ According to the Rule 23(a), all class actions have to fulfil the following requirements. First, the class is so numerous that joinder of class members is impracticable. Second, there are questions of law or fact common to the class. Third, the claims or defenses of the class representatives are typical of those of the class. Fourth, the class representatives will fairly and adequately protect the interests of the class.

also find at least one of the criteria listed under Rule 23(b).²⁹ The settlements generally fall into three basic categories:

- *Automatic distribution settlements.* Damage awards are automatically distributed to class members who do not exercise their right to opt out. Under this settlement category, class members are not required to submit claim forms so as to receive award. In order to proceed with this model, the entire class should be precisely identified. The awards are typically mailed to each of them. However, a substantial number of class members may not cash their checks.³⁰ Therefore, undistributed funds can be distributed via *cy pres* process (discussed below), or in rare cases returned to the defendant. The attorney receives a fee that is proportionally calculated on the total value of the settlement, regardless of how many victims actually received damages.
- *Claims-made settlements.* This scheme is utilized when there is no reliable data to list the identities of victims. As such, class members are required submit a valid claim in order to obtain award. Typically, the total payout to the class will be smaller than in an automatic payment settlement and thus depends on how many class members submitted claim forms. Indeed, there is a possibility that in some cases (for example, when submitting claim form is cumbersome) only few members will receive compensation. Despite this unsuccessful outcome, the attorney receives a percentage based on the potential value of the settlement, regardless of how many victims submitted a valid claim form. This may lead to an ironical situation: the attorney's fee can exceed the actual payout to the class.³¹ Uncollected funds are rare (only when issued checks are not cashed) and the surplus is either distributed to a *cy pres* entity or back to the defendant.
- *Cy pres settlements.* There is no direct compensation to class members, but an award is made to a charitable organization whose activities are as closely as possible related with the antitrust victims. In order to avoid abusive *cy pres* distributions, the *cy pres* relief has become closely scrutinized by courts.³²

Despite settlements being faster means of solving antitrust disputes, they are criticized for a variety of reasons. If the certification is formally approved by the court, it is well established practice that the vast majority of cases are settled.³³ Roughly estimated, less than 1% of certified private cartel

²⁹ In addition to the Rule 23(a), the district court must determine one of the findings under the Rule 23 (b). First, prosecution of separate actions risks either inconsistent adjudications which would establish incompatible standards of conduct for the defendant or would as a practical matter be dispositive of the interests of others. Second, defendants have acted or refused to act on grounds generally applicable to the class. Third, there are common questions of law or fact that predominate over any individual class member's questions and that a class action is superior to other methods of adjudication.

³⁰ See, e.g. Wytan M. Ackerman, *Class Action Settlement Structures*, Meeting of Federation of Defense & Corporate Counsel, 4 (March 2 - March 9, 2013), <http://www.thefederation.org/documents/13.Class%20Action-Structures.pdf> (last visited Aug. 3, 2018).

³¹ *Id.* at 8.

³² See, e.g. *Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 689–90 (7th Cir.2013); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 172–73 (3d Cir.2013); *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 434–36 (2d Cir.2007).

³³ See, e.g. Rhonda Wasserman, *Cy Pres in Class Action Settlements*, 88 S. Cal. L. Rev. 97, 102 (2015) ((citing Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 Notre Dame L. Rev. 591, 647 (2006); Thomas E. Willging & Emery G. Lee III, *Class Certification and Class Settlement: Findings from Federal Question Cases, 2003-2007*, 80 U. Cin. L. Rev. 315, 341-42 (2011)).

cases lead to a final court decision³⁴, while around 99% are settled. The critical understanding of class actions was summarized by the former commissioner of the Federal Trade Commission, who considered antitrust class action suits ‘almost as scandalous as the price-fixing cartels that are generally at issue ... [the plaintiffs’ lawyers] stand to win almost regardless of the merits of the case.’³⁵ Similarly, Crane argues that antitrust class actions can be easily brought, but the defense expenses can be significant, and hence to force defendants to pay for settlement to get rid of the case.³⁶ In other words, the fear of ultimate loss, resulting in huge financial loss and reputational damage, might press the defendant to settle a class action wholly lacking in merit rather than to proceed to trial with unpredictable jury verdict. Indeed, the combination of measures may incentivize private attorney general to bring lawsuits lacking merit. If third-party funding—the financing of lawsuits by entities other than parties or their legal representatives—is utilized in class actions, Hensler refers to three assumptions, raised by the corporate community that may ‘produce a flood of frivolous class actions’: first, the defendants are forced to settle frivolous class claims because of the *in terrorem* effect; second, the jurisprudence allows easy access to courts for frivolous class actions; third, litigation funders will favor frivolous actions.³⁷ It can be argued that the same fears apply when legal representatives act as private investors through contingency fees, i.e. a predominant financing model in class actions. After all, there is little or no difference as regards financial incentives when a third party funder finances the antitrust class action lawsuit or a private attorney general. Three factors tend to strengthen this claim.

First, in contrast to the ‘American rule’ where each party bears its own litigation, US federal antitrust law entitles the prevailing plaintiff to recover not only treble damages, but also to obtain attorney’s fees as part of his costs of suit.³⁸ This provision is often referred to as ‘one-way fee shifting’, because defendants have no right to attorneys’ fees. The purpose of such a scheme is to encourage the class counsel to invest in private actions (especially for impecunious victims), while the interests of defendants are not the primary objective (even if they are found innocent). For the defendant, the only way to recoup his legal expenses is if the plaintiff was sanctioned under the inappropriate use of Rule 11 of the Federal Rule of Civil Procedure, which regards frivolous or improper pleadings.³⁹ However, the fact-intensive nature of antitrust actions highly complicates the task of discovering the violation under Rule 11.⁴⁰ If the case is settled, the one-way fee shifting is usually removed in settlement negotiations. In addition, if the class action is dismissed (for example, in a pre-trial stage) or if the plaintiff loses the claim, each party bears its own litigation

³⁴ John M. Connor and Robert H. Lande, *Not Treble Damages: Cartel Recoveries Are Mostly Less Than Single Damages*, 100 Iowa L. Rev. 1997, 2001 (2015).

³⁵ John T. Rosch, Fed. Trade Comm’n Comm’r, Remarks to the Antitrust Monetization Commission, 9-10 (June 8, 2006) (citation omitted), https://www.ftc.gov/sites/default/files/documents/public_statements/antitrust-modernization-commission-remarks/rosch-amc20remarks.june8.final.pdf (last visited Aug. 11, 2016).

³⁶ See e.g. DANIEL A. CRANE, *THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT*, 58 (1st ed. 2011).

³⁷ Deborah R. Hensler, *Third-Party Financing of Class Action Litigation in the United States: Will the Sky Fall?*, 63 DePaul Law Review 2, 510 (2014).

³⁸ Clayton Act, 15 U.S.C. §§ 15(a).

³⁹ See, e.g. *Wigod v. Chicago Mercantile Exchange*, 981 F.2d 1510, 1523 (7th Cir. 1992) (the attorney was sanctioned, because he failed to interview prior counsel and available witnesses).

⁴⁰ See, e.g. William H. Wagener, *Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation*, N.Y.U. L. Rev. 78, 1892-93 (2003) (claiming that multifaceted nature of antitrust action makes the application of Rule 11 very complicated. Wagener also refers to Daniel E. Lazaroff, *Rule 11 and Federal Antitrust Litigation*, 67 Tul. L. Rev. 1033, 1043 (1993)).

costs. It therefore means that defendants would never be recompensed for frivolous lawsuits brought by plaintiffs.

Second, discovery rules are designed disadvantageously to the defendants due to asymmetric discovery costs. As a general rule, the parties are entitled to request a broad range of the discovery material from the opposing party that would reveal the admissible evidence.⁴¹ The discovery rules require a responding party to bear the costs of the other side's requests. The issue of concern is that plaintiffs are able to propound extremely broad and burdensome requests without the fear of retaliation from the other side.⁴² This is notable because a defendant (for example, a big corporation) routinely holds a broad latitude of documents and items (hard copies, electronic information, transactions and etc.), which might be geographically dispersed and dating back a decade or even more. A wide-ranging discovery usually also involves a significant amount of interrogatories and depositions, thereby creating a substantial financial burden on the defendant.⁴³ In addition, the defendant receiving a broad discovery request will be forced to pay close attention to the details of every element, as the disclosure material needs to be produced in a consistent and organized form.⁴⁴ In contrast with the defendant, the lead plaintiff(s) have a relatively small number of responsive discovery material, because the resulting harm of a class member is usually of low value. As a consequence, the related evidence can be collected and produced with little burden or expense. Another concern for the defendant is that plaintiffs might benefit from a tangible discovery (both fact and expert) even prior to class certification briefing.⁴⁵ If the case is prolonged, the defendant should take into consideration that the discovery costs increase in relation with the increase of time lags. Yet, it should be stressed that there is a possibility for a portion or all of the discovery costs to be shifted to the plaintiff if the requests are unduly burdensome for the defendant.⁴⁶ However, in reality the defensive counterclaim is very complicated. The judge often struggles to screen frivolous discovery requests, because the plaintiff has the ability to structure an antitrust claim in a way that prevents adverse effects in the future.⁴⁷

⁴¹ The Federal Rules of Civil Procedure allows the disclosure for oral and written depositions (Rule 28–32), interrogatories (Rule 33), production of documents and electronically stored information (Rule 34), and requests for admission (Rule 36).

⁴² See, e.g. *Boeynaems v. LA Fitness International, LLC* 285 F.R.D. 331, 334–35, 341 (E.D. Pa. 2012) (stating that plaintiffs had “very few documents” in comparison with the defendant’s “millions of documents and millions of items of electronically stored information”).

⁴³ For example, under Federal Rule of Civil Procedure 33(a), a party may serve on any other party up to 25 written interrogatories. The responses should be submitted within 30 days after service (Rule 33(b)(4)).

⁴⁴ Wagener, *supra* note 40, at 1895 (referring to Fed. R. Civ. P. 34(b) that obliges the documents to be produced “as they are kept in the usual course of business”).

⁴⁵ See, e.g. Robert E. Bloch & Joseph R. Baker, *Legal and Practical Considerations Influencing Whether and When to Opt Out of a Class Action*, 6 (2012), <https://www.mayerbrown.com/files/Publication/40fdd8df-11a0-46f6-8406-700ac93bc21b/Presentation/PublicationAttachment/933b5357-d218-4c4d-b53d-79f275f39f1f/12278.pdf> (last visited Aug. 2, 2018).

⁴⁶ See e.g. *Boeynaems v. LA Fitness International, LLC* 285 F.R.D. 331, 334–35, 341 (E.D. Pa. 2012) (noting that “discovery burdens should not force either party to succumb to a settlement that is based on the costs of litigation rather than the merits of the case”). Eventually, the Court warranted a cost shifting under Rule 26; thus, the parties had to share discovery costs incurred prior to class certification. Another example of discovery cost-sharing is *Schweinfurth v. Motorola, Inc.*, 2008 U.S. Dist. LEXIS 82772 (N.D. Ohio Sept. 30, 2008).

⁴⁷ Wagener, *supra* note 40, at 1897 (also referring to Frank H. Easterbrook, *Comment, Discovery as Abuse*, 69 B.U. L. Rev. 635, 638–39 (1989)).

Third, defendants may encounter the joint and several liability for the aggregated (treble) damages caused by all violators, with no right to contribution from co-violators.⁴⁸ If for example the claim is brought against 5 co-violators, and if 4 of them settle, the unsettled violator is potentially subject to the combined damages of the violation (damages of 5 conspirators multiplied by 3). Indeed, this situation incentivizes each co-violator to settle as early as possible to avoid the situation when all co-infringers have already settled and hence the final co-violator remains responsible for the combined liability of all the damages caused by the violators.⁴⁹

The skeptical view of class actions has been confirmed by judicial decisions as well. Throughout the history of antitrust case-law, the Supreme Court has given a broad function for class actions to secure the antitrust objectives. However, this attitude has changed in *Bell Atlantic Corp. v. Twombly*.⁵⁰ The Court asserted that class actions can force defendants to settle cases lacking merit.⁵¹ Furthermore, it was ruled that the judicial system lacks confidence in screening meritless cases.⁵² A few years before *Twombly*, in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*⁵³, the Court stated that courts are incompetent to manage the daily monitoring of antitrust litigation.⁵⁴

Despite the Court's skepticism, Davis and Lande argue that the *Twombly* decision has no merit in itself, because there was no empirical study conducted.⁵⁵ The Court made a modification for pleading standard (without any reasonable ground) that conflicts with the Federal Rules of Civil Procedure.⁵⁶ To facilitate support for class actions, Davis and Lande performed two studies of recent large and significant antitrust class action cases, combining 40 cases in the first study⁵⁷ and 20 additional cases in the second one.⁵⁸ According to the results of the combined 60 cases, the fear of a blackmail settlement was considered as unjustified alert: a large majority of cases have merit. The main assessment relies on a test of a probability of success: the amount of over \$50 million was considered above the nuisance value of a frivolous case.⁵⁹ It was found that the recovery was more than \$100 million in 60% of cases, while in only a few cases led to significantly less than \$50 million, and the smallest was \$30 million. Furthermore, 88% of the cases studied received at least

⁴⁸ *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)

⁴⁹ Terra Hittson and Jonathan H. Hatch, *Multi-Defendant Antitrust Litigation: Lessons Learned from In re: Automotive Parts Antitrust Litigation*, Antitrust Law Blog (2017), <https://www.lexology.com/library/detail.aspx?g=78755b7b-4d5f-4e15-8e42-7e213c0f225a> (last visited Aug. 15, 2018).

⁵⁰ 550 U.S. 544 (2007).

⁵¹ *Id.* at 558-559.

⁵² *Id.*

⁵³ 540 U.S. 398 (2004).

⁵⁴ *Id.* at 414-415. See also Cavanagh, *supra* note 15, at 637.

⁵⁵ Davis & Lande, *supra* note 4, at 67.

⁵⁶ *Id.* at 3 (citing Joshua P. Davis & Eric L. Cramer, *Of Vulnerable Monopolists: Questionable Innovation in the Standard for Class Certification in Antitrust Cases*, 41 Rutgers L.J. 355, 399-400 (2009) (noting that the "Court arguably modified the pleading standard without following proper procedure")).

⁵⁷ Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F.L. REV. 879 (2008).

⁵⁸ Joshua P. Davis & Robert H. Lande, *Summaries of Twenty Cases of Successful Private Antitrust Enforcement*, Univ. S.F. Law Research Paper No. 2013-01 (2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1961669 (last visited Aug. 2, 2018).

⁵⁹ Joshua P. Davis & Robert H. Lande, *Toward an Empirical and Theoretical Assessment of Private Antitrust Enforcement*, 36 Seattle U. L. Rev. 1269, 1279 (2013) (in this paper the authors are further clarifying the study on combined sixty cases).

one validation that the plaintiffs' case was meritorious.⁶⁰ Moreover, a federal judge approved all the discussed settlements as fair, reasonable, and adequate.⁶¹ In order to reinforce the results, Davis and Lande point to cases where class attorneys earned praise from judges and therefore were awarded significant amounts in damages.⁶² To a similar extent, Hensler argues that the *in terrorem* effect—when frivolous class action forces defendants to settle—lacks empirical proof, and if there is any impact, its magnitude is likely minimal.⁶³ She criticizes corporate lobbyists for disregarding the empirical data by the RAND institute and the Federal Judicial Center estimating that only around 12% of class actions against insurers resulted in class-wide remedies, and that 13% of all class complaints in federal courts led to a class certification and settlement. Hensler further supports her claim based on the following points. First, the attorney in *American Express v. Italian Colors Restaurant* stated that only 20% of 'putative class actions are certified.'⁶⁴ Second, the potential of frivolous actions is significantly diminished, because the Supreme Court has increased the requirements for proving certification.⁶⁵ It is important to stress that Hensler does not distinguish estimations for antitrust collective actions, which are the most relevant for a discussion in this Chapter. Nevertheless, there is no reason why the above-mentioned reasoning should be somewhat different for antitrust cases. History has shown that courts in antitrust cases apply equal (if not stricter) evidentiary requirements for class certification.⁶⁶

The public debate between these opposing views well characterizes the controversial nature of class actions in the United States. Ironically, even if a settlement agreement is assumed to have a merit, a series of additional controversies are claimed to occur in class actions: both in compensating victims/class members and deterring violators. The purpose of the following study is to determine how well antitrust class actions fulfill compensation objectives and to what extent they can facilitate deterrence of antitrust enforcement.

3.3 A CONTROVERSY OF COMPENSATION IN SMALL-STAKES CLASS ACTIONS: A PERSPECTIVE OF ANTITRUST

Private antitrust litigation, and especially class actions, is facing broad criticism for failing to fulfill its compensatory goal. First, victims receive little or no compensation from class action lawsuits, but the plaintiff bar is overpaid.⁶⁷ When victims do receive compensation, the distribution of the settlement fund can be financially worthwhile, because the administrative costs may consume the

⁶⁰ Davis & Lande, *supra* note 4, at 19-21. The types of validation of merits include the following (percentage of meritorious): 1) Criminal Penalty (28%); 2) Government Obtained Civil Relief (28%); 3) Defendants Lost Trial Related Case (25%); 4) Plaintiffs Survived or Prevailed at Summary Judgment or Judgment as a Matter of Law (23%); 5) Plaintiffs Survived Motion Dismiss (22%); 6) Class Certification for Litigation (60%).

⁶¹ *Id.* at 21-22.

⁶² Davis & Lande *supra* note 59, at 1282-1283 (mentioning *In re Cardizem CD Antitrust Litig.*, 332 F.3d 896 (6th Cir. 2003); *In re High Fructose Corn Syrup Antitrust Litig.*, 936 F. Supp. 530 (C.D. Ill. 1996); *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MD-1775, 2011 WL 2909162 (E.D.N.Y. July 15, 2011); *In re Air Cargo Shipping Services Antitrust Litig.*, No. 06-MD-1775, 2009 WL 3077396 (E.D.N.Y. Sept. 25, 2009)).

⁶³ Hensler, *supra* note 37, at 511-512.

⁶⁴ Transcript of Oral Argument at 5, *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013) (No. 12-133).

⁶⁵ Hensler, *supra* note 37, at 512 (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011)).

⁶⁶ See, e.g. *In Re Hydrogen Peroxide Antitrust Litigation* 552 F.3d 305 (3rd Cir. 2008).

⁶⁷ See, e.g. Edward D. Cavanagh, *Antitrust Remedies Revisited*, 84 Or. L. Rev. 147, 214 (2005) (stating that "[m]any class action suits generate substantial fees for counsel but produce little, if any, benefit to the alleged victims of the wrongdoing.").

entire recovery.⁶⁸ In addition, the class members usually recover only worthless coupons, or their award is distributed to unrelated charities.⁶⁹ As a counterclaim, the proponents of class actions assert that most criticism has been based on anecdotal evidence.⁷⁰ In order to contribute to the debate, this Chapter will assess the main controversies. The major criticisms that have been stated about private (class action) antitrust enforcement can be classified into three categories.

3.3.1 Class Members Obtain Little or No Compensation

According to the critical approach, there is no need to present empirical evidence of the failure of the compensation goal; it is predetermined that antitrust class actions generate little or no compensation to class members.⁷¹ One of the major issues is that indirect purchasers are prohibited from recovering antitrust damages at the federal level.⁷² By prohibiting these actions, the Court prevents a majority of financial victims from receiving compensation. The overcharge usually causes harm at different levels of distribution chain. The further down the chain, the smaller the harm is and thus there are less incentives to litigate individually. Therefore, it is programmed that many victims will be uncompensated, especially if they are end consumers.

Indirect purchasers, however, may recover damages in some state law actions.⁷³ But, it is highly debatable whether indirect purchasers have the ability to bring a lawsuit as financial victims. The potential problems can be well illustrated through the Canadian example. In 2013, the trilogy of Supreme Court's (SCC) decisions in *Pro-Sys Consultants Ltd v Microsoft Corporation*⁷⁴, *Sun-Rype Products Ltd v Archer Daniels Midland Company*⁷⁵, and *Infineon Technologies AG c Option Consommateurs*⁷⁶ ultimately affirmed the right of indirect purchasers to claim damages. Despite the new ability to proceed with class actions, indirect purchasers still face difficulties in proving their harm at the merits stage. An actual example of the complexity for indirect purchasers is underlined in *Sun-Rype*, where the SCC denied the certification of a class action, since there was no evidence that the indirect purchasers could self-identify. The claim alleged that the defendants engaged in a price fixing violation of high fructose corn syrup (HFCS) sold to direct purchasers, and that some of the overcharge was passed on to indirect purchasers, including end consumers.⁷⁷ The Court asserted

⁶⁸ See, e.g. Daniel A. Crane, *Optimizing Private Antitrust Enforcement*, 63 Vand. L. Rev. 675, 682-83 (2010) (asserting that "issuing them a check is often so expensive that administrative costs swallow the entire recovery").

⁶⁹ See, e.g. John E. Lopatka & William H. Page, *Indirect Purchaser Suits and the Consumer Interest*, 48 Antitrust Bull. 531, 554-55 (2003) (noting that "courts often turn to cy pres distributions of part or even all of the funds to worthy causes.").

⁷⁰ See e.g. Scott C. Hemphill, Janet L. McDavid, Andre J. Pincus & Ronald A. Stern, panellists, *Roundtable Discussion: Mark D. Whitener and Andrew I. Gavil, Moderators*, 22 Antitrust 8, 12-13 (2007) (The former ABA Antitrust Section Chair Janet McDavid noting that that "[the] issue [of class action abuse] was never directly presented in these cases, but many of the issues arise in the context of class actions in which the potential of abusive litigation is really pretty extraordinary"). However, the proponents of class actions critically reviewed this observation, given that any empirical study was set aside. For further discussion, see Davis & Lande, *supra* note 4, at 66.

⁷¹ See, e.g. Crane, *supra* note 68, at 678-90 (explaining the determined failures in static injuries because of a widespread overcharge in consumer cases and in dynamic injuries because of the complicated, if not impossible quantification of the dynamic efficiency loss).

⁷² *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 729-31 (1977) (asserting that indirect purchasers claims based on the "passing on theory" may punish the defendants twice for the same infringement).

⁷³ See, e.g. *California v. ARC Am. Corp.*, 490 U.S. 93, 105-06 (1989) (allowing indirect purchaser actions at the state level).

⁷⁴ 2013 SCC 57, [2013] 3 S.C.R. 477.

⁷⁵ 2013 SCC 58, [2013] 3 S.C.R. 545.

⁷⁶ 2013 SCC 59, [2013] 3 S.C.R. 600.

⁷⁷ 2013 SCC 58, at 4-5, 33, 64-65.

that direct purchasers had used HFCS interchangeably and indistinguishably with liquid sugar, thus making it impossible to define which product was eventually sold to indirect purchasing consumers.⁷⁸ It was concluded that the evidentiary standard was too high, because an ‘identifiable class cannot be established for the indirect purchasers.’⁷⁹ The Canadian example clearly demonstrates that identifying and compensating indirect purchasers of an antitrust overcharge might be very complicated, if not impossible at times.

Even if the real economic victims may be identified, the individual recoveries are usually so small that the administrative costs tend to consume the individual recovery.⁸⁰ An illustrative example is the Augmentin settlement of indirect purchasers that yielded \$7.134 million and, as a consequence, sent notices to 800,000 potential injured consumers of the anti-depressant drug Remeron.⁸¹ However, only 65,000 submitted proofs of claim, resulting in an average payout of \$109. Given that this number amounts to only 8% of all potential members, the remaining victims, like 92% of the effected consumers ‘absorbed their losses.’⁸² Another example is the *El Paso* settlement of indirect purchasers, who consisted of 13 million California consumers and 3,000 businesses, in total generating the \$1.4 billion value of the settlement.⁸³ Due to the substantial administrative costs, the individual distribution was financially unfeasible. As a result, it was decided to provide gas rate reductions in California in the upcoming two decades.⁸⁴ The most criticized part of the effectiveness of distribution was that the range of consumers changed dramatically from the time of the infringement and through the rate-reduction term.⁸⁵

Coupon settlements have been used as another undesirable scenario that fails to provide meaningful compensation to class members. The criticism has stemmed primarily from the fact that the redemption rates are very low. For example, in *In re Cuisinart Food Processor Antitrust Litigation*,⁸⁶ the claim rate was only 0.54%, while the actual redemption was even lower.⁸⁷ In *Perish v. Intel Corp.*⁸⁸, 500,000 coupons offering a \$50 discount on microprocessors generated only 150 coupons for class members. Low coupon redemption rates are notable because the redemption process imposes many restrictions, so that very few coupons can ever be redeemed. The best illustration was in *In re Domestic Air Transportation Antitrust Litigation*,⁸⁹ where the class action claimed a price fixing conspiracy. The settlement provided \$50 million in cash and \$408 million was granted in travel coupons. The usage of coupons, however, had many limitations. First, class

⁷⁸ *Id.*, at 65 (stating that it was impossible to “know whether the particular item that they purchased did in fact contain HFCS”).

⁷⁹ *Id.*, at 80.

⁸⁰ See, e.g. William H. Page, *Indirect Purchaser Suits after The Class Action Fairness Act*, in COLLECTIVE ACTIONS: ENHANCING ACCESS TO JUSTICE AND RECONCILING MULTILAYER INTERESTS?, 295 (Stefan Wrbka et al eds., 2012) (noting that “[i]t is very often impractical to distribute tiny individual damage awards to consumers at a reasonable cost”).

⁸¹ *In re Remeron End-Payor Antitrust Litig.*, Nos. Civ. 02-2007 FSH, Civ. 04-5126 FSH, 2005 WL 2230314, (D.N.J. Sept. 13, 2005). For further discussion, see Crane, *supra* note 68, at 684-85.

⁸² Crane, *supra* note 68, at 685.

⁸³ For further discussion, see, e.g. Robert H. Lande & Joshua P. Davis, *Benefits from Antitrust Private Antitrust Enforcement: Forty Individual Case Studies*, University of San Francisco Law Research Paper No. 2011-22, 77-78 (2008), <http://ssrn.com/abstract=1105523> (last visited Aug. 3, 2018).

⁸⁴ *Id.* at 84-86.

⁸⁵ Crane, *supra* note 68, at 686.

⁸⁶ 1983-2-CCH Trade Cas. 65,680 (D. Conn. 1983).

⁸⁷ See, e.g. THOMAS A. DICKERSON, CLASS ACTIONS: THE LAW OF 50 STATES, 9-40 (Lslf ed., 2016).

⁸⁸ No. CV-75-51-01 (Cal. Super. Ct. Santa Clara Co. June 22, 1998).

⁸⁹ 148 F.R.D. 297, 305, 308 (N.D. Ga. 1993).

members could not sell coupons to brokers or others willing to purchase them. In addition, tickets purchased with other promotions were excluded.⁹⁰ Second, the coupons were excluded during the blackout periods, such as Thanksgiving, Christmas and New Year's. Given such restrictions in place, less than 10 percent of the coupons were redeemed.⁹¹

As a counter-claim, the proponents assert that class actions usually result in substantial compensation to class members.⁹² For example, the Paxil and the Relafen settlements are taken as examples of producing significant recoveries for the class members.⁹³ As regards the claims of indirect purchasers, empirical analysis suggests that the administration costs amount to only 4.1%.⁹⁴ Moreover, if an abuse occurs it is mainly the fault of the judges, who should carefully exercise their control. Another interesting point is that individuals may not receive compensation not because of large attorney's fees, but because of inertia.⁹⁵ Neither critics nor proponents have provided sufficient empirical evidence that compensation issues are (un-)common or (a-)typical. Yet there have been some attempts to estimate the actual recoveries in small-value class actions.

A. An overview of empirical data on compensation in small-stake class actions

So far the existing empirical data builds up to a contrasting view on whether class action litigation and settlements provide meaningful compensation to victims. The discussion below summarizes the findings of the empirical studies in small-stakes settlements.⁹⁶ But it is aimed to crystalize the numbers that are applicable to antitrust cases. The results (summarized in Table 1) can be placed in three categories: showing (1) negative; (2) both positive and negative and (3) positive outcomes.

The studies tend to differentiate (directly or indirectly) between settlements with automatic distribution and those with claims-made settlement proceeds. Based on these studies, a distinction should also be made between the 'claiming rate' and the 'compensation rate.' The claiming rate (CLr) considers the number of class members who file claim forms to receive payments. The compensation rate (Cr) addresses when class members receive some kind of compensation, and usually applies to settlements with automatic distribution.

⁹⁰ *Id.* at 331.

⁹¹ See, e.g. James T. Power, *Comment: Tearing Down a House of Coupons: CAFA's Effect on Class Action Settlements*, 9 U. St. Thomas L.J. 3, 910 (2012) (citing Brendan J. Day, *Comment, My Lawyer Went to Court and All I Got Was This Lousy Coupon! The Class Action Fairness Act's Inadequate Provision for Judicial Scrutiny Over Proposed Coupon Settlements*, 38 Seton Hall L. Rev. 1085, 1100 (2008); James Tharin & Brian Blockovich, *Coupons and the Class Action Fairness Act*, 18 Geo. J. Legal Ethics 1443,1446 (2005)).

⁹² See e.g. Myriam E. Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. Pa. L. Rev. 103, 131 (2006) (telling that a significant portion of a common fund goes to class members).

⁹³ Davis & Lande, *supra* note 4, at 46.

⁹⁴ Davis & Lande, *supra* note 59, at 1307-08 tbl.II.

⁹⁵ CLIFFORD A. JONES, *Deterrence and Compensation in New Competition Regimes: The Role of Private Enforcement*, in NEW COMPETITION JURISDICTIONS: SHAPING POLICIES AND BUILDING INSTITUTIONS, 177 (Richard Whish & Christopher Townley eds., 2012).

⁹⁶ This discussion is well observed by other authors. See Brian T. Fitzpatrick & Robert C. Gilbert, *An Empirical Look at Compensation in Consumer Class Actions*, 11 N.Y.U. J. L. & Bus 4 (2015). In this paper, the study of Fitzpatrick and Gilbert has been expanded upon by the author's own research.

Table 1. Small-stake cases compensation data (1986–2015)

Negative-Sided Study			
Name of the study	Type of rate	Number of class action settlements (available results)	Results
Gramlich Study	Redemption rate of coupon settlements	12 antitrust cases (10 of them were consumer cases)	1) The average redemption rate was 26.3%. 2) In 10 consumer cases the mean redemption rate was 13.1%.
Mayer-Brown Study	Claiming rate	6 (different areas)	Claiming rates were the following: 0.000006%, 0.33%, 1.5%, 9.66%, and 12%, and 98.72%.
CFPB 2015 Study	Claiming rate	251 settlements (claim rates are available in 105 cases)	The <i>unweighted</i> average claims rate was 21%, and the median was 8%. The weighted average claims rate was between 4% and 11%.
Both-Sided Study			
Hensler Study	Compensation rate	2 small-stakes settlements (out of 6)	1) 35% out of 4 million class members received an average payment of \$5. 2) 90% out of 60,000 received an average payment of \$134.
Pace-Rubenstein Study	Not clearly defined (tentatively both compensation and claiming rates were calculated)	<i>1st Part:</i> 6 (out of 31 settlements on the federal docket). <i>2nd Part:</i> 9 (out of 57 found on the websites of major settlement administration companies)	<i>1st Part:</i> In 4 ‘automatic’ distribution settlements, the compensation fractions ranged from 72% (of 7,400 class members with an average payout \$35) to 99.5% (of 200 class members with an average payout of \$2,000). In 2 ‘claims made’ settlements, the claiming rates ranged from 20% (of 3,500 class members; average payout \$1,000) to 4% (of 1 million class members; payout of software worth \$20). <i>2nd Part:</i> 3 settlements had rates between 1% and 5%, four cases had rates between 20% and 40%, and two cases were above 50%.
Positive-Sided Study			
Fitzpatrick-Gilbert Study	Compensatory and recovery rates	15 (disputes on bank overdraft fees)	An average compensation rate is 55% (in 13 automatic distribution settlements) and 5% (in 2 claim-form settlements). An average recovery rate is 38% (available only on 13 automatic distribution settlements).

Negative-sided category

This category critically overviews the effectiveness of compensation distribution to class members. The data demonstrates that small-stake class actions fail to deliver sufficient compensation to class members. The first study was led by Gramlich in 1986 (‘Gramlich Study’).⁹⁷ He studied 20 antitrust settlements where class members had been paid in coupons, but only in 12 cases was he able to redeem information from the settlement administrators and the parties. He found an average redemption rate of 26.3%. In 10 settlement cases the plaintiffs were consumers and the average redemption rate was only 13.1%.⁹⁸ The study did not report whether settlements were distributed automatically, or with claims-made proceeds.

The second study was done in 2013 by the law firm Mayer Brown (at the request of the US Chamber Institute for Legal Reform).⁹⁹ The results should be approached with caution, because each law firm has an interest in protecting its own and its clients’ interests. Coincidence or not, but the claiming rates are far lower than in other studies. Mayer Brown conducted a study of 148

⁹⁷ Fred Gramlich, *Scrip Damages in Antitrust Cases*, 31 Antitrust Bull. 261 (1986).

⁹⁸ *Id.* at 274.

⁹⁹ Mayer Brown LLP, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions*, (2013), <https://www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf> (last visited Aug. 3 2018).

putative class action lawsuits filed in or removed to federal court in 2009, forty of which ended in settlements. Of these forty settlements, the authors found data on distribution (claiming) rates in 6 of them: 0.000006%, 0.33%, 1.5%, 9.66%, and 12%, and 98.72% respectively. The ‘astonishing 98.72%’, however, is not representative for small-stakes class actions because it involved the ERISA litigation with an average payout exceeding \$2.5 million.¹⁰⁰ The final conclusion of the study was that most class actions are dismissed, and those that settle typically provide few, if any, benefits to absent class members.¹⁰¹ The authors, however, did not provide any valuable information on the average payout of these settlements, except for the ERISA litigation.

The last study was done by the Consumer Financial Protection Bureau (‘CFPB 2015 Study’).¹⁰² The Bureau searched for consumer class action settlements involving financial products between 2008 and 2012. Out of 419 settlements detected on the Federal court sheet dockets, the claiming rates could only be found in 105 settlements.¹⁰³ The analysis estimated that 11 million class members received \$1.1 billion in compensation over the 2008-2012 period.¹⁰⁴ In addition, the study reported that an average claiming rate was 21%.¹⁰⁵ Despite being the most comprehensive study so far, it has been strongly criticized for failing to abide its own stated methodology and for obscuring evidence of huge variation in claims rates across different case categories.¹⁰⁶ Furthermore, the Report was accused of presenting a ‘rosy picture’, because 21% seems highly unlikely in large class actions where consumers have to fill out forms to obtain award; rather it likely has to be lower than 5%.¹⁰⁷ One of the reasons for the lack of clarity of the CFPB study is that the reported rates are reflected in an aggregate average.

Both-sided category

This category reflects neutral results, whereas small-stake class actions can both provide proportionally sufficient and insufficient recoveries to class members. In 1999, prof. Hensler and her co-authors (‘Hensler study’) conducted a study where 6 class action settlements provided valuable information on compensation, yet only 2 of them were regarding small-stakes settlements.¹⁰⁸ In the first settlement, only 35% (out of 4 million) received compensation with an average payout of \$5. In the second one, over 90% of 60,000 class members received compensation with an average payout of \$134.¹⁰⁹ However, it is unclear what proportion of the harm victims

¹⁰⁰ See Final Order, *In re Beacon Assoc. Litig.*, No. 09-cv-777, 11 (S.D.N.Y. May 9, 2013) PACER No. 77-2. It represents the Madoff Ponzi scheme: a potentially huge individual claims can be made. In present case, the individual recovery on average was over \$2.5 million. It is unsurprising that 470 (98.72%) class members decided to submit a claim.

¹⁰¹ Mayer Brown, *supra* note 99, at 12.

¹⁰² Consumer Financial Protection Bureau, *Arbitration Study: Report to Congress Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(A)* (2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf (last visited Aug. 3, 2018).

¹⁰³ *Id.* at 30.

¹⁰⁴ *Id.* at 27–28.

¹⁰⁵ *Id.* at 30.

¹⁰⁶ Jason S. Johnston & Todd Zywicki, *The Consumer Financial Protection Bureau’s Arbitration Study: A Summary and Critique*, Mercatus Working Paper, 42-46 (2015), <http://mercatus.org/sites/default/files/Johnston-CFPB-Arbitration.pdf> (last visited Aug. 3, 2018).

¹⁰⁷ *Id.* at 43. The authors base their claim on other empirical studies that are also presented in their analysis (also discussed in this paper): Hensler study and Mayer Brown study.

¹⁰⁸ DEBORAH HENSLER ET AL., *CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAINS* (1st ed., 2000).

¹⁰⁹ *Id.* at 184, 204–05, 310, 359, 549–50.

received. The study notes that settlements were distributed through automatic distributions in both cases.¹¹⁰

The second study was undertaken by Pace and Rubenstein ('Pace-Rubenstein Study').¹¹¹ The study searched for distribution rates in federal docket databases and found available information in 6 cases.¹¹² In 4 cases, where the monetary awards were distributed automatically, the compensation/fraction rate ranged from 65% (of 4,800 class members with an average payout of \$35) to 99.5% (of 200 class members with an average payout of \$2,000).¹¹³ In two 'claims made' settlements, the rates were far lower than in automatic distribution cases: 20% (of 3,500 class members; average payout of \$1,000) and 4% (of 1 million class members; average payout of \$30 in the form of software).¹¹⁴ The second part of their project sought to determine distribution data from settlement administration companies. Although 57 class actions were identified, relevant information was detected only in 9 cases.¹¹⁵ 3 settlements had rates below 5% (two of which were below 1%), 3 cases had claiming rates between 20% and 40%, one at 35% (with around one million class members), 2 cases were above 50%, one at 65% (with 431 class members receiving an average award of \$5,000), and one at 82% (with 350 class members receiving an average award of \$2,600).¹¹⁶ It was concluded that claiming rates tend to be far lower in cases involving large classes, with the sole exception of 35% in a case of one million class members.¹¹⁷ The Pace-Rubenstein Study, however, did not reveal information about average payouts in each case, nor if distributions were automatic.

Positive-sided category

According to this category, class members receive actual compensation with high proportional value. The only study that falls into this category was performed by Fitzpatrick and Gilbert ('Fitzpatrick-Gilbert study').¹¹⁸ The authors analyzed 15 class action settlements against the largest banks in the United States.¹¹⁹ In these cases, the number of class members ranged from 28,000 to almost 14 million, with a mean of 2.1 million. The settlement funds ranged from \$2.2 million to

¹¹⁰ *Id.* at 276. In the settlement where only 35% of class members received compensation, payment was automatic for current and recent customers of the defendant. Others were required to file claim forms.

¹¹¹ Nicholas M. Pace & William B. Rubenstein, *How Transparent Are Class Action Outcomes? Empirical Research on the Availability of Class Action Claims Data*, RAND Inst. for Civil Justice, WR-599-ICJ (2008), billrubenstein.com/Downloads/RAND%20Working%20Paper.pdf (last visited Aug. 3, 2018).

¹¹² *Id.* at 23.

¹¹³ *Id.* In the first case, the claiming rate was 72% (applied to 7,400 class members), but only 65 percent (out of 7,400) of potential recipients actually realized any payment at all, because they failed to cash their benefit checks by the expiration date. A cy pres recipient received the value of all unredeemed checks in that case, thus resulting in essentially 100 percent of the fund being consumed. In the second case, the claiming rate was 99.6%. Almost all (99.5%) members of that class ultimately received some payment.

¹¹⁴ *Id.* at 24.

¹¹⁵ *Id.* at 29.

¹¹⁶ *Id.* at 32.

¹¹⁷ *Id.* at 32.

¹¹⁸ Brian T. Fitzpatrick & Robert C. Gilbert, *An Empirical Look at Compensation in Consumer Class Actions*, 11 N.Y.U. J. L. & Bus 4 (2015).

¹¹⁹ *Id.* at 779. All 15 cases were brought under Rule 23(b)(3). 13 settlements arose in the *In re* Checking Account Overdraft Litigation multidistrict litigation ("MDL 2036"), which was consolidated before the United States District Court for the Southern District of Florida (626 F. Supp. 2d 1333 (J.P.M.L. 2009)). Other 2 settlements derived from related federal lawsuits that were not part of MDL 2036 ((*Trombley v. Nat'l City Bank*, F. Supp. 2d 179 (D.D.C. 2011); *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 500 (N.D. Ill. 2011)).

\$410 million, with an average payout of \$63 million.¹²⁰ Out of 15, 13 settlements were automatically distributed and two of them were claim-form settlements. In these 13 cases, around 55% of class members realized compensation.¹²¹ Contrary to other studies, the authors sought to provide data on the recovery rates; that is, the money delivered to class members in light of damages suffered by the class. Accordingly, the average recovery rate was 38% (of all the settlements), and 42% if two incidentally low recovery rates were not included.¹²² Notably, the compensation rates were very low in the claim-form settlements: 1.76% and 7.39% respectively. It remains unclear, however, whether the chosen type of class actions (MDL 2036) are the most representative consumer class actions, and especially in the case of antitrust, as they regard the issues of debit card transactions.

B. The compensation effectiveness: A study of antitrust

It appears that this empirical data covers a large majority studies that deal with consumer class actions. Given that there are at least 300 class actions in federal courts alone every year¹²³, or thousands of class actions both in federal and state courts¹²⁴, it is incomprehensible that so few studies have been performed to appreciate the issue. Indeed, there is no possibility to draw evidenced-based conclusions, but the above data nevertheless provides valuable insights into the effectiveness of compensation. In what follows, the antitrust litigation cannot be juxtaposed with some categories of small-stake class actions. In some studies, small-stake class actions were considered even if only few hundreds of victims were included in the class and the recoveries were very high (*see* Mayer-Brown and Pace-Rubenstein studies). For example, the law and economics literature estimates that the average duration of a cartel is around 8 years.¹²⁵ In the case of antitrust monopolization, the wrongdoer (typically a large corporation) engages in anticompetitive conduct, and by using its widespread market power harms a significant amount of consumers.¹²⁶ Therefore, a typical small-value antitrust class action should meet the following criteria:

- The number of potential class members should start from thousands (1,000-9,999), but more likely from tens and hundreds of thousands (10,000 – 999,999) or even millions in some disputes;
- The average individual damage in antitrust class actions should be a small-stake, and thus range between low (100\$-300\$) or very low (1\$-100\$) estimations;

¹²⁰ *Id.* at 780-81.

¹²¹ *Id.* at 787, tbl.3. The compensation rate ranges between 37.27% and 70.48%.

¹²² The significantly lower recovery rates used postcard-sized checks (14.16% and 6.61% respectively).

¹²³ *See, e.g.* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 4, 818 tbl.1 (2010).

¹²⁴ Hensler, *supra* note 37, at 510.

¹²⁵ *See* Florian Smuda, *Cartel Overcharges and the Deterrent Effect of EU Competition Law*, Centre for European Economic Research, Discussion Paper No. 12-050, 19-21 (2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2118566 (last visited Aug. 3, 2018).

¹²⁶ *See, e.g.* Consumer Federation of America, *Microsoft Monopoly Caused Consumer Harm*, (1999) (stating that “U.S. vs. Microsoft trial leaves no doubt as to the magnitude and scope of harm that Microsoft has caused consumers ... monopoly forced consumers to overpay, denied access to new and better products, and stifled overall quality improvements. These are the classic symptoms of a monopoly, which is so fundamentally abhorrent to the American consumer”) (citation omitted) <http://www.consumerfed.org/pdfs/antitrustpr.pdf>. (last visited Aug. 3, 2018); Thomas G. Krattenmaker, et al., *Monopoly Power and Market Power in Antitrust Law*, Airlie House Conference on the Antitrust Alternative (1987) (explaining, for example, Bainian market power and Stiglerian market power that lead to a determined consumer welfare loss), <https://www.justice.gov/atr/monopoly-power-and-market-power-antitrust-law> (last visited Aug. 3, 2018).

Following this approach, the next point to address is what the compensatory success would mean in such class actions. Given the fact that a large majority of class actions are settled, the successful distribution should cover one of the following points ('*success presumption*');

- (1) *The actual compensation rate (ACr) is over 40% in automatic distribution settlements.*

The following proportion was determined after assessing the feasible sums available to class members. These amounts can be estimated when potential costs (administrative costs, attorney's fees and the costs related to inertia) are deducted from the actual settlement award. First, it should be acknowledged that many cases are settled for amounts closer to actual damages (award < 100%) rather than treble damages.¹²⁷ This is confirmed by an empirical study of Connor and Lande, which found that 80% of cartel cases generate less than single damages to victims and around 20% antitrust settlements produce initial (or more) damages in settlements.¹²⁸ Out of 71 cases studied, victims recovered less than 1% of damages in 4 cases and less than 10% in 12 cases. Only in 7 cases (10%) victims recovered more than double damages. The average recovery ratio was only 66%.¹²⁹ However, this study does not estimate what actual compensation victims receive after deducting attorneys' fees, administrative costs and other case-related expenses; only the total case recovery. According to the optimistic empirical study, administrative costs range only between 0.03% and 9.25%.¹³⁰ An average contingency fees range between 11% and 33%.¹³¹ The perceived costs of inertia include some unpredictable determinants (such as market changes, inflation and etc.), yet it would be fair to reserve the proportion of the settlement fund in a range between 5%-15%.¹³² Even though antitrust cases are rarely settled for higher than actual damages, the pursued compensation goal should aim for at least actual damages (award = 100%). Otherwise the compensation model is highly distorted and unjustifiable. Combining the upper limits of the estimates, the *realistic* effectiveness rate would be calculated under the following equation: 100% – 9.25% – 33.3% – 15% = 42.5%. Under this approach, at least 40% of combined damages should be available to class members, or roughly that 4 out of 10 class members should be able to recover the actual harm.

- (2) *The claiming rate is over 25% in claims-made settlements.* This is a different category because claims-made settlements estimate the number of class members who file claim forms to receive award. Therefore, claims-made settlements reflect the initiative rate that cannot be very high due the following reasons: (1) the preparation of claim form is burdensome and complicated, sometimes requiring notarization¹³³; (2) some class

¹²⁷ See, e.g. Cavanagh, *supra* note 15, at 644 ("Most cases settle for amounts that more closely approximate actual damages than treble damages"); DAVID BOIES, *COURTING JUSTICE: FROM NY YANKEES V. MAJOR LEAGUE BASEBALL TO BUSH V. GORE, 1997-2000*, 333 (1st ed., 2004) ("Although the antitrust laws provide for treble damages, most price-fixing class actions settle for some amount less than the actual overcharge").

¹²⁸ John M. Connor and Robert H. Lande, *Not Treble Damages: Cartel Recoveries Are Mostly Less Than Single Damages*, 100 Iowa L. Rev. 1997, 1998 (2015).

¹²⁹ *Id.* at 2009.

¹³⁰ See Davis & Lande, *supra* note 59, at 1307-08 tbl.II. Other commentators are much more critical and regard that the costs related with antitrust class action may consume a large portion of the settlement award (Crane *supra* note 68). Yet, it is assumed that optimistic results have ground.

¹³¹ See *infra* Section 3.2.3 for a discussion on the average rates of contingency fees.

¹³² There no evidence-based calculation to set this amount. Yet, the upper limit of 15% seems sufficient to cover the negative effects of consumer inertia.

¹³³ The U.S. introduced the complex scheme for the claim forms in order to prevent frivolous litigation, See, e.g. Ackerman, *supra* note 30, at 5.

members lost their proof of the purchase or forgot about the purchase. Thus, many class members have a lack of interest in preparing complicated claim forms for small awards, or they are simply unable to do so in practice. There is no well-grounded method to ascertain a compensatory success in such settlements. However, some useful insights may be derived from the Gramlich study that calculated redemption rates in coupon settlements. Although the report does not provide comprehensive material to set the success presumption, it is the only research study of claim rates in antitrust settlements. It was found that an average redemption rate is 26.3%.¹³⁴ In consumer cases, the average redemption rate was 13.1%. However, as previously, this Chapter takes into account the highest possible (realistic) amounts, even though estimates in consumer cases are lower. For the purpose of this analysis, it is instructive to set the lowest rate of 25% for the compensation success in claims-made settlements. There is no claim that this approach is ideal, but seemingly there is no alternative approach to define the success rate in antitrust claims-made settlements. After all, it would be difficult to declare the compensatory award as successful if the compensation is provided to less than 25% of victims.

The above-mentioned empirical studies estimated the compensation rates concerning how many members receive compensation (at least some kind), except for the Fitzpatrick-Gilbert study. After filtering irrelevant settlements for a typical antitrust settlement (either the payout is very high or the class size is very small), applicable compensation rates can be detected in 4 settlements, and in the Fitzpatrick-Gilbert study, encompassing 13 settlements. The first two were found in the Hensler study: 35% (of 4 million class members; average payout of \$5) and over 90% (of 60,000 class members; average payout of \$134). The other two were established in the Pace-Rubenstein Study: 65% (of 4,800 class members; average payout of \$35) and 35% (of over one million class members; the average payout is not defined). No part of the study sought to investigate *actual* compensation rates (Acr), i.e. how these payouts fared in comparison to the entire settlement fund. However, it is clear that compensation rates of 35% automatically fail to pass the presumption test, while the 65% rate is also unlikely to ensure actual compensation for 40% of class members. This can be explained by relying on the Fitzpatrick-Gilbert study that calculated both the compensation and recovery rates. The study found that the compensation rate is on average 59%, while the mean recovery rate is 43%.¹³⁵ As a consequence, the results fail to pass the success presumption test, since the Acr is around 24% on average.¹³⁶ Even the highest combined value of Acr (65% compensation rate and 57% recovery rate) fails to pass the success presumption test with the result of 39%.¹³⁷ The 90% compensation rate found in the Hensler study seems to be the only settlement result that could potentially fulfill the success test, since it is more realistic that 40% of class members would obtain actual compensation for harm suffered. However, the 90% is obviously an outlier rate. According to

¹³⁴ Gramlich, *supra* note 97, at 262-64.

¹³⁵ Fitzpatrick & Gilbert, *supra* note 118, at 787 tbl.3. The average proportion is not provided, but they can be easily calculated.

¹³⁶ In order to calculate the *actual* compensation rate (Acr), compensation rate (Cr) should be multiplied by the recovery rate (Rr). Therefore, the average $ACr = 0.59 \times 0.4 = 0.236$ ($\approx 24\%$)

¹³⁷ The highest combined values can be found in case No 8 (Fitzpatrick & Gilbert, *supra* note 118, at 787 tbl.3). Accordingly, $ACr = 0.6475 \times 0.5692 = 0.386$ ($\approx 39\%$).

some authors, the rates tend to get much lower where the case involves thousands of members and the mean award is low.¹³⁸ As mentioned before, large classes are very typical in antitrust cases.

From a broader perspective, the Fitzpatrick-Gilbert study sends a message to critics that some consumer class actions are not so ineffective: in fact, they do bring benefits to class members. The study is nevertheless primarily useful in small-stakes class actions relating to the disputes of overdraft bank fees, whereas the harm and the extent of that harm can be precisely identified via electronic services. But the same method is difficult to apply in antitrust cases where the ‘comfortable’ electronic format is rare. Notably, antitrust offenses are sophisticated frauds that make the quantification of overcharge very complicated even in the simplest cartel infringements.¹³⁹ In order to calculate an overcharge, economists should quantify the difference between the actual and the counterfactual scenario. Sometimes, there is no reliable data to precisely identify victims of overcharge. Thus, the automatic distribution of settlement fund is unattainable in practice. As a result, claims-made settlements are the second (and the last) option to directly compensate antitrust victims. However, the comparative empirical results show that the success test fails in this category as well. None of the studies found results that pass the success presumption, with one outlier in the Pace-Rubenstein study.¹⁴⁰ When settlements use claim forms, the representative rates range between 1% and 15%. Even in the Fitzpatrick-Gilbert study, where two claim forms settlements were analyzed in the context of overdraft fees, the results were only 7.39% and 1.76%. The next result to the success presumption is the CFPB study (21%), yet it was criticized for the claiming rate being too high.¹⁴¹ Needless to say, the extremely low claim rates in the Mayer-Brown study (0.000006% and 0.33%) seem to be possible in claim-form settlements. In fact, the rates can be very low when class members receive indirect notice about the possibilities to submit claim form, for example via media advertisements.¹⁴² Also, the rates can be negligible when obtaining the modest award requires producing years-old bills, notarization or mailing via postal services.¹⁴³ To sum up, claim-form settlements are principally framed to undercompensate class members.

The conclusion is that antitrust class actions fail to pass the test of success presumption. Even more disappointingly, the applicable rates are far away from the required proportions to achieve the compensation objective. Indeed, the compensation goal fails due to the complex nature of antitrust overcharge. First, it creates many difficulties in identifying and compensating class members. Second, administrating the case and distributing damages requires significant expenses. Third,

¹³⁸ Pace & Rubenstein, *supra* note 111, at 32 (noting that “[t]he cases with the highest claiming rates had very small class sizes (a few hundred class members), while those with the smallest distribution rates tended to have class sizes of several hundred thousand class members”).

¹³⁹ Patrick L. Anderson et al., *Damages in Antitrust Cases*, AEG Working Paper 2007-2 (noting that the overcharge in the simplest price-fixing violations “is not listed on the invoices nor shown on the accounting income statement.” The author also stresses that an “overcharge” is typical in price-fixing cases and monopolization, while “loss profit” is usual in predatory pricing, resale price maintenance and refusal to deal) (last visited Aug. 4, 2018), <http://www.andersoneconomicgroup.com/portals/0/upload/doc2066.pdf>.

¹⁴⁰ *Id.* at 32. The only case with large class (with around million class members) had more than a tiny distribution rate, i.e. 35%. The authors accept that this is an exception because the smallest distribution rates typically should “have class sizes of several hundred thousand class members.”

¹⁴¹ Johnston & Zywicki, *supra* note 106, at 43.

¹⁴² Alison Frankel, *A Smoking Gun in Debate Over Consumer Class Actions?*, Reuters (2014) (stating that the median claims rate for cases in the claims administrator (KCC) analysis was only 0.23%) (Aug. 4, 2018) <http://blogs.reuters.com/alison-frankel/2014/05/09/a-smoking-gun-in-debate-over-consumer-class-actions/>.

¹⁴³ See, e.g. *Redmond v. RadioShack, Corp.*, 768 F.3d 622, 628 (7th Cir. 2014) (Judge Richard Posner stating that “[t]he fact that the vast majority of the recipients of notice did not submit claims hardly shows ‘acceptance’ of the proposed settlement: rather it shows oversight, indifference, rejection, or transaction costs”).

settlement awards are usually very low and typically lower than actual damages. In such circumstances, antitrust class actions are programmed to provide very low proportional compensation to an insignificant number of victims.

3.3.2 The Compensation Mechanism is Framed to (Largely) Overpay Attorneys

The previous discussion has demonstrated that antitrust class actions fail to accomplish the stated goal of compensation for class members. This, too, might suggest that the remuneration of the class counsel should be adjusted accordingly. However, the practice is different.

Judges have a great deal of discretion in how they set fee awards in class action cases. Under Rule 23(e) of the Federal Rules of Civil Procedure, judges determine a reasonable fee that should be awarded to class counsel. Courts typically choose between two methods. One is the percentage-of-the-settlement method, according to which the judge bases the attorney's fee on the size of the settlement. The other is the lodestar approach, as a result of which the court calculates attorney's reasonable fee by multiplying the number of hours reasonably worked for the case by a reasonable hourly fee.¹⁴⁴ Throughout the years, the percentage-of-the-settlement approach (also referred as a 'contingency fee agreement') has been dominant over the lodestar method.¹⁴⁵ Indeed, the percentage method brings legal certainty and transparency. According to the Second Circuit Court of Appeals, this method 'align(s) the interests of plaintiffs and their attorneys more fully by allowing the latter to share in both the upside and downside risk of litigation.'¹⁴⁶ On the contrary, critics assert that the percentage method can yield outsized compensation to the lawyers who bring class actions.¹⁴⁷ It should be stressed that the Ninth Circuit adopted a presumption that 25% is the proper fee percentage in class action cases.¹⁴⁸ If we assume that the fee award is 25% on average, a contingency fee of \$2.5 million in a settlement of \$10 million does not seem so significant. But if the settlement award is in the hundreds of millions, the counsel can obtain very significant compensation. To that extent, the district court vividly explained that it would be 'generally not 150 times more difficult to program, try and settle a \$150 million case than [it would be] to try a \$1 million case'¹⁴⁹. In fact, the increase in the value of settlement depends directly on the size of the class rather than on the quality of counsel's legal services. Another concern is that few, if any class members have an appreciable incentive to monitor the behavior of the class counsel, because the harm is of low value. Furthermore, class counsel takes all litigation risks when he or she sign a contingency fee agreement. Thus, the lawyer is empowered to negotiate the terms of the settlement and to set own fees. It can be argued that there is no feasible mechanism to monitor attorney's compensation, unless the judge determines the fees to be excessive and rejects the settlement as unfair. However, they are often satisfied with the agreed settlement, because they clear complex

¹⁴⁴ See e.g. *Trans World Airlines Inc v Hughees*, 312 F Supp 478, 482 (S.D.N.Y. 1970); *City of Philadelphia v Chas. Pfizer & Co, Inc* 345 F Supp 454, 484 (S.D.N.Y. 1972).

¹⁴⁵ See, e.g. Fitzpatrick, *supra* note 123, at 832

¹⁴⁶ See *McDaniel v. County of Schenectady*, 595 F.3d 411, 419 (2d Cir. 2010).

¹⁴⁷ See, e.g. Cavanagh, *supra* note 67, at 214 (stating that "[m]any class action suits generate substantial fees for counsel but produce little, if any, benefit to the alleged victims of the wrongdoing").

¹⁴⁸ *Staton v. Boeing Co.*, 327 F.3d 938, 968 (9th Cir. 2003) (citing *Hanlon v. Chrysler Corporation*, 150 F.3d 1011, 1029 (9th Cir. 1998)).

¹⁴⁹ *In Re NASDAQ Market Makers Antitrust Litigation*, 187 F.R.D. 465, 487 (S.D.N.Y. 1996) (Opinion Robert Sweet, District Judge).

antitrust class actions from the docket. But what does the empirical data tell about the real values that go to the plaintiff bar rather than class members?

A. An overview of empirical data on attorney's fees in antitrust cases

Like in compensation effectiveness to class members, there is a lack of empirical data on the attorney's fees. To my knowledge, there are three studies that provide handful points regarding attorneys' fees in antitrust cases (Table 2).

Table 2. An overview of mean attorneys' fees

Name of the study	Number of cases	Attorney's fee percentage (average)	Actual recoveries (average in millions)
Lande-Davis study	30 antitrust	\$1<\$100 million – 28.3% (16 cases) \$100-\$500 million – 29.6% (9 cases) >\$500 million – 11.1% (5 cases)	\$1<\$100 million – 19.1 \$100-\$500 million – 56.5 >\$500 million – 183.3
Fitzpatrick study	30 antitrust (688 in total)	22% (no specific separation)	\$21
Eisenberg-Miller study	71 antitrust (689 in total)	25% (no specific separation)	\$15.1

The first case is a study of Lande-Davis that was able to ascertain the attorney's fee percentage in 30 cases.¹⁵⁰ Accordingly, in cases involving recoveries lower than \$100 million, the courts awarded class counsel a percentage of the recovery that was between 30% and 33.3%, with two incidental exceptions generating 15% and 7%. For the recoveries between \$100 million and \$500 million, the awards ranged between 20% and 33.3%, with a mean of 29.5%. In cases over \$500 million, the court awarded a much smaller percentage of the total settlement value, with a mean 11.1%.¹⁵¹ The study did not provide the actual average recoveries by attorneys. But this average can be easily calculated, as all data necessary to make simple mathematical calculations is available. Thus, the mean actual recoveries are the following (respectively by the category): \$19.1 million, \$56.5 million and \$183.3 million.

The second study was done by Fitzpatrick, who calculated the attorney's fees for all 2006-2007 federal class settlements.¹⁵² He claimed that (only) 15% of the settlement amount (or \$5 billion out of \$33 billion) went to the plaintiff bar in fees and expenses. But the figure for antitrust class actions is different. First, the mean fees were much larger during the same period, with an average of 25%.¹⁵³ Second, antitrust attorneys are the best compensated among other subject areas, with a mean of \$15.1 million per case. Even in securities cases—by far the most common class actions—the mean is \$13.1 million, while lawyers in other fields obtain much lower compensation, varying from \$0.11 million to \$2.26 million.¹⁵⁴

¹⁵⁰ Lande & Davis, *supra* note 57, at 902-03.

¹⁵¹ *Id.* at 911-12, tbl.7A,7B,7C (overviewing all the results).

¹⁵² Fitzpatrick, *supra* note 123.

¹⁵³ *Id.* at 831, tbl. 7.

¹⁵⁴ *Id.* The mean rewards represent the following numbers (in \$ millions): Labor and employment 2.25, Consumer 2.26, Employee benefits 2.2; Civil rights 1.1, Debt collection 0.11. The figures have been calculated on the basis of own calculations.

The third study of Eisenberg-Miller collected data from class action settlements in both state and federal courts, found from court opinions published in the Westlaw and Lexis databases between 1993 and 2008.¹⁵⁵ The study, in essence, demonstrates similar results to the Fitzpatrick study. Eisenberg and Miller found that the amount of recovery was 22% in antitrust cases. According to the study, the antitrust attorneys were second best paid (\$21.02 million) after the torts (\$30.15 million).¹⁵⁶

B. The evaluation of attorney's fees: risk and reward

The results suggest that antitrust class counsels are one of the most if not the most well paid practitioners among all legal fields. No study has yet managed to draw a line between over and underpayment of attorneys. The above-mentioned data debates for the percentage of the total settlement. However, the inaccuracies of the percentage method are well illustrated in the Visa/MasterCard case¹⁵⁷, where the class counsel received around \$250 million in recovery, but the fee percentage was only 6.5. Even though this is one of the largest antitrust cases in history, it does not change the fact that large cases are fixed to overcompensate the class counsel. Consequently, this Chapter argues that the counsel's compensation should be assessed under two key criteria: (1) how much attorneys spend; and (2) how much they obtain.

The existing empirical data does not provide the information needed to evaluate the total plaintiff's costs in antitrust class actions. Finding this information is probably hindered due to confidentiality restraints encompassing the relationship between the attorney and the client. However, this does not mean that the potential costs cannot be observed. First, in *In re Baby Products Antitrust Litigation* the Court approved the attorney's total litigation expenses to the amount of \$2.2 million, including the attorney's fees, expert fees and administration costs.¹⁵⁸ Second, defense attorneys report that average total costs for antitrust defendants typically range between \$5 million and \$10 million (even more in some cases).¹⁵⁹ As mentioned before, the plaintiff's expenses are much lower than the defendants' (largely due to broad discovery). Based on these observations, the following study will take into account the threshold of \$5 million, which seem to fairly reflect the maximum size of plaintiff's costs; larger amounts would equal the defendant's expenses.

It should first be observed that engaging in class action litigation is a risky step that demands significant investment, both in terms of resources and time. Indeed, not every action is successful. No information is supplied about how often attorneys lose. However, the plaintiff bar usually reaps significant awards. In fact, it is very complicated to define the appropriate risk-to-reward ratio. One option would be to set a cap that prevents attorneys from receiving too much compensation, but, at the same time, this cap represents the counsel's quality and ability to litigate antitrust case that involves substantial risk. The suggestion would be to limit the award that would be three times higher than the attorney's costs. The idea arises from the antitrust rule of automatic trebling, which permits tripling the amount of the actual damages. To the same extent, the plaintiff's counsel would

¹⁵⁵ Theodore Eisenberg & Geoffrey Miller, *Attorneys' Fees and Expenses in Class Action Settlements: 1993–2008*, 7 J. Empirical Legal Stud. 248 (2010).

¹⁵⁶ *Id.* at 262.

¹⁵⁷ See *Wal-Mart Stores, Inc. v. Visa USA & MasterCard Int'l*, 396 F.3d 96, 117 (2d Cir. 2005). See also Davis & Lande, *supra* note 59, at 1308; Lande & Davis, *supra* note 57, at 912 tbl.7C.

¹⁵⁸ 708 F.3d 163, 11 (3d Cir. 2013).

¹⁵⁹ Jaska Z. (January 29, 2016) personal meeting with partners of Schiff Hardin LLP (Ann Arbor office).

be entitled to three times the costs he spent on litigation. It would allow a balance between risk and award: if the case is won, the class counsel may invest in two subsequent cases of the same magnitude. Therefore, a balance between costs and award would equal the ratio of 1:3, which could be regarded as a fair compensation presumption. For example, if the court approves the case costs of \$2 million, the plaintiff's lawyer could receive \$6 million.

However, the current remuneration scheme fails to pass the compensation test. First of all, it should be observed that contingency fee payments on average range between \$15 million and \$75 million.¹⁶⁰ If the *upper* threshold of plaintiff's expenditure (\$5 million) is applied, the goal of fair compensation can be potentially fulfilled in the Eisenberg-Miller study (\$5 million: \$15 million). Yet it can occur only in exceptional cases, given that defense costs of \$5 million are atypical. In the other two studies, the compensation ratios range from 1:4 to 1:15. Considering these results, it appears undeniable that the remuneration scheme is created to overpay attorneys. It is beyond the compensation rationale, because, as discussed before, class members are highly undercompensated. To sum up, it would be wrong to say that attorneys are *largely* overpaid, especially when they take cases that others are afraid of, but an element of overpayment can be identified.

3.3.3 Class Actions do not Compensate the Real Victims

When the settlement fund is distributed to the class members, either automatically or upon submission of claim forms, then victims receive compensation through a direct payment. However, there is a realistic possibility that settlement funds can be non-distributable or unclaimed by victims. First, a number of absent class members may not be able to be located, and a further distribution of award is impossible.¹⁶¹ Second, even when their identities are known, it might be financially unfeasible to distribute awards to class members, because the case costs outweigh the individual awards.¹⁶² Third, even where direct payments are feasible, absent class members may fail to submit claim forms.¹⁶³

Concerns surrounding these problems led US courts to introduce the *cy pres* mechanism that is used to compensate victims indirectly. Under this scheme, the unclaimed awards are disbursed to *cy pres* recipients (usually to a charity) whose activities relate 'as near as possible' to the interests of absent

¹⁶⁰ The lower threshold is based on the lowest amount found in the Eisenberg-Miller study. The upper threshold is based on the Lande-Davis study that estimates the average payments \$55.7 million in the settlement category of \$100-\$500 and \$183 million in the category of >\$500 million. Given that there are not many cases in the category of >\$500 million, it was presumed that \$75 million would be a fair amount for the upper threshold.

¹⁶¹ See e.g. *In re Cuisinart Food Processor Antitrust Litig.*, 1983 U.S. Dist. LEXIS 12412, 8-10, 20-21, 29 (D. Conn. Oct. 24, 1983) (approving the class of more than 1.5 million Cuisinart purchasers, but less than one million received information about the proposed settlement).

¹⁶² See, e.g., *Lane v. Facebook, Inc.*, 696 F.3d 811, 821 (9th Cir. 2012) (noting that objectors "concede[d] that direct monetary payments to the class of remaining settlement funds would be infeasible given that each class member's direct recovery would be *de minimis*") (quoting *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011), cert. denied sub nom. *Marek v. Lane*, 134 S. Ct. 8 (2013) (mem.)); *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 475 (5th Cir. 2011) ("[T]here comes a point at which the marginal cost of making an additional pro rata distribution to the class members exceeds the amount available for distribution"). For further discussion, see Wasserman, *supra* note 33, 104.

¹⁶³ See, e.g. *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 176 (3d Cir. 2013) (The Third Circuit Court of Appeals noted that "many class members did not submit claims because they lacked the documentary proof necessary to receive the higher awards contemplated, and the \$5 award they could receive left them apathetic").

class members.¹⁶⁴ While this solution sounds laudable in theory, the *cy pres* remedy is subject to much criticism in practice.

The *first* criticism is that *cy pres* distribution fails to serve the interests of the absent class members: the courts approve the distribution of unclaimed funds to *cy pres* recipients that bear little relationship with class members who were directly injured by the violation.¹⁶⁵ For example, in *In re Motorsports Merchandise Antitrust Litigation*¹⁶⁶ a class action suit was brought by NASCAR fans alleging the price-fixing infringement by vendors of merchandise sold at NASCAR races. The court approved a *cy pres* distribution to 9 charitable organizations, including the Lawyers Foundation of Georgia and the American Red Cross, which had no tangible relationship with the absent class members.¹⁶⁷ In another antitrust case concerning a price-fixing conspiracy in the modeling industry, the district court approved a *cy pres* distribution to charities with a focus on women's issues, yet only around 60% of the class members were women.¹⁶⁸

The *second* criticism is that *cy pres* distributions create a conflict of interest between the class counsel and the absent class members. The class counsel's fee is typically calculated as a percentage of the entire class award¹⁶⁹, so he or she will be paid the same regardless of whether the funds go to class members or to a *cy pres* charity. All the problems encountered are best illustrated in a widely publicized *cy pres* distribution in *In re Baby Products Antitrust Litigation*.¹⁷⁰ The district court approved the settlement of the claims for \$35.5 million, under which the class members, who submitted a valid proof of purchase, would receive 20% of the actual purchase price, and the ones who did not would receive only 5 dollars.¹⁷¹ The settlement agreement was appealed, because it turned out that most class members failed to submit proof of purchase and therefore would receive 5 dollars each (generating approximately \$3 million), while around \$14 million would be paid for attorney's fees and approximately \$18.5 million was reserved for *cy pres* recipients.¹⁷² In turn, the Third Circuit Court of Appeals vacated the lower court's decision. More specifically, the Court confirmed the issue of the potential for conflict between the counsel and class members in *cy pres* distributions:

¹⁶⁴ See *Miller v. Steinbach*, No. 66 Civ. 356, 1974 WL 350, 2 (S.D.N.Y. Jan. 3, 1974). This case was the earliest use of judicial *cy pres* remedy in class actions. See also *In re Airline Comm'n Antitrust Litig.*, 307 F.3d 679, 682 (8th Cir. 2002) ("[T]he unclaimed funds should be distributed for a purpose as near as possible to the legitimate objectives underlying the lawsuit, the interests of class members, and the interests of those similarly situated" (citing *In re Airline Ticket Comm'n Antitrust Litig.*, 268 F.3d 619, 625-26 (8th Cir. 2001))).

¹⁶⁵ See, e.g., *In re Lupron Marketing and Sales Practices Litigation*, 677 F.3d 21, 33 (1st Cir. 2012) (noting the failure to distribute *cy pres* funds to organizations that "reasonably approximate the interests of the class"); *Superior Beverage Co., v. Owens-Illinois, Inc.*, 827 F. Supp. 477, 479 (N.D. Ill. 1993) (stating that the doctrine of *cy pres* permits for courts to distribute funds for public interest purposes other than the purposes underlying their claims).

¹⁶⁶ 160 F. Supp. 2d 1392 (N.D. Ga. 2001).

¹⁶⁷ *Id.* at 1395 (explaining that the "[c]ourt has attempted to identify charitable organizations that may at least indirectly benefit the members of the class of NASCAR racing fans").

¹⁶⁸ *Fears v. Wilhelmina Model Agency, Inc.*, No. 02 Civ. 4911 (HB), 2007 WL 1944343, 36-44 (S.D.N.Y. Jul. 5, 2007). For further discussion, see Wasserman, *supra* note 33, 120.

¹⁶⁹ See, e.g., *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 821 (3d Cir. 1995) ("Courts use the percentage of recovery method in common fund cases on the theory that the class would be unjustly enriched if it did not compensate the counsel responsible for generating the valuable fund bestowed on the class").

¹⁷⁰ 708 F.3d 163 (3d Cir. 2013) (The case aimed to resolve two consolidated collective litigation cases brought against Toys "R" Us, Babies "R" Us, and manufacturers of baby products).

¹⁷¹ *Id.* at 170-71.

¹⁷² *Id.* at 169-70.

1. 'Cy pres distributions also present a potential conflict of interest between class counsel and their clients because the inclusion of a cy pres distribution may increase a settlement fund, and with it attorneys' fees, without increasing the direct benefit to the class.'¹⁷³
2. '[T]he current distribution of settlement funds arguably overcompensates class counsel at the expense of the class.'¹⁷⁴

Thus, *Baby Products* is the best illustration of how the *cy pres* distribution can bring great rewards to the class counsel, but many class members remain largely undercompensated. Another undesirable class action settlement chosen by critics (although not concerning antitrust) is *Lane v. Facebook Inc*¹⁷⁵, in which class members received no compensation at all. The lawyers representing the class received about \$3 million and \$6.5 million of the funds were reserved for *cy pres* recipient(s).¹⁷⁶ There was no effort made to pay even a portion of the settlement fund to the absent class members. The most noteworthy criticism this decision attracted was that the *cy pres* award went to set up a new charity ('Digital Trust Foundation').¹⁷⁷ Ironically enough, Facebook's Director of Public Policy was one of three directors who ran the Foundation, and Facebook's attorney, together with class counsel, made up the Board of Legal Advisors. The settlement was affirmed by the Ninth Circuit, but not without controversy. Another anecdotal example is *Diamond Chemical Co. v. Akzo Nobel Chemicals, B. V.*¹⁷⁸, in which the court approved a *cy pres* award to create the Center for Competition Law at the George Washington Law School. The proposal was made by class counsel, an alumnus of the law school, who was later nominated by the Law School as a result of the *cy pres* award.¹⁷⁹

These cases clearly demonstrate that abusive *cy pres* awards occur in practice. However, critics routinely point to cases that attracted much reproach, but they remain silent as to whether frivolous *cy pres* awards occur in a high proportion of cases and whether they are typical. Thus, the proponents of class actions correctly note that if the figure is only true in 5% of the cases, the critics are overstating the issue.¹⁸⁰ This controversy can be assessed by establishing the presumption of failure, yet this approach requires reliance on some assumptions. First, it should be accepted that *cy pres* distributions would never be ideal. Second, fraudulent *cy pres* awards should be prevented from occurring more often than in incidental cases. Therefore, it seems feasible to establish a 20% failure cap (out of ten, more than two *cy pres* settlements are frivolous). While the one-tenth proportional failure seems to be the norm under the non-enforcement of unjust laws, another one-tenth can be justified due to the complexity in relating the nature of antitrust infringement to the activities of the *cy pres* charity. To sum up, the abusive *cy pres* awards are confirmed under two conditions: first, the *cy pres* entity is created solely for the benefit of the class counsel rather than for the benefit of class members; second, the money is distributed to a charity that is unrelated to

¹⁷³ *Id.* at 178

¹⁷⁴ *Id.* at 179.

¹⁷⁵ 696 F.3d 811 (9th Cir. 2012), *reh'g denied*, 709 F.3d 791 (9th Cir. 2013), *cert. denied sub nom.* Marek v. Lane, 134 S. Ct. 8 (2013).

¹⁷⁶ *Id.* at 817.

¹⁷⁷ *Id.* at 817.

¹⁷⁸ 517 F. Supp. 2d 212, 215 (D.D.C. 2007).

¹⁷⁹ See, e.g. Jennifer Johnston, *Comment, Cy Pres Comme Possible to Anything Is Possible: How Cy Pres Creates Improper Incentives in Class Action Settlements*, 9 J.L. Econ. & Pol'y 277, 292-93 (2013); Sam Yospe, *Cy Pres Distributions in Class Action Settlements*, 2009 Colum. Bus. L. Rev. 1014, 1027-28 (2009).

¹⁸⁰ Davis & Lande, *supra* note 4, at 42.

the injured class members. Under such circumstances, the criticism is confirmed if one or another or both abuses occur in more than 20% antitrust *cy pres* cases.

In order to assess the controversy, the study of Redish and two others ('Redish study') should be discussed further.¹⁸¹ The study found that federal courts granted or approved *cy pres* settlements in 35 cases between 2001 and 2008, and that 16 settlements can be regarded as faux class actions.¹⁸² Under these type of distributions, the *cy pres* measure is primarily used for the benefit of the class counsel rather than the absent claimants. Under such circumstances, there is no intention to compensate the absent class members. However, it is not defined whether there is a direct correlation with the unrelated *cy pres* entity, yet it does not change the fact that attorneys were overpaid in 16 (45%) *cy pres* settlements at the expense of the class. Under the failure test, the abuse numbers should be even higher. In some cases, the class counsel may be not overcompensated, but settlement funds may be distributed to unrelated charities.

However, there is no possibility to draw definite evidence-based conclusions from this study alone. It does give a preliminary benchmark that at least one fourth (4 cases out of 16) of fraudulent distributions relates to antitrust settlements between 2001 and 2008: *In re Airline Comm'n Antitrust Litig*¹⁸³; *In re Motorsports Merch. Antitrust Litig*;¹⁸⁴ *In re Compact Disc Minimum Advertised Price Antitrust Litigation*¹⁸⁵; *Diamond Chemical Co. v. Akzo Nobel Chemicals, B. V.*¹⁸⁶ However, as far as I am aware, prior empirical studies (including the Redish study) have not examined how many antitrust *cy pres* settlements there were between 2001 and 2008. Such analysis would allow for a comparison of the overall numbers with fraudulent actions. Despite the absence of key data, it can be argued that there is a high potential for frivolous actions to occur in more than 20% of antitrust cases. This is notable because antitrust distributions cover the largest portion of announced frivolous settlements, showing that a wide nature of antitrust overcharge is predetermined to attract much abuse when settlements take the *cy pres* form.

3.3.4 Synopsis

For the purposes of this analysis, the presumptions of success and failure have been presented. Following this approach, each criticism has been approved to a greater or lesser degree, and they are broadly consistent with each other. First, applying the 40% success presumption of the actual compensation rate in automatic distribution cases, it was determined that antitrust class actions largely fail to provide actual compensation for at least 40% of class members. In claims made settlements, the 25% success presumption also failed, because the mean rates range between 1% and 15%. Second, the compensation mechanism is programmed to overpay antitrust class counsel. After the assessment of the risk-to-reward ratio, it was found that attorneys obtain disproportionately high rewards. However, large overpayments were denied due the high risk ratio. Third, among all subject areas the frivolous *cy pres* distributions are most often announced in antitrust cases. It therefore means that there is a high possibility that frivolous actions occur in more

¹⁸¹ Martin H. Redish, et al, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 3 (2009).

¹⁸² *Id.* at 654-57 (the best illustration is in Figure 2 and Figure 4).

¹⁸³ 307 F.3d 679 (8th Cir. 2002).

¹⁸⁴ 160 F. Supp. 2d 1392 (N.D. Ga. 2001).

¹⁸⁵ 2005 WL 1923446 (D.Me. 2205).

¹⁸⁶ 517 F. Supp. 2d 212 (D.D.C. 2007).

than 20% of cases. To sum up, the compensation goal in antitrust collective litigation fails to a large extent.

3.4 A CONTROVERSY OF DETERRENCE

Even if it may sound paradoxical, the failure of the compensatory objective can be justified. Those who believe in economic efficiency argue that the real goal of small-stakes class actions is to maximize deterrence.¹⁸⁷ The class action device furthers deterrence by aggregating small claims that are too little to pursue individually. If the suit aggregates claims that might not have otherwise been brought, the infringer is confronted with the ensured collective litigation and hence with the increased magnitude of the liability. This, in turn, forces defendants to internalize more of the negative effects caused by the anti-competitive behavior, thereby pushing deterrence closer to the optimal level. Furthermore, where a large number of victims are automatically included in the class, the collective action alerts the society about the real value of the harm that is actually caused by the wrongdoer. Finally, by aggregating small-stakes claims, the class can ‘exploit the same scale economies as the defendant.’¹⁸⁸

The same rationale applies to the *cy pres* remedy, whereas absent class members usually receive no direct benefit from settlements. By distributing the funds to charities, the courts ignore the objective of compensating direct victims. Indeed, the principal purpose is to punish the wrongdoer and therefore to facilitate the deterrence objective: ‘[t]here is no indirect benefit to the class from the defendant's giving the money to someone else. In such a case the ‘cy pres’ remedy ... is purely putative.’¹⁸⁹ Put more generally, *cy pres* relief is desirable to force the internalization of illegal gains from the violation.

Some studies have questioned the effectiveness of class action litigation as a means of strengthening the deterrence of US antitrust rules.¹⁹⁰ It is simply considered as an insufficient device to achieve deterrence. If this conclusion is true, and given the failure of the compensation, class actions would benefit only the plaintiff bar and thus would be hard to justify. The proponents of class actions, again, deny the critics’ assertions. In order to appreciate the controversy, the effectiveness of deterrence is further discussed by weighing both sides in the class action wars. A comparative overview is hereafter highlighted in Table 3, and further discussed in this Chapter.

¹⁸⁷ See, e.g. Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. Pa. L. Rev. 2043, 2068 (2010) (“the only function small-stakes class actions serve is deterrence”); Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. Pa. L. Rev. 103, 105-07 (2006) (describing deterrence as the primary goal of class actions); RICHARD A. POSNER, *ANTITRUST LAW*, 266 (University Of Chicago Press, 2d ed. 2001) (stating that compensation should be a “subsidiary” to deterrence).

¹⁸⁸ Bruce Hay & David Rosenberg, *Sweetheart and Blackmail Settlements in Class Actions: Reality and Remedy*, 75 Notre Dame L. Rev. 4, 1380-81 (2000); David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 Ind. L.J. 561, 573 (1987) (claiming that class actions would “substantially diminish the cost advantage conferred on defendant firms by the private law, disaggregative process”).

¹⁸⁹ *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004) (citations omitted).

¹⁹⁰ See e.g., Crane *supra* note 68, at 691-98; Jonathan M. Jacobson & Tracy Greer, *Twenty-one Years of Antitrust Injury: Down the Alley with Brunswick v. Pueblo Bowl-O-Mat*, 66 Antitrust L.J. 273, 277 (1998) (arguing that class actions are used as a weapon to harm competitors).

Table 3. A comparative overview of deterrence debate points

Components of debate	Low deterrence value (Critical approach)	High deterrence value (Proponents' approach)
Class certification	The complicated certification procedure discourages many class actions.	No counterargument
Settlement agreements	Most cases settle – the deterrence value is low	Settlement agreements held defendants liable for approximately \$34 to \$36 billion. In the same cases, the DOJ imposed fines of only around \$11 billion.
Treble damages	Treble damages are typically removed in the negotiate process of settlements	The rule of joint and several liability force defendants to appreciate the amount of settlement
Corporations' liability	Defendants admit no liability in settlements	No counterargument
The relationship between public and private enforcement	Private cartel litigation is mostly followed by public enforcement. Thus, there is no deterrence value in private enforcement.	Around half of the alleged cartel infringements are initiated by private attorney generals.
The behavior of cartel managers	Corporate managers are not deterred by private litigation, because the time lag between the beginning of anticompetitive behavior and the judgment is too long. This period ranges between 5 and 10 years in an ordinary case, and it lasts over 5 years in settlements.	The most important criteria are the time lags between each cartel decision until the judgment. The data suggests a lag of between 3 and 4 years.
The effects on stock prices	The filing of a public enforcement action lawsuit reduces a defendant's share by 6%, while bringing a private lawsuit drops it by only 0.6%.	The total 6.6% stock drop is mainly related with the ensured follow-on litigation following the public enforcement action.

3.4.1 Low deterrence value

The core element of the class action lawsuit is the seeking of class certification. Due to the defendants' aggressive defense, antitrust class actions may reach the certification stage and be denied on the basis of failing to meet the requirements under Rule 23. Most importantly, the courts utilize strict evidentiary standards for the class certification in antitrust cases. In the *In Re Hydrogen Peroxide Antitrust Litigation*¹⁹¹, the 3rd Circuit established that the class certification requires 'rigorous analysis' of factual and legal evidence.¹⁹² This examination extends to assessing the testimony of both defendant's and plaintiffs' experts.¹⁹³ In addition, the standards for meeting the requirements under Rule 23 must be met by a 'preponderance' of evidence, rather than by a mere 'threshold showing'.¹⁹⁴ Therefore, there is high chance that defendants may succeed in opposing the class certification. In such case, the class action rule serves no use. As mentioned before, if a court certifies a class action, the large majority of class action lawsuits are settled; very few certified class actions proceed to trial. Consequently, treble damages are typically removed from the negotiation process and, after all, defendants admit no liability for having violated antitrust laws. From this issue flows another concern; that the private attorney general mechanism is not the right tool to facilitate deterrence. Lawyers make huge investments in antitrust cases and are thus the ones who

¹⁹¹ 552 F.3d 305 (3rd Cir. 2008).

¹⁹² *Id.* 320.

¹⁹³ *Id.* 307.

¹⁹⁴ *Id.*

decide when and whether to settle the case.¹⁹⁵ The individual damages caused by antitrust wrongdoers are typically very small, so few if any class members have an incentive to monitor the settlement negotiations. As a consequence, defendants are satisfied to ‘buy off’ the attorney in exchange for a favorable settlement agreement.¹⁹⁶ The opposite may also be true that the class counsel may coerce defendants to go into settlements out of fear, regardless of whether the claim has merit or not.¹⁹⁷ Thus, the settled class action lawsuits undercut the deterrence of class litigation. From a cartel perspective, a majority of class actions follow successful government actions.¹⁹⁸ Consequently, private attorneys use the efforts of public enforcers for their own benefit, for example, by reducing their own costs in expensive fact discovery proceedings.¹⁹⁹ According to this view, private actions are unable to cure public shortcomings like, for example, a low detection rate.

Another critical argument is that corporate managers (who should be foremost affected) are not deterred by private litigation. First, the time period between the beginnings of anticompetitive behavior until the judgment is considered the important deterrence criteria against corporate managers. In a typical antitrust case, the period may last from at least 5 years to more than 10 years.²⁰⁰ It is highly unlikely that corporate managers and mid-level executives will still hold their positions at the time of the judgement.²⁰¹ In case of settlement cases, the early deterrent impact is also improbable, because, even if the day of judgement is speeded up, the average time from the planning of anticompetitive conduct to any settlement payout is still more than 5 years.²⁰² Second, corporate managers are unlikely to internalize the wrongdoing immediately after launching the antitrust claim. As mentioned before, empirical studies showed that government antitrust actions reduce the share value by 6% on average, and filing a private lawsuit by around 0.6%.²⁰³ Thus, ‘[a] half-percent drop in market capitalization’ is highly unlikely to cause negative impacts on corporate managers.²⁰⁴

¹⁹⁵ See, e.g. *Kirkpatrick v JC Bradford & Co*, 827 F2d 718, 727 (11th Cir. 1987) (noting that class counsel is the main actor in the litigation, while the lead plaintiff is put in a passive position. In addition, class counsel is more skilled professionally to succeed in the certification stage).

¹⁹⁶ Linda S. Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, 64 Emory L.J. 399, 421 (2014).

¹⁹⁷ See, e.g. Joanna C. Schwartz, *The Cost of Suing Business*, UCLA School of Law Research Paper No. 15-19, 10-12 (2015), at 20-25, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2589208 (last visited Aug. 2, 2018); Thomas S. Ulen, *An Introduction to the Law and Economics of Class Action Litigation*, 32 Eur J Law Econ, 195-196, 201-202 (2011).

¹⁹⁸ See e.g., Tiffany Chieua, *Class Actions in The European Union?: Importing Lessons Learned from the United States’ Experience into European Community Competition Law*, 18 Cardozo J. Int’l & Comp. L. 123, 137 (2010) (stating that “majority of antitrust class actions are price fixing cases that typically follow a successful case brought by the DOJ or the FTC through public enforcement mechanisms” (citing Spencer Weber Waller, *The United States Experience with Competition Class Action Certification: A Comment*, 3 Canadian Class Action Review, 210)).

¹⁹⁹ See, e.g. William B. Rubenstein, *On What a “Private Attorney General” is – and Why it Matters*, 57 Vand. L. Review 6, 2150 (2006) (citing John C. Coffee “*No Soul to Damn; No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment*”, 79 Mich. L. Rev. 386, 435-436 (1981)).

²⁰⁰ Crane, *supra* note 68, at 691-92 (referring to Federal Court Management Statistics under which the average time from filing of the case to trial has steadily increased from around 18.5 months in 1996 to 24.6 months in 2007).

²⁰¹ *Id.* at 693.

²⁰² *Id.* at 696.

²⁰³ *Id.* at 695 (citing Kenneth D. Garbade et al., *Market Reaction to the Filing of Antitrust Suits: An Aggregate and Cross-Sectional Analysis*, 64 Rev. Econ. & Stat. 686, 686-71 (1982); John M. Bizjak & Jeffrey L. Coles, *The Effect of Private Antitrust Litigation on the Stock-Market Valuation of the Firm*, 85 J. Am. Econ. Rev. 436, 437 (1995)).

²⁰⁴ *Id.* at 695.

3.4.2 High deterrence value

While significant obstacles exist, proponents of class actions continue to claim that private antitrust enforcement provides meaningful deterrence. First and foremost, the supporters criticize theory-based assessments, which are more anecdotal than empirically based.²⁰⁵ The counterargument is supported by the empirical analysis. A comprehensive study on 40 successful antitrust class actions found that private recoveries are substantial enough to have significant deterrence power.²⁰⁶ Although the study attracted widespread attention on both sides of the Atlantic²⁰⁷, it was also the subject of much criticism.²⁰⁸ In order to reinforce the results, the authors performed a supplemental study of 20 antitrust cases.²⁰⁹ After the assessment of the total recoveries in 60 private cases through 1990-2011, the authors made the powerful claim that private antitrust enforcement probably deters more than the anti-cartel program of the DOJ Antitrust Division.²¹⁰ In a comparative context, it was found that victims received substantial compensation ranging from \$33.8 billion to \$35.8 billion, which is far higher than the combined DOJ criminal sanctions (corporate fines, individual fines, and criminal fines) totaling \$11.7 billion²¹¹, or \$15.4 billion if the deterrent value of a prison sentence is increased.²¹² Another study of over 100 international cartels prosecuted between 1990 and 2008 found similar results: a total of \$29 billion in announced private settlements, and \$7.6 billion for international cartel fines collected by the DOJ.²¹³ Contradicting to the critics' claim that class action litigation is usually preceded by government actions, the study revealed that out of 60 cases, 24 were not preceded by public enforcement and a further 12 had a different background than government actions.²¹⁴ Furthermore, in the first study, only 10 of 40 private cases were follow-ons to DOJ enforcement efforts, and 16 were discovered by private parties.²¹⁵ This figure, as authors observed, is consistent with another study, which found that only 20% of private cases were follow-on cases.²¹⁶ It may suggest that private enforcement precedes public enforcement as well.

²⁰⁵ Davis & Lande, *supra* note 4, at 7, 41, 43-46.

²⁰⁶ Lande & Davis, *supra* note 57, at 879-80.

²⁰⁷ See, e.g. Andrea Renda et al., *Making antitrust damages actions more effective in the EU: Welfare Impact and Potential Scenarios*, Final Report (2007), http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf (last visited Aug. 9, 2018); See also Judiciary Committee, *Open Access to the Courts Act of 2009: Hearing on H.R. 4115 Before the H. Comm. On the Judiciary*, 111th Cong. (2009) (written testimony of Professor Joshua P. Davis) (Aug. 1, 2018), <http://judiciary.house.gov/hearings/pdf/DavisO91216.pdf>.

²⁰⁸ See, e.g. Crane, *supra* note 68.

²⁰⁹ Davis & Lande, *supra* note 58.

²¹⁰ Davis & Lande, *supra* note 59, at 1272; Robert H. Lande & Joshua P. Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws*, *BYU L. Rev.* 315, 315 (2011).

²¹¹ Davis & Lande, *supra* note 59, at 1277 (“[f]rom 1990 through 2011, the total of DOJ corporate antitrust fines, individual fines, and restitution payments totaled \$8.18 billion. Valuing each year of prison at \$6 million and each year of house arrest at \$3 million adds another \$3.588 billion in total deterrence from DOJ’s anti-cartel cases. This combined DOJ deterrence totals approximately \$11.7 billion” (footnote omitted)).

²¹² *Id.*, at 1278 (“instead of our assumed disvalue of \$6 million for a year in prison, one could use an estimated deterrence value of \$12 million for a year in prison, and \$6 million for the deterrence effects of a year of house arrest instead of our \$3 million assumption. Doing this would raise the total estimate of deterrence from the DOJ criminal enforcement program from 1990 to 2011 from \$11.7 billion to \$15.4 billion” (footnote omitted)).

²¹³ John M. Connor, *Cartels & Antitrust Portrayed: Private International Cartels from 1990 to 2008*, AAI Working Paper No. 09-06, 51 (2009), <http://ssrn.com/abstract=1467310> (last visited Aug. 1, 2018).

²¹⁴ Davis & Lande, *supra* note 4, at 30.

²¹⁵ Lande & Davis, *Comparative Deterrence*, *supra* note 59, at 346. Lande & Davis, *supra* note 57, at 893 (illustrating that \$7.631 billion to \$8.981 billion came from the 15 cases that did not follow any government enforcement actions).

²¹⁶ Lande & Davis, *Comparative Deterrence*, *supra* note 210, at 346 (citing John C. Coffee, *Understanding the Plaintiff’s Attorney: The Implications of Economic Theory for Private Enforcement of Law through Class and Derivative Actions* 86 *Colum. L. Rev.* 669, 681 (1986)).

Therefore, the threat of private enforcement might even coerce wrongdoers to confess to the DOJ through the leniency program.²¹⁷

Furthermore, the proponents assert that critics misrepresent the actual time lags. The most important determinant is the time from the latest cartel manager's decision to continue cartel until judgement. To that extent, the data suggests that the applicable range is less than four years.²¹⁸ From the perspective of the defendant's stock value, it is asserted that private antitrust actions have a far higher impact than is originally envisaged. Although the filing of private antitrust lawsuits reduces the value of defendant's shares on average by 0.6%, the total 6.6% stock drop is mainly associated with the inevitable private litigation following the government action.²¹⁹ This is notable because the anticipated private sanctions are four times as costly as sanctions from public enforcers. There is also a claim that an average stock drop of 0.6% is surprisingly high, given that government action is typically followed by private litigation.²²⁰

3.5 THE EFFECTIVENESS OF DETERRENCE: A STUDY OF OPTIMAL DETERRENCE

There is no common standard of how to estimate the impact of small-stakes antitrust class actions on deterrence. This phenomenon is interpreted differently by both sides. Critics argue that the complicated certification procedure and the successive inevitable settlement diminish any deterrence value of class actions. Proponents customize the criteria of significant financial value of settlements. To give an additional flavor to this debate, the impact of class actions upon the standards known to the optimal deterrence theory is further examined. However, before going to this analysis, the formula proposed by Simard on estimating the deterrent value of small-stakes class actions (or negative-value claims) should be presented.²²¹ According to the author, the following equation characterizes the deterrent impact of class actions for damages:

$$EL_{CA} * P_{CA} + EC_{CA} \geq I_{CA}$$

EL_{CA} stands for the expected aggregate loss to the class; P_{CA} represents the probability of being held liable for the harm caused to the class; EC_{CA} stands for the expected costs in defending against the class actions lawsuit; I_{CA} represents the potential investment in safeguarding the harm to the class.

This equation is useful in defining the standards of deterrence in small-stakes class actions. However, Simard applies this formula to all types of class actions, without any emphasis on antitrust. In fact, antitrust violations are unique and cannot be easily compared with other violations (such as contract or labor suits), because they typically generate a widespread overcharge (often across different supply chains) to victims. Antitrust scholars have developed the optimal deterrence

²¹⁷ Cavanagh, *supra* note 15, at 634 (referring to S. D. Hammond, Acting Deputy Assistant Att'y Gen., An Overview of Recent Developments in the Antitrust Division's Criminal Enforcement Program (Jan. 10, 2005)).

²¹⁸ *Id.* at 60 (citing John. M. Connor, *Private Recoveries in International Cartel Cases Worldwide: What Do the Data Show?*, AAI Working Paper No. 12-03, 8, 12 (2012)).

²¹⁹ *Id.* at 28, (quoting Connor, *supra* note 218, at 11 (“[O]f the 52 international cartels that were fined by the DOJ during 1990-2005, 100% were followed up with private damages actions”)).

²²⁰ *Id.* at 29.

²²¹ Linda S. Simard, *A View from Within the Fortune 500: An Empirical Study of Negative Value Class Actions and Deterrence*, Suffolk University Legal Studies Research Paper Series, Research Paper 13-32, 4 (2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2331676 (last visited Aug. 19, 2018).

theory with a reason. Under this theory, the total amount of the sanctions should be equal to the infringement's anticipated 'net harm to others'²²², divided by the multiplication of probability of detection and proof of the infringement.²²³ The representative equation of the optimal deterrence theory is the following:

$$\text{Optimal deterrence (sanction)} = \frac{\text{Net harms to others}}{(\text{Probability of detection} \times \text{Probability of conviction})}$$

In this Chapter, a theory of optimal deterrence (sanction) is primarily examined from the perspective of cartel violations. The generally accepted view is that cartel managers behave as rational actors who conduct a cost-benefit analysis to see the magnitude of a likely penalty and the probability of being detected.²²⁴ Optimal deterrence is considered to be achieved when the imposed penalty outweighs the expected benefits of antitrust violation. However, the achievement of optimal deterrence would not mean that there will be no cartel violations. Still, the possibility remains that some infringers would engage in cartel violations, even if total fines were raised to the highest possible level. Violators will always take into account that detecting cartels and proving their harm is very complex due to their covert nature. Nevertheless, it is clear that optimal sanction would reduce cartel agreements to a minimum.

In order to define the optimal sanction, the appropriate multiplier should be set, which would define the threshold for optimal deterrence. First of all, it should be recalled that this paper applies the most optimistic empirical data that is available. Following this logic, the most optimistic combined proportion for detecting and successfully prosecuting cartels should be applied in the context of optimal deterrence theory. In short, the best possible multiplier would be up to 1/3.²²⁵ This proportion comes from the fact that potentially up to 33% of all cartels (under the most optimistic scenario) are detected.²²⁶ However, it does not mean all detected cartels lead to successful conviction. But, again, this paper is optimistic and presumes that the most optimistic combined rate of detection and subsequent successful conviction is up to 33%, which corresponds to the multiplier of <1/3. When applying this multiplier in the equation of optimal deterrence, the optimal penalty is equal to (at least) three times the 'net harm to others'. If this Chapter applied less optimistic rates, for example up 20% (<1/5) or up to 10% (<1/10), the optimal penalty would be equal to (at least) five or ten times the 'net harm to others'. Even if lower multipliers are seemingly more realistic in practice, as 33% is an outlier rate, this Chapter applies the highest possible percentage to make the outcome more feasible. To sum up, *at least* three times the 'net harm to others' would correspond

²²² WILLIAM BREIT & KENNETH G. ELZINGA, *ANTITRUST PENALTY REFORM: AN ECONOMIC ANALYSIS*, 11-12 (AEI Press 1986) (explaining the "net harm to others" standard).

²²³ William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. Chi. L. Rev. 652 (1983). Landes built this theory upon concepts developed by Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. Pol. Econ. 169 (1968).

²²⁴ Int'l Competition Network, *Defining Hard Core Cartel Conduct, Effective Institutions, Effective Penalties*, Conference Paper, presented for the ICN 4th Annual Conference, Bonn, 6-8 June 2005, <http://www.internationalcompetitionnetwork.org/uploads/library/doc346.pdf> (last visited Aug. 5, 2018).

²²⁵ See Robert H. Lande, *Why Antitrust Damage Levels Should Be Raised*, 16(4) Loy. Consumer L. Rev. 329, 335-337 (2004) (stressing that the multiplier was determined "without much evidence" but one can show that the multiplier of 2 or 4 is possible).

²²⁶ See John M. Connor & Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays*, 34 Cardozo L. Rev. 427, 486-490, Appendix tbl. 3 (2012) (summarizing the studies and opinions about the probability of cartel detection).

fairly well with optimal deterrence. In other words, if the sanction equal to three times of ‘net harm to others’ was achieved, it would be to a large extent in line with optimal deterrence.

Under the antitrust model, there are at least three interrelated components that enhance deterrence: corporate fines, personal fines and damages claims. Regardless of these components being different in nature, Davis and Lande consider that they can be converted into and compared in dollars. Accordingly, one year of prison corresponds to \$6 million and a year of house arrest to \$3 million of corporate liability.²²⁷ Therefore, relying on this estimation, all three components can be converted in the same value and applied in calculating optimal deterrence. However, it is highly debatable whether a year of prison can be converted in financial value (in any form). What is clear is that despite the risk of being punished through the different layers of the enforcement mechanism, there is no indication that the optimal deterrence has been achieved.²²⁸ This is reinforced by the fact that wrongdoers ‘tend to be recidivists.’²²⁹ The major question for this study is whether antitrust collective litigation pushes deterrence closer to an optimal level. Another important question is how corporations respond to the threat of litigation from small-stakes class actions. Indeed, the magnitude of the increase in deterrence depends upon the likelihood of antitrust class actions increasing the probability of cartel detection and conviction. Another factor is estimating how the total damages of class action lawsuits may correspond with the ‘net harm to others’. Each of the elements will be discussed in turn.

To start with, it should be stressed that class actions that follow after government actions have little or no effect on detection. By contrast, stand-alone actions have much higher impact on the probability of detection, and the consequent deterrence. According to the studies of Connor and Lande-Davis mentioned above, a large share (40%-50%) of private antitrust actions are stand-alone lawsuits, while follow-on cases are only around 20%-30%. Relying on this data, it can be claimed that class action lawsuits have a potential of substituting actions of public enforcers. However, another study by Connor and Lande found that out of 71 cartel damages cases from 1990 to 2014, 42 suits were follow-on damages actions (36 after U.S. government convictions and 6 after European antitrust authorities’ decisions) and 29 non-follow-on damages suits.²³⁰ However, it is not entirely clear whether all non-follow-on damages claims were stand-alone actions. What is clear from the data is that at least 60% of cartel damages claims are follow-ons. The study also concludes that the mean Recovery Ratio (size of antitrust settlements relative to damages) is higher in follow-on suits (81.2%) than in the non-follow-on cases (54.8%). These findings confirm what has been obvious for many years: stand-alone cartel actions are less attractive for private attorney generals. Smarter it is to wait until competition authorities issue their decision, because cartel cases are covert, requiring more investigation and financial capacities to prove the violation than for example monopolization cases. As it will be discussed later, public authorities are also better suited to deal with cartel cases. To sum up, private antitrust claims have a potential to substitute public enforcement in non-cartel cases, while this is highly unlikely when it comes to cartel violations. This conclusion is reinforced by the fact that only around 10% of potential class actions that are on

²²⁷ Davis and Lande, *supra* note 4, at 58-59.

²²⁸ See e.g. Maurice E. Stucke, *Morality and Antitrust*, Colum. Bus. L. Rev. 443, 470-74 (2006).

²²⁹ See e.g. John M. Connor & C. Gustav Helmers, *Statistics on Modern International Cartels 1990–2005*, AAI Working Paper No 07-01, 22-23, Appendix tbl. 11 (2007) (out of 283 modern private international cartels, fixing recidivists were found in 174 cases. Notably, 11 companies were caught 10 or more times fixing prices).

²³⁰ Connor and Lande, *supra* note 34, at 2010.

the radar of law firms are brought to the courts.²³¹ Therefore, private attorneys usually take low risk cases, while a majority of cases remain unprosecuted. This is not to deny the reality that public enforcers also take low-risk cases, as many cartels are detected and prosecuted after the leniency program. But this mechanism is the main concern for rational infringers that cartel violations may be detected. There is always a potential that a whistleblower (a co-infringer) will report violations to antitrust authorities. In addition, public enforcers have the enforcement resources that private enforcers lack: grand juries, lawyers specialized in cartel enforcement, and the support of the Federal Bureau of Investigation.²³² It then follows that government actors are able to create a considerable threat at the time when rational actors perform their cost-benefit analysis. Notably, the personal sanctions (criminal fines and jail sentences) against cartel managers foremost depend on how active the DOJ criminal enforcement is. The recent findings show some interesting trends in criminal enforcement. In 2017, the Antitrust Division of DOJ sentenced 30 individuals to prison – the highest number since 2012, while 9 criminal cases went to trial – a record number in the modern history of criminal antitrust enforcement.²³³ This is surprising considering that there were decreasing trends before 2017.²³⁴ On the one hand, it may suggest that current criminal penalties under-deter. On the other hand, it may show the maturity of public enforcement in prosecuting antitrust violations. In turn, it leads to increased fear of wrongdoers, i.e. facilitated deterrence. It is hard to assess the reality, as it remains unknown how many cartels remain undetected and whether this number is increasing or decreasing each year. Despite that, the truth is that effectiveness of public enforcement is the most important element affecting rational actors' behavior and stand-alone actions of private enforcers have little impact. However, this reasoning is partly against the empirical study by Simard, who asked every corporate counsel of Fortune 500 companies to rate his ability to anticipate the class action. For third generation small-stakes class actions, almost 90% of general counsels asserted that they had “moderate” or “high” ability to foresee that their company will be sued.²³⁵ However, corporate counsels anticipate their liability less frequently for first and second generation small-stakes class actions under the same determinants, respectively 25% and 65%.²³⁶ However, these findings should not be directly applied in the context of antitrust optimal deterrence theory. First, Simard in her questionnaire focuses on all types of class actions. Second, the results are subject to some errors as observed by the author.²³⁷ Third, it is unclear from the study

²³¹ Steven E. Fineman, Guest Lecture Complex Litigation Course, Stanford University (October 2015). The antitrust cases are potentially brought even less frequently.

²³² Bill Baer, *Public and Private Antitrust Enforcement in the United States*, Conference Paper, remarks prepared for delivery to European Competition Forum 2014, Brussels, February 11, 2014, 2, <https://www.justice.gov/atr/file/517756/download> (last visited Aug. 10, 2018).

²³³ The United States Department of Justice, *Doing Hard Time: The Antitrust Division Sets Records in Number of Individuals Sentenced and in Number of Criminal Trials*, <https://www.justice.gov/atr/division-operations/division-update-spring-2018/doing-hard-time-antitrust-division-sets-records-number-individuals-sentenced-and-number-criminal> (last visited Feb. 7, 2019).

²³⁴ Organisation for Economic Co-operation and Development, *Sanctions in Antitrust Cases*, Global Forum on Competition (2016), https://www.ftc.gov/system/files/attachments/us-submissions-oecd-other-international-competition-fora/sanctions_united_states.pdf (last visited Feb. 8, 2019). The following number of executives was sentenced: 45 (2012), 28 (2013), 21 (2014), 12 (2015).

²³⁵ Simard, *supra* note 221, at 26. According to the author, third generation small-stakes class actions has a basis for legal and factual support developed in previous litigation and the available information is the most comprehensive.

²³⁶ *Id.* at 24-26. First generation small-stakes class actions include unexplored legal theories and/or unproven factual scenarios. Second generation small-stakes class actions include legal theories and factual scenarios that have been previously argued in other cases but have not been definitively resolved.

²³⁷ *Id.* at 21. (for example, stressing that “all Respondents are vulnerable to class action suits, they have an incentive to downplay the validity of this costly regulatory device”).

how general counsels foresee their liability under stand-alone and follow-on antitrust actions for damages.

With regard to the probability of conviction, it mainly relates to the possibility of class actions to be certified. Even if the lawsuit is brought, its chances to survive the certification stage are far from good. In that regard, the RAND Institute estimated that only 14% of the state and federal class actions against insurers were certified.²³⁸ This proportion is likely to be similar, or even lower in antitrust class actions. This is notable because judges have become more reluctant to certify these actions during the last years.²³⁹ But if the class action is certified, the probability of conviction is 100% or very close to that proportion, since the vast majority of class actions is settled. The Federal Judicial Center, for instance, estimated that 13% of class actions are certified and further settled in federal courts.²⁴⁰

Another point regards the impact of class actions on the ‘net harm to others’. The standard calculation of the ‘net harm to others’ encompasses not only cartel overcharges, but also the allocative inefficiency.²⁴¹ At least two elements may be included in this context: the expected cost of litigation and actual damages. As regards the first element, the expected costs to oppose class certification, or lead the case after the certification may be valued in millions (largely due to expensive discovery procedures). According to the empirical data, the average time to settlement is around 3.3 years.²⁴² It might demand very high litigation expenses, with the possibility to consume up to \$10 million or more out of the defendant’s pocket.²⁴³ If a class is certified, the following step is to estimate the award of settlement. Even if trebled damages are typically waived in the settlement agreement, it is wrong to assume that the potential value of trebling is excluded in the settlement negotiation process. At its core, automatic trebling creates a good bargaining position for the plaintiff. The further assessment of deterrence weighs the components in Table 3 by assessing a rational actor’s position.

Certification: Given the complicated nature of certification, it is the primary element that rational agents weigh when conducting a cost-benefit analysis. Another point is to assess the judges’ reluctance to proceed with certain types of antitrust litigation. Only then may the rational agents assess the potential risks from settlement.

Settlement: Rational players must have forethought to the probability of conviction being almost 100% when the case is certified, because they will seek settlement, i.e. a lenient form of conviction.

²³⁸ Nicholas M. Pace and etc., *Insurance Class Actions in the United States*, RAND Institute for Civil Justice, xxi (2007), https://www.rand.org/content/dam/rand/pubs/monographs/2007/RAND_MG587-1.pdf (last visited Aug. 18, 2018).

²³⁹ See, e.g. *In re Hydrogen Peroxide Antitrust Litigation* 552 F.3d 305, 318 (3d Cir. 2008). For further discussion, see also Ariana Andreangeli, *Collective Redress in EU Competition Law: An Open Question with Many Possible Solutions*, 35 *World Competition* 529, 545-46 (2012).

²⁴⁰ Emery G. Lee III & Thomas E. Willging, *Impact of the Class Action Fairness Act on the Federal Courts*, Federal Judicial Center, 6 (2008), <https://www.fjc.gov/sites/default/files/2012/CAFA1108.pdf> (last visited Aug. 18, 2018). This study, however, does not give data about certification rates in antitrust class actions.

²⁴¹ Connor and Lande, *supra* note 226, at 455.

²⁴² See, e.g. Fitzpatrick, *supra* note 123, at 820 (also noting that Eisenberg-Miller study found averages 3.35 years in fee-shifting cases and 2.86 years in non-fee-shifting cases).

²⁴³ See *supra* note 159.

In turn, settled actions have a larger potential to internalize the damages caused due to far higher awards than government actions.

Trebling: Trebling is very important when negotiating terms of the settlement. However, the impact on the magnitude of a likely penalty is significantly reduced due to the fact that cases usually settle for amounts that are more close to actual damages than treble damages. Connor and Lande estimated that only around 20% of cartel settlements during 1990-2014 produced initial (or more) damages in settlements, while other cases generated less than single damages.²⁴⁴ An even more disappointing factor is that the average recovery ratio was only 66%.²⁴⁵ Indeed, there is little probability that rational actors calculate their illegal behavior on the basis of the potential value of trebling, because it is rarely applied in practice.

Liability: Defendants admit wrongdoing in settlements, but they usually admit no liability (moral or legal). Thus, there is no effect on a rational actors' behavior when they assess the costs and benefits of the infringement. In some cases, for example in *cy pres* settlements, the defendants may receive positive public response due to the significant 'donation' to charities.²⁴⁶

The relationship between two enforcement modes: Both enforcement methods take the less risky cases that have a relatively large chance of success. Yet, public enforcement, with its wide investigation tools, is better suited to detect wrongdoings than private enforcement. At the same time, private enforcement (especially class action lawsuits) is a more effective tool to increase the significance of liability when the case is certified.

Cartel managers: The managers foremost engage in a personal cost/benefit analysis of the probability of facing criminal or monetary sanctions. The data suggests that around 69% of individuals are convicted in DOJ proceedings.²⁴⁷ Furthermore, there is an existing fear that some corporations might prefer prison sentences for their own executives rather than giving significant payouts in private litigation. Thus, the time lags of infringements are not so valuable under optimal deterrence theory, because a criminal conviction can follow the manager even if he or she no longer holds the same position in the corporation.

Stock prices: The total 6.6% drop in share value is an aggregate of both enforcement modes. The simple model suggests that stock prices are driven by expectations²⁴⁸, thereby suggesting that the anticipated private litigation may have immediate effects on deterrence. In this respect, it must be borne in mind that the actual drop of share value by filing a private suit should be higher than 0.6%, but there is no reliable method to determine the exact impact (proportions) on stock prices.

Based on these conclusions, one could argue that class action litigation extends the deterrence objective through the prism of optimal deterrence. It is probably true that government actors have

²⁴⁴ Connor and Lande, *supra* note 226, at 1998.

²⁴⁵ *Id.* at 2009.

²⁴⁶ Wasserman, *supra* note 33, at 101.

²⁴⁷ See John M. Connor, *Problems with Prison in International Cartel Cases*, 56 Antitrust Bull. 311, 43 tbl. 3. (2011) (For the entire 1990–2009 period the individuals after DOJ proceedings were convicted 158 times out of 228 (69%)).

²⁴⁸ For further discussion, see, e.g. Michael D. Hurd & Susann Rohwedder, *Stock Price Expectations and Stock Trading*, National Bureau of Economic Research Working Paper 17973 (2012), <http://www.nber.org/papers/w17973> (last visited Aug. 10, 2018).

more tools and resources than private litigators to increase the probability of detection. However, it is equally true that private litigation is more efficient in increasing the magnitude of a monetary penalty. This is because a class action lawsuit has the ability to aggregate the negative expected value claims, sometimes totaling in millions of class members. Even if these claims are low individually, the anticipated aggregate value may push the wrongdoer to internalize the cost of the harm caused closer to the optimal level. In fact, it is hard to imagine other tool that could impose the same high monetary value.

Hence, it undeniably appears that achieving optimal deterrence would fail if private litigation, and class actions especially, were not included in the scheme together with the other two indispensable elements of deterrence: corporate fines and personal fines. Despite having a high potential to extend the monetary liability, class action litigation faces crucial obstacles. First, the complicated certification procedure reduces the probability of conviction. If the class is certified, the case is typically settled for amounts closer to actual damages rather than treble damages. As shown before, low settlement values provide low proportional recovery to an insignificant number of victims, meaning that wrongdoers internalize a low cost for the harm caused. As a consequence, class action litigation is not so efficient in increasing the level of the ‘net harm to others’ as it may seem from the first blush.

When compared with other two elements, class actions only serve a *secondary* function in achieving the objective of optimal deterrence. The crucial point is that government enforcement deters rational offenders even before they engage in anticompetitive conduct, while private remedies are rather assessed when the investigation is started or the action is brought to the court. This is because damages actions are subject to many restrictions, while public enforcement is reinforced by the possibilities of employing extensive investigatory tools. In addition, criminal prosecution of cartel managers primarily depends on how effective public enforcement is. Thus, it is perhaps overly optimistic to claim that ‘*private antitrust enforcement probably deters more anti-competitive conduct than the US Department of Justice’s anti-cartel program*’²⁴⁹. For private remedies to serve a better deterrent function, and potentially the equal deterrent function as public enforcement, some amendments are needed. In order to increase the rate of detection, private enforcers should be provided with additional incentives. One option may be that public enforcers would provide investigatory support when a stand-alone action is brought. Another option is to allow a more lenient approach in certifying antitrust class actions.²⁵⁰ In order to increase the total fine of collective litigation, the settlement awards may be capped for higher than actual award (for example, requiring to settle for double damages). Hence, it may force the wrongdoer to internalize the higher cost of the harm caused.

However, this *hypothetical* scenario cannot be implemented in practice. First, state investigatory powers will need to support private actions financially and in terms of resources. There is no reasonable justification for this amendment, since government enforcers lack resources for prosecuting all potential actions of their own. Second, a robust policy on certification has become a central safeguard against abusive litigation. Hence, relaxing certification may exacerbate ‘blackmail

²⁴⁹ Lande & Davis, *supra* note 210, at 315.

²⁵⁰ One example is that flexibility would be given for aggregating different sub-classes.

settlement'. Third, capping settlement would jeopardize the free will of the parties to decide on the final outcome of the case.

Even if we suppose that this hypothetical scenario was implemented, it would not ensure optimal deterrence. One issue is that there the combined rate of detection and prosecution (the multiplier) will be enhanced, but this increase should be minimal, and not a 'game changer'. First, there is no guarantee that each class will be certified and that each case will collect sufficient evidence for proving damages. Second, capped settlements may have dissuasive effects for plaintiffs, since defendants may be more reluctant to settle in some cases, either before or after certification. This is because the ultimate damages may not differ much from treble damages, for example, if double damages were set. In fact, capped settlements may reduce plaintiffs' incentives to sue in cases where early settlements would not be predicted. Another point is that capped settlements would not ensure the penalty, which would correspond to the required level of fines: around triple net harm to others. Under the most optimistic scenario, it can be assumed that double damages will be awarded to class members. After the deduction of case-related costs (contingency fees, administrative and expert fees), there is a possibility that class members will receive high proportional awards, or even full awards in some cases. However, this level is far away from the optimal deterrence, which would require to award at least three times of 'net harm to others'. Therefore, the element of under-deterrence should be observed. This statement is contrary to the critics who claim that class actions deter too much.²⁵¹ One of the most popular views is that the plaintiff-friendly class action mechanism, especially the possibility of treble damages, incentivizes private attorneys to bring too many class action suits (both meritorious and not) that lead to over-deterrence, resulting from over-enforcement.²⁵² However, it was already shown that treble damages are in practice lower than single damages. Instead, this paper relies on the approach that over-deterrence would occur if one of the conditions was met: first, the sanction is set at too high a level; second, the enforcement activities, which defines the levels of the probability of detection and conviction, is excessive.²⁵³ Indeed, the analysis has clearly shown that none of the conditions are fulfilled by class actions.

In conclusion, it should be stressed that the debate over optimal deterrence theory mainly regards cartel infringements. However, it does not mean that the private attorney general serves the same deterrent effects in other type of infringements, for example in case of monopolization. The fact that at least 90 percent of all federal antitrust cases are private actions is of crucial importance. It therefore suggests that private attorneys general bring much needed deterrence to antitrust enforcement, especially when public enforcers have neither the time nor the resources to prosecute all anticompetitive conduct. However, another viewpoint is that the effectiveness of cartel prosecution is the most important determinant factor in assessing the deterrence model. Indeed, hard-core cartels require much more attention due to their covert nature. If the probability of detection is low, such a system cannot be considered to provide much deterrence. To sum up, the effective anti-cartel deterrence system should be a function of three equal components acting together – competition authorities' fines, private (class action) damages claims and personal fines.

²⁵¹ See, e.g. JOHN C. COFFEE, *ENTREPRENEURIAL LITIGATION*, 134 (Harvard University Press 2015).

²⁵² Antitrust Modernization, *supra* note 16, at 247. In order to illustrate, the Commission noted that "some have argued that treble damages, along with other remedies, can over-deter some conduct that may not be anticompetitive and result in duplicative recovery. No actual cases or evidence or systematic over-deterrence were presented to the Commission, however."

²⁵³ Bucirossi et al., *Deterrence in Competition Law*, LEAR Study Discussion Paper No. 285, 6 (2009), <http://www.sfbtr15.de/uploads/media/285.pdf> (last visited Feb. 19 2018).

Under the current scheme, however, the private antitrust remedies are framed to serve only a secondary function.

3.6 CONCLUSION

The research question of this Chapter was the following:

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

When addressing this question, it was found that antitrust class actions have not been as effective as theory predicts them to be. Building on this, the following findings were made.

1) The compensation goal in antitrust collective litigation fails to a large extent

This Chapter presented the success and failure presumptions of compensation. By applying the actual compensation rate of 40% in automatic distribution settlements and a 25% claiming rate in claims-made settlements, it was found that antitrust class actions fail to pass the defined threshold in small-stakes class actions. The class action device is determined to provide very low proportional compensation to a low number of victims due to the unique nature of antitrust litigation: widespread overcharge, high administrative fees, expensive counterfactual assessments and low settlement awards. Attorneys' overpayment has also been confirmed. Despite of class members remaining largely undercompensated, the class counsel usually reaps significant rewards without any connection to the (lack of) success of the distribution. It was argued that amounts higher than three times that of the expenditure costs can be already considered as overpayment. Consequently, the empirical data proved that the class counsel typically receives higher proportional compensation, which sometimes can even be tens of times higher compensation than the expenditure. In order to appreciate the *cy pres* controversy, the 20% failure presumption has been set; that is, if more than two out of ten *cy pres* settlements are frivolous. Because of the limited data available, there was no attempt to draw definite conclusions. It was found that dubious *cy pres* distributions most often occur in antitrust cases, suggesting that a majority of antitrust distributions attract dubious actions.

2) Antitrust collective actions, in any form, produce small impacts on the objective of deterrence

This Chapter assessed the impact of antitrust class action on deterrence through the elements of the optimal deterrence theory: probability of detection, probability of conviction and 'net harms to others'. It was found that the fulfilment of optimal deterrence requires three equal components acting together: corporate fines, personal sanction and damages actions. When compared with two other elements, the current scheme allows for private enforcement to serve only a *secondary* function.

It was determined that the DOJ enforcement has more effect on the probability of detection, but the class action litigation may score higher points in maximizing the monetary penalty. However, the full effect of deterrence is diminished due to the following factors. First, the courts are reluctant to certify antitrust class actions. Second, cases are settled for amounts closer to or around the actual

damages rather than treble damages. Third, class members receive less than actual damages, meaning that infringers internalize only low costs from the harm caused. Due to these obstacles, class action litigation does not deter rational actors during or before the antitrust violation; it has an effect only when the investigation is started.

However, even if private remedies were enhanced by additional support from public enforcers, by relaxing rules on certification and by capping settlements for higher than actual awards, optimal deterrence would not be achieved. It is highly questionable whether attorneys would bring more cases under the proposed model, as capping settlements may bring dissuasive effective for attorneys' incentives to sue. Therefore, the proportion of detecting and convicting cartels would remain similar, as in the current mechanism. Another viewpoint is that capped settlements would potentially ensure full award to class members, but this value is much lower than the optimal penalty, which necessitates awarding the damages at least as three times of the 'net harm to others'.

3.7 APPENDIX: SUMMARY OF AMENDMENTS

Page	Description of amendment	Explanation
51	Amendment in the title of the Chapter, adding "the United States".	It gives more clarification about the structure of the dissertation.
59	Additional data on the rates of class certification.	This important data was overlooked in the published article. Additional reference is added, numbered 34.
59	Additional discussion on the meaning of abusive litigation, based on the Hensler's study.	It gives a more insightful picture about abusive litigation if a class action lawsuit is funded by third party funders. Additional reference is added, numbered 37.
61	Additional discussion on the joint and several liability.	The discussion on the joint and several liability—deterrence-based measure—better explains the potential of abusive litigation. Additional references are added, numbered 48-49.
62	Hensler's view in favor of class actions is added.	Hensler gives a more insightful picture, as she supports the view that abusive litigation has less fear than perceived. For the amendment, additional references are added, numbered 63-66.
69	Additional statistics on the number of class actions both in federal and state courts.	This data gives a more comprehensive view about the actual numbers of class actions. Additional reference is added, numbered 124.
70	Additional data on the real value of treble damages after a settlement, based on the empirical study of Connor and Lande.	It gives more comprehensive data about the effectiveness of class actions in compensating victims. Additional references are added, numbered 128-129.
84	Simard's formula estimating the deterrent value of small-stakes class actions is presented.	It gives a more insightful view about the standards of deterrence in small-stakes class actions. Additional reference is added, numbered 221.
85	Explanation on optimal deterrence theory and its determinants.	Clarification helps to better determine the scope and boundaries of optimal deterrence. Additional references are added, numbered 225-226.
86	The approach of Davis and Lande is presented regarding the comparison of corporate fines, personal fines and damages claims in the form of US dollars.	It gives a more insightful picture about the standards of deterrence. Additional reference is added, numbered 227.
86	The possibility of class action lawsuits to substitute the actions of public enforcers is additionally discussed.	The findings of Connor and Lande give a more insightful view about the relationship between stand-alone and follow-on class actions. In addition, it provides important data regarding the recovery ratio (size of antitrust settlements relative to damages). Additional reference is added, numbered 230.
87	Additional data by the DOJ regarding the trends in criminal enforcement.	This data gives more insightful picture about the increased public enforcement, which helps to overview the activities of the Antitrust Division of DOJ. Additional references are added, numbered 233-234.
87	Additional empirical data on corporate counsel's ability to anticipate the class action.	The findings by Simard tell that corporate counsel can foresee class actions, and this potentially adds to deterrence. This is in contrast with the thesis author's view that "the strength of public enforcement is the most important element affecting rational actors' behavior and stand-alone actions of private enforcers have little impact". Therefore, Simard's view gives a more insightful picture to a general discussion in the dissertation. Additional references are added, numbered 235-237.
88	Additional figures on the rates of certification and settlements.	Additional data by the RAND institute and the Federal Judicial Center. Additional references are added, numbered 238-240.
89	Additional findings on the effectiveness of trebling.	It gives a more insightful analysis about the average recovery rates. Additional references are added, numbered 244-245.
91	Additional discussion on over-deterrence.	This was involved as the published article missed this important assessment. Additional references are added, numbered 251-253.

4 THE IMPACT OF CONTINGENCY FEES ON COLLECTIVE ANTITRUST ACTIONS: EXPERIMENTS FROM LITHUANIA AND POLAND*

Abstract:

Contingency-fee agreements are one—if not the only—tool that can be used to ensure that small-stakes collective antitrust actions are heard, yet they are subject to strong resistance from the European Commission. There is a concern that contingency fees could lead to abuses of the system or conflicts of interest, as has been seen in the United States. Contrary to the Commission's approach, two proactive member states—Lithuania and Poland—have introduced the possibility of using contingency fees in group litigation in order to facilitate group actions. Despite having a lot of potential, this Chapter will demonstrate that the introduction alone of contingency fees will not facilitate the compensation objective that is embedded in the Directive on damages actions. In addition, it will show that the safeguard policy against frivolous litigation is sufficient to limit the possibilities for litigation abuses, but it is ineffective for monitoring the individual behaviour of group representatives.

Keywords: antitrust, contingency fees, collective actions, compensation, abusive litigation

4.1 INTRODUCTION

Throughout history, class-action litigation has been a widespread phenomenon in the United States. After many struggles and political debates, this form of collective litigation is now slowly finding its own way into the European Union as well. Some member states have made changes in their national legal systems so that citizens and companies can collectively enforce their rights granted under the law. Furthermore, the European Commission adopted a Recommendation on collective redress¹ (which could prescribe a form of class actions) aimed at facilitating access to justice, while also proposing procedural safeguards to avoid incentives to abuse collective-redress systems.² According to the Commission, an example of such detrimental effects can be found in the US class-action system, which contains a ‘toxic cocktail’ of contingency fees, punitive damages, opt-out

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This Chapter is a revised version of the original published article. It includes the amendments in the introduction and conclusion to maintain the common approach of the PhD thesis. As regards the introduction, it includes additional sections: A. Research question and scope; B. Methodology and limitations; C. Overview of research material; D. Structure. With regard to the conclusion, it is amended to answer the research question of the Chapter. Reference n. 5 is added in order to give a more insightful picture on the methodology. Furthermore, the words “article” and “paper” have been changed with “Chapter”, also “EU policy” changed to the “European Commission's approach”. In addition, the numbering of sections has been changed in accordance with the common structure of the PhD dissertation. It should be stressed that the revised Chapter maintains the original journal standards: citation, style, punctuation and consistency. Moreover, the Section on the American system was moved out in order to avoid repetition with Chapter 3.

¹ 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, C(2013) 3539/3, 11 June 2013.

² 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”, C(2013) 401/2. According to the Communication, collective actions “must not attract abusive litigation or have effects detrimental to respondents regardless of the results of the proceedings. The European approach to collective redress must thus give proper thought to preventing these negative effects and devising adequate safeguards against them.”

schemes, and broad discovery rules.³ By choosing a careful approach, the Commission has limited the financial viability of collective litigation, in particular in cases involving multiple claims of low value.⁴ Contrary to the current Commission's approach, and with the intention of facilitating group actions, two proactive member states—Lithuania and Poland—have introduced group litigation procedures by importing some elements of the American ‘toxic cocktail’, in particular that a group advocate is allowed to sign a contingency-fee agreement with clients. Furthermore, a group member is allowed to perform the role of group representative.

Central to this work is the belief that valuable lessons can be learned in the area of competition law, where individual damages caused by wrongdoers are typically very small. This harm is often so small that the expected benefits outweigh the expected litigation costs. Therefore, the allowance for lawyers to act as private litigators through contingency fees is one of the most effective tools for making collective actions viable. Despite having a lot of potential to facilitate compensatory effectiveness, there is a concern that contingency fees could lead to abuses of the system or to conflicts of interest. This is notable because the individual harm is typically so small that few, if any, class members have an appreciable incentive to monitor the behaviour of the lead plaintiff and class counsel.

A. Research question and scope

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

The following steps are taken to address this question. Lithuanian and Polish group actions are presented, and both are compared with the European Commission's approach on collective redress and American class actions. Furthermore, the impact of contingency fees on compensation effectiveness in Lithuanian and Polish antitrust collective actions is discussed. By assessing the existing safeguards in both countries, the Chapter overviews their effectiveness to prevent abusive litigation, if collective actions are brought under contingency fees.

As regards the scope, Chapter 4 mainly analyses the impact of contingency fees on compensatory effectiveness in small-stakes collective antitrust actions. Lithuania and Poland are chosen as working examples because the group advocate is given a broad role in comparison with the few other EU member states where contingency fees are allowed in collective litigation. Furthermore, both states serve as a good basis for comparative analysis, because both are post-socialist countries that share a similar litigation culture and economic standards. To sum up, Chapter 4 aims to assess whether the availability of contingency fees has incentivized attorneys to bring antitrust collective actions. If not, it seeks to identify the reasons for this failure, and what potential these fees may have in the EU perspective.

³ See, e.g. European Commission, “Green Paper on Consumer Collective Redress—Questions and Answers”, MEMO/08/741, para. 9, available at <http://europa.eu/rapid/press-release_MEMO-08-741_en.htm>.

⁴ See, e.g. Christopher Hodges, “Collective Redress: A Breakthrough or a Damp Squibb?”, 37 *Journal of Consumer Policy* (2014), 67-89, at 83-84; Zygimantas Juska, “The Future of Collective Antitrust Redress: Is Something New Under the Sun?”, 8(1) *Global Competition Litigation Review* (2015), 14-24, at 18-23.

B. Methodology and limitations

In this Chapter, the analytical comparative approach is predominant. It is used to examine the relationships between the different elements of group actions in Lithuania and Poland. The main focus is on contingency fees and thereon the following elements: a) the relationship between the group representative (a member of the group or public entity) and the group advocate (acting as a private investor through contingency fees); b) the effectiveness of the existing safeguards against abusive litigation (“loser-pays” principle and the rules of professional ethics). Other elements that are compared include, *inter alia*, the following: a) identification before the court; b) the role of the courts; c) certification criteria.

The main limitation is that there have been no antitrust collective actions brought under contingency fees in either country. Therefore, the legislation and theory are primarily compared, not the practice. Indeed, such a limited comparative analysis can only be applied for states that are not at the core of comparative research.⁵ This is indeed the case as regards the comparison between Lithuania and Poland, as neither country can be considered as the most plaintiff-friendly for bringing collective actions, especially when compared with the Netherlands and the UK, where an opt-out collective action model is permitted. The analysis of Lithuania and Polish systems gives a preliminary view on whether contingency fees should be allowed in the EU context.

C. Overview of research material

The primary sources include the related legislation on group actions and contingency fees in the analysed countries. As regards Lithuania, the legislative basis is enshrined in the Civil Code and the Civil Procedure Code. With regard to Poland, the Act on the Pursuit of Claims in Multi-party Proceedings is foremost taken into consideration. Regarding the analysis of the Lithuanian group actions, the useful publications are of Moisejevas, Montvydienė, Grigienė and Čerka. Concerning the Polish mechanism, important works have been published by Gomulka, Piszcz, Jaworski and Radzimierski. Particular emphasis is also put on the case law in surrounding fields: private antitrust enforcement cases, group actions and claims where contingency fees have been used in other fields of law.

D. Structure

The structure of this Chapter is as follows. Section 2 presents two EU compensatory collective-redress schemes: the recently introduced scheme in Lithuania and the regime in Poland, which has been in place since 2010. Section 3 analyses the impact of contingency fees on compensation effectiveness. Finally, the last section provides an overview of the value of procedural safeguards for preventing abusive litigation in Lithuania and Poland.

⁵ Mark Van Hoecke, “Methodology of Comparative Legal Research“ (2015) *Law and Method*, 6-7 <<https://www.bjutijdschriften.nl/tijdschrift/lawandmethod/2015/12/RENM-D-14-00001.pdf>>.

4.2 COLLECTIVE ANTITRUST ACTIONS IN LITHUANIA AND POLAND: A COMPARATIVE STUDY

Four years have passed since the adoption of the EU Directive on antitrust damages actions,⁶ which is aimed at alleviating the burden of proof resting on the party to prove the damage suffered, as well as at optimizing the interaction between public and private enforcement of EU competition rules. On the one hand, it is expected that the Directive will alleviate the party that has suffered a loss of the burden of proof; on the other hand, no collective-redress mechanism is envisaged by this Directive. Instead, only a non-binding recommendation was proposed. However, even before the EU initiative on damages actions, some member states had already introduced measures for private claims. In order to make collective antitrust actions feasible, several proactive countries introduced American-style remedies.

The most prominent examples are the Dutch and the UK jurisdictions, which allow opt-out collective actions in some fashion. In the Netherlands, where collective settlement procedures can be based on an opt-out basis, a special vehicle called Equilib brought a collective action on behalf of all victims throughout Europe.⁷ In the UK, two opt-out antitrust collective actions have been brought, yet both have failed to pass certification test.⁸ For further discussion, see Chapter 5 (Section 5.4.2).

Albeit largely overlooked in the academic literature, Lithuania and Poland offer valuable lessons for the European doctrine of private antitrust enforcement. These countries were chosen as working examples because they have specific elements in place that both distinguish them from other member states and are also closer to the US system. In the following discussion, each of these two jurisdictions will be briefly presented, and both will be compared with American class actions.

Private antitrust actions, while recognized in Lithuania, have been relatively rare so far, and have not attracted a lot of litigation.⁹ One of the reasons for this lack of development might be that, before 2015, there was no effective legislation for collective-action damages; however, group actions were *de jure* possible under existing laws.¹⁰ With a view to remedying this situation,

⁶ 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.

⁷ The first case was brought against KLM, Air France, and Martinair. See Claims Funding International plc press release (30 September 2010). The second case was brought against KLM, Air France, and Martinair. See Amsterdam District Court, 7 January 2015 (C/13/561169 / HA ZA 14-283).

⁸ See respectively *Dorothy Gibson v Pride Mobility Products Ltd* [2017] CAT 9 and *Walter Hugh Merricks v Mastercard Inc* [2017] CAT 16.

⁹ From 2000 to the summer of 2015, the NCA investigated 47 cases of restrictive agreements (under Art.5 of the Competition Law, LoC). The number of cases brought concerning the abuse of dominance (Art.7 of the LoC) is much lower than the number of cases involving infringements under Article 5 of the LoC. Although the NCA has adopted a number of infringement decisions, follow-on actions are rare. To my knowledge, there have been only six private antitrust cases brought by plaintiffs involving infringements. None of private enforcement actions were initiated by consumers (rather by competitors). For further discussion of the development of private enforcement in Lithuania, see Raimundas Moisejevas, “Development of Private Enforcement of Competition Law in Lithuania”, 8(11) *Yearbook of Antitrust and Regulatory Studies* (2015), 35-51; Ramūnas Audzevičius, Žygimantas Juška, and Vytautas Saladis, “Lithuania”, in Ilene Knable Gotts (ed.), *Private Competition Enforcement Review* (London, Law Business Research Ltd., 2015, 8th ed.).

¹⁰ According to Art.49(6) (withdrawn as of 1 January 2015) of the Code of Civil Procedure, a group action could be brought in case it was necessary to protect the public interest. See, e.g. Case No. 2-492/2009 (2009), where the

Lithuania adopted amendments to its Code of Civil Procedure that entered into force on 1 January 2015.¹¹ These amendments make it possible for individuals to bring collective-action lawsuits across different fields of law, including competition law.

In Poland, private enforcement of competition law has been recognized since the early 1990s, a decade before the EU doctrine was introduced.¹² However, there were no more than 10 private antitrust cases during the period from 1999 through 2012.¹³ One of the most important steps towards the facilitation of private enforcement (especially for consumers) was taken when a collective-actions procedure was introduced by the Act on the Pursuit of Claims in Multi-party Proceedings (hereinafter ‘the Act’).¹⁴

Because of national developments in group actions and the fact that the Directive on damages actions has come into force, there is potential that there will be collective antitrust litigation in both countries. Presumably, more active litigation can be expected because both countries introduced more relaxed financing opportunities for group actions than other EU member states. In order to better understand the nature of Lithuanian and Polish-style group actions, the main features are highlighted below in Table 1 through the prism of the EU policy on collective redress and US class actions. For a thorough discussion of the US deterrence-based mechanism, see Chapter 3.

Table 1 shows that both Lithuania and Poland followed some recommendations from the EU. Most importantly, collective claims should be pursued on an opt-in basis, which requires explicit consent from victims to join an action. Furthermore, with respect to the reimbursement of legal costs, group actions are based on the ‘loser pays’ principle, according to which the party that loses a collective action should reimburse the legal costs of the winning party.¹⁵ There is another facet of Table 1 that bears immediate mention: contrary to the current Commission's approach, both schemes resemble US class actions in two important respects.

Lithuanian Court of Appeal ruled that the rights granted under Art.49(6) could not be realized because there was no mechanism for the implementation of group actions.

¹¹ The major amendment is found in Art.441¹, which was newly adopted.

¹² Judgment of the Polish Antimonopoly Court of 29 December 1993, XVII Amr 42/93, 5 Wokanda (1994). The Polish Antimonopoly Court held that “the lack of a public interest violation does not mean that an individual injured by the illegal behavior of a certain undertaking may not protect its fundamental rights. There is no obstacle in enforcing such rights before the court.” The translation of the above-mentioned judgment was taken from Maciej Gac, “Poland: Private Enforcement of Antitrust Law – Unfulfilled Dream?”, 3 *Concurrences* (2015), 217-222, at 219.

¹³ Between 1999 and 2012, there were no more than 10 private enforcement cases in Poland. For further discussion, see Agata Jurkowska-Gomułka, “Comparative Competition Law Private Enforcement and Consumer Redress in the EU 1999-2012”, Centre for Antitrust and Regulatory Studies, University of Warsaw, 1-19, available at <<http://www.clcpecreu.co.uk/pdf/final/Poland%20report.pdf>>

¹⁴ Ustawa o dochodzeniu roszczeń w postępowaniu grupowym (17 December 2009) No.7, item 44. (hereinafter “The Act on Pursuing Claims in Group Proceedings.”) The importance of collective actions has been actively discussed by leading Polish scholars. See, e.g. Tomasz Jaworski and Patrick Radzimierski, “Ustawa o dochodzeniu roszczeń w postępowaniu grupowym. Komentarz”, Warszawa (2010), 4; Małgorzata Sieradzka, “Ustawa o dochodzeniu roszczeń w postępowaniu grupowym. Komentarz”, Warszawa (2010), 15-16

¹⁵ Taking the example of Lithuania, legal costs include state costs and attorneys’ fees. The court allocates legal costs between the parties on a pro rata basis on the basis of a separate decision. Advocate fees are calculated on a statutory basis, so the winning side can rarely expect to be fully reimbursed. See, e.g. Ramūnas Audzevičius and Vytautas Saladis, “Lithuania”, in *International Comparative Legal Guide: Competition Litigation 2016* (London, Global Legal Group, 2015, 8th ed.).

Table 1. A comparative analysis between Lithuanian-Polish group actions, the EU collective redress policy and US class actions

Measure	Lithuanian approach	Polish approach	EU approach	Explanation in the context of US class actions
Application	Horizontal (including antitrust)	Neither horizontal nor sectorial ¹⁶	Horizontal	Horizontal
Financing	<ol style="list-style-type: none"> 1) Contingency fees are available; 2) Third-party financing is possible, but there is no practice of third-party financing in Lithuania; 3) The ‘loser pays’ principle is predominant. 	The same rules apply as in Lithuania	<ol style="list-style-type: none"> 1) Contingency fees should not be permitted 2) Third-party funding is subject to strict conditions 3) The ‘loser pays’ principle, which is dominant in civil disputes, should also apply in collective-redress actions. 	The crucial difference is that the ‘loser pays’ principle is dominant in Lithuania and Poland, while each party bears its own costs in the United States.
Identification before the court	An opt-in measure is predominant. There is no exception for an opt-out measure.	The same rules apply as in Lithuania	Collective-redress systems should, as a general rule, be based on the opt-in principle	Class actions are based on opt-out schemes.
The role of the courts	<p>The role of the judge is <i>relatively</i> active:</p> <ol style="list-style-type: none"> 1) The court may propose changing the group’s representative and/or the advocate if he/she thinks that they are not properly representing the interests of the group; 2) The court may invite other members of the group to justify their claim without the participation of a group representative; 3) The court <i>approves</i> all collective-action settlements; 4) The court must consider whether the claim could pass the certification test. 	<p>The role of the judge is <i>relatively</i> active:</p> <ol style="list-style-type: none"> 1) The judge decides on the admissibility of a claim for group proceedings (certification process); 2) The judge verifies claims and ensures that unfounded claims are eliminated at an early stage; 3) The judge controls the proceedings (e.g. orders the publication of information on the group’s claim, issues a decision on the formation of the group, renders a ruling or approves the settlement); 4) The judge has an influence on the cost of the 	<p>The central role should be given to the judge, who should effectively manage the case and be vigilant against any possible abuses.</p>	<p>The judge plays an <i>essentially</i> active role in complex litigation cases:</p> <ol style="list-style-type: none"> 1) Active role in the pretrial stages of the case; 2) The judge must <i>review</i> and <i>approve</i> the settlement; 3) Administrative function (for example, reviewing awards for attorneys’ fees); 4) US courts have the right to adopt general rules of civil procedure¹⁷

¹⁶ The Act is limited exclusively to claims involving consumer law, product liability, and tort liability (Art.1(2)). Problems arise with respect to class-action certification where some class members have suffered infringements of personal interests and others of a non-personal nature. In the famous class action involving the collapse of the International Trade Hall in Katowice, the District Court of Warsaw refused to certify the class since the collapse caused deaths and personal injuries (Decision of 8 April 2011, II C 121/11). The Court held that the action was inadmissible because class members are only allowed to bring non-personal claims, excluding personal injury or death.

¹⁷ Each US state is authorized to determine its own rules of civil procedure, although most states have adopted rules based on the Federal Rules of Civil Procedure. See, e.g. Randy J. Kozel, “Stare Decisis as Judicial Doctrine”, 67(2) *Washington and Lee Law Review* (2010), 411-466.

		proceedings (decides on a guaranty deposit, decides on the division of costs of the proceedings).		
Representation	<p>The representative of a group may be:</p> <ol style="list-style-type: none"> 1) A member or members of the group; 2) An association; 3) A labor union. <p>The group has to be represented by an advocate.</p>	<p>The representative of a group may be:</p> <ol style="list-style-type: none"> 1) A member or members of the group; 2) A consumer ombudsman.¹⁸ <p>The group has to be represented by an advocate.</p>	<p>In terms of standing, the European Commission recommends two types of collective redress mechanisms:</p> <ol style="list-style-type: none"> 1) Group actions brought jointly by natural and legal persons who claim to have suffered harm; 2) Representative actions. 	<p>The representative of a group may <i>only</i> be a member or members of the class. The court that certifies a class must appoint class counsel (based on Rule 23(g) of the Federal Rules of Civil Procedure).</p>
Certification criteria	<p>A class action may be brought if the following conditions are fulfilled:</p> <ol style="list-style-type: none"> 1) Group actions are based on identical or similar facts; 2) Collective action is a more economical, more effective, and more appropriate way to resolve a particular dispute than individual actions; 3) A pre-court dispute resolution procedure took place; 4) The group has an appropriate group representative. 	<p>A class action may be brought if the following conditions are fulfilled:</p> <ol style="list-style-type: none"> 1) The claim is brought before a civil court; the claim covers at least 10 persons (natural or legal); 2) Members of the group are of a similar type and are based on the same or similar factual basis; 3) The claim concerns protection of consumers, product liability, or a delict (illicit act); 4) The claim concerns material injury suffered by the members of a group. 	<p>The European Commission has not proposed any rules on certification. Yet, the court should play a crucial role in approving or denying the class certification.</p>	<p>Certification in the US is more detailed and more complex. Rule 23(a) of the Federal Rules of Civil Procedure sets forth four threshold requirements for class certification:</p> <ol style="list-style-type: none"> 1) The class is so numerous (at least 75 people) that the joinder of class members is impracticable (<i>numerosity</i>); 2) There are questions of law or fact common to the class (<i>commonality</i>); 3) The claims or defenses of the class representatives are typical of those of the class (<i>typicality</i>); 4) The class representatives will fairly and adequately protect the interests of the class (<i>adequacy</i>).

- (1) The representative of a group can be a member of the group. The representative must in turn be represented by an attorney (the so-called group advocate).
- (2) Lawyers are allowed to agree on a contingency fee (no-win-no-fee arrangements).

¹⁸ There is an important advantage of claims initiated by consumer ombudsmen. Once a claim is brought by a consumer advocate, the costs of bringing the claim do not have to be incurred, unlike in the case of a group claim brought by a member of a group.

In this respect, one must bear in mind that both countries share a combination of elements that differ from other EU member states. First, a member of a group is allowed to submit a group action, while the collective-redress schemes adopted by various EU member states mostly limit standing to public organizations.¹⁹ Second, professional representation by private attorneys is *mandatory*, and lawyers are encouraged to perform as litigation funders via contingency fees. In contrast, contingency agreements for legal fees are prohibited or severely restricted in most states, as they can strengthen incentives for frivolous litigation.²⁰ Even if the usage of contingency fees is allowed in some circumstances, these countries imposed restrictions in the event of collective actions.²¹ Compared with other countries, lawyers in Lithuania and Poland are granted a relatively active role, and contingency fees are permitted in collective actions with the least restrictions. Despite the similarities, both countries have their own safeguards against abusive litigation. In Lithuania, the contingency fee is determined on a case-by-case basis. However, under Article 50 of the Law on Advocacy, payments to lawyers may not violate the rules of professional ethics.²² This means that the amount of an attorney's fee must correspond to the complexity of the case, the attorney's experience and expertise, the financial status of the client, as well as other circumstances that might be relevant to the particular situation. Poland leaves even less discretion on contingency fees: the upper limit of contingency fees is 20 percent.²³ It is important to note that capping arrangements for contingency fees are *exceptionally* allowed for group claims, while in general they are considered contrary to the rules of Polish civil procedure and legal ethics.²⁴ The explanation for such a dramatic change is not in line with the Commission's approach. The authors of the Act were afraid that very few lawyers would be interested in taking on collective-action cases, so they tried to attract professional litigators to engage in complex group actions and to take over, or at least to reduce, the costs for injured individuals via contingency fees.²⁵ To conclude, it should be stressed

¹⁹ See, e.g. Manning Gilbert Warren III, "The U.S. Securities Fraud Class Action: An Unlikely Export to the European Union", 37(3) *Brooklyn Journal of International Law* (2012), 1075-1114, at 1089. In general, the standing is provided to governmental authorities (e.g. Finland), consumer associations (e.g. Greece, France, Sweden), and to other specified organizations (e.g. Portugal).

²⁰ The best example regarding restrictions on contingency fees is illustrated by the German Lawyers' Remuneration Act 2008 (Art.4a(1)), which allows contingency fees only in cases where the claimant would otherwise not be able to enforce his rights because of his financial situation. To the same extent, contingency fees are allowed in group actions in Sweden, but under the condition that access to justice is otherwise denied. However, contingency fees are very rarely allowed in practice.

²¹ For example, the UK relaxed their rules on opt-out collective actions, and while contingency-fee arrangements are permitted for damages actions brought by individuals, they are not permissible in the context of collective actions. However, conditional fee arrangements are permitted in collective actions. For further discussion, see Barry J. Rodger, "The Consumer Rights Act 2015 and Collective Redress for Competition Law Infringements in the UK: A Class Act?", 3(2) *Journal of Antitrust Enforcement* (2015), 258-286.

²² "Lietuvos Respublikos Advokatūros Įstatymas" with subsequent amendments (18 March 2004) No.IX-2066, *Valstybės žinios* (2004) No.50-1632 (hereinafter the "Lithuanian Law on the Bar"), available at <<https://www.e-tar.lt/portal/lt/legalAct/TAR.9F4371AB03A3>>.

²³ Article 5 provides that "[t]he agreement regulating the remuneration of the legal representative may determine the remuneration proportionally to the amount awarded in favor of the claimant, but not beyond 20% of the said amount."

²⁴ According to different scholars, it was possible to conclude contingency-fee agreements even before the entry into force of the Law on Group Litigation (on the basis of Art.353(1) of Polish Civil Code, Contractual Freedom of Choice), but this was seen by lawyers and their associations as being contrary to the rules of ethics (the codes of ethics of advocates and legal advisers, respectively, did not allow the conclusion of such agreements).

²⁵ See the explanatory notes to the draft of the Act (11 August 2016), available at <<http://orka.sejm.gov.pl/proc6.nsf/opisy/1829.htm>>. Later, the following observations were expressed by advocates and legal advisers in the Polish Bar.

First, advocates argued that contingency-fee agreements might be allowed only as a measure providing for supplementary remuneration (basic remuneration must be set as a fixed amount independent of the result of the case).

that both countries are a good source of comparison because both are post-socialist states that share a similar litigation culture and economic standards. An even more important factor is that even though they introduced some limits on contingency fees, lawyers are granted a relatively active role compared with other EU countries where attorneys are involved in collective actions.

4.3 CONTINGENCY FEES IN LITHUANIA AND POLAND: A STUDY OF COMPENSATION EFFECTIVENESS IN COLLECTIVE ANTITRUST ACTIONS

Contrary to the United States, the EU policy on competition law does not shape private enforcement in the form of deterrence; rather, it can only be seen as a side effect. The primary objective is to ensure that any antitrust victim (natural or legal person) can effectively exercise the right to claim full compensation for harm suffered.²⁶ This means that victims have the right to compensation for actual losses, loss of profit, plus the payment of interest. In order to ensure the achievement of the principle of full compensation, both direct and indirect purchasers have the right to require full compensation for harm caused by an infringement of competition law.²⁷

Both of the countries discussed follow the EU's approach to the principle of full compensation. Contrary to the Commission's approach, however, the achievement of compensation is reinforced by the mandatory legal representation in group actions. The main idea behind this is likely that private litigators are (foremost) considered those with sufficient expertise and funding to litigate complex and expensive collective actions, such as antitrust. The simple logic is that the active involvement of group advocates would mean more actions brought before the courts and thus more victims compensated for the harm caused by violators. One of the major ways to incentivize attorneys to deal with collective litigation is to allow them to reap sufficient awards that outweigh the risks. In fact, contingency-fee agreements are one of the most attractive options for achieving this goal. As mentioned above, Polish legislators stressed that contingency fees are a very important factor in determining whether group actions will be brought before a court or not. However, the incentive to utilize such a reimbursement model depends on many factors, such as if the case generates significant financial value. If the aggregate value is substantial, there is a very good chance that an action will be brought and victims will be compensated. Therefore, the following discussion will assess the impact of contingency fees (in their current form) on the compensation objective in the discussed states.

To start with, the goal of receiving compensation is significantly diminished in Lithuania and Poland due to the fact that opt-in schemes have been introduced. During the early attempts at collective-redress actions in EU member states, there were two major failures in the UK and France that clearly demonstrate that very few antitrust victims join an action when affirmative steps are required by potential group members.²⁸ These examples have become a source of concern that an

Second, legal advisers accept a more liberal approach: changes were introduced to the Legal Advisers Code of Ethics. Article 36(3) of the Legal Advisers Code of Ethics, which entered into force on 1 July 2015, allows for the legal exception in case of a contingency-fee agreement.

²⁶ Directive 2014/104/EU, *op.cit* note 6, Arts.1 and 3.

²⁷ *Ibid.*, Article 12.

²⁸ In the UK, the consumer association Which? brought a claim as a result of a cartel that artificially fixed the price of replica football kits. Ten businesses, including Manchester United and Umbro, were hit with fines totalling £18.6 million. The resulting collective action 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*

opt-in measure is not the right solution for collective antitrust litigation. This is probably one of the main reasons why opt-in collective antitrust actions are extremely unpopular in the EU member states. Despite the ineffectiveness of this approach, some level of compensation can be achieved, but it depends on whether rational actors are provided with sufficient incentives to sue. As indicated in Table 1, collective actions in Lithuania and Poland can be brought by public actors or members of a group that is represented by a group advocate. Before delving into a discussion of the effectiveness of contingency fees in each country, it is necessary to briefly overview the possibilities for public entities to lead collective antitrust actions.

In Lithuania, group actions may be brought by an association or labor union, but in the case of antitrust group actions, only an association may have standing to bring a claim. The law provides that the requirements expressed in group proceedings must arise from activities directly related to an entity.²⁹ It is important to stress that associations (e.g. consumer associations) are very limited in terms of their ability to finance litigation due to their very small budgets.³⁰ This issue is even more pronounced in antitrust litigation, where the total costs of bringing collective actions can be extremely high because of the complexity of legal and economic assessments.³¹ Thus, a poorly financed consumer association would face the insurmountable burden of both proving causation and organizing a group in an antitrust collective action. In Poland, the consumer ombudsman, as specified by legislation, can act as a representative organization in group actions.³² Despite the fact that the Polish consumer ombudsman represents a larger population and logically should generate a large budget, the prospect of having sufficient financial capacity to bring costly antitrust actions is blurry at best. The consumer ombudsman is understaffed, with only a small number of paid employees. In fact, a lot of its activities are conducted by volunteers.³³ In such circumstances, it seems highly unlikely that the consumer ombudsman would invest in expensive collective antitrust litigation.

The above discussion suggests that public standing cannot be considered a tool for facilitating the objective of receiving compensation. A broader discussion on the ineffectiveness of public standing is beyond the scope of this Chapter, the aim of which is rather to assess the possibility of a group advocate, acting as a private investor through contingency fees, to facilitate the goal of receiving compensation.

v Office of Fair Trading [2006] Court of Appeal, EWCA Civ 1318. Which? managed to collect claims from only approximately 130 consumers, even though the price-fixing cartel affected around 2 million victims.

In France, after the Competition Council decision (Conseil de la concurrence, Decision No.05-D-65 of 30 November 2005), the consumer organization UFC-Que Choisir brought a collective antitrust claim on an opt-in basis. Despite an extensive information campaign, UFC-Que Choisir managed to collect claims from only 12,350 consumers, although the case, which involved a price-fixing agreement among three mobile operators, had potentially impacted 20 million consumers.

²⁹ Art.441⁴, Code of Civil Procedure.

³⁰ For example, the Lithuanian Consumer Institute has only four paid positions.

³¹ Charlotte Leskinen, "Collective Actions: Rethinking Funding and National Cost Rules", 8(1) *The Competition Law Review* (2011), 87-121, at 95.

³² The Act on Pursuing Claims in Group Proceedings, Art.4(2).

³³ See, e.g. Breda Kutin, "Consumer Movement in Central and Eastern Europe", 2 *Consumatori, Diritti Mercato* (2011), 102-110, at 106, available at <<http://www.consumatoridirittimercato.it/wp-content/uploads/2012/12/2011-02-consumer-movement-in-central-and-eastern-europe-n543470.pdf>>.

4.3.1 An Overview of Contingency Fees in Lithuania

So far, there has been no practice regarding group antitrust actions in Lithuania.³⁴ This is probably the case because collective-redress actions have been available only since 2015. This, too, might suggest that contingency fees have no immediate effect on antitrust group litigation. Indeed, there are reasons to believe that contingency fees would continue to have little or no effect for group litigation in the near future. Practice has shown that advancing private antitrust actions based specifically on contingency fees have been unpopular during the existence of this compensation model. The first private antitrust claim was brought in 2003,³⁵ while contingency fees have been permissible in damages actions for breach of competition law since 2004.³⁶ Therefore, despite a private antitrust remedy being available for more than a decade, to the best of my knowledge, there has been no private antitrust action brought under the contingency-fee agreement.³⁷ This can be partly explained by the fact that private enforcement has been rather underdeveloped compared with public enforcement actions: only five private antitrust cases have been brought before the courts so far, and all them concerned issues between large corporations.³⁸ However, even if the EU Directive on damages actions will increase the number of damages claims, the author is skeptical about the prospects of litigation in group actions. If a case is conducted on an hourly-fee basis, the group representative would probably face too high a financial burden to reimburse group advocates in costly antitrust actions. Contingency fees are also an unattractive option for lawyers because the financial benefit is minimal (or even negative) if only a small number of victims join the action under an opt-in measure.³⁹ In addition, competition-law actions are very complex, requiring extensive economic analysis that often leads to significant cost exposure. Before taking action, lawyers should assume the risk of losing any money invested, the risk of being required to

³⁴ To my knowledge, a final court decision was issued in only one case. A municipality in the Ukmergė District of Lithuania brought a claim on behalf of some 7,000 heat consumers, alleging that the heat-sector lessors were selling heat energy for a higher price than the lessors were committed to purchasing by public tender. However, the Court of Appeal of Lithuania dismissed the claim, asserting that the plaintiffs failed to comply with pre-court dispute-resolution procedures (Art.137 of the Code of Civil Procedure). See *Ukmergės rajono savivaldybė v. UAB "Energijos taupymo centras" bei UAB "Miesto energija"*, Decision of 10 July May 2015 of the Court of Appeals of Lithuania, civil case No.e2-816-157/2015. For further discussion, see Žygimantas Juška, "Class Actions in Lithuania", Global Class Actions Exchange, Country Reports (2016), available at <<http://globalclassactions.stanford.edu/category/authors/zygimantas-juška>>.

³⁵ On 2 January 2003, a private damages claim was brought by UAB Šiaulių Tara against AB Stumbras. This action arose half a year after the adoption of the Decision of the Competition Council of the Republic of Lithuania of 30 May 2002 No.6/b.

³⁶ Lithuanian Law on the Bar, *op.cit.* note 22, Article 50.

³⁷ To the best of my knowledge, the following cases have been brought before the Lithuanian courts: *UAB Šiaulių Tara v. AB Stumbras* Decision of 26 May 2006 of the Court of Appeals of Lithuania, civil case No.2A-41/2006.; *LUAB Klevo lapas v. AB Orlen Lietuva*, Decision of 17 May 2010 of the Supreme Court of Lithuania, civil case No.3K-3-207/2010; *AB flyLAL-Lithuanian Airlines v. Air Baltic Corporation A/S and Airport Riga*. Decision of the Court of Appeals of Lithuania of 31 December 2008, civil case No.2-949/2008; *AB Orlen Lietuva v. the Competition Council of the Republic of Lithuania*; *UAB Naftos grupė v. AB Klaipėdos nafta*, Decision of the Court of Appeals of Lithuania of 17 June 2014, civil case No.2A-606/2014. None of the case reported that the contingency agreement was made between an advocate and the client.

³⁸ For further discussion of private antitrust enforcement cases in Lithuania, see R. Moisejevas, "Development of Private Enforcement of Competition Law in Lithuania", 8(11) *Yearbook of Antitrust and Regulatory Studies* (2015), 35-51.

³⁹ In the above-mentioned French mobile cartel case (No.05-D-65), the value of the claim was EUR 800,000, while the litigation expenses amounted to EUR 500,000. For further discussion of the case statistics, see U.F.C. – QUE CHOISIR de RENNES, "Consultation de la Commission Européenne sur les Recours Collectifs Contribution de L UFC-CHOISIR" (2011) available at <http://ec.europa.eu/competition/consultations/2011_collective_redress/ufc_que_choisir_de_rennes_fr.pdf>.

compensate the defendants for their litigation costs if the case is lost (under the ‘loser pays’ principle), as well as not receiving any reimbursement from class members.

4.3.2 An Overview of Contingency Fees in Poland

In Poland, the picture may seem somewhat different, but only at first glance. There were around 170 collective actions brought during the period 2010-2015.⁴⁰ Initially, the state (central or local authorities, the state social security scheme, or state hospitals) was the main defendant. Many actions failed to satisfy the certification criteria and were dismissed, thus preventing individuals from protecting their rights in court. It should be stressed that advancing antitrust group claims is very unpopular. There has been only one group action in Poland regarding competition protection. However, this was not a traditional antitrust action under Articles 101-102 of the Treaty on the Functioning of the European Union or the equivalent Polish provisions; rather, it was an unfair-competition action concerning misleading advertising. In 2010, a group of 35 insurance intermediaries filed a collective-action lawsuit against the LINK4 insurance company under the Law on Combating Unfair Competition. The group plaintiff alleged that unfair advertising encouraged clients to come directly to the insurer. As a result, the violation reduced the total number of the claimants’ customers by around 5.7 percent. In order to resolve the dispute, the Court appointed a mediator in February 2013, but no agreement was reached.⁴¹ Then, on 12 July 2013, the Regional Court in Warsaw issued a decision rejecting the admissibility of the lawsuit.⁴² The basis for the rejection was that: (1) in the Court’s opinion, it was a lawsuit aimed at protecting personal rights, and such lawsuits are barred by Article 1(2) *in fine* of the Act of 17 December 2009 on the pursuit of claims in group proceedings; (2) in the case, the Court considered the issues of fact to be neither common nor similar across the group, whereas the Act of 17 December 2009 on the pursuit of claims in group proceedings applies only to proceedings in which claims of a single type arising from common or similar issues of fact are pursued by a group (Article 1(1) of the Act).

Regarding contingency fees, there was a promising start. A contingency-fee arrangement was concluded in one of the first collective actions brought in Poland, where flood victims in the Sandomierz area brought damages actions against the public authorities.⁴³ A law firm representing 17 class members making a combined claim of PLN 9.31 million (around EUR 2.16 million) in damages. However, the contingency-fee agreement became unfeasible when the representatives faced the issue of certification. Therefore, they decided to change their claim to declaratory relief only. As a result, their contingency-fee arrangement was revoked and a new up-front fee was agreed

⁴⁰ See the website Informator Statystyczny Wymiaru Sprawiedliwości, available at <<http://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/>>, which provides Polish statistics related to the administration of justice.

⁴¹ According to Article 7 of the Act of 17 December 2009 on the pursuit of claims in group proceedings, at each stage of the case the court may refer the parties to mediation.

⁴² Case No.XVI GC 595/11, Judgment of the Regional Court in Warsaw, 16th Commercial Division of 12 July 2013. For further analysis of this judgment, see Anna Piszcz, “Czy nieuczciwą konkurencję można zwalczać tylko indywidualnie? Postanowienie Sądu Okręgowego w Warszawie z 12 lipca 2013 r., XVI GC 595/11, Link4”, 4(4) *Kwartalnik Antymonopolowy i Regulacyjny* (2015), 142-144, available at: <<http://ikar.wz.uw.edu.pl/numery/27/pdf/142.pdf>>.

⁴³ Case No.I C 1419/10, First Civil Division, Regional Court in Krakow. At present, the group proceedings are in the third stage, i.e. a content-related examination of the legitimacy of the claims. For further discussion, see Kubas Kos Gałkowski, “Sandomierz group proceedings” (2016), available at <<http://www.kkg.pl/en/class-action/sandomierz-group-proceedings/>>.

upon. As far as I am aware, this is the only impact that contingency fees have had on group actions in Poland, i.e. a country of almost 40 million inhabitants.

It is also true that the expectations for collective consumer actions should not be high. To start with, it should be recalled that in more than 20 years fewer than 10 private antitrust actions were brought before the courts. However, the very low number of private actions is not the major source of concern. More importantly, no actions have been initiated by consumers, and none of the actions taken so far exercised the right to compensation for harm suffered.⁴⁴ Even though the EU Directive on damages will facilitate possibilities for private antitrust actions, the prospects for collective consumer actions are not good. In fact, the Directive does not change much in the litigation landscape, as there would be no rules on collective-redress actions. And the ones proposed in the Recommendation significantly diminish the compensatory effectiveness of collective redress. Therefore, consumer ombudsmen will remain too weak financially to bring antitrust claims. And most importantly, there are no incentives for private litigators to proceed on an hourly-fee basis or to utilize contingency-fee agreements. The latter reimbursement model (under favorable conditions) is a major tool, if not the only tool, for financing collective actions when legal costs exceed the expenses of individual claims. As in Lithuania, however, contingency fees appear to be too risky an investment because of the very low opt-in rates. Also, losing a case could result in significant costs to be paid on behalf of the other party.

The practice in Lithuania and Poland demonstrates that the introduction of contingency fees *alone* has not facilitated the objective of ensuring the payment of compensation. It can be acknowledged that this goal will fail if group actions are formed on an opt-in basis. The major disincentive is the small size of groups, which results in little financial benefit (which can sometimes even be negative) in successful cases. In fact, when the group is small, there is no incentive for lawyers to invest in complex antitrust cases, even though US-style contingency fees are in place. Regrettably, the EU Directive on damages actions is not framed in such a way as to mitigate the risks related to traditional opt-in antitrust claims.

To conclude, while no antitrust collective actions have been brought on the basis of contingency fees, the available theory is insufficient to assess how a contingency fee agreement works in both countries. For a discussion in the US, see Chapter 3 (especially Section 3.3.2).

4.4 THE POTENTIAL OF CONTINGENCY FEES TO ABUSE LITIGATION

The impact of contingency fees on the effectiveness of ensuring compensation was discussed above, but compensation success also depends on two other indirect factors. *First*, the intent of collective actions should be to defend people who have genuinely incurred financial damage. *Second*, private litigators should reap a reward that is proportional to the efforts made. According to the European Commission, contingency-fee-based actions are one of the main causes of these negative outcomes in the EU's litigation culture.⁴⁵ At least in the US litigation landscape, it is believed that contingency fees allow attorneys to have a significant degree of autonomy to conduct litigation: picking their client, defining the parameters of the class, and proposing the amount of compensation

⁴⁴ See Gac, *op.cit.* note 12, 219.

⁴⁵ Recommendation, *op.cit.* note 1, paras. 29-30.

to the judge.⁴⁶ There is no reliable mechanism to monitor the activities of the class counsel. If EU member states allow contingency fees on an exceptional basis, they have to incorporate safeguards against abusive litigation while also respecting the principle of full compensation.⁴⁷

According to the European Commission, abusive litigation occurs ‘when [collective action] is intentionally targeted against law-abiding businesses in order to cause reputational damage or to inflict an undue financial burden on them ... Law-abiding defendants may be prone to settle the case only in order to prevent or minimize possible damage.’⁴⁸ From this wording, it can be acknowledged that the main concern is that collective actions may force defendants to settle even meritless cases, a phenomenon that the critics of US class actions have characterized as a ‘blackmail settlement’.⁴⁹ While this fear is questionable in the EU context,⁵⁰ it is important that the EU also be aware of other type of abuses. One of the risks is that lawyers can set their fees in such a way so as to maximize their own financial reward while minimizing the recovery for the group. Another risk is that any funds left over from the award may be distributed in an abusive manner. In the US, for example, it is typical that undistributed funds are distributed to a cy pres charity whose activities are closely related to the antitrust violation. However, this distribution model has attracted a lot of criticism because cy pres awards can go to unrelated charities.⁵¹ In order to facilitate a discussion among scholars, this Chapter will discuss the safeguard policies in both Lithuania and Poland against any type of abusive litigation. But what can be learned from these countries about frivolous litigation when there is no practice of collective antitrust actions, and especially when they are based on contingency-fee agreements? Given the absence of this data, it is impossible to draw definite evidenced-based conclusions. The focus, however, is on providing a preliminary study of the effectiveness of national safeguards to prevent abusive litigation.

First, we should provide an overview of the major safeguards that are in place both countries. To begin with, an opt-in scheme acts as a central safeguard against abusive litigation. In opt-in collective actions, group members are identified, and those who opt to take part often have more interest in the proceedings, given that they voluntarily opted in to the action. Second, the ‘loser-pays’ principle is equally important as a deterrence mechanism. The group advocate should assume the risk of compensating the defendant’s litigation costs if the case is lost. Third, the national rules

⁴⁶ See, e.g. *Kirkpatrick v. JC Bradford & Co*, 827 F.2d 718 (11th Cir. 1987) at 727. However, there have been some exceptions throughout history, e.g. *Lazy Oil Co. v. Witco Corp.* 166 F.3d 581 (3d Cir. 1999). The principal of Lazy Oil, an oil producer named Bennie G. Landers, disagreed with the settlement and moved to have the class counsel disqualified.

⁴⁷ Recommendation, *op.cit.* note 1, para. 30.

⁴⁸ 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”, C(2013) 401/2.

⁴⁹ See, e.g. Jonathan M. Landers, “Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma”, 47 *Southern California Law Review* (1974), 842-890, at 843.

⁵⁰ Usually, a “blackmail settlement” in the US occurs when an aggregate value of a collective claim is so high that the defendants choose to settle regardless of whether the claim has merit or not rather than to continue a case with an unpredictable outcome. Furthermore, discovery entails massive costs for the defendants, while the claimant enjoys a favorable one-way fee-shifting rule. On the contrary, there are no grounds for blackmailing the defendants in the EU. Even though some states allow opt-out collective actions, damage multipliers are prohibited in all states. In addition, the limited discovery rules are combined with the ‘loser pays’ principle.

⁵¹ See, e.g. Cecily C. Shiel, “A New Generation of Class Action Cy Pres Remedies: Lessons from Washington State”, 90(2) *Washington Law Review* (2015), 943-991 <<https://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/1467/90WLR0943.pdf?sequence=1&isAllowed=y>>; Jay Tidmarsh, “Cy Pres and the Optimal Class Action”, 82(3) *George Washington Law Review* (2014), 767-797.

on disciplinary liability are a good solution to determine the safeguard policy. In fact, these measures demand particular attention and thus are discussed below.

The Lithuanian rules on professional ethics provide a sound basis for preventing abusive litigation. Under the law, any party that brings an unfounded claim or acts against a fair and timely trial resolution may be obliged to reimburse the other party's costs and losses.⁵² In addition, a fine of up to EUR 5,800 may be imposed for the above-mentioned actions. Second, the Court of Honor (*Advokatų garbės teismas*) has enough discretion to deal with frivolous litigation arising from contingency fees and other related matters. For example, the Court may impose disciplinary liability for any conduct on the part of an advocate that is contrary to the law or professional ethics.⁵³ The main issue, however, is that the Court of Honor may use these powers only if there is a complaint (mostly after the end of proceedings) from the potential victim. Indeed, the clients in an action may simply be unaware that their attorney acted in violation of ethical rules. Even though the Court rarely acts in case of an unfair contingency-fee agreement, there is a notable example that serves as a possible deterrent for potential wrongdoers to comply with the rules on professional ethics.

In a case concerning neonatal burn injuries against a hospital, an advocate and the plaintiff signed a contingency-fee agreement that the lawyers' fees would be 50 percent of the sum awarded.⁵⁴ Soon after the case was won, with an award of LTL 500,000 (around EUR 150,000) in damages, the plaintiffs brought a complaint before the Court of Honor, accusing their advocate of unfair and corrupt conduct. After conducting an assessment, the Court ruled that the lawyers acted in violation of the legal requirements and that their actions were incompatible with the principles of professional ethics.⁵⁵ More specifically, the Court held the following:

- A contingency fee of 50 percent was agreed upon without regard to the relevant circumstances of civil proceedings and was thus deemed to be too high;
- The lawyers did not adequately inform their clients about the property rights of children under Article 3(188) of the Civil Code;
- The lawyers unlawfully used deposited client awards to pay their fees.

Due to the above-mentioned significant violations of professional ethics, the Court of Honor imposed the most severe punishment possible by removing the advocate and his assistant from the bar.

Disciplinary liability can also be considered an important safeguard in Poland.⁵⁶ In addition, potential abuses are also effectively prevented by the introduction of a 20 percent cap on

⁵² Article 95, Code of Civil Procedure.

⁵³ Disciplinary penalties are as follows: 1) admonition; 2) reprimand; 3) public reprimand; 4) removal from the bar.

⁵⁴ This claim was filed after the ruling of the Supreme Court of Lithuania in *L. Z., M. Z., V. Z., G. Z. v. Vši Marijampolės ligoninė*, No.3K-7-255/2005.

⁵⁵ The decision of 24 February 2006 of the Court of Honor, Case No.10. For further assessment of the case, see Ingrida Montvydienė, "Pacta de quota litis, kaip alternatyva valstybės garantuojamai teisinei pagalbai užtikrinti civilinėse bylose", 7(109) *Jurisprudencija* (2008), 85-91, at 88; Jurgita Grigienė and Paulius Čerka, "Advokato Atlyginimo, Priklausančio nuo Bylos Baigties, Reglamentavimas bei Problemos Lietuvoje", 2(9) *VDU Law Review* (2012), 5-16, at 11.

⁵⁶ Ustawa "Prawo o adwokaturze" with subsequent amendments (26 May 1982), *Dziennik Ustaw* (hereinafter "Dz.U.") (1982) No.16 item 124, Arts. 80-95, available at <<http://isap.sejm.gov.pl/DetailsServlet?id=WDU19820160124>>; Ustawa "o radcach prawnych" with subsequent amendments (6 July 1982), *Dz.U.* (1982) No.19 item 145, Arts. 65-74,

contingency fees. The provision that allows the defendant to request that the claimant make a deposit (20 percent of the value of the claim) so as to secure the costs of litigation can be considered an additional safeguard. Accordingly, a security deposit can be regarded as a sort of counterbalance to contingency fees and a mechanism introduced in order to protect the financial interests of the defendant. In most cases, however, the court does not grant such a deposit.

When combined, all of the above-mentioned safeguards in both countries would appear to keep the possibility of litigation abuse at a minimum. However, even though the safeguard policy would make rational abusers think twice before engaging in unprofessional conduct, the scheme is not ideal. Indeed, there is no reliable mechanism to monitor the activities of group representatives: the lead plaintiff and the group advocate. For example, the US mechanism used for the distribution of damages in successful cases has been very difficult to inspect. Also, no one can ensure that national judges in EU member states will take a closer look at attorneys' activities especially when a case is expected to be settled. Judges are typically interested in ending antitrust actions (which are typically complex) as soon as possible. A potential solution would be to establish a body that would be vested with the powers to monitor the group's lawyer and the group's representative in collective actions, as well as to verify the distribution of damages. Notably, Lithuania's Court of Honor may not be able to perform such a role, as it usually uses its powers only if it receives a complaint (mostly after the end of proceedings). A special (independent) body needs to be established that could operate throughout an entire case. One proposal is to appoint a committee on a case-by-case basis that would consist of different high-ranking professionals: academics, advocates, judges, etc. Indeed, this would ensure a much better monitoring mechanism.

To conclude, it should be stressed that the strict safeguard policy in both countries limits the financial viability of collective actions even if US-style contingency fees are introduced. This is especially true since groups are formed by allowing potential members to opt in. It remains questionable whether the combination of opt-out actions and contingency fees would increase the chances of abuse. On the one hand, the 'loser pays' principle would still act as the central safeguard against any possible misconduct on the part of group representatives. In addition, the US legal system has been accused of having overly broad discovery rules, allowing for the plaintiffs to request any type of evidence, but, at the same time, propounding extremely expensive and burdensome requests for the defendant. Also, it has been suggested that trebling of damages could generate such significant value in class actions that it would compel defendants to settle the lawsuits whether they have merit or not. In the EU, however, treble damages and broad discovery rules are limited in member states. On the other hand, there are obvious implications involving increased opportunities to abuse litigation in opt-out actions. A much larger group of victims would be involved in such litigation, thereby leading to cases with much greater financial value. Very few of these victims would have incentives or means to monitor the lead plaintiff and the group attorney or their strategic choices. Therefore, the most difficult question is whether EU collective-action schemes could be customized to handle uncontrolled opt-out actions. This is no easy task, particularly given that the US has not been able to resolve this issue for decades. Under these circumstances, it is difficult to predict if contingency fees combined with opt-out schemes would

available at <<http://isap.sejm.gov.pl/DetailsServlet?id=WDU19820190145>>. Possible disciplinary penalties include the following: 1) admonition; 2) reprimand; 3) fine; 4) suspension from practicing the profession for a period from three months to five years; 5) removal from the bar.

lead to any sort of abuse, especially if the schemes rejected treble damages and broad discovery rules. Further discussion of this topic would go beyond the scope of this Chapter.

4.5 CONCLUSION

The research question of this Chapter was the following:

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

When addressing this question, it was found that contingency fees have attracted a great deal of controversy in US class actions. On the one hand, contingency fees allow for small-stakes class actions to be heard at all. On the other hand, such a reimbursement model is considered one of the most important factors in raising the problem of abusive litigation in the American system. In the EU context, and more specifically in Lithuania and Poland, the following findings were made about contingency fees.

1. Contingency fees alone have so far had no impact on the increase in antitrust collective litigation

There have been no antitrust collective actions brought on the basis of contingency fees in Lithuania and Poland. Even more concerning factor is that no antitrust collective actions have been brought. The absence of an impact in Lithuania can be explained due to the recent introduction of group actions, but the same explanation cannot be applied in Poland, where collective-redress schemes have been in place since 2010. The primary reason for ineffectiveness of contingency fees is the availability of only an opt-in group aggregation model. An opt-in measure results in too low an aggregate financial value, which discourage lawyers' investment in complex and costly antitrust collective actions.

2. The national safeguards against abusive litigation appear to reduce the possibility of litigation abuse at a minimum

The most typical American litigation abuse (blackmail settlement) is highly unlikely to occur in Lithuania and Poland, because contingency fees alone cannot generate a high aggregate value (without opt-out schemes and treble damages) that would force defendants settle regardless of whether the claim has merit or not. However, the prevention policy is ineffective in monitoring the individual behaviour of group representatives. Lithuanian experience with contingency fees has shown that lawyers can set their fees in such a way so as to maximize their own financial reward while minimizing the recovery for the group. Another risk is that any funds left over from the award may be distributed in an abusive manner. As a possible solution, an *ad hoc* committee of professionals that would monitor group representatives was proposed.

3. The combination of contingency fees and opt-out schemes has a potential for increasing the standards of the compensation objective, but there are obvious implications for increased opportunities to abuse litigation.

It remains to be seen if there is also potential to combine contingency fees with opt-out schemes, without attracting litigation abuses. The most challenging task is how to monitor the plaintiffs' representative and the group's lawyer when a case is brought under a contingency-fee agreement. This necessitates further thought that might indeed be very uncomfortable for lawmakers, although rather interesting for an academic discussion. One could argue that an effectively regulated control mechanism could start a whole new chapter in the EU's litigation culture. But there are still many steps that have to be taken to build up enough trust to convince the EU and its member states of this. However, the long-standing practice in the United States provides an opportunity for closer consideration of the opportunities for more forceful litigation approach in the EU context that would make it more likely to meet the objective of ensuring compensation.

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

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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 rules⁴; 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 following¹⁵:

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-6297 and 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 following²¹:

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 Squibb?" *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 441¹. 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 I-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 Européenne 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 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 Convergence Holding AG, 2016 Ageas and Fortis Shareholders.

⁵² See, e.g. Frank van Alphen, 2010. "Luchtvrachtkartel Krijgt Reuzeclaim van Verladere." *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 in 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. 1257/7/16. Retrieved 1 September 2018, <http://www.catribunal.org.uk/237-9255/1257-7-16-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.allenoverly.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 disproportionately 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](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 disproportionately 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.

6 THE EFFECTIVENESS OF ANTITRUST COLLECTIVE LITIGATION IN THE EUROPEAN UNION: A STUDY OF THE PRINCIPLE OF FULL COMPENSATION*

Abstract:

Policy preferences in the US shape private antitrust remedies in the form of deterrence; any compensation failures can be justified as long as the deterrent function is successful. In contrast, EU private antitrust enforcement seeks to ensure that anyone who has suffered harm from a violation of competition law can effectively exercise their right to claim full compensation; deterrence can be seen as a mere side effect. This paper will demonstrate that full compensation is unfeasible in practice, because compensating direct purchasers and indirect purchasers will inevitably fail to a greater or lesser degree. Second, it will show that the EU's compensation-based mechanism, with a specific emphasis on full compensation, has more of a need for deterrence-based tools than the deterrence-focused mechanism of the US.

Keywords: full compensation, deterrence, private enforcement, damages actions, direct purchasers, indirect purchasers.

6.1 INTRODUCTION

Traditionally, the enforcement of the competition law system of the European Union has been the exclusive competence of the EU's public enforcer - the European Commission. However, after the adoption of Council Regulation 1/2003, the national competition authorities (NCAs) and national courts were empowered to enforce EU antitrust rules alongside the Commission.¹ Time has shown that member states have successfully enforced EU competition rules in the national context.² Therefore, public enforcement has reached a point of stability and maturity over the last decade. In contrast, private enforcement is underdeveloped in compensating consumers and SME's, especially if they are indirect purchasers. Due to the ineffective right to claim damages, victims are losing billions of euros per year.³ However, it is true that several direct purchaser actions have been brought in the EU member states, yet the disputes have mainly been between large corporations.

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This Chapter is a revised version of the original published article. In order to address new developments, Chapter 6 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 PhD dissertation. Moreover, the published article's reference list has been moved out from Chapter 5 in order to avoid repetition with the bibliographic details in the dissertation's List of Reference. To conclude, it should be stressed that the revised Chapter maintains the original journal standards: citation, style, punctuation and consistency.

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

² NCA's reported that there were 1,334 investigations and 646 envisaged final decisions between 1 May 2004 and 31 December 2012. For the further discussion, see Wils 2013, pp. 295-296.

³ Renda et al. (2008), p. 11.

The ineffectiveness of the private antitrust enforcement regime has created more incentives for the European Commission to enhance damages actions. The search for an appropriate system of private antitrust enforcement has culminated in the adoption of the Directive on antitrust damages actions⁴ and the Recommendation on collective redress mechanisms.⁵ Although the Recommendation takes the form of a horizontal framework (across all legal fields), its relevance for competition law is particularly highlighted by the fact that it was adopted simultaneously with the Proposal for a Directive on damages actions. For the purposes of this study, the latter package, consisting of the Directive and the Recommendation, is called the EU private antitrust reform.

The reform is focused on the objective of compensation, while deterrence can be seen as only a side effect. The Directive requires all EU member states to ensure that anyone who has suffered harm due to an infringement of competition law can effectively exercise their right to claim *full compensation*.⁶ This means that each financial victim down the supply chain, including the end consumer, is entitled to actual loss, loss of profit plus interest. This Chapter will discuss to what extent the EU private antitrust reform is capable of achieving the objectives of full compensation.

The EU's compensation approach stands in contrast with that of the United States, where antitrust policy preferences shape private remedies in the form of deterrence. Indeed, the availability of deterrence-oriented remedies incentivized the development of the so-called "private attorney general", i.e. a lawyer who enforces the laws so aggressively that private remedies have become a motivating power in antitrust enforcement.⁷

A. Research question and scope

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

The following steps are taken to address this question. First, Chapter 6 gives a general overview about the private antitrust enforcement schemes on both sides of the Atlantic: the EU's compensation-oriented one and the US deterrence-based one. Second, it examines to what extent the key provisions of the EU private antitrust reform are capable of achieving the objectives of full compensation. More specifically, Chapter 6 discusses the impact of the indirect purchasers' rule and how the EU private antitrust reform interacts with public enforcement. Third, it scrutinises the potential impact of US deterrence-based measures in the EU compensation-oriented system.

As regards the scope, Chapter 6 is the most important in exploring the background and extent of the principle of full compensation. For this reason, a specific emphasis is given to the Directive on damages actions, and especially as regards its objectives and functions. To that extent, the

⁴ 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.

⁵ 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.

⁶ Directive, *supra* note 4, Arts. 1, 3.

⁷ Over 90% of antitrust litigation is filed by private plaintiffs. See, for example, Sourcebook of Criminal Justice Statistics Online (2004).

Recommendation of collective redress is considered representing the European Commission's approach on antitrust collective actions, and it is examined accordingly in the context of full compensation. To sum up, the Chapter's main objective is to examine the impact of damages actions, and collective actions especially, on full compensation. As regards deterrence, it is discussed only as regards the means of fulfilling full compensation.

B. Methodology and limitations

In this Chapter, the comparative research study primarily combines structural and analytical approaches. As regards the structural approach, it compares a set of components that characterise the EU's compensation-based and the US deterrence-oriented private antitrust enforcement schemes. The analytical approach is twofold. First, it is used to separate the main elements of the EU private antitrust reform, and to evaluate their potential to contribute for achieving full compensation. Second, it is applied to isolate the respective private antitrust elements within the compared EU and US systems, with the main focus on collective/class actions. The latter study is helpful for understanding the potential impact of the US-style elements in the EU context, if any. Contrary to other chapters, this paper neither includes a deeper evaluation of the available empirical data nor a deeper assessment of the case law in the field. It mainly conducts the EU-US comparative study based on concepts, provisions and principles.

At first glance, two limitations can be observed. First, the chosen approach may only provide a conceptual or preliminary understanding of the EU-US comparative analysis. Second, comparing the concepts and provisions between the EU and the US is highly complicated, because both systems are inherently distinct: the US being deterrence-oriented (and more forceful) and the EU being compensation-based (and more careful). In the context of these limitations, it should also be taken into consideration that this Chapter is a part of the overall framework of the PhD dissertation. Therefore, the conclusions made in this Chapter are based on the findings in other chapters, which combine a variety of case-law and empirical studies. However, as discussed throughout the dissertation, the main research limitation is that there is a lack of practical examples of collective actions in the EU context and that the US system provides insufficient empirical data about the effectiveness of antitrust class actions. In order to mitigate these limitations as much as possible, different research techniques are combined in the dissertation.

C. Overview of research material

The main emphasis is on the extent of principle of full compensation, and how this principle has evolved. Therefore, a particular focus is given to the EU's policy documents, including *inter alia* the Directive on damages actions and the 2005 Green Paper and the 2008 White Paper on damages actions. As regards collective redress, the most important are the Recommendation on collective redress and the Communication "Towards a European Horizontal Framework for Collective Redress". The analysis has been as well based on by reflections of Hodges, Kuijpers and Peyer. For a comparative analysis with the US system, the works of Crane are of particular importance, especially as regards the views on the progression of compensation-oriented schemes and on the importance of deterrence-based remedies in the EU system. While the Crane's study concentrates on the 2008 White Paper, this Chapter expands his study in the context of the EU private antitrust reform. The author of this dissertation had an advantage of having a direct contact with prof. Crane

(one of the most prominent American scholars in private antitrust enforcement), who was his supervisor during the research stay at the University of Michigan. Crane's critical approach on the US private antitrust enforcement has been heavily criticised by other American scholars, such as Lande and Davis. However, the criticism of Lande and Davis is not discussed in this Chapter, as its emphasis is on the EU's compensation-based mechanism. These contrasting views are carefully assessed in Chapter 3.

D. Structure

This Chapter is structured as follows. Section 2 gives an overview of the basic definitions and objectives of enforcement models in EU competition law, with a particular emphasis on private enforcement. Section 3 describes the antitrust policy preferences under private remedies in the US and in the EU. Section 4 assesses how the key provisions of the EU private antitrust reform interact with the principle of full compensation. Section 5 analyses the impact of deterrence-based remedies in the EU compensatory collective actions.

6.2 THE ROLE OF PRIVATE ENFORCEMENT IN THE COMPETITION LAW OF THE EUROPEAN UNION

6.2.1 A General Background of the Enforcement of EU Competition Law

The main competition rules of the EU are set out in articles 101 and 102 in the Treaty on the Functioning of the European Union (TFEU).⁸ Article 101 prohibits agreements or concerted practices between two or more undertakings which have the objective of preventing, restricting or distorting competition within the internal market. Article 102 prohibits the abuse of a dominant position by one or more undertakings in a particular market within the EU, insofar as it distorts trade between member states. In general, the enforcement of competition law primarily seeks to remedy anti-competitive situations. This is to be achieved by pursuing the following three objectives through two models of enforcement: public and private enforcement.

1. To identify the violation and to clarify the surrounding legal situation.

This objective has been pursued mainly through public enforcement, which operates within a two-tiered system: the European Commission's DG Competition at the EU level, and the NCAs at the national levels. Private enforcers are motivated by private gains and hence mainly pick up low-risk cases, while competition authorities have better investigatory tools and are able to coordinate their activities with other public authorities.

2. To punish the perpetrator and to deter from breaching the law in the future.

The deterrent function is pursued through the imposition of competition fines, which punish the infringer (in other words, specific deterrence). It also deters other persons from engaging in, or continuing, behaviour that is contrary to the competition rules (in other words, general deterrence).⁹

⁸ Consolidated Version of the Treaty on European Union [2008] OJ C115/13.

⁹ For the discussion on both types of deterrence, see European Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 [2006] OJ C 210/2, para. 4.

According to the EU, public enforcement is considered to have sufficient means for achieving deterrence.¹⁰ In this respect, it must be borne in mind that the EU competition law exclusively focuses on imposing fines on infringing businesses, but member states are given space to introduce other types of penalties.¹¹ In order to combat cartels, some EU member states have incorporated criminal sanctions on individuals (such as imprisonment or criminal fines) in their antitrust enforcement schemes.¹² However, these sanctions have very rarely been imposed in practice.¹³ Therefore, public authorities in the EU jurisdictions have failed in setting an example for criminal penalties being effectively utilized in public enforcement.

3. *To achieve corrective justice when the infringement has taken place.*

This goal can be pursued if two conditions are met.¹⁴ First, corrective justice is achieved if the monetary remedy deprives from any benefit the wrongdoer gained from illegal conduct. This measure may be used when public enforcers impose a sub-optimal fine. As such, the enforcement may be reinforced by imposing additional fines on the wrongdoer in order to fully remedy the anti-competitive situation. Second, corrective justice is achieved when victims are compensated for the harm suffered. According to the Directive on damages actions, the objective of compensation is fulfilled when victims effectively exercise the right to claim and to obtain full compensation for the harm suffered. However, this objective should not lead to overcompensation of the claimants, whether by means of punitive, multiple or other kind of damages.¹⁵ For this reason, the enforcement of the first condition may not comply with the principle of full compensation, as additional fines (besides damages on fully compensating victims) may be required to ensure corrective justice. As a consequence, only the second condition will be further discussed in this Chapter.

The achievement of full compensation is primarily realized through private enforcement. Antitrust victims may bring a claim for damages or for injunctive relief.¹⁶ However, claims for damages are more attractive, as financial benefits are expected. In contrast, injunctions only aim to cease the violations of victims' rights granted by EU law. The antitrust claim may be brought on a stand-alone basis or on a follow-on basis. The former action is popular in the United Kingdom, while the latter is predominant in civil law countries.¹⁷

To sum up, the EU seeks to create an effective system of private enforcement that "complements, but does not replace or jeopardise, public enforcement."¹⁸ However, it is true that effective private enforcement, allowing for a multitude of victims to obtain compensation, can also serve a

¹⁰ See, for example, Italianer (2013).

¹¹ Regulation 1/2003 did not harmonise sanctions for antitrust violations. This is probably because the EU seeks to comply with article 83(2) of the TFEU, which preserves the sovereignty of the EU member states in criminal matters. For the discussion on the issue, see Günsberg (2015), pp. 55-59.

¹² For the study, see Jones and Harrison (2014); Whelan (2012).

¹³ See, for example, Jones and Harrison, *supra* note 12; Slotboom (2013).

¹⁴ For the additional discussion, see Wils (2009), p. 3.

¹⁵ Directive, *supra* note 4, Art. 3.

¹⁶ The injunctions, for example, are allowed under the Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers interests [2009] OJ L 110.

¹⁷ The exception of a stand-alone case in a civil law country can be found in the Lithuanian jurisdiction. See *AB flyLAL-Lithuanian Airlines v. Air Baltic Corporation A/S and Airport Riga*, Decision of the Court of Appeals of Lithuania of 31 December 2008, civil case No. 2-949/2008. For the discussion on stand-alone actions in the UK, see Kuijpers et al. (2017), pp. 56-58.

¹⁸ White Paper on damages actions for breach of the EC antitrust rules COM (2008) 165 final, Sec. 1.2.

deterrence function.¹⁹ The basic idea is that if more victims are compensated (especially if these claims would not otherwise be litigated), there are broader possibilities to force the wrongdoers to internalize the negative effects of the damage caused. This includes not only the amount of damages (awarded, or settled), but also attorneys and experts fees, and administrative expenses. Therefore, successful compensatory actions may deter potential wrongdoers from two perspectives: first, because of the aggregate value of damages; second, because of the combination of case-related costs. Until now, however, private enforcement has had little effect on compensation, and the impact on deterrence is likely absent. This is for at least two reasons. First, the actions for damages have been mainly brought in Germany, the Netherlands and the UK.²⁰ Second, the cartel damages claims have been mostly brought by corporations, meaning that ordinary consumers have been inactive in bringing private claims; both as a group and individually.²¹

In conclusion, it should be stressed that the principal aim of this paper is to analyse the role of private enforcement, and collective actions especially, in fulfilling the objective of full compensation. Deterrence is analysed only as regards the means of achieving full compensation. Furthermore, the discussion on clarifying the terms of antitrust violations is disregarded in this Chapter.

6.2.2 The Evolution of Private Antitrust Remedies

Traditionally, the enforcement of EU competition law has mostly been carried out by the European Commission. The situation changed dramatically when the enforcement of competition law was amended by the Regulation 1/2003. The key measures included, *inter alia*, the following: (a) stimulating national courts' activity in the enforcement of EU competition law; (b) decentralizing the enforcement of EU competition rules, and (c) strengthening the possibility for individuals to seek redress before national courts. Thus, the aim of facilitating private enforcement was on the EU's agenda. At the same time as the EU legislators were taking the aforementioned steps, the objective to improve antitrust damages actions was reinforced by the Court of Justice of the European Union (CJEU) ruling in *Courage v. Crehan*.²² The Court held that private antitrust actions contribute to the effective enforcement of competition law, and hence victims should be able to claim damages for the harm suffered.²³

Following the CJEU decision, the Commission aimed at identifying key barriers to the further promotion of antitrust damage actions in its policy proposals in the Green Paper²⁴ and the White Paper.²⁵ Both papers recognized the need for collective redress mechanisms in the field of antitrust. While the Green Paper did not specify the types of collective actions, the White Paper suggested a combination of two complementary mechanisms of collective redress: representative actions and

¹⁹ 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.

²⁰ For the discussion on these jurisdictions, see Kuijpers et. Al., *supra* note 17.

²¹ BarentKrans (2015). In 2015, there were 65 pending cartel damages claims in Europe, but one was brought outside the EU (in Belarus). It seems that no end-consumer/citizen collective claims have been brought.

²² Case C-453/99 *Courage Ltd. v. Bernard Crehan* [2001] ECR I-6297.

²³ *Ibid*, paras. 26-28.

²⁴ Green Paper - Damages actions for breach of the EC Antitrust Rules COM (2005) 672 final.

²⁵ White Paper, *supra* note 18.

opt-in collective actions. Although both papers identified problems that needed to be addressed, only in 2013 the European Commission eventually conclude its long-awaited package on antitrust damages claims. The most important step was taken in November 2014, when the EU adopted the Directive on damages actions. It is designed to remove obstacles to compensation for victims of infringements of EU competition law, and to balance interests between public and private enforcement. Member states were required to implement the provisions of the Directive in their national legal systems by the end of 2016. However, countries struggled to implement the Directive into national laws: only 5 countries managed to do it in time.²⁶ The Directive should be strongly criticized for not including provisions on collective redress actions. These actions are the main, if not the only tool for small-stakes actions to be heard in courts, as pursuing them individually is financially unfeasible. In order to facilitate the situation, the Recommendation on collective redress was published. However, the Recommendation is not very helpful, since it is a non-binding document and does not incentivise member states to take actions. Another viewpoint is that the Recommendation takes a horizontal approach, and as such, its content applies to all areas of law. Given that the Recommendation was adopted together with the draft on the Directive, it shows a particular desire for more extensive private litigation within the area of competition law. Yet, ultimately, the reality is that no measures on collective redress were included in the Directive on competition damages.

Although DG Competition was in favour of antitrust collective litigation, it was not included in the Directive for at least three reasons.²⁷ First, the European Commission sought to introduce a legislative instrument before the end of the mandate in 2015; only an uncontroversial proposal could pass in the European Council. The inclusion of collective redress actions, being inherently controversial due to the so-called American problems of abusive litigation, could jeopardize the very adoption of the Directive. Second, the principal aim was to clarify terms on the leniency program, especially after the CJEU decision in *Pfleiderer*.²⁸ It was considered that the availability of collective actions could raise uncertainties for leniency applicants, and they would refrain from coming forward if there was even a minimal possibility of being exposed to private claims from all victims. Third, DG Competition primarily aimed to address the technical issues on damages claims, such as limitation periods, joint and several liability, etc. Therefore, a political decision was taken to not include collective claims, which could distort the negotiation process on technical issues.

In light of these reasons, only the Recommendation was proposed, for which a four-year trial period was given. The need for further legislative measures in the field of collective redress will be decided on the basis of member states' experiences.

6.3 POLICY PREFERENCES UNDER ANTITRUST PRIVATE ACTIONS IN THE UNITED STATES AND THE EUROPEAN UNION

6.3.1 The Deterrence-Oriented Approach in the United States

²⁶ European Commission (2016) Directive on antitrust damages actions.

²⁷ The discussion on "three reasons" is based on the analysis of Hodges (2014), pp. 74-75.

²⁸ Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-05161.

The US Supreme Court has ruled that antitrust private actions serve two objectives: compensation and deterrence.²⁹ But, in case of a conflict between these objectives, the Supreme Court seems to give prevalence to deterrence over compensation.³⁰ The prevailing goal of deterrence is even more visible in class actions, which aggregate private actions under Rule 23 of the Federal Rules of Civil Procedure. According to the economic rationale, identifying different kinds of victims and compensating them may be financially unfeasible.³¹ Generally, the case costs (administrative, expertise and etc.) are substantial, hence individuals (especially consumers) obtain small individual awards.³² As such, the positive effect for the individual class member is minimal. Therefore, in the context of economic efficiency, the real and only goal of class action lawsuits, and especially of small-value claims, is to facilitate deterrence.³³ In fact, when small stakes claims which typically otherwise would not be prosecuted are aggregated, the wrongdoer is forced to better internalize the costs caused by illegal conduct. Therefore, the significantly increased number of damages claims sets the example that class actions can be utilized in antitrust enforcement, thereby enhancing deterrence to some extent. Indeed, class action lawsuits are mainly reinforced through a *combination* of five measures aimed at enhancing deterrence:

- Automatic treble damages;
- Wide-ranging discovery rules;
- An opt-out measure;
- One-way fee shifting (the absence of the "loser pays" principle);
- Lawyers being allowed to accept antitrust cases on a contingency fee basis.

Together, these measures create sufficient incentives for lawyers to enforce the antitrust laws as private attorney generals. If there was no kit of deterrence-based tools, lawyers would probably not bring antitrust cases not only because they are difficult to detect and convict, but also considering that the total costs can be extremely high due the complexity of antitrust violations.

As regards compensation, the US experience demonstrates that class members receive low proportional awards.³⁴ Even though victims remain highly undercompensated, the plaintiff bar receives significant compensation, which potentially overpays the class counsel.³⁵ It should be also observed that defendants are eager to settle cases as soon as possible: the discovery proceedings

²⁹ See, for example, *Am. Soc. of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556, 575-76 (1982); *Pfizer, Inc. v. Gov. 't of India*, 434 U.S. 308, 314 (1978).

³⁰ The primary importance of deterrence was observed in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). For further discussion, see Richman and Murray (2007), p. 90; Page (1985), p. 1452.

³¹ Crane 2010, 682-683.

³² This is the approach of the Chicago School. See, for example, Schwartz (1980), p. 1086.

³³ See, for example, Fitzpatrick (2010a), p. 2068; Friedman and Gilles (2006), pp. 105-107.

³⁴ In automatic distribution settlements, around 35%-90% of victims receive some kind of compensation. But these victims never receive actual compensation, and their individual award is generally lower than 50% of their actual harm. On these points, see Fitzpatrick and Gilbert (2015), p. 6; Pace and Rubenstein (2008), p. 23; Hensler et al. (2000), pp. 184, 204-05, 310. In claims made settlements, only between 1% and 20% of victims receive compensation, and in some cases the proportion can be even lower than 1%. For the discussion, see Consumer Financial Protection Bureau (2015), p. 27-31; Mayer Brown (2013).

³⁵ The attorney's compensation on average ranges from 15 to 80 million dollars. And in some cases it is even higher. For the discussion, see Fitzpatrick (2010b), p. 831; Eisenberg and Miller (2010), p. 262; Davis and Lande (2008), p. 902-903.

may generate very high costs.³⁶ If the case is prolonged, the discovery expenses increase proportionally. For the class counsel, it is also worth to settle cases, as his or her compensation is based on the contingency fee agreement, which is calculated as a percentage of the class net recovery. However, the group is in any case large (both in number and financially capacity) due to an opt-out measure, which binds all potential victims, unless someone decides to opt out.

Indeed, the objective of compensating victims is programmed to fail, because most cases are settled for awards lower than actual damages.³⁷ When case costs (administrative fees, expert fees and contingency fees) are deducted from the settlement award, it is determined that class members will receive low individual compensation. However, compensation is not the only objective in a deterrence-oriented system, such as in the United States. The failure of compensation can be justified if the class action device facilitates deterrence.³⁸ The basic logic is that it is better to prevent the wrongdoers from engaging in anticompetitive conduct rather than to attempt to restore all the damages caused by antitrust violations. But if an infringement has taken place, the class actions lawsuits become in essence the only option for most victims to receive compensation.³⁹ To sum up, compensation is an integral component of class actions, but it only serves a subsidiary function to deterrence. For further discussion on the US mechanism, see Chapter 3.

6.3.2 The Principle of Full Compensation in the European Union

The policy preferences in EU competition law do not shape the private remedies in the form of deterrence. The primary objective is that of compensating victims of antitrust infringements, while deterrence can be seen as a mere side effect. For this purpose, the EU established the principle of full compensation for private enforcement, summarized in Table 1.

The beginning of the development of the principle of full compensation can be considered to be the CJEU decision in the *Crehan* case.⁴⁰ The CJEU expressly established that the full effectiveness of Article 101 TFEU would be put at risk if it was not open to *any* individual to claim damages for the loss caused.⁴¹ Later, in the *Manfredi* judgement, the CJEU provided further elaboration that each injured person must be able to seek compensation not only for actual loss, but also for loss of profit plus interest.⁴² In accordance with the CJEU judgments, the subsequent 2008 White Paper established the principle of full compensation that allows to claim damages for the *real* value of the loss suffered, taken together: i) the actual loss, (ii) loss of profit, and (iii) the right to interest.⁴³

³⁶ Brief of the American Antitrust Institute in Support of Respondents at 5, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) (No. 05-1126).

³⁷ See, for example, Cavanagh (2010), p. 644.

³⁸ See, for example, Fitzpatrick, *supra* note 33, p. 2047; Posner (2001), p. 266.

³⁹ Lande (2016), p. 81.

⁴⁰ *Courage*, *supra* note 22.

⁴¹ *Ibid*, para. 26.

⁴² Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi and Others v. Lloyd Adriatico Assicurazioni SpA and Others* [2006] ECR I-6619, paras. 95-97.

⁴³ White Paper, *supra* note 25, Sec. 2.5.

Table 1. A study of the principle of full compensation of damages

Principle of Full Compensation of Damages		
	Main provisions	The relationship with full compensation principle
Crehan judgement	<i>The right to claim damages <u>to any individual</u>.</i>	<i>The initial confirmation of full compensation by the CJEU</i>
Manfredi judgement	<i>Any individual must be <u>able to seek compensation not only for actual loss</u> (damnum emergens) but also <u>for loss of profit</u> (lucrum cessans) <u>plus interest</u>.</i>	<i>The CJEU extension of the compensation objective including the expected loss (loss of profit and interest)</i>
White Paper (2008)	<i>Full compensation covers the real value of the loss suffered: (i) the actual loss, (ii) loss of profit, and (iii) the right to interest.</i>	<i>Confirmation of the full compensation principle in the non-binding document of the European Commission</i>
Directive on damages actions (2014)	<i><u>Any natural or legal person should be able to claim and to obtain full compensation</u> for the harm caused by an infringement. Full compensation shall therefore cover the right to compensation for actual loss and for loss of profit, plus the payment of interest.</i>	<i>Confirmation of the full compensation principle in the legally binding document of the European Union</i>
Recommendation on collective redress (2013)	<i>Collective actions facilitate access to justice and enable compensation to individual claimants in mass harm situations.</i>	<i>The primary objective is facilitate access to justice and to enable compensation in mass harm situations. There is no particular emphasis on full compensation.</i>

The Directive reaffirms the EU *acquis communautaire* by providing that anyone has a right to claim full compensation for the harm caused by antitrust infringements.⁴⁴ It also seeks to avoid overcompensation by rejecting any form of damage multipliers, such as the US treble damages.⁴⁵ The principle of full compensation is reinforced by two additional provisions:

- Both direct and indirect purchasers are entitled to claim full compensation;⁴⁶
- The injured party may claim compensation from any of the jointly and severally liable infringers until the claimant is fully compensated.⁴⁷

Compared to the Directive, the Recommendation aims at facilitating access to compensatory justice for individual claimants, while there is no particular emphasis on full compensation.⁴⁸ A logical implication of this would seem to be that there is no intention to regulate the competition law on a sectorial basis, since the Recommendation takes a horizontal approach (across a range of sectors). Thus, there is no reason why the principle of full compensation and avoidance of overcompensation should not guide the proceedings of antitrust collective actions.

⁴⁴ Directive, *supra* note 4, Art. 1.

⁴⁵ *Ibid*, Art. 3(3).

⁴⁶ *Ibid*, Arts. 12 and 14.

⁴⁷ *Ibid*, Art. 11(1).

⁴⁸ However, para 30 of the Recommendation mentions the right to full compensation, but in the context of contingency fees. It remains unclear how this provision would interact with the principle of full compensation enshrined in the Directive on damages actions.

Any damages actions reform that seeks to ensure the right to full compensation, also commits to implement a scheme that allows for victims to exercise that right at all distribution levels. A primarily compensation-oriented system frames a procedural framework that implicitly acknowledges the progression of successive determinants.⁴⁹ First, by promising full compensation the EU reform accepts that each financial victim of the antitrust infringement can claim compensation for the harm suffered. Therefore, it means that standing should be granted to direct purchasers and to indirect purchasers all the way down the distribution chain. In addition, the indirect purchasers can rely on a rebuttable evidential presumption that cartel overcharges are at least partially passed on to them. Therefore, exercising the right of indirect purchasers would require chasing the "harm downstream to the ultimately injured parties" (usually totalling in thousands or even millions indirect purchasers) who usually suffer dispersed and low-value damages.⁵⁰ To complicate matters further, the right to seek full compensation encompasses the real value of the loss suffered, including the actual loss, lost profits and interest. All things considered, the EU has introduced a mechanism that demands a very effective compensation scheme, since every victim is entitled to full compensation. This objective sounds laudable, but in reality the implementation of full compensation requires the implementation of at least the following elements, illustrated in Table 2.

Table 2. The determinants of an effective enforcement of the principle of full compensation

An effective implementation of full compensation
Full involvement of victims
↓
The availability of effective collective redress schemes
↓
The potential ground for representatives to represent victims
↓
Discovery rules enable the disclosure of incriminating evidence

First, the effectiveness of compensation depends on if victims actively engage in private litigation. However, the further down the distribution chain victims are, the more remote they are from the violation and the less incentives they have to litigate. Therefore, the main alternative for collecting scattered individual losses is the availability of effective collective redress schemes. But identifying, collecting and compensating antitrust victims can be very burdensome, especially if they are located far down the supply chain. It is also true that collective actions would never be heard if there was no sufficient ground for group representatives to take complex and expensive antitrust cases. Indeed, the potential award should outweigh the risks involved. In addition, regardless of how distant victims are from the infringement, the discovery rules should enable receiving incriminating evidence. Otherwise, establishing, proving and quantifying damages may be an insurmountable task. Considering these factors, it will be further examined whether the proposed measures in the damages actions reform (in the Directive and in the Recommendation) are likely to achieve the objective of full compensation or not.

⁴⁹ The progression regarding the compensation objective in the 2008 White Paper was observed by the American scholarship. See Crane, *supra* note 31, pp. 682-83. In this paper, the discussion has been extended on the basis of the EU's private antitrust reform.

⁵⁰ *Ibid.*

6.4 THE FULFILMENT OF FULL COMPENSATION UNDER THE EU PRIVATE ANTITRUST REFORM

6.4.1 An Overview of the Directive

When designing a system of private antitrust enforcement, policy makers had to strike a delicate balance between public and private enforcement. Yet, in spite of the proclaimed goal to facilitate damages claims, the new Directive first and foremost seeks to preserve the effectiveness of public enforcement, and leniency programs in particular. Despite the strong focus on public enforcement, some provisions are of particular relevance to consumer actions, such as granting standing to indirect purchasers. The main features of the Directive are therefore analyzed through the lens of full compensation.

A. Access to evidence

With the *Pfleiderer* judgement, the CJEU introduced a great dose of concern for potential leniency applicants. Most importantly, the Court refused to ensure the protection of leniency submissions. Considering the absence of EU rules on disclosure, the national courts were entitled, in each case, to carry out the balancing test for granting access to leniency documents.⁵¹ Hence, it became difficult to predict how national courts would treat each request for access to leniency material.

With a view to remedy an unpredictable *Pfleiderer's* case-by-case test, EU legislators introduced two limitations in the Directive: (1) leniency statements and settlement submissions have absolute protection from disclosure (the so-called black-listed documents); (2) information prepared specifically for the regulatory investigation until the competition authority has closed its proceedings, as well as withdrawn settlement submissions, are granted temporary protection from disclosure (the so-called grey-listed documents).⁵² Other documents falling outside the scope of these two categories should be subject to disclosure at any time (the so-called white-listed documents). One of the most important provisions is that the courts are enabled to order disclosure at their discretion. An important facilitation for plaintiffs is that defendants and third parties can be forced to grant access to documents to the other side. However, national courts are required to limit the disclosure of evidence in consideration with the following points⁵³: (1) the plaintiff has pleaded facts and evidence justifying the request to disclose evidence; (2) the plaintiff's request is accompanied by a "reasoned justification" to support the plausibility of the suit; (3) the requested evidence should be defined as precisely and narrowly as possible, and national courts must confirm the proportionality of the disclosure. To sum up, the court shall perform a balancing test on a case-by-case basis, and hence shall decide whether the requested documents fall under the white list category and whether the request is proportional.

At first sight, relatively wide disclosure rules may increase the probability of incriminating evidence about the real harm caused to the victim being revealed, even if leniency statements and settlement submissions are not part of disclosure. For example, by allowing the disclosure of more direct evidence (such as prices, sales volumes, profit margins or costs), the Directive allows a better

⁵¹ *Pfleiderer*, *supra* note 28, para. 32.

⁵² Directive, *supra* note 4, Art. 6.

⁵³ *Ibid*, Art. 5.

estimation of how the alleged infringement affects a particular market situation, and how the harm can be quantified.⁵⁴ Hence, it may solve the information asymmetry between plaintiffs (such as end consumers) and defendants (such as large corporations), who hold a monopoly regarding the evidence of violation.

B. Joint and several liability

Article 11 of Directive introduces the concept that infringers are jointly and severally liable for the entire harm caused by the joint infringement. Under this provision, each victim has the right to claim full compensation from any of the co-infringers until the harm is fully recovered. The court is responsible for determining the magnitude of liability, based on the extent of the harm caused by co-infringers. As regards immunity recipients, a conditional limitation of joint and several liability applies to immunity recipients, once again to avoid the negative and unpredictable effects on the leniency program.⁵⁵ In principle, they will be jointly and severally liable to their own purchasers (direct and indirect) only. However, the leniency recipients may be held liable if injured purchasers cannot obtain full compensation from the co-infringers.⁵⁶ It can be acknowledged that the Directive seeks to ensure the entire co-cartelists responsibility for the infringement, yet the civil liability for damages should be the least severe for the immunity recipient.

C. Indirect purchasers

The new rules on standing are the most important improvement for consumer actions. In accordance with the principle of full compensation, article 15 of the Directive extends standing to both direct and indirect purchasers. Indirect purchasers are natural or legal persons who acquired products or services (which are subject to competition law violations) not directly from a wrongdoer, but from a direct purchaser or a successive purchaser.⁵⁷ This is a class category that usually includes downstream consumers and SMEs, who are indirectly affected by competition infringement; particularly when antitrust overcharges are passed down to them in the supply chain. However, it is true that consumers and SMEs can both acquire cartelized products as direct and indirect purchasers. Arguably, the expansion of standing is in conformity with the *Courage* and *Manfredi* decisions that grant standing to every (direct and indirect) victim of anti-competitive behaviour. This approach differs from that in the United States at the federal level. The US Supreme Court rejected the pass on defence in the landmark *Hanover Shoe* decision.⁵⁸ From an economic rationale, it is considered that direct purchasers are best suited, and hence most likely, to bring antitrust claims.⁵⁹ Almost a decade after *Hanover Shoe*, the Supreme Court ultimately denied standing to

⁵⁴ Practical Guide on Quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, accompanying the Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union SWD (2013) 205, para. 30. The Guide observed that the availability of direct evidence may be useful information for assessing the quantum of damages.

⁵⁵ Directive, *supra* note 4, Art. 11 (4).

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*, Art. 2.

⁵⁸ *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968).

⁵⁹ Oxera (2014).

indirect purchasers to bring antitrust claims.⁶⁰ Conversely, indirect purchasers may recover damages in some state law actions.⁶¹

With regard to the EU, the standing to indirect purchasers is reinforced through the inclusion of a rebuttable presumption. Accordingly, the indirect purchaser shall be considered to have proven that (at least some of) the overcharge levied on a direct purchaser will have been passed on him or her, when the following points are shown⁶²:

- The defendant has breached competition rules;
- The violation has resulted in an overcharge for the direct purchaser;
- The indirect purchaser purchased the goods or services concerned.

If all factors are demonstrated to a credible extent, the court needs to approve the presumption of passing-on. In contrast, most EU countries have to date required proof of the overcharges in claims of indirect purchasers.⁶³ Therefore, the EU facilitation is very helpful for indirect purchasers, who are typically remote from the defendant, and for whom the substantiation of overcharge is particularly burdensome.

In order to avoid overcompensation for purchasers, the Directive accepts the availability of the passing-on defence.⁶⁴ The defendant can invoke this type of defence against a damages claim if the claimant passed the overcharge on to the next level of the distribution chain, either fully or partially. The defendants are imposed the burden of proving the passing-on "credibly to the satisfaction of the court."⁶⁵ To facilitate the defendant's burden of proof, the defendants are able to request reasonable disclosure from the claimant or from third parties. It is clear that the defendants usually lack information and access to information on the relationship between a direct purchaser and a subsequent purchaser, including information on the price of the resale.

D. The existence of harm

Article 17 of the Directive establishes a rebuttable presumption that cartels cause harm. The alleged violator bears the burden of rebutting that presumption. In simple terms, a final decision by the Commission, national competition authorities or by a review court should be established as irrefutable evidence of harm that can be used for the purposes of a follow-on damages claim. However, even though the requirement to prove harm is removed, a claimant is still required to prove causation, loss and the quantum of damages. In addition, the Directive empowers the courts to estimate the quantum of harm based on reasonably available evidence, provided it is "practically impossible or excessively difficult" for the claimant to estimate the amount of harm suffered based on the available material.⁶⁶ For this purpose, the Commission issued the Practical Guide on how to quantify damages.⁶⁷ Yet, such estimates are based on complex, unpredictable econometric models.

⁶⁰ *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 729-730 (1977).

⁶¹ *See, for example, California v. ARC Am. Corp.*, 490 U.S. 93, 105-06 (1989).

⁶² Directive, *supra* note 4, Art. 14 (2).

⁶³ European Commission (2015) Competition Policy Brief, p. 3.

⁶⁴ Directive, *supra* note 4, Art. 13.

⁶⁵ *Ibid*, Art. 14(2).

⁶⁶ *Ibid*, Art. 17(1).

⁶⁷ Practical Guide, *supra* note 54.

In addition, the final decisions taken by the competition authorities or courts of one member state will constitute at least *prima facie* evidence before civil courts in other EU countries.⁶⁸ However, this type of finding has already been recognized in many EU jurisdictions, even before the adoption of the Directive.

6.4.2 The Commission's Model of the Recommendation

The main principles of the collective redress mechanisms that the Commission expects the member states to adopt include the following:

- As a general rule, collective redress claims should be pursued on an opt-in basis, requesting the express consent of victims. Any exception to this rule should be "duly justified by reasons of sound administration of justice."⁶⁹
- The systems of collective redress should cover both injunctive and compensatory collective redress actions.
- A coherent collective redress scheme should be ensured by procedural safeguards in order to avoid the development of abusive litigation, such as in the US class action system.⁷⁰ According to the Recommendation, these safeguards must cover, *inter alia*:
 - i) Contingency fees should not be permitted. But, if a Member State allows for such a reimbursement model, it should be subject to appropriate national regulation⁷¹;
 - ii) Punitive damages must be prohibited in collective redress claims;
 - iii) The "loser pays" principle is a central safeguard against abusive litigation;
 - iv) There must be limitations on third party funding. The funders should be free from conflicts of interest, and they should have sufficient funds to support the legal action.

In terms of standing, the European Commission recommends two types of collective redress mechanisms:

- Group actions brought jointly by natural and legal persons who claim to have suffered harm;
- Representative actions.

Group actions are very poorly defined in the Recommendation, only stating that "the issue of standing [in group actions] is more straightforward than in the context of representative actions."⁷² Indeed, the key policy emphasis is on representative actions brought by representative entities, which should be limited to *ad hoc* certified entities or representative entities designated in advance. The Commission's approach sets stringent requirements for *ad hoc* or general certification, such as a non-profit character, a direct relationship between the violation and the activities of the representative entity, as well as sufficient capacity in terms of financial resources, human resources, and legal expertise.⁷³

⁶⁸ Directive, *supra* note 4, Art. 9.

⁶⁹ Recommendation, *supra* note 5, para. 21

⁷⁰ Recommendation, *supra* note 5, para. 1

⁷¹ Recommendation, *supra* note 5, para. 30.

⁷² *Ibid*, rec. 17.

⁷³ *Ibid*, para. 4

It is expected that the proposed principles of the Recommendation will facilitate access to justice, as well as facilitating compensation in mass harm situations. Given that the Recommendation is the most concrete step in the field of collective redress, the following discussion produces a study on to what extent the proposed measures in the Recommendation (in combination with the Directive) fulfil the objective of full compensation that is embedded in EU private antitrust reform.

6.4.3 The Assessment of the EU Private Antitrust Reform: A Study of Full Compensation

It is a very challenging task to combine the effectiveness of public enforcement and private enforcement on the one hand, and of giving standing to direct and indirect purchasers on the other, especially if there is an intention to ensure the victim's effective right to full compensation. While trying to achieve a lot in one swoop, the reform is in fact most likely to fail in providing full compensation, both for direct and indirect purchasers.

First, the EU has expressed the concern that private actions might actually undermine the effectiveness of the leniency programme, a crucial tool in exposing long term cartel violations and in bringing them to an end.⁷⁴ Thus, there is a need to secure public enforcement by ordering protection from disclosure of leniency statements and settlement submissions. Yet, in order to qualify for the leniency, the applicant has to provide the incriminating evidence of the alleged cartel, as well as a corporate statement that incriminates the receiver of the potential leniency.⁷⁵ Therefore, the inherently incriminating evidence will always be kept in the Commission's leniency file, and will not be available to victims. In fact, the inaccessibility of incriminating evidence reduces the incentives to bring follow-on damages claims, as other types of evidence (prices, profit margins or costs) are unlikely to characterise cartels as well as leniency material. Even though the Directive approves two rebuttable presumptions—one being that cartels cause harm and the other being that overcharges are passed on to indirect purchasers—it does not alleviate the burden to prove the harm suffered. Indeed, there are considerable difficulties in showing that, for example, indirect purchasers have indeed purchased goods that were the object of the competition law infringement.

The possibilities to bring stand-alone actions raise even more doubts. These actions are discouraging because they require a high standard of proof that the harm has actually occurred, without being able to rely on the findings of public enforcers. But, when compared with follow-on claims, the conviction rate is lower, and thus the likelihood of receiving damages is also lower.⁷⁶ Moreover, overcharges calculations and the disclosure come at high costs, especially when there is no prior public enforcement. The logical solution would be to reinforce private actions by forceful measures with regard to standing and funding so as to incentivize claimants to invest time and money in stand-alone claims. However, currently the only facilitation is that the Directive allows for the court to decide whether relevant evidence should be disclosed or not.⁷⁷ Indeed, the Directive enhances legal certainty for stand-alone actions that potential evidence may be disclosed through court orders. But it is highly unlikely that such facilitation will increase the incentives to litigate cumbersome stand-alone claims.

⁷⁴ Directive, *supra* note 4, rec. 38.

⁷⁵ Commission Notice on immunity from fines and reduction of fines in cartel cases [2006] OJ C298/17, paras. 9-11.

⁷⁶ Renda, *supra* note 3, p. 153

⁷⁷ Directive, *supra* note 4, Art. 5.

By not actually facilitating stand-alone actions, the Directive significantly diminishes the objective of full compensation, which is to provide compensation to any injured party. To explain this, it should be stressed that competition authorities usually take cases that have high rates of conviction. For example, at least 60% of cartel infringements were uncovered due to the leniency programme.⁷⁸ Under this model, investigatory tools are generally not used to reveal cartels; whistle-blowers come forward on a voluntary basis. The subsequent issue is that the detection rate of cartels is only up to 33% in the EU.⁷⁹ Consequently, a large majority of cases are bound to be undetected, and therefore victims will remain uncompensated, as private enforcers are unlikely to bring stand-alone actions.

Second, the reform has extended the standing to direct and indirect purchasers (including consumers and SMEs). Despite of the compensation of any injured party sounding laudable in theory, the reform is controversial because neither direct purchasers nor indirect purchasers (and especially not end consumers) can effectively exercise the right to claim full compensation.

The favourable treatment of end purchasers raises many obstacles to the achievement of the compensation goal in direct purchaser cases. The acceptance of the passing-on defence may reduce the amount of damages that can be claimed by direct purchasers. If a pass-on presumption has been confirmed, the direct purchaser would receive the reduced damages based on the amount passed on to subsequent purchasers.⁸⁰ It is even possible that a direct purchaser may pass on all or part of an overcharge to downstream consumers, but in reality "a direct purchaser has absorbed an overcharge in part or full"; this situation is contrary to the economic rationale.⁸¹ There is also a concern that the successful application of the passing-on defence is not in line with the application of the principle of full compensation, which awards compensation not only for the actual loss but also for loss of profit plus interest. A scenario is possible in which direct purchasers are not entitled for actual loss on the basis of the harm being passed on to indirect purchasers, but they would succeed in claiming damages for loss of profits, for example when the increased costs reduce revenues compared to what they would have obtained in a non-infringement scenario (in other words, counterfactual loss of profits).⁸² To sum up, the passing-on defence may decrease the willingness of direct purchasers to claim damages, where indirect purchasers are as well largely harmed by antitrust violations. As will be shown later, some actions were brought by direct purchasers in the EU member states, even before the adoption of the Directive on damages actions. In these cases, the passing-on defence does not seem to be a popular defendant's tool. First reason may be that the concerned antitrust violations mainly harmed direct purchasers. Second reason may be that the passing-on was not possible in some states prior to the adoption the Directive. Moreover, unpopularity of indirect purchasers' claims may be related to the fact that victims may be simply unaware about the violation.

When the availability of indirect purchaser claims is combined with the passing-on defence, it makes it very difficult to define how much of the cartel overcharge is actually passed down through

⁷⁸ See, for example, Carmeliet (2011-2012), p. 463. Wils finds even higher numbers: that at least in 80% of cartel decisions with fines during 2006-2015, the immunity was granted to undertaking. See Wils (2016), pp. 8-10.

⁷⁹ See Smuda (2012), p. 19; Combe and Monnier-Schlumberger (2009), p. 41-43. The latter authors estimated that the detection rate was around 15% during 1975-2009. Some commentators observe that the 15% detection rate of a cartel is an upper bound, see Mariniello (2013), p. 2.

⁸⁰ Peyer (2015), p. 25.

⁸¹ Oxera, *supra* note 59. It should be agreed with Oxera that a rebuttable pass-on presumption is not based on economic principles, rather on policy considerations.

⁸² Büyüksagis (2015), p. 25.

each distribution level (both for direct and indirect customers).⁸³ Further down the distribution chain, more complex factual and economic analysis is typically required in order to quantify the overcharge. It can be acknowledged that the number of victims increases proportionally down the distribution chain.⁸⁴ End consumers usually stand at the very end of the distribution chain, and the harm they suffer is of scattered and low impact. Unsurprisingly, these victims have the weakest interest in bringing damages claims, because they possess little information about the nature and extent of the harm and, most importantly, the cost-benefit of the claim is negative. Therefore, there is a high possibility that antitrust infringers will avoid responsibility for the harm caused when the overcharge was passed down the distribution chain.

Most likely, the only way to reach *each* victim (including end purchasers) and therefore to stand firmly against the wrongdoers is the possibility of aggregating suits and pursuing them together through collective actions. Despite being the vital amendment in any form of antitrust damages reform, the issue was only dealt with in the non-binding Recommendation. Yet, the problem is not that the effectiveness is considerably limited by the non-binding nature. The real issue is that the current European Commission's approach inherently limits the facilitation of access to justice to *any injured victim* as long as the collective redress scheme is framed under the proposed principles of the Recommendation. There are at least four reasons why the objective of fully compensating victims with small stakes is destined to fail if the proposed principles of the Recommendation will ever take a legally binding form:

- *The ineffectiveness of an opt-in principle*

First, the national experiments in France⁸⁵ and the UK⁸⁶ reveal the inefficacy of opt-in collective actions in attracting a sufficient number of victims to make an action economically feasible.⁸⁷ Despite an extensive media campaign in both countries, only a few hundred victims joined the action, while the violations had potentially caused harm to millions of consumers.⁸⁸ These failures can be easily explained. The potential awards were so low (the individual harm was on average €60 in France and £20 in the UK) that victims simply did not care about possibilities to join the action. Furthermore, many of them appeared to be unaware that they were harmed by the alleged cartel.

Second, the US experience shows the lack of responsiveness of class members when affirmative steps are required, even when they are entitled to an award. As mentioned before, only up to 20% of class members in the US file claims to receive payments when settlement distribution requires class

⁸³ *Ibid*, 24 (citing Maier-Rigaud (2014), p. 341; Becker, Bessot and De Smijter (2008), p. 5).

⁸⁴ Drexl (2015), p. 2.

⁸⁵ In France, after the Competition Council decision (Counseil de la concurrence, Decision No.05-D-65 of 30 November 2005), the consumer organisation UFC-Que Choisir brought an opt-in collective antitrust claim on the basis of price-fixing made by three mobile operators.

⁸⁶ In the UK, the consumer association *Which?* sued JJB Sports for fixing prices of replica football kits. An opt-in 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; *JJB Sports plc v Office of Fair Trading* [2006] Court of Appeal, EWCA Civ 1318.

⁸⁷ "*Which?*" stated that low number of consumers joined the action to make it feasible, and only an opt-out scheme would ensure the financial feasibility. See *Which?* (2011).

⁸⁸ Out of 20 million victims, the UFC-Que Choisir managed to collect claims from only 12,350 consumers. Out of 2 million victims, *Which?* managed to collect claims from only 130 consumers.

members to file claim forms. At its core, an opt-in measure is much more dissuasive than claim forms, because there is no guarantee of any recovery at all (the probability of success is much less than 100%). Furthermore victims can be required to pay membership fees in order to opt into the action.

- *The interrelated problems of standing and funding*

One of the most attractive designations to bring representative actions is a non-profit consumer organisation or other public body (for example, the Ombudsman or a trade union), as these entities are incentivised by their organisational mission to represent consumers in line with their best interests (at least in theory).⁸⁹ However, in reality there is a lack of rational actors who would have the capacity to bring risky, complex and costly collective competition actions under conditions of eligibility. For example, consumer organisations in many EU states have limited or no public funding, and if they are financed then it is only on an annual basis, preventing them from acting for instance in the form of a court action.⁹⁰ An even more concerning factor is that consumer organisations are struggling for survival in some countries, and consequently have a small number of paid staff.⁹¹ In fact, the idea that these entities would be able to fulfil the EU Recommendation's requirements for designated representative entities, i.e. to have sufficient financial resources, human resources, and legal expertise, sounds rather anecdotal.⁹²

The picture is somewhat different, for instance, in the UK⁹³ and France⁹⁴, where specified wealthy consumer organisations are entitled to bring a claim on behalf of consumers in relation to damages for breach of antitrust law. However, the above-mentioned opt-in actions raised a general issue of funding that was not cured simply through organisational standing. In case of representation by a group member, the issue of funding is even more evident: group members are unlikely to have more capacity in terms of funding and resources. This suggests that another important determinant for compensating victims is the incentive for potential intermediaries to bring claims on behalf of these victims. If a solution was found, the objective of compensation would be better achieved; the logic is simply that the more actions are brought, the more victims are compensated.

- *No involvement of private litigators*

The US experience suggests that the most important consideration from the standpoint of a plaintiff, and more specifically a class counsel, is whether the expected awards outweigh the expected risks of bringing complex antitrust actions. In the US, this objective is achieved because the private antitrust mechanism combines *six* deterrence-based tools: an opt-out measure, contingency fees,

⁸⁹ Buccrossi et al. (2012), p. 68. However, public standing cannot fully remedy the principal-agent problem. The decisions of the public entity may be influenced by political groups. For example, if a powerful company infringes on competition law (for example, by price-fixing), it may be able to influence the decisions of the association through political groups.

⁹⁰ Howells and Micklitz (2009), p. 20.

⁹¹ Kutin (2011), p. 106.

⁹² Recommendation, *supra* note 5, para. 4.

⁹³ Section 47B of the Competition Act 1998 allows representative actions to be brought in the Competition Appeal Tribunal by a "specified body" on behalf of consumers for damages for violation of UK or EU competition law.

⁹⁴ Under article 421-1 of the Consumer Code, an authorized consumer association may exercise the "rights given to a civil party relating to facts which cause direct or indirect harm to the collective interests of consumers, prejudicing the collective interest of consumers."

treble damages, one-way fee shifting (the absence of the "loser pays" rule), joint and several liability, as well as wide-ranging discovery. The biggest difference from the EU is that the American deterrence-oriented system urges active involvement of private litigators through the scheme of the private attorney general. In the EU context, however, a more active role of private litigators is limited by the careful approach to respecting the different legal systems and traditions of the member states, and also to preventing any possibilities of overcompensation. Therefore, the EU rejects the contingency fee agreements, while third-party funders are subject to the strict eligibility test.⁹⁵ Also, opt-out schemes and multiple damages are seen contrary to the EU's and its member states' legal traditions. In such circumstances, it seems highly unlikely that rational actors would have sufficient incentives to serve as class representatives or bring complex competition law collective action without expectation of significant awards.

- *Collective actions are so costly that they consume a large portion of the award*

The last issue is that full compensation is rather unrealistic for claimants who participate in the action, due to the organisation of the group demanding large organisational costs, including both administrative costs and case-management costs.⁹⁶ In order to inform the affected parties of the litigation, and to thus attract them to join the action, opt-in collective actions require expensive awareness-raising campaigns through mass media and other information channels. These problems are well illustrated by the *Mobile Cartel* opt-in collective action in France. The litigation costs were around 0,5 million euros, while the total value of the claim was 0,8 million euros (12,530 consumers joined the action with an average claim of 60 euros).⁹⁷ Much less than 1% of consumers joined the action, but the litigation demanded the hiring of 21 employees, and 2,000 hours were consumed to prepare the action.⁹⁸ In cases where opt-out schemes are used in practice, all victims become parties in the action and thus the group is already organized. Therefore, the organisational costs should be lower than in opt-in actions. However, as the US experience has shown, identifying the potential class members, processing the litigation and distributing the damages also causes significant costs.⁹⁹ To sum up, the total costs for bringing collective damages actions remain significant regardless of the type of representative action preferred by policy makers (an opt-in and/or an opt-out), because of the complexity of legal and economic assessments and a high burden of proof.

6.4.4 Synopsis

The antitrust damages reform's objective of fully compensating victims of all types fails to a large extent, for at least three reasons:

1. *Public enforcement remains the predominant tool in antitrust enforcement*

The principal aim of the Directive on damages actions is to preserve strong public enforcement. The main emphasis is on protecting leniency documents in follow-on private actions, where victims can

⁹⁵ Recommendation, *supra* note 5, paras. 14, 30.

⁹⁶ See, for example, Nagy (2013), p. 472-473, 479.

⁹⁷ UFC-Que Choisir (2011), p. 2.

⁹⁸ Hodges (2008), p. 84.

⁹⁹ On the US experience, see, for example, Crane, *supra* note 31, pp. 682-83.

free-ride on the efforts of competition authorities. Yet, the protection of leniency documents diminishes the motivation to bring follow-on actions, as inherently incriminating evidence is protected. Other documents are unlikely to describe the violation as well as leniency materials.

2. There are no sufficient incentives to bring stand-alone actions

The only facilitation of stand-alone actions is the court ordering disclosure, which is also dependant on the judge's willingness to disclose the relevant documents. However, the provisions on effective funding tools and favourable rules for standing are disregarded in the Directive. In absence of these tools, the chances that stand-alone claims will be brought to courts are rather incidental. In fact, by not actually facilitating stand-alone actions, the Directive simultaneously prevents private enforcement from curing the public enforcement's shortcoming of low detection rates.

3. Victims and their representatives are discouraged from bringing collective actions

The reform fails to maintain a balance between the claims of direct and indirect purchasers. The special treatment of the indirect purchaser makes litigation cumbersome for direct purchasers, as the defendants can invoke the passing-on defence. A rebuttable pass-on presumption may create a situation where an overcharge levied on direct purchasers will have been passed to their own downstream consumers, but in essence a direct purchaser has absorbed an overcharge. Ironically, despite the new right for indirect purchasers to seek compensation before national courts, it remains worthless if member states would follow the proposed principles of the Recommendation. Essentially, the proposed opt-in measure limits the access to justice to *any injured party*. Furthermore, there is a lack of rational actors who would serve as class representatives by taking on the risks of complex antitrust actions. This is especially true given that there are no tools for enabling sufficient compensation, which could outweigh the risks.

Despite the objective of compensating indirect purchasers being predetermined to fail, there is high potential for direct purchasers (particularly big businesses) bringing more damages actions. In 2015, a year before the Directive on damages actions was implemented in the member states, there were 64 pending cartel damages claims in 10 EU member states.¹⁰⁰ However, a large majority of actions have been brought by large corporations that purchased directly from the violators. There is also an increased possibility for arbitration in antitrust damages claims. The Directive enables parties to secure damages through consensual dispute resolution mechanisms, such as out-of-court settlements and arbitration.¹⁰¹ However, it should be stressed that arbitration will be subject to conditions in damages claims.¹⁰² Also, arbitration in collective actions seems highly complex, and potentially impossible in most cases, as not all group members will be necessary in contractual relations, or they may lack pre-existing arbitration agreements.¹⁰³

Given that damages claims were unavailable in many EU states, and that the Directive has only recently been incorporated into national laws (or will be soon), cartel damages claims (and potentially arbitration cases) should become a trend across the member states. The most alarming

¹⁰⁰ BarentKrans, *supra* note 21.

¹⁰¹ Directive, *supra* note 4, rec. 48.

¹⁰² Driessen-Reilly (2015), pp. 575-576.

¹⁰³ See Živković (2017).

factor is that indirect purchasers (SMEs and consumers) or direct purchasers with small claims will continue to struggle to receive damages, since forceful collective redress schemes were not included in the Directive. In turn, it will create incentives for "forum shopping" by choosing the jurisdictions that allow for opt-out collective actions (such as, Portugal, the Netherlands and the UK). However, litigating in other fora requires significant costs, which vulnerable victims lack. As a result, a large majority of victims will remain uncompensated.

6.5 THE IMPACT OF DETERRENCE-BASED TOOLS ON THE EU COMPENSATORY COLLECTIVE ACTIONS

As already discussed, American class actions are primarily designed to serve the objective of deterrence. This does not eliminate the importance of compensation, but it remains a mere secondary tool after deterrence. In marked contrast with the United States, and regardless of the complexity of detecting victims and compensating them, the EU system primarily focuses on ensuring full compensation for the damage actually incurred. In an effort to appropriately assess the rationale of full compensation, the following discussion will examine the importance of deterrence-based remedies in the EU system.¹⁰⁴

6.5.1 The Need for Damage Multipliers

In the United States, the automatic treble damages are the key deterrent to potential infringers.¹⁰⁵ In addition to deterrence, treble damages are also expected to provide "ample" compensation to antitrust victims.¹⁰⁶ However, trebling has no fairness criteria of fully compensating victims, rather it seeks to provide "rough justice" to sufferers.¹⁰⁷ Furthermore, the American experience offers the lesson that treble damages actions are typically settled, and hence the award generates amounts closer to actual damages rather than treble damages.¹⁰⁸ When the high administrative costs are deducted from this award, basic economic logic essentially demonstrates why antitrust class actions provide very low proportional compensation to an insignificant number of victims. But, as mentioned before, the compensation failure can be justified if the deterrent function is successful.

The European Commission's approach is much more precise than the US one. It has the explicit aim of providing actual compensation and the expected loss (lost profits and interest). Nonetheless, the Commission's proposal is in a deadlock situation: it seeks to ensure full compensation to all victims, but this goal is likely to fail. After all, there is no way to bypass the compensation failure, as in the US. To make matters even more complex, opt-in claims are very costly, since the group needs to be organized (as shown in the *Mobile Cartel* litigation). Suppose a scenario where victims are awarded *full damages*: in reality they would not receive them, because the *case related costs* would consume a large portion of the recovery. In case of settlement, the compensation failure is even more inevitable, because full damages would never be awarded. In order to solve the ineffectiveness in

¹⁰⁴ This point was discussed by Professor Crane several years ago. See Crane, *supra* note 31, pp. 700-02. The following discussion in this article has been expanded on the basis of the EU private antitrust reform.

¹⁰⁵ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985).

¹⁰⁶ *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472 (1982).

¹⁰⁷ Cavanagh, *supra* note 37, p. 632 (citing Lande (1993), p. 118). Cavanagh provides a monopolization example where the difficulties occurred in reconstructing the "but for" test in the case *LePage's, Inc. v. 3M Co.*, 324 F.3d 141, 164-66 (3d Cir. 2003) (en banc), cert.denied, 542 U.S. 953 (2004)).

¹⁰⁸ *Ibid* p. 644; Boies (2004), p. 333.

fully compensating victims, the Commission's scheme requires additional financial reinforcement to cover the costs related to the enforcement of the compensation goal (*full damages + case related costs*). One solution, if not the only one, would be to allow a damage multiplier in the EU context. It would ensure the award of full damages even after deducting the case related costs. We can therefore acknowledge that while the damage multiplier is considered to have the potential to lead to overcompensation, in reality it is not bound to do so. It really varies from case to case, and depends on the size of the multiplier to be applied. In summary, while trebling is primarily aimed at ensuring the deterrence standards in the United States, some sort of damage multipliers are required to ensure the essential requirements when enforcing the objective of compensation in the European Union.

6.5.2 The Need for Broad Discovery Rules

The objective of ensuring full compensation all the way down the supply chain is also not in accordance with the limited discovery rules. First, they prohibit the disclosure of leniency statements and settlement submissions. Second, they are also potentially limited due to the court ordering disclosure. Such a restrictive model is of particular relevance for vulnerable victims. The first category contains direct purchasers, where each has only suffered harm. The second category includes indirect purchasers, who are spread out among different distribution chains. The specific feature of indirect purchasers is that the further down the distribution chain they are, the less facts and evidence have to prove that the discovery requests are proportionate under article 5 of the Directive.

It seems rather unrealistic that rational representatives would bring stand-alone cases on behalf of vulnerable victims when the main and potentially only facilitator is the court ordering disclosure. In these cases, a wide disclosure is especially important for the certification stage.¹⁰⁹ However, collective actions seem too risky without fully knowing whether the judge will disclose the relevant material or not - indeed, proving proportionality is a complex task. Another worrying factor is that the infringer has a monopoly on possessing the violating material.¹¹⁰ Therefore, the wrongdoer can structure the disclosure in a way that prevents incriminating evidence from ever being disclosed. Moreover, claimants may not be able to specify the evidence they need to support their case. When compared to public enforcers, private enforcers have far less investigation tools. But even follow-on actions do not seem very attractive under the current model. The problem is that white-listed documents are unlikely to characterise cartels as well as black-listed documents. And, in turn, there is no guarantee that they will contain evidence allowing to quantify the harm and to identify the full extent of the violation. This uncertainty acts as one of the major factors dissuading representatives from bringing collective claims on behalf of vulnerable victims.

In the context of the American system, cases of both categories are more attractive for legal representatives. Contrary to the EU, the US system allows for liberal party-initiated discovery.¹¹¹

¹⁰⁹ In the United States, for instance, the court requires to "present evidence that varies from member to member" in order to prove the commonality of the claim. See *Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005).

¹¹⁰ See, for example, White Paper, *supra* note 25, sec. 2.2 ("Much of the key evidence necessary for proving a case for antitrust damages is often concealed and, being held by the defendant or by third parties, is usually not known in sufficient detail to the claimant").

¹¹¹ Federal Rules of Civil Procedure, Rule 26. For a discussion, see also Duns et al. (2016), p. 403.

Therefore, the Federal Rules of Civil Procedure allows flexibility in requesting the disclosure of depositions via oral and written depositions (Rule 28–32), written interrogatories (Rule 33), electronically stored information (Rule 34), and requests for admission (Rule 36). The American system is also unique, because even leniency applicants must provide "satisfactory cooperation" to the plaintiffs in their damages claims in order to enjoy de-trebling.¹¹² The combination of these factors allows for the representatives to structure claims better. In turn, it becomes much easier to pass the certification stage and to prove damages.

To sum up, the US system, which bars indirect purchaser claims (at least at the federal level), has less need for broader discovery rules, since direct purchasers have more insight to the defendant's illegal practices (e.g. the quantum of harm caused by that infringement) than do indirect purchasers.¹¹³ Paradoxically, the American system has wide-ranging discovery rules in place, while the EU discovery is much more limited.

6.5.3 The Need for Opt-out Schemes and Forceful Funding Tools

Antitrust violations (such as price-fixing cartels) often generate a low value harm that is widespread geographically, and in some cases spread far down the distribution chain as well. One reason for this is that antitrust infringements last for several years¹¹⁴, meaning that the market structure may change significantly during the violation period. Another reason is that antitrust damages can be spread in different directions, as antitrust harm can be passed on down the supply chain.¹¹⁵ As a result, collecting victims under an opt-in model, which requires convincing them to join the collective action, is simply unfeasible. First, these victims are not interested in investing time and effort in joining the claim, because the expected award is financially small by its very nature. Second, the violation may be so distant that detecting victims and compensating them can become a very complex, if not impossible task.¹¹⁶ Third, victims may be unaware of the violation, which can date back several years or more. In addition, one concern for legal representatives is that the "loser pays" principle is predominant, which can expose claimants to substantial adverse costs when the claim is lost. When combined with insufficient funding tools, it becomes clear why opt-in collective actions have been extremely unpopular in the EU member states that do allow such a claim aggregation model. In contrast, the availability of opt-out actions has proved to be the main factor incentivizing collective actions to be brought in three jurisdictions: Portugal¹¹⁷, the Netherlands¹¹⁸ and the UK.¹¹⁹

¹¹² Antitrust Criminal Penalty Enhancement and Reform Act, Pub. L. No. 108-237, §§ 201-214, 118 Stat. 666–67 (2004) (codified at 15 U.S.C. § 1 note). "Satisfactory cooperation" shall contain "a full account to the claimant of all facts known to the applicant ... that are potentially relevant to the civil action."

¹¹³ Crane, *supra* note 49, p. 702.

¹¹⁴ The law and economics scientists calculate that the mean duration of a cartel is around 8 years. See Hüschelrath et. al (2012), p. 3; Smuda (2012), p. 19-21.

¹¹⁵ Han et. al (2008), p. 2.

¹¹⁶ An illustrative example can be found in the decision of the Supreme Court of Canada, where the harm was identified, but that harm could not be proved to indirect purchasers. See *Sun-Rype Products Ltd v Archer Daniels Midland Company*, SCC 58 [2013] 3 S.C.R. 545.

¹¹⁷ See Lisbon Judicial Court, case no. 7074/15.8T8LSB.

¹¹⁸ *Equilib v British Airways et al.*, Decision of 7 January 2015, District Court of Amsterdam.

¹¹⁹ The UK introduced amendments in the 2015 Consumer Rights Act in order to provide space for opt-out collective actions in competition law. As a consequence, two follow-on actions were brought in the UK: *Dorothy Gibson v Pride Mobility Products Limited* and *Merricks v MasterCard*.

It should also be stressed that these collective actions have been reinforced by third party funding, with the unique exception of Portugal.¹²⁰ It shows that the efficiency of collective actions is directly related to the availability of opt-out schemes and forceful funding tools. In the US, class actions are mainly funded with contingency agreements for legal fees.¹²¹ When these fees are combined with treble damages and an opt-out aggregation model, class counsel is ensured to obtain compensation that outweighs the costs involved in antitrust collective litigation (if the case is successful). Under such a scheme, private attorneys are incentivized to invest in all types of cases. Even the claims of indirect purchasers may be of particular interest, as an overcharge is likely to affect a large group of victims, which are spread out down the supply chain. After trebling of the damages, the financial value of the class may be substantial, meaning that lawyer's compensation is also likely to be significant due to the contingency fee agreement. In the EU context, most states prohibit this reimbursement model in collective actions. In the few countries where contingency fee agreements are allowed in collective litigation, they have not been utilized in antitrust practice.¹²² This is notable, because only opt-in schemes are allowed. In conclusion, the experiences in the EU member states clearly demonstrate that effective compensatory collective actions are dependent on the American-style tools of deterrence.

6.5.4 Synopsis

The EU's principle of full compensation, in which the indirect purchaser rule is enshrined, demands an effective collective redress mechanism in order to achieve the objectives of compensation. Despite the grand compensation goal, the EU is inclined to rely on a careful but powerless approach to achieve full compensation. The truth is that effectiveness in compensating victims can be only achieved by allowing a far reaching collective redress mechanism, including for example US-style deterrence-based measures. Even if American measures are highly controversial, they appear to be the only way to effectively contribute to achieving full compensation: to reach and effectively compensate any victim who suffered harm for infringements of competition law.

On this point, it needs to be clarified that the EU private antitrust enforcement is not exceptional for seeking to ensure the victim's right to full compensation. The principle of full compensation has been also embedded in the European Tort law¹²³, the European Contract Law¹²⁴ and in some legislative measures of the EU.¹²⁵ Furthermore, the European Convention on Human Rights

¹²⁰ The claim was filed by the Portuguese Competition Observatory, a *non-profit* association of academics. However, it is more the exception than the rule. The academics are likely experimenting with the new type of antitrust litigation.

¹²¹ Fitzpatrick, *supra* note 35, p. 832.

¹²² For the discussion, see Juška (2016). It was observed that contingency fees in collective litigation are allowed in Germany, Sweden, Lithuania and Poland. In the latter two countries, the participation of attorneys is mandatory in collective actions, and contingency fees are permitted with the least restrictions. But, there have been no antitrust collective actions on the basis of contingency agreements.

¹²³ Principles of European Tort Law, art 9:101.

¹²⁴ Principles of European Contract Law, art 9:502.

¹²⁵ See, for example, Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delays of flights ECC No 295/91 [2004] OJ L 46. Article 8 allows to obtain the "full cost of the ticket at the price at which it was bought, for the part or parts of the journey not made, and for the part or parts already made if the flight is no longer serving any purpose in relation to the passenger's original travel plan." *See also* Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (85/374/EEC).

(ECHR) enshrines the right to compensation to the standard of "just satisfaction".¹²⁶ According to some commentators, this compensation rule employs the so called "Hull"-formula, which demands the fulfilment of high standards: compensation needs to be adequate, effective, prompt and provide full compensation.¹²⁷ Despite of the possibility of seeking full compensation in different fields, the EU private antitrust enforcement is exceptional for encompassing not only the full award (actual loss plus expected loss), but also the availability of the claims of indirect purchasers. Indeed, this type of litigation is exceptional in competition law, yet it demands extensive enforcement powers. Does this show that the EU is overambitious in the field of antitrust? The answer is both yes and no. It is obvious that providing full compensation to indirect purchasers may be very complicated, or impossible in some cases, especially when indirect purchasers are very remote from the violation. EU legislators could take the easy road by preventing indirect purchasers from seeking full compensation, and empower only direct purchasers. However, it is also true that setting the threshold at such a broad level allows for a better development of full compensation. Even if reaching and compensating victims will be impossible in some cases, the potential of indirect purchaser's claims will always bring new thoughts, perspectives and ideas to the litigation landscape; both in competition law and in other types of litigation. In addition, the right of vulnerable victims to claim compensation will be respected, even if it cannot be exercised in all cases. For these reasons, the inclusion of the indirect purchaser rule should be welcomed.

6.6 CONCLUSION

The research question of this Chapter was the following:

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

When addressing this question, it was found that the EU reform on facilitating private antitrust claims is driven by the objective of ensuring full compensation to every economic victim of anticompetitive behaviour. This objective requires the implementation of a very effective compensation scheme: both direct and indirect purchasers should be entitled to obtain full award for the harm caused, including the actual damages, loss of profit and interest. On this basis, the following findings were made.

- 1) The EU's private antitrust reform is bound to fall short of its stated goal of fully compensating every victim.

The reform is framed such that neither direct purchasers nor indirect purchasers can effectively exercise their right to claim and obtain full compensation. The standing for indirect purchasers undermines the incentives for direct purchasers, because defendants are allowed to invoke the passing-on defence. Despite the new right for indirect purchasers to seek compensation, their right is not effectively facilitated: there are no provisions regarding collective actions in the Directive. In this regard, the Recommendation does not seem very helpful: it is a non-binding document and the

¹²⁶ ECHR, Art. 41.

¹²⁷ Geler-Noch and Kirchner (2012), p. 25 (citing Peters (2003), p. 193).

proposed measures significantly diminish the chances for antitrust collective actions to ever be brought. As a result, the chances for indirect purchasers (and for victims with small claims) to obtain recovery depends on if they are situated in a country with favourable rules regarding collective redress schemes, more particularly if opt-out schemes and forceful funding tools are allowed.

- 2) The EU's private antitrust reform will have no impact on remedying the public enforcement's shortcomings.

The exclusive element of the EU private antitrust reform is that it is principally aimed at preserving strong public enforcement. By granting absolute protection to leniency statements and settlement submissions, the incentive to bring follow-on claims on behalf of victims, especially with small claims, is significantly diminished. As regards stand-alone actions, they are highly unlikely to be brought, as the EU reform does not facilitate these actions: claimants lack discovery tools and effective approach on funding and standing. Therefore, by not actually facilitating stand-alone and follow-on actions, the EU simultaneously prevents private enforcement not only from effectively compensating victims, but also from remedying the public enforcement's shortcomings. The contribution by forceful and effective private enforcement would allow increasing the detection rates and the cost of violation to wrongdoers.

- 3) The achievement of the EU's principle of full compensation demands an effective collective redress mechanism. However, the effectiveness can only be achieved by allowing far reaching tools, such as the ones found in the US deterrence-based mechanism.

This Chapter analysed the rationale of full compensation in comparison with deterrence-based remedies. It was found that the achievement of full compensation inevitably demands overstepping the bounds of the European Commission's careful approach. First, multiple damages are necessary to ensure full compensation standards (including actual loss and expected loss) and to compensate for the high case-related costs in opt-in actions. Second, broader discovery rules are vital for ensuring success in certifying collective actions. Third, reaching all types of victims requires a combination of opt-out schemes and forceful funding tools. In conclusion, it should be asserted that the achievement of the EU's compensation objective (to fully compensate any victim) demands deterrence-based remedies more than the US deterrence-oriented system, which forbids indirect purchasers' actions and hence has less demanding goals for achieving the standards of compensation. Despite this, the European Commission is inclined to rely on a careful and ineffective approach to achieve full compensation.

6.7 APPENDIX: SUMMARY OF AMENDMENTS

Page	Description of amendment	Explanation
145	Clarification on the costs of violation.	Amendment clarifies that the cost of violation for wrongdoers includes not only the amount of damages, but also case-related costs.
156	Additional statistics on leniency.	Wils study gives a broader view to the estimation by Carmeliet. Additional reference is added, numbered 78.
156	Explanation on the passing-on defence.	Further clarification on the relationship between the passing-on defence and indirect purchasers' right to claim damages provide a better understanding why passing-on defence has been not popular so far.
164	Amendment of the Synopsis (first paragraph).	The role of collective redress mechanism on full compensation and on indirect purchasers needed further explanation.

7 A MORE FORCEFUL COLLECTIVE REDRESS SCHEMES IN EU COMPETITION LAW: WHAT IS THE POTENTIAL FOR ACHIEVING FULL COMPENSATION?*

Abstract:

The damages actions reform of the European Union is predetermined to fail in achieving its stated goal of full compensation. There are two main reasons for this. First, the Directive on damages actions fails to maintain a balance between the claims of direct and indirect purchasers. Second, the EU approach is not designed to collect a large group of antitrust victims, who have suffered only a low value harm (e.g. end consumers). The only way to achieve compensation effectiveness is to overstep the bounds of the EU compensatory regime, which is based on the cautious approach. In such circumstances, this Chapter will explore three forceful scenarios of collective redress that include different type of deterrence-based remedies. The principal aim is to assess the chances of these scenarios in achieving full compensation. After assessing them, the best possible mechanism for compensating victims will be designed. In turn, it will allow the evaluation of to what extent such a scheme can ensure the achievement of full compensation.

Keywords: full compensation, private enforcement, damages actions, collective actions, deterrence.

7.1 INTRODUCTION

In June 2013, the European Commission introduced the reform on antitrust damages actions (hereinafter ‘EU private antitrust reform’). The most gratifying thing about the reform is that the European Union eventually adopted the Directive on damages actions in November 2014.¹ Therefore, the EU member states had been required to implement the provisions of the Directive in their national laws by the end of 2016. In reality, however, the states have struggled in implementing this Directive: only five countries had adopted the legislation in time.² But the most disappointing attribute of the reform is that the Directive includes no provisions on collective litigation. Instead, the Commission adopted the non-binding Recommendation on collective redress.³ Although the Recommendation takes the form of a horizontal framework, the importance

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This Chapter is a revised version of the original published article. In order to address new developments, Chapter 7 includes amendments, summarised in the Appendix to this Chapter. Few changes are not shown in the Appendix. First, the introduction and conclusion have been changed to maintain the common approach of the PhD dissertation. As regards the introduction, it includes additional sections: A. Research question and scope; B. Methodology and limitations; C. Overview of research material; D. Structure. With regard to the conclusion, it is amended to answer the research question of the Chapter. Second, few structural amendments are not shown in the Appendix. The word ‘article’ has been changed to ‘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 (Directive hereinafter).

² See Commission, ‘Competition’, available at:

<http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html> accessed 28 December 2016.

³ 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 (Recommendation hereinafter).

for antitrust litigation is particularly emphasized by the fact that it was adopted together with the proposal for a Damages Directive (2013).

The major goal of the Directive is that any victim who has suffered harm caused by antitrust infringement should effectively exercise the right to claim full compensation.⁴ This objective is very ambitious, as it requires enabling each financial victim (direct and indirect purchasers) to obtain full compensation (actual loss plus expectation loss). By emphasizing full compensation, the EU extends this principle both to private and collective actions.

This policy is contrary to the approach in the United States, where the objective of deterrence is primarily served by private antitrust enforcement and especially small-value class actions. Although the US legal system differs significantly in terms of rationale, the EU models collective actions with the aim to prevent the perceived litigation abuses of US class actions. It is believed that careful tools (such as the opt-in measure and the absence of private funding possibilities) would achieve the objective of full compensation. However, when realizing the compensation-based mechanism, it will be shown that measures of deterrence are vital for ensuring full compensation. In light of these provisions, this Chapter will explore three ambitious scenarios of collective redress that include different type of deterrence-based remedies. The principal aim is to assess their abilities to achieve the objective of compensation, and the potential effect on deterrence. The discussion will take a closer look at the scenario of collective redress that would best facilitate the compensation objective, but would not overstep the limits of full compensation.

A. Research question and scope

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

The following steps are taken to address this question. In the first place, Chapter 7 shows that EU-style collective actions are ineffective in contributing to achieving full compensation. Therefore, it examines three forceful (hypothetical) scenarios that contain different measures of deterrence. Its main purpose is to evaluate their potential effectiveness for facilitating the objective of compensation, and to assess whether there would be a side-effect on deterrence. After assessing them, Chapter 7 designs the best possible mechanism within the lines of full compensation and legal traditions (at least in some member states). Subsequently, this mechanism is analysed from two perspectives: one considers the effectiveness in achieving full compensation; another regards the possibility of facilitated deterrence through an enhanced compensatory mechanism.

As regards the scope, Chapter 7 concludes the PhD dissertation. Therefore, the findings in preceding chapters are combined and further elaborated in order to answer the thesis' research question. In addition to discussing an impact of different collective actions on compensation and deterrence, it takes into account the potential of blackmail settlement and other litigation abuses that may occur in the EU due to more forceful collective redress schemes. However, this is a secondary objective and it is only discussed as much as necessary for dealing with the primary objective.

⁴ Directive, *supra* note 1, Art. 3.

B. Methodology and limitations

In this Chapter, the comparative research method primarily combines functional and analytical approaches. Following the findings in previous chapters, this Chapter relies on the premise that the compensation problem in antitrust cases is similar across the EU member states. The Directive on damages actions is unlikely to cure this problem, especially for victims who suffered low value harm. The availability of collective redress schemes would also not mean that the compensation objective would be significantly enhanced. Even in the most pro-active member state—the UK—opt-out antitrust collective actions have brought no effects on compensating victims, as they failed to pass the certification stage. Considering the failure of compensation, this Chapter looks at potential ways to remedy the issue of compensation. In that regard, the functional approach focuses not only on the solutions already found by the EU member states, but also on potential ones. Indeed, this hypothetical consideration demands complementing the functional approach with the analytical one. The latter approach, for its part, explores the extent and boundaries of full compensation, and defines how separate measures could fit in this context, with a particular focus on double damages and wide-ranging discovery. To that extent, the available data is analysed and applied for conducting estimations.

However, there are few limitations. First, there are no other studies (at least to the author's knowledge) that would explore the best possible collective redress mechanism for antitrust actions. Therefore, there is a lack of background to justify the proposed model or to contrast with opposing views. In case of pioneering, the advantage is that there is more space for own interpretations. It also leaves no choice but to rely on personal assumptions and common sense. Second, there is a lack of data about the costs in opt-in and opt-out antitrust collective actions in the EU context. Therefore, the study relies on only one opt-in case (*Mobile cartel*) where tangible data about the litigation expenses was provided. Indeed, there is no possibility to draw definite conclusions from this case alone; it only gives a preliminary benchmark for evaluating the potential effect of damage multipliers on the objective of compensation. In conclusion, it should be recalled that Chapter 7 is the last in the dissertation, meaning that it is based on the outcomes of other chapters, which combine different research materials, techniques and methods.

C. Overview of research material

Most of the material used in Chapter 7 has already been used in other chapters, but this time it is applied to a different and often broader context. For instance, the available data on litigation statistics and on the contingency fees is used to estimate the scope of damages multipliers (double and treble damages) and to calculate the compensation value of opt-out collective actions. Quite in contrast with other chapters, the findings about the effectiveness of US class actions are used for assessing the potential impact of EU-style compensatory collective actions—combining different measures of deterrence—on compensating victims and deterring the wrongdoers. Following this background, the best possible collective redress mechanism is designed, and its effectiveness is assessed.

D. Structure

The structure of this Chapter is as follows. Section 2 briefly discusses the main reasons of the determined failure of the compensation goal in antitrust collective litigation. Section 3 presents three forceful scenarios that overstep the limits of the EU proposal. It further discusses the justification of each of them and their impact on compensation and deterrence. Section 4 aims to design the best possible compensation mechanism that is within the borders of the implementation of full compensation, as well as being within legal traditions (at least in some member states). This section ends with a discussion on how this mechanism interacts with full compensation. Section 5 discusses the potential legislative measure of the EU approach on collective redress.

7.2 THE PREDETERMINED FAILURE OF THE COMPENSATION GOAL

By shaping the policy preferences in private actions, the Directive on damages actions established the principle of full compensation. It means that victims shall have the right to compensation for actual loss and for loss of profit, plus the payment of interest. In fact, the perception of full compensation obliges to compensate any natural or legal person down the supply chain (including the end consumer) who has suffered harm caused by an infringement of competition law. It means that both direct and indirect purchasers are entitled to full compensation. The Recommendation, however, has no particular aim to ensure the effective exercise of the victim's right to full compensation. Rather, it seeks to facilitate access to justice, stop illegal practices, and enable victims to obtain compensation in mass harm situations.⁵ But it seems clear that the principle of full compensation would be applicable in antitrust collective actions, because all victims are entitled to exercise the right to claim full compensation. Despite the grand compensation goal, the compensatory effectiveness is significantly diminished by three important aspects.

First, the Directive orders the robust protection of public enforcement. It contains a complete protection from disclosure of leniency statements and settlement submissions, i.e., the directly incriminating evidence.⁶ Such a protection reduces the incentives to bring follow-on damages actions. An even more disappointing fact is that stand-alone actions are not enhanced at all. The Directive only introduces a court-ordered scheme that requires national courts to order the disclosure *only* when the claimant presents a reasoned justification.⁷ This is in contrast with the liberal party-initiated discovery mechanism in the United States.⁸

Second, the Directive fails to keep a balance between the claims of direct and indirect purchasers. In fact, the special treatment of indirect purchasers is a welcome step. However, the availability for the defendants to invoke the passing-on defence against a damages claim creates many uncertainties and complexities for direct purchasers. If the defendant proves that the overcharge was passed down the distribution chain, the direct purchasers suffer the decreased damages award, which equals the amount that has been passed on.⁹ Yet, it is highly unlikely that the downstream harm would ever be litigated; the further down victims are down the supply chain, the less interest to litigate they have. In addition, the passing-on defence causes crucial difficulties for quantifying the exact amount of damages passed down the distribution chain.

⁵ Recommendation, *supra* note 3, para. 1.

⁶ Directive, *supra* note 1, Art. 6.

⁷ *Ibid.*, Art. 5.

⁸ Federal Rules of Civil Procedure, Rule 26.

⁹ S. Peyer, 'Compensation and the Damages Directive', *CCP Working Paper 15-10*, 2015, p. 25, available at: <https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2654187> accessed 10 August 2018.

Third, even though the Directive facilitates indirect purchasers' claims, the new opportunity is considerably restricted if collective redress schemes were designed following the proposed principles of the Recommendation. Regardless of whether the claims are brought by direct or indirect purchasers, it is unclear who will have the financial means and capacity to organize and lead the group under an opt-in basis. This is especially true in end consumer actions where victims have the least motivation to go to court, because they normally suffer a spread-out harm of low value.¹⁰ In such circumstances, it is important to inform victims (such as consumers) about the proposed litigation and thus convince them to join the action. However, this information campaign may require significant costs while only few victims may adhere to the action; after all, consumers are typically apathetic towards litigation if only a small award is expected. Furthermore, consumers cannot easily opt in to an action, because they are unaware that they are being, or have been, harmed by antitrust infringements, or they cannot prove their legal interest (for example, the consumer did not save the proof of the purchase). Therefore, organizing the group may be too risky considering the low expected compensation. The problems in collecting victims for opt-in collective actions are well illustrated through the examples in France (*Mobile cartel case*)¹¹ and the UK (*Replica Football Shirts*).¹² In spite of broad media campaigns in both states, only a few hundred of victims joined the actions, while the infringements had potentially caused harm to millions of consumers.¹³ These examples have become a source of concern for an opt-in measure not being the right solution for the antitrust collective litigation. This is probably one of the main reasons for opt-in collective antitrust actions having been extremely unpopular in the EU member states afterwards.

7.3 THE FULFILMENT OF THE COMPENSATION GOAL UNDER MORE FORCEFUL SCENARIOS OF COLLECTIVE REDRESS

The EU's desire to ensure access to justice and full compensation to antitrust victims collides with another desire - to prevent abusive litigation.¹⁴ According to the European Commission, this phenomenon can be found in the American system, which contains the 'toxic cocktail': contingency fees, punitive damages, opt-out schemes, and wide-ranging discovery.¹⁵ It should be added that the 'loser pays' principle – the most widely adopted allocation method for legal costs in the EU member states – has been rejected in the American system. Instead, the US introduced a plaintiff-

¹⁰ J. Drexler, 'Consumer Actions after the Adoption of the EU Directive on Damage Claims for Competition Law Infringements', *Max Planck Institute for Innovation and Competition Research Paper No. 15-10*, 2015, p. 2, available at: <<http://ssrn.com/abstract=2689521>> accessed 10 August 2018.

¹¹ The follow-on collective action was brought on the basis of the Decision of 30 November 2005, Conseil de la Concurrence (Competition Council), No. 05-D-65. The claim was brought by the French consumer organization (UFC-Que Choisir).

¹² In the UK, the consumer association *Which?* brought a collective damages claim as a consequence 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.

¹³ Out of 20 million victims, only 12,350 consumers joined the actions. Out of 2 million victims, only 130 consumers participated in the action.

¹⁴ See Recommendation, *supra* note 3, para. 1; 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 See, e.g., Commission, 'Green Paper on Consumer Collective Redress – Questions and Answers', MEMO/08/741, 2008, para. 9, available at: <http://europa.eu/rapid/press-release_MEMO-08-741_en.htm> (last accessed 10 August 2018).

friendly one-way-fee shifting rule.¹⁶ These measures are aimed at enhancing the objective of deterrence through private attorneys (the so-called ‘private attorney general’). The *combination* of these measures ensures the viability of antitrust collective litigation. First of all, attorneys are allowed to act as private litigators through contingency fees, which allow for the lawyer to receive a percentage of the recovery. When this compensation model is combined with treble damages and an opt-out measure, private attorneys are given the chance to reap significant awards.¹⁷ While it may already seem a good mix, the American deterrence-built mechanism is further reinforced by the liberal party-initiated disclosure scheme and the one-way fee-shifting rule. Despite that, the American private antitrust system does not (completely) achieve its intended goals. First, a large majority of cartels remain undetected.¹⁸ Second, a large number of private actions, and more specifically class actions, fail: a rather small number of victims receive only very small compensation proportionally.¹⁹ Another issue is that the private attorney general mechanism may create possibilities of abuse of litigation by way of pressuring the defendants to settle cases lacking merit.

However, there is no evidence that the introduction of one or two American elements of deterrence (not the entire combination) would inherently attract frivolous litigation in the EU context. The American mechanism is composed of six *interrelated* elements: the absence of one may significantly reduce the possibilities to abuse the litigation. First, a liberal party-initiated discovery means that the claimant is entitled to request a broad range of the discovery material, which typically causes extremely high costs for the defendant. In contrast, the plaintiffs (a class) have a relatively small number of responsive materials.²⁰ Second, the one-way fee shifting means that defendants have no right to obtain attorney’s fees, while the plaintiff is entitled to not only treble damages, but also to attorney’s fees as part of his costs of claim.²¹ Third, it is obvious that punitive damages or opt-out schemes are indispensable elements for blackmailing defendants, as both generate substantial financial value of claims. Fourth, the availability of joint and several liability may push the violators to settle cases even lacking merit, as the unsettled violator may be liable for the combined trebled damages of all violators. Fifth, the availability of contingency fees exacerbates the blackmail as well. Attorneys are incentivized to settle, because their compensation is determined to be large (due to the large number of victims in the class). Last but not least is the

¹⁶ Clayton Act, 15 U.S.C. §§ 15(a).

¹⁷ For example, if an aggregate damage after trebling is \$100 million and the contingency fees are 20%, the attorney can foresee a compensation of \$20 million. Even if the case is settled, the possibility of receiving a compensation in the millions remains realistic.

¹⁸ Even under to the most optimistic scenario, it is estimated that only up to 33% of cartel violations are detected. *See, e.g.,* J.M. Connor & R.H. Lande ‘Cartels as Rational Business Strategy: Crime Pays’, *Cardozo Law Review*, Vol. 34, 2012, p.427, at 486-490.

¹⁹ *See, e.g.* B.T. Fitzpatrick & R.C. Gilbert, ‘An Empirical Look at Compensation in Consumer Class Actions’, *Vanderbilt Public Law Research Paper No. 15-3*, 2015, available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2577775> (last accessed 9 August 2017); Consumer Financial Protection Bureau, ‘Arbitration Study: Report to Congress Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(A)’, 2015, available at: <http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf> (last accessed 19 January 2017); Mayer Brown LLP, ‘Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions’, 2013, available at: <<https://www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf>> (last accessed 10 August 2018); N.M. Pace & W.B. Rubenstein, ‘How Transparent Are Class Action Outcomes? Empirical Research on the Availability of Class Action Claims Data’, *RAND Institute for Civil Justice Working Paper*, 2008 <<http://billrubenstein.com/Downloads/RAND%20Working%20Paper.pdf>> (last accessed 10 August 2018).

²⁰ *See, e.g.,* *Boeynaems v. LA Fitness International, LLC* 285 F.R.D. 331, 334-335, 341 (E.D. Pa. 2012).

²¹ Clayton Act, 15 U.S.C. §§ 15(a).

fact that private antitrust actions should be ended in jury trials. It is obvious that final decisions are always unpredictable. Indeed, ordinary citizens, even before the trial, may have a predetermined negative view about a large corporation that potentially caused harm to consumers. When these measures are combined, they raise many incentives for the defendant to settle even unmeritorious claims rather than go to trial with unpredictable jury trials: a loss may cause significant and potentially irreparable damage, both reputational and financial.

Given that the EU's compensation objective fails to a large extent, this Chapter will explore forceful scenarios and assess their effectiveness for facilitating the objective of compensation, and their side effect on deterrence. These scenarios are shown in Table 1.

Table 1. The potential scenarios of antitrust collective litigation

	Exceptional measure	Permanent measure
Scenario 1	Multiple damages and opt-in scheme	Contingency fees (third party funding as an additional remedy)
Scenario 2	Wide-ranging discovery (only in indirect purchasers' claims) and opt-in scheme	Contingency fees (third party funding as an additional remedy)
Scenario 3	Opt-out scheme	Contingency fees (third party funding as an additional remedy)

At the outset, some important clarifications should be made. Each scenario combines two deterrence-based measures. This approach has been chosen because it gives a better perspective for assessing the impact of separate measures on compensation. One measure alone, regardless of what it is, may have little influence on compensation, but when combined with other measures, it may bring a lot of positive effect. The combination of three measures may hinder the assessment of separate measures, as what effect each measure brings on compensation will be unknown. With regard to each scenario individually, the following clarifications should be made. In Scenario 1, the proposal of multiple damages is within the limits of full compensation. In opt-in actions, multiple damages are necessary to recompense high organization costs and to ensure full compensation standards (actual loss plus expected loss). To the same extent, the proposed wide discovery rules in Scenario 2 are vital for the attainment of full compensation in indirect purchaser cases. The objective of full compensation requires the 'courts [to] chase the harm downstream to the ultimately injured party.'²² Further down the distribution chain, plaintiffs have less evidence to prove the harm suffered. Therefore, only ensured access to directly incriminating evidence could facilitate the chances of proving damages in follow-on cartel actions. Finally, an opt-out measure proposed in Scenario 3 is in accordance with the group formation model in some EU member states. So far, these actions have not attracted abusive litigation.

From Table 1, it can be seen that contingency fees and third party litigation are proposed in all scenarios. It is of crucial importance to include private litigators in collective redress schemes, since public standing cannot be considered a tool for facilitating the objective of compensation. In most EU member states public authorities (e.g., consumer organizations) do not have sufficient financial capacity, human resources or legal expertise to represent the multitude of victims in antitrust

²² D. A Crane, 'Optimizing Private Antitrust Enforcement', *Vanderbilt Law Review*, Vol. 63, 2010, p. 673, at 701.

collective actions.²³ In a few other countries consumer organizations are financially strong (for example, in Germany, France and in the UK), but they may keep from taking such antitrust collective actions that are not predetermined to succeed. The loss might significantly diminish the reputation of consumer organizations, knowing they had represented the group of consumers. To the same extent, the public authority can be restrained to bring the claim on behalf of certain group of victims if their loss is not directly related to the activities of that entity. On the other hand, attorneys have the ability to represent numerous victims in all types of legal matters. Moreover, private firms are much more experienced in litigation and thus they can even find ways to deal with cases that might be seen unattractive for public authorities. From a quantitative perspective, there are a large number of attorneys who may seek representation in collective antitrust litigation. But in order to attract lawyers to engage in group litigation, they should be allowed to obtain awards that outweigh the risks. One of the best options is to allow for attorneys to sign a contingency fee agreement with clients, yet this reimbursement model has to be reinforced by other tools. As the examples in Lithuania and Poland have shown, the introduction of contingency fees alone cannot increase the number of antitrust collective actions.²⁴ Another option is the availability of a conditional fee agreement, which is allowed in England and Wales. The lawyer takes the risks, but if the case is won, he or she can obtain a success fee in addition to the initial legal fee based on hourly billing. This reimbursement model was utilized in the above-mentioned *Replica Football Shirts* case, where the success fee was raised to 100%.²⁵ But this model is problematic in most EU member states, because financially poor representative organizations would be required to pay hourly legal fees to attorneys. Therefore, contingency fees are prioritized over conditional fees in the following discussion.

With regard to third party litigation, it may serve an auxiliary function in compensating victims. This is mainly because there are far fewer third party litigators compared to law firms. An even more important factor is that this type of litigation funding is uncommon in the EU context. So far the most popular financing of antitrust class actions has been on the basis of the Special Purpose Vehicles (SPVs).²⁶ Under this model, investors purchase several claims with significant damages and then all litigation rights are transferred to SPV. But it is clear that the popularity of third party funding would increase if one of the scenarios was introduced. Regardless of the potential of third-party funding, the main emphasis in the following discussion is on contingency fees. These fees arguably have more possibilities of attracting a more active involvement of private parties. As proved in the US, this tool ensures that small-stakes collective actions are heard in courts.

However, it is true that all schemes are subject to criticism. One could argue that representation by a group lawyer, especially when contingency fees are combined with another deterrence-oriented

²³ B. Kutin, 'Consumer Movement in Central and Eastern Europe', *Consumatori, Diritti Mercato*, Vol. 2, 2011, p. 106, available at: <www.consumatoridirittimercato.it/wp-content/uploads/2012/12/2011-02-consumer-movement-in-central-and-eastern-europe-n543470.pdf> (last accessed 10 August 2018). According the author, consumer organisations in Central and Eastern Europe are understaffed and have a small number of paid employees. Only a few entities have more than 10 employees. The budget is usually around 300,000 euro or less. Some consumer entities rely on volunteers.

²⁴ Z. Juska, 'The Impact of Contingency Fees on Collective Antitrust Actions: Experiments from Lithuania and Poland', *Review of Central and East European Law*, Vol. 41, No. 3/4, 2016, p. 368, at 389.

²⁵ See C. Leskinen, 'Collective Antitrust Damages Actions in the EU: The Opt-In v. The Opt-Out Model', *Working Paper IE Law School WPLS 10-03*, 2010, p. 10, available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1612731> accessed 10 August 2018.

²⁶ For explanation, see C. Veljanovski, 'Third-Party Litigation Funding in Europe', *The Journal of Law, Economics & Policy*, Vol. 8, No. 3, 2012, p. 404, at 430-431.

remedy (especially an opt-out measure), may lead to abusive litigation by entrepreneurial lawyers. But the reality is that none of the scenarios are close to the American system, in which six deterrence-based remedies are combined. Notably, the measures of deterrence (two in each scheme) are proposed in a more lenient form than their American counterparts. Furthermore, the ‘loser pays’ principle is proposed as a common safeguard against litigation abuses of the representatives. But this measure is an insufficient prerequisite in itself to prevent frivolous actions, especially in countries where the other sides’ costs are not high (such as the Netherlands). The safeguard mechanism is reinforced by national ethical rules, which essentially act as tools to enforce fair behaviour among lawyers.²⁷ In order to mitigate the risks, additional safeguards can be introduced. The first one is a public tender system for legal services.²⁸ Another safeguard option is to qualify an *ad hoc* body that would be empowered to monitor the activities of the group lawyer and the group representative during the process.²⁹

These justifications seem not to be in line with the survey commissioned by the U.S. Chamber Institute for Legal Reform (ILR).³⁰ The survey, coordinated by Sidley Austin LLP in Brussels, was conducted in 10 EU member states (encompassing all the largest economies) to assess the trends and issues of all types of collective actions across the EU. The report released in March 2017 found that the development of collective redress schemes across the EU member states include the removal or reduction of traditional safeguards against abusive litigation, thereby increasing the potential of litigation abuses in the EU context. More specifically, the following concerns have been observed. First, member states lack effective screening mechanisms to assess the suitability and eligibility of the representative entity. For instance, there are no qualification requirements to represent victims in the Netherlands. ILR points to the case where a foundation started an action on behalf of almost 200,000 consumers against the Dutch State Lottery.³¹ The Report underlines that the director of the foundation had allegedly distributed millions of euros of consumers’ financial contribution for personal gain. Second, member states are becoming more lenient in allowing lawyers to work on a contingency fee basis. Third, especially in the Netherlands and the UK have seen third-party litigation funding becoming a prominent element of the litigation landscape in member states. ILR underlines that where third party funding is available, ‘it operates with shadows, without mandatory disclosure rules’ and litigation funders ‘appear to have structural

²⁷ For example, an attorney acting against professional ethics can be removed from the bar.

²⁸ For example, in Lithuania law firms are only qualified for a public tender if they meet minimum qualification requirements. Under this scheme, competing attorneys have to submit sealed bids indicating their proposed fees. If the appointed tender commission decides that fees are too low, the bidder is required to justify his proposal by providing detailed explanations of price components; such a scheme acts as the main safeguard against abuse of procedural rights. The price is important, but not crucial, for selecting the winner of the bid. The commission also takes into consideration the following factors: (i) the rationale; (ii) the quality; and (iii) the implementation plan.

²⁹ Such a committee would operate on a case-by-case basis. The members could be high-profile professionals, such as academics, economists, judges, etc.

³⁰ 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 (last accessed 10 August 2018). It was later contributed with new survey, U.S. Chamber Institute for Legal Reform, ‘Supporting Safeguards: EU Consumer Attitudes Towards Collective Actions and Litigation Funding’ (2017) http://www.instituteforlegalreform.com/uploads/sites/1/EU_Paper_Web.pdf (last accessed 10 August 2018). However, the relevance has not been found for the discussion on compensation, as it deals with consumers’ responses on safeguard measures and third party litigation funding.

³¹ Daly, 2017, *supra* note 30, p. 22-23.

relationships with law firms.’³² In the UK, for example, the code of conduct for funders is drafted by the same funders. Furthermore, the funders are acting without any effective oversight mechanism. Fourth, the ‘loser pays’ principle is not as effective as envisaged. In collective actions, the ‘loser pays’ principle often applies only to court costs, and not to the actual costs of the action. In addition, third party funders are often immune from the adverse costs of the other side.³³ Fifth, experimenting with opt-out collective actions increases the chances of abuse.

Despite being one of the most, if not the most comprehensive studies in assessing the potential of abusive litigation in the EU-style collective actions, there are some reasons to criticise the report.

First, in some parts the report picks up the cases and facts that are the most subject to criticism, but remains silent about contrasting facts that may deny that criticism. For example, Dutch commentators criticised the ILR report for overlooking crucial facts about the above-mentioned Dutch State Lottery case.³⁴ The foundation’s board was successfully replaced by the participants of the foundation. Moreover, the case was successfully settled, despite difficulty in establishing causation and damages. The settlement allowed for 2.5 million class members to obtain damages. Biard and others pointed out that the Lottery case should be compared with the WCAM settlements, where the Amsterdam Court of Appeal positively evaluated the soundness of a collective settlement and the fairness of compensation for representative organizations.³⁵

Second, the ILR criticism regarding the weakness of the existing safeguards against litigation abuses does not seem to be very well grounded. Biard and others claim that safeguards function well, especially as regards the admissibility of representative organizations. More specifically, that 1) courts have become much stricter when screening the suitability of representative entities; 2) the threshold for representative bodies to obtain admissibility has been raised significantly. Furthermore, the report harshly criticizes third party funding for operating in the shadows but bases its claim on the fact that it is largely unregulated in the EU member states. This situation does not inherently attract abusive litigation.

Third, ILR claims that the report encompasses 10 jurisdictions, but at least one third is not included in discussing the most important components of collective actions that are common across the jurisdictions: the standards for the representative entity (chapter 1), the ‘loser pays’ principle (chapter 3), the court’s admissibility standards (chapter 5). Without a full assessment, ILR’s report can be accused of cherry-picking.

Fourth, the report relates the EU’s abusive litigation with the perceived issues in the US system, but disregards the fact that the latter is a deterrence-based system, combining six deterrence-based measures: the absence of one (for example, an opt-out measure or contingency fees) may significantly lower the chances for abusive litigation. It should also be taken into account that some US measures are not in line with the EU legal traditions, such as the one-way-fee shifting, broad

³² Ibid., p. 29.

³³ Ibid., p. 35.

³⁴ 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/>> (last visited 10 August 2018).

³⁵ Ibid.

discovery rules or treble damages. It is also important to stress that an opt-out damages distribution model—one of the most criticized measures by collective actions' critics—has been under a heavy scrutiny in the Netherlands, including a public registration scheme.³⁶ So far, the system has not attracted criticism regarding abusive actions; if there is a possibility, it is rather incidental.

However, it does not mean that the ILR's concerns are groundless. It is obvious that contingency fees or third-party funding allow representatives to gain profit. Therefore, there are more incentives for framing the cases for their own benefit, potentially even leading to abusive litigation. The proposed scenarios have even more potential for litigation abuses, as they combine few measures of concern. In fact, it is hard to predict the outcome when the proposed combinations have not been tested in the EU's collective redress schemes. For this reason, Chapter 7 does not intend to show that one of the schemes should be introduced at the EU level. Instead, the principal aim is to assess the chances of these scenarios in achieving full compensation. In addition, there is a discussion on the potential of facilitated compensatory actions to contribute to public enforcement through an increased effect of deterrence.

7.3.1 First scenario: Multiple Damages Combined with Contingency Fees and Third Party Funding

Determining multiple damages is not a revolutionary proposal at the EU level. In 2005, the European Commission proposed *double* damages for horizontal cartels in the Green Paper on damages actions.³⁷ However, after criticism that the EU was importing US litigation culture (especially from the business sector), the double damages were no longer included in the 2008 White Paper.³⁸ Following the same approach, the Directive on damages actions rejected punitive, multiple, or other kind of damages.³⁹ Accordingly, antitrust collective schemes should be formed under the same provisions.

A. The potential justification for the first scenario

Under this scenario, group formation is based on an opt-in remedy. This type of action entails significant costs, since the group needs to be organized. One of the major reasons why the group organization entails substantial expenses is that the typical adherence to the group is subject to formal requirements that exacerbate the financial costs. Furthermore, opt-in collective actions demand expensive awareness-raising campaigns in order to attract the affected parties to join the action. If the case is won, full compensation is unattainable in practice because the high organization and case management costs have already consumed the large portion of the award. This leads to a paradoxical outcome. The objective of full compensation demands the insurance of full compensation standards (actual loss and expectation loss), meaning that there is no space for undercompensating a victim. However, the action is predetermined to generate the award, which is much lower than the actual loss. Therefore, it clearly emerges that damage multipliers are needed to fill this gap of under-enforcement.

³⁶ Ibid.

³⁷ Commission, 'Green Paper – Damages actions for breach of the EC antitrust rules' COM (2005) 672 final.

³⁸ Commission, 'White Paper on damages actions for breach of the EC antitrust rules' COM (2008) 165 final.

³⁹ Directive, *supra* note 1, Art. 3.

The same conclusion can be drawn from the above-mentioned *Mobile Cartel* case. So far, it has been one of few cases that have been brought on an opt-in basis. Most importantly, it has been the only case where tangible data about the opt-in collective antitrust litigation has been disclosed for public access. In that case, the French Competition Authority (NCA) imposed a record fine of 534 million euros on three mobile operators (Orange France, SFR, and Bouygues Telecom), alleging a price-fixing conspiracy. As a consequence, the consumer association *UFC Que Choisir* brought a follow-on collective damages claim. Table 2 summarizes the main figures of the litigation in the French case.⁴⁰

Table 2. An overview of the litigation statistics in *Mobile cartel*

Element	Outcome
NCA fine	534 million euros
Number of consumers opted in	12,530 out of \approx 20 million (much less than 1%)
Value of the claim	0,8 million euros (roughly EUR 60 per consumer participating in the claim)
Case management expenses	2,000 hours to prepare the action. The costs were 0,5 million euros

The case attracted only 12,530 consumers (much less than 1% of the total amount) to join the action, while the violation had a potentially negative impact on 20 million consumers. In spite of the small number of victims, the litigation involved 21 employees, 2,000 hours were needed to prepare the action, and it required issuing three cubic meters of documents.⁴¹ As a consequence, the case management costs (0.5 million euros) consumed the majority of the potential recovery (0.8 million euros). On this point, it should be noted that the case was dismissed by the Paris Court of Appeal on the grounds that UFC Que Choisir ‘solicited consumer mandates via the internet.’⁴² If the case was won, the damages would need to be distributed, thereby demanding extra costs. After all, if there would be some surplus, the class members would receive very low awards proportionally. Hence, this case proves that the achievement of full compensation calls for some form of the damage multiplier.

However, there is no possibility to draw definite conclusions about the opt-in litigation costs in the entire antitrust landscape from this case alone. Primarily, the *Mobile cartel* case is representative in high-profile cartel actions, where representatives typically face similar issues when organizing the group. In addition, plaintiffs are facing a comparable burden of quantification and causation. But other types of infringements, such as abuse of dominance, cannot be directly compared with cartels. Cartel actions are typically more covert, and may thus require more costs and efforts to litigate them. In spite of the differences, all antitrust infringements share common features. First, the infringer usually targets the most vulnerable victims, such as ordinary consumers, who have fewer capabilities (financial and legal) to bring a claim than large entities do. In these violations, the

⁴⁰ UFC-Que Choisir, ‘Consultation de la Commission Européenne sur les Recours Collectifs Contribution De L UFC-Choisir’, 2011, available at: <http://ec.europa.eu/competition/consultations/2011_collective_redress/ufc_que_choisir_de_rennes_fr.pdf> (last accessed 10 August 2018).

⁴¹ C. Hodges, *The Reform of Class and Representative Actions in European Legal Systems: A New Framework for Collective Redress in Europe*, Oxford, Hart Publishing, 2008, p. 84.

⁴² M. Ioannidou, *Consumer Involvement in Private EU Competition Law Enforcement*, 1st edn, Oxford, Oxford University Press, 2015, p. 128.

individual harm is typically low (for example, when consumers were buying an overpriced product), so the costs of the individual law-enforcement outweigh the expected benefits.⁴³ Second, the antitrust violation causes harm to a multitude of victims, which are often spread out in different distribution chains. In such circumstances, the *Mobile cartel* case can only be considered a preliminary benchmark for assessing the potential impact of damage multipliers on the compensation goal.

This scenario seems to be in line with EU law, but subject to some conditions. First, multiple damages are not *per se* prohibited under Article 3 of the Directive on damages actions: “[f]ull compensation under this Directive shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages”. Also, the Court of Justice of the European Union (CJEU) asserted that the imposition of specific damages, such as exemplary or punitive damages, in response to harm caused by antitrust violations would not be contrary to the EU law if the principle of equivalence is respected.⁴⁴ Second, contingency fees are also not against EU legal traditions. According to paragraphs 29 and 30 of the Recommendation on collective redress, the Member States should not permit contingency fees which lead to unnecessary litigation, yet they can be allowed if they respect the principle of full compensation. Third, third-party funding can be allowed under paragraph 15 of the Recommendation, yet if there is no conflict of interest, the third party has sufficient financial resources to meet its commitments and the claimant party has sufficient resources to meet adverse costs. As regards practical enforcement, this scenario may lead to a problem of over-compensation. Indeed, it is hard to set standards for preventing multiple damages and contingency fees from breaching the principle of full compensation, for example by overcompensating victims or representatives of collective actions. Each collective action should be seen as an opportunity for maximising profit, especially when led by natural or legal persons. In case of third-party funding, typically a private institution is involved that seeks to prioritise its profit rather than providing effective compensation to class members.

B. The effectiveness of compensation and deterrence

It is very hard to define the balanced magnitude of a damage multiplier that would fully compensate, but not overcompensate, group members. Yet, given that the EU has already evaluated the possibilities for double damages, the effectiveness of doubling will be assessed first. The major question is whether double damages can ensure full compensation to victims who opted into the action. To start with, it should present the range of contingency fees that may be applicable in the EU context. In the US antitrust collective actions, contingency fees range between 15% and 33% (on average).⁴⁵ This proportion also seems realistic in the EU, given that a larger percentage than 33% may breach the rules of attorney’s fee conduct, and a lower percentage than 15% may be economically unfeasible for private litigators. If the upper threshold is applied in the context of the

⁴³ It is also possible that a consumer can be a large corporation, which was buying an overpriced product. These entities may have more direct and more frequent relationships with the violator than an ordinary consumer would. In that case, the financial stake is determined to be higher than in ordinary consumer cases.

⁴⁴ Joined Cases C-295/04 to 298/04 *Vincenzo Manfredi and Others v. Lloyd Adriatico Assicurazioni SpA and Others* [2006] ECR I-6619, paras. 98-99.

⁴⁵ See, e.g., B.T. Fitzpatrick, ‘An Empirical Study of Class Action Settlements and Their Fee Awards’, *Journal of Empirical Legal Studies*, Vol. 7, No. 4, 2010, p. 811, at 818 (table 1); T. Eisenberg & G. Miller, ‘Attorneys’ Fees and Expenses in Class Action Settlements: 1993–2008’, *Journal of Empirical Legal Studies*, Vol. 7, No. 2, 2010, p. 248, at 262.

Mobile cartel, the potential compensation of the group counsel (in an optimal scenario) would be around 0.5 million euros.⁴⁶ If this amount is deducted from the total award, damages doubling can both overcompensate and undercompensate group members. In this respect, three observations should be made.

First, if we suppose the ideal scenario when the court awarded damages requested (0.8 million euros), the total award after doubling would be 1.6 million euros. After the deduction of a contingency fee (around 0.5 million euros), the consumer fund would amount to 1.1 million euros. It therefore means that the ultimate recovery would exceed the damages for 0.3 million euros (1.1 million euros – 0.8 million euros). But, once the case is won, the distribution of damages requires additional administrative costs, which should not be high in opt-in collective litigation. Group members had already joined the group, and therefore their identities are clear when damages need to be distributed. Given this understanding, there is a chance that there will be some surplus of award when the entire case costs are deducted from the recovery. Therefore, there is a possibility of overcompensation. However, it should be acknowledged that the award of full damages is very optimistic and only possible in incidental cases. *Second*, a more realistic possibility is that the court will grant lower compensation than claimed. Under this approach, class members are unlikely to obtain full damages. *Third*, antitrust actions are likely to be settled. In that case, the full compensation is determined to fail, since defendants would aim at settling cases for lower than actual awards. Otherwise, the settlement is not so attractive.

After discussing three possible outcomes, it can be argued that the prospect of complete compensation is possible only in occasional cases. Another question is whether double damages induce more active involvement of representatives and group members when combined with contingency fees. The increased participation of private actors would mean more actions brought and in turn more victims compensated.

A potential 33% contingency fee (when full damages are awarded) may generate the group counsel's award of around 0.5 million euros, i.e., the same as litigation expenses of the *UFC Que Chosir*. In fact, it is too risky to engage in a contingency fee agreement, knowing that the litigation costs may equal the expected award. There would be no business in this case. Therefore, the combination of contingency fees and double damages would not significantly increase the lawyers' incentives to invest in collective litigation. With regard to group members, double damages are not capable of attracting many more victims to join the action. Given that antitrust violations normally generate harm of low value, the incentive to join the action is not much increased if a victim, for example, can potentially receive 70% instead of 30% of the loss.⁴⁷ In particular, as a result of very low opt-in rates, the deterrence effect remains minimal or absent in this scenario. Most importantly, the magnitude of a likely penalty will be negligible if only few victims join the action. To conclude, this scenario has the ability to provide high proportional compensation to group members, but the size of the group is doomed to be very small. Due to the small size of the group, this scenario is not designed to deter infringers.

⁴⁶ The estimation was made under the following equation: 1.6 (million euros) \times 0.33 = 0.528 (million euros).

⁴⁷ For example, the individual harm was on average 60 euros in the *Mobile Cartel* and 20 pounds in the *Replica Football Shirts*. As a consequence, there is no big difference in incentive to join the action when the potential damages receivers consider whether they may receive 18 or 42 euros, or if they may receive 6 or 14 pounds.

In conclusion, the potential of treble damages for achieving the objectives of compensation and deterrence should be noted. When applying the same data as in the *Mobile cartel*, a potential for overpayment can be foreseen if the case leads to a final court decision (Table 3).

Table 3. The potential scenario of treble damages

	Award (≈million euros)	A 33% contingency fee (≈million euros)	Award to victims (million euros)	Potential surplus (≈million euros)	The potential of overpayment
Full award	2,4	0.8	0.8	0.8	Yes
	2.2	0.7	0.8	0.7	Yes
	2.0	0.7	0.8	0.5	Yes
Partial award	1.8	0.6	0.8	0.4	Yes
	1.6	0.5	0.8	0.3	Very high
	1.4	0.5	0.8	0.1	Minimal
	1.2	0.4	0.8	0	No
	1	0.3	0.8<	No surplus	No
Settlement	0,8<	0.3<	0.8<	No surplus	No

It can be seen that with an increase or decrease of the award, the payment to the class counsel and the potential surplus increase or decrease proportionally. On this point, it should be stressed that the additional costs for distributing damages in won cases are not included in Table 2, yet these expenses should not be high in case of opt-in (since victims are already identified). As a consequence, the overpayment is realistic when at least 60% (1.4 million out of 2.4 million) of full award is granted. In case of settlement, the overpayment is improbable. Furthermore, Table 2 shows that even in case of trebling the counsel's potential award, it is not high enough to attract more active participation. After the deduction of litigation costs, the profit can potentially be 100,000 to 300,000 euros (in the best scenario).⁴⁸ It does not seem a very lucrative investment, because the expected profit hardly outweighs the risks. However, again, the *Mobile cartel* case provides only a preliminary benchmark for assessing treble damages in compensating victims and deterring wrongdoers. But the preliminary assessment suggests that treble damages have a high probability for overcompensation. For this reason, this Chapter will no longer consider trebling in the EU context.

7.3.2 Second Scenario: Broader Discovery Rules in Indirect Purchasers' Actions Combined with Contingency Fees

The CJEU previously brought uncertainty when striking a balance between the leniency programme and the private antitrust actions. In the *Pfleiderer* decision, the Court asserted that it was for the national courts to carry out a balancing test for the disclosure of leniency documents on a case-by-case basis.⁴⁹ This ruling became a source of concern for whistle-blowers, because it was difficult to foresee how the national courts would treat the requests for disclosure. In order to protect the informers and the ones who had settled, the Directive on damages actions introduced the following limitations.⁵⁰ First, it has restricted access to leniency statements and settlement submissions ('black-listed' documents). Second, the information prepared by a natural or legal person specifically for competition authority proceedings and settlement submissions that have been withdrawn, can only be disclosed after a competition authority has closed its proceedings ('grey-listed' documents). Third, other evidence or relevant categories of evidence can be disclosed at any time, but a claimant should make a reasoned justification supporting the plausibility of his or her

⁴⁸ This amount is calculated when case-related costs are deducted from the recovery.

⁴⁹ Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-05161, para. 32.

⁵⁰ Directive, *supra* note 1, Art. 6.

claim. It is true that claimants are provided with some access to evidence in actions for damages. Nevertheless, the multi-layered safeguard policy raises doubts whether the incriminating material will be disclosed. An even worse factor is that national courts are granted the power to assess the proportionality of disclosure requests and whether confidential information is duly protected.⁵¹ In fact, the access to evidence depends on how national courts will conduct a disclosure test, which needs to be performed on a case-by-case basis.

A. The potential justification for the second scenario

Facilitated access to leniency materials could be justified in antitrust collective actions when indirect purchasers face crucial evidence-gathering problems. It is clear that the further down the distribution chain victims are, the less evidence they have in order to prove the loss suffered. It is thus obvious that end consumers are a good target for antitrust offenders, because these victims are the least aware about the nature and extent of the harm. Therefore, access to leniency statements would significantly facilitate the chances of proving damages in consumer anti-cartel actions. Another argument in favour of better access to leniency statements stems from the fact that cartel meetings are typically covert, and proof of unlawful agreements may be destroyed.⁵² Also, the infringers are well aware about the violation, so they can impose additional enforcement costs on potential claimants so as to dissuade them from taking any actions.⁵³ If broader discovery rules are not allowed in consumer actions (specifically, if they are indirect purchasers), representatives would lack interest in antitrust collective litigation, particularly if only opt-in actions are allowed. As a consequence, infringers will avoid the responsibility for the harm caused when claimants are consumers who stand at lower distribution levels.

The decision on whether to grant access to leniency materials or not could be made by national judges on a case-by-case basis. However, this type of disclosure may bring uncertainty about when and in what circumstances leniency materials will actually be disclosed, while simultaneously jeopardizing the functioning of leniency programme. For example, there is a risk that direct purchasers will free-ride on the efforts of indirect purchasers. In fact, the outcome of such disclosure is unpredictable. Further discussion on this matter is beyond the scope of this Chapter. Rather, the principal aim is to assess whether and to what extent a more forceful disclosure measure would compensate indirect purchasers and subsequently deter wrongdoers.

However, this scenario does not seem to be justified from an EU law perspective. Access to leniency materials, even in case of indirect purchasers, is against Article 6 of the Directive on damages actions - they are included in a black-list of disclosure. It does not seem that the Directive gives any exceptions to this provision. As a consequence, access to leniency documents is not included when defining the best possible scenario for antitrust collective redress in Section 7.4. Nevertheless, for a general discussion it is important to assess the potential of broader discovery rules in indirect purchasers' actions for contributing to the objectives of compensation and deterrence. It is not unlikely that one day a strict approach regarding black-list documents may change, if damages actions continue producing much lower benefits to victims than expected.

⁵¹ Ibid., Art. 5(3).

⁵² *Industrial Bags Case* (COMP/38354) Commission Decision of 30 November 2005, OJ L 282/41, paras. 140, 794.

⁵³ S. Peyer, 'Cartel Members Only-Revisiting Private Antitrust Policy in Europe', *International and Comparative Law Quarterly*, Vol. 60, 2011, p. 627, at 645.

B. The effectiveness of compensation and deterrence

In the absence of the damage multiplier, indirect purchasers cannot be fully compensated for harm suffered. Therefore, the main question is whether the combination of broad discovery rules and contingency fees can incentivize attorneys to bring more damages claims and to attract more victims to join the action than in a traditional opt-in claim.

To begin with, the disguised information, which is kept in leniency statements, provides fundamental insights for quantifying the harm caused by a rise in prices ('overcharge' and 'volume effect').⁵⁴ In turn, it constitutes a useful basis for defining the affected group, and therefore increases the chances to pass the certification test. If the group is certified, the availability of incriminating evidence (such as internal documents regarding agreed price increases and their implementation in practice) raises the chances of proving damages. It may therefore cause a shift of balance between the parties: on the one hand, a defendant – usually a large corporation – holding a key disguised material; and, on the other hand, plaintiffs – a group of consumers – who are normally distant from direct evidences. But will the access to leniency statements attract lawyers to invest in opt-in cases?

It is obvious that the investment is less risky when the incriminating evidence is available to plaintiffs. First, it is easier to pass the certification test. Second, it is easier to prove the loss closer to full damages. Despite having a lot of potential to facilitate damages actions, a crucial issue is that facilitated access to evidence is unlikely to much increase the amount of victims when compared with a standard opt-in case. The facilitated discovery rules do not motivate consumers to participate in the action, because the potential compensation remains similar to that of a standard opt-in case. In addition, wide discovery rules do not ease the administrative burdens or formal necessities for individual consumers when they intend to adhere the action. For example, even if a consumer lost the proof of purchase of the overcharged product (such as, a purchase check), he or she is still required to 'include all essential documents' in order to join the group.⁵⁵ In such circumstances, it is hard to imagine that rational actors will take the risk to act as representatives (especially investing in an information campaign) when the size of the group is determined to be small. The one, if not only, advantage of broader access is that indirect purchasers who have more extensive evidences of harm can prove damages more easily. However, the award of full compensation is highly distorted due to the need to compensate litigation costs in costly opt-in actions. Adding to the fact that the expected size of the group is small, the facilitation of the compensation objective is negligible in this scenario. This in turn does not deter wrongdoers. Like in the first scenario, the magnitude of the liability is rather anecdotal. To sum up, facilitated access to leniency documents increases the probability of success at the pre-trial and trial stages. However, there is little prospect that the group will be larger than in a typical opt-in action. Therefore, under this scenario, the expected effects would be minimal on full compensation, and most likely absent on deterrence.

⁵⁴ For further discussion on the overcharge and the volume effect, see Practical Guide on Quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, accompanying the Communication from the Commission on quantifying harm in actions for damages based on breaches of Arts. 101 or 102 of the Treaty on the Functioning of the European Union, SWD(2013) 205, C(2013) 3440.

⁵⁵ Leskinen, 2010, p. 10.

7.3.3 Third Scenario: Opt-out Schemes Combined with Contingency Fees

The previous scenarios indicate that an opt-in group formation combined with more forceful measures (double damages or broad discovery rules) can only marginally improve compensation. Despite the new opportunities, the reality is that very low participation rates are expected. Therefore, both scenarios fail to accomplish the stated goal of compensation. Following the basic logic, a very small number of victims receiving compensation (even if damages are close to full compensation) could not outbalance the fact that a large majority of victims receive nothing. Therefore, the size of the group is the principal factor in evaluating the implementation of the compensation goal. In fact, the success depends on whether a private antitrust model has a versatile tool for aggregating claims of different kinds. So far, the most effective device in gathering victims is an opt-out mechanism. This tool raises participation rates to maximum: the claim is brought on behalf of a defined set of victims unless someone declares to opt out.⁵⁶ There is no requirement to involve all victims, but claimants typically try to define the group as widely as possible, i.e., as close as possible to the optimal level. Such an aggregation remedy may result in millions of victims, thereby generating a great aggregate financial value. As a result, lawyers have much interest in investing in antitrust collective actions (even if they are of small-stakes), especially if contingency fee agreements are allowed.

A. The potential justification for the third scenario

The major concern is that an opt-out vehicle may be in violation of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which allows for the parties to freely dispose their claims. However, an opt-out mechanism does not seem to be inherently against EU law. The CJEU ruling in *Eschig* seemingly supports opt-out actions as long as victims can be adequately informed about their opt-out rights and can effortlessly withdraw from the group proceedings.⁵⁷ The underlying rationale is that an effective information mechanism may ensure that a claimant's free choice to litigate or not. This basis is probably one of the reasons why the Recommendation on collective redress allows exceptions to an opt-in principle when they can be "duly justified by reasons of sound administration of justice" (paragraph 21). The potential practical enforcement problems of this Scenario are illustrated below through the US example, as well in Chapter 3 (especially in sections 3.3-3.4). It should be also stressed that this Scenario, combining an opt-out model with contingency fees, has a potential of distorting the compensation principle when representatives are overpaid and victims under-compensated. Chapter 3 (especially sections 3.3.1-3.3.2) analyses this issue deeper.

Opt-out collective actions have already been tested in Portugal, the Netherlands and the UK. There are no reports of representatives in these cases engaging in any type of abusive litigation. For further discussion on these experiences, see Chapter 5 (especially Section 5.4).

⁵⁶ The US practice shows that opt-out rates are less than 0.2%. See T. Eisenberg & G Miller, 'The Role of Opt-outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues', *New York University Law and Economics Research Paper No. 04-004*, 2004, p. 14, at 25, available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=528146> accessed 10 August 2018.

⁵⁷ Case C-199/08 *Erhard Eschig v.UNIQA Sachversicherung AG* [2009] ECR I-8295, para. 64. For further discussion, see D.-P.L. Tzakas, 'Effective Collective Redress in Antitrust and Consumer Protection Matters: A Panacea or a Chimera?', *Common Market Law Review*, Vol. 48, 2011, p. 1125, at 1137.

B. The effectiveness of compensation and deterrence

There is no doubt that an opt-out remedy is the most effective in collecting victims, as claims are brought on behalf of all potential victims. However, this does not mean that opt-out actions are very effective in compensating victims. The US experience indicates that around 35% – 90% of consumers receive some kind of compensation in automatic distribution settlements.⁵⁸ Under this procedure, monetary awards are automatically distributed to class members who do not express willingness to withdraw from the action. But for the ones who receive recovery, the actual compensation is proportionally very low. Even in the most optimistic recovery scenario, automatic distribution settlements can only generate up to 70% compensation of the victim's actual harm.⁵⁹ Another type of distribution is where class members are required to submit a valid claim form in order to obtain compensation (a so-called 'claims made' settlement). Under this model, only between 1% and 15% of class members receive compensation, and in some cases the proportion can be even lower than 1%.⁶⁰ Although the number of class members receiving compensation is disappointingly small, the actual recovery rate is close or equals to 100%. This is notably because class members are only entitled to compensation if they submit a valid claim form proving their harm. After all, it does not change the fact that the large majority of victims receive no compensation.

Despite the failures, this scenario is the most effective in compensating victims. First, an opt-out remedy generates a significant aggregate financial value. Therefore, private actors are given the chance to reap substantial compensation. As a result, many more cases are going to be heard in courts in comparison with other scenarios. Second, the automatic inclusion mechanism ensures that a large number of victims will receive some form of compensation in automatic damages distribution cases. Even though many victims remain undercompensated, the final compensation value is greater compared to other scenarios where few class members obtain higher individual recoveries. In the following discussion, a comparison will be made of the potential value of compensation in each scenario (Table 4), using the illustrative example of the case where 1 million victims suffered the mean harm of 50 euros.

Table 4. The analysis of the potential compensation value

	Scenario 1	Scenario 2	Scenario 3
Expected participation rate	≤ 1%	< 1%	35% (compensation rate)
The potential number of victims involved in the action	≤ 10,000 (1% of victims)	< 5,000 (0,5% of victims)	350,000 (35% of victims)
The value of the claim	≤ 1,000,000 (€)	< 500,000 (€)	≈ 17,500,000 (€)
Individual recovery rate	Up to 100%	Up to 60%	Up to 40%
The total compensation value of the claim	≤ 800,000 (€)	< 350,000 (€)	≈ 7,000,000 (€)

⁵⁸ See, e.g., Fitzpatrick & Gilbert, 2015; Pace & Rubenstein, 2008:19; Deborah Hensler *et al.*, *Class Action Dilemmas: Pursuing Public Goals For Private Gains*, 1st edn, Santa Monica, CA, RAND Corporation, 2000.

⁵⁹ Fitzpatrick and Gilbert, 2015, p. 787 (table 3). However, this study is primarily useful in cases relating to the disputes of overdraft bank fees. In contrast to antitrust cases, there is a comfortable electronic system that directly identifies victims.

⁶⁰ For the range between 1% and 15%, see Consumer Financial Protection Bureau, 2015, *supra* note 19; Pace & Rubenstein, 2008. For the range lower than 1%, see Mayer Brown, *supra* note 19.

For the sake of clarity, it should be noted that all calculations are based on the highest possible threshold, i.e. taking into account the most optimistic rates for participation and recovery. This approach allows for the evaluation of the achievement of compensation and deterrence under the most positive expectations. Following this approach, Scenario 1 is regarded to have a potential to aggregate a group consisting of 1% of victims (10,000). Yet, when considering the failures in France and the UK, a 1% rate would be very high for an opt-in antitrust collective action. But this proportion is possible when doubling of damages is combined with contingency fees. In that case, both victims and lawyers have more incentives to participate in the action: the former enjoy double compensation, while the latter enjoy double reimbursement. In contrast, Scenario 2 is less interesting to both sides, since there is no promise of higher awards than in ordinary opt-in claim. If an upper threshold is applied, a 0.5% participation rate seems feasible.

The estimations of recovery rates (the proportion of the damages delivered to group members in the light of damages suffered) are unpredictable, as it is unclear how many victims would actually join the action. The ultimate individual compensation directly depends on what the aggregate value of the claim would be.⁶¹ However, the proposed rates in scenarios 1 and 2 (up to 100% and 60% respectively) seem realistic when compared to the magnitude of the potential award.⁶² When the potential participation rates are taken into account, none of the scenarios would be worth more than 1 million euros.

With regard to Scenario 3, the representative compensation rates (when class members receive some kind of compensation) can be drawn from the US jurisdiction. As mentioned before, the compensation rates in consumer cases range between 35% and 90%, but the most relevant data for the antitrust case would be 35%.⁶³ It would therefore mean that around 350,000 victims are expected to receive some kind of compensation under the Scenario 3. But, again relying on the US results, these victims could only expect up to 40% recovery rate of their loss.⁶⁴ As a result, the total (optimistic) compensation value could potentially be around 7 million euros.

Admittedly, this study reflects only a hypothetical scenario. In fact, the rates (participation, compensation, and recovery) fluctuate from case to case. However, this does not change the key factor that the compensation value in Scenario 3 is always considerably higher than in other

⁶¹ The size of the group determines the case-related costs and contingency fees. Therefore, it directly affects how much money will be deducted from the total award. The larger the group, the more possibilities for larger individual compensation.

⁶² In Scenario 1, the potential of 100% compensation can be drawn from the discussion in Section 1.2. In Scenario 2, this data can be found when, for instance, analysing the following scenario. If 0.3% of victims (3000) join the action, the actual value of the claim would be 150,000 euros. When a 30% contingency fee was deducted from the award, the leftover would be 100,000 euros. When this amount is distributed to class members, each recovery could be potentially around 30 euros (around ≈60% of the recovery).

⁶³ See Pace & Rubenstein, 2008. Authors argue that “the smallest distribution rates tended to have class sizes of several hundred thousand class members.” And indeed antitrust cases fell under this category, because typical antitrust violation lasts for years. It is estimated that the average duration of a cartel is 5.7 years. See F. Smuda, ‘Cartel Overcharges and the Deterrent Effect of EU Competition Law’, *Centre for European Economic Research*, Discussion Paper No. 12-050, 2012, pp. 19-21, available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2118566> (last accessed 10 August 2018).

⁶⁴ There is a lack of data on this issue. The only relevant study is Fitzpatrick & Gilbert, 2015. However, it estimated the recovery rates for small-stakes class actions relating to the disputes of bank overdraft. It is highly unlikely that these optimistic rates would be applicable in case of antitrust.

scenarios. This fact would not change significantly even if the case-related costs would be higher in an opt-out litigation, or if the participation rates would be higher (e.g., 2% or 3%) in other scenarios. The difference between the compensation values is simply too large.

These results also demonstrate that Scenario 3 scores the best marks in deterring infringers. If the case is successful, the aggregate value of multiple claims (even if the individual harm is low) can total millions of euros. This in turn forces defendants to internalize more of the negative effects caused to victims. Because of a larger group, the defendant also needs to invest more resources (both financial and human) to defend the case. Therefore, the combined benefits of Scenario 3 have more potential of adding a side effect on deterrence. Another important factor is that a large majority, if not all, of the decisions by DG Competition in consumer cases will be followed up with collective damages claims. The European Commission typically engages in high-profile cases where the violation negatively affects a wide range of victims, often across the EU member states. Therefore, there is a large incentive for private actors to sign a contingency fee agreement, which, in case of success, would lead to a significant award. At the national level, there is no guarantee that all the NCA's fining decisions will be followed by actions of private litigators. For example, regional cases or cases in small countries may produce low combined financial loss. Therefore, in the absence of damage multipliers, the risks may be too high for utilizing contingency fees in lower profile cases. This undercuts the deterrence objective.

To conclude, this scenario is the best suited to facilitate compensation. Even though the achievement of full compensation for individual victims is significantly diminished, a very large portion of victims can expect some form of compensation. In addition, rational infringers have to consider the increased probability of being punished by private parties in follow-on actions. Nevertheless, deterrence is diminished in lower magnitude cases. After all, in comparison with other scenarios, this scenario facilitates the deterrence in best terms.

7.4 THE BEST POSSIBLE COMPENSATORY MECHANISM OF ANTITRUST COLLECTIVE ACTIONS: CHECKS AND BALANCES

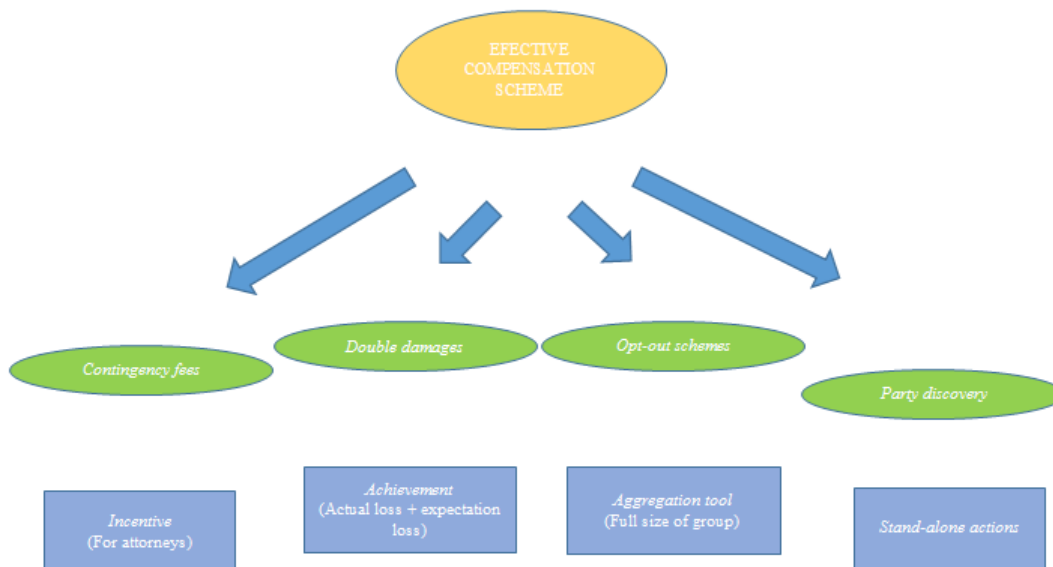
The results show that the case for full compensation is weak in all scenarios. It is predetermined that either very few victims will receive compensation, or that many victims will obtain very low proportional recovery. It can be argued that the compensation largely fails as a goal in these scenarios, because the principle of full compensation demands reaching very high standards of implementation. If the EU is inclined to shape private antitrust enforcement under full compensation, there is no other choice than to combine the above-discussed scenarios. As a result, the following analysis will design the best possible mechanism that is within the limits of full compensation and the legal traditions (at least in some member states). However, there is no intention to raise a debate about whether or not it would attract the litigation abuses announced in US class actions. As mentioned before, the principal aim is to assess Proposal's effectiveness in compensating victims, and if there is any impact on deterrence.

7.4.1 The Design of the Best Possible Compensation Mechanism

When designing this model, two major components should be combined. First, each victim should be empowered to claim and obtain full compensation (actual harm, loss of profit, and interest).

Second, the aggregation device should be capable of reaching both direct and indirect purchasers, regardless of how distant they are from the violation. In order to ensure both components, the collective action mechanism should be an aggregate of three indispensable elements: contingency fees, opt-out schemes, and double damages. Furthermore, the scheme should secure that sufficient measures are introduced for incentivizing stand-alone actions. These measures are interrelated and complement each other towards the achievement of the best possible compensation. The scheme (hereinafter ‘Proposal’) is illustrated in Chart 1.

Chart 1. The best possible compensation scheme (Proposal)



Contrary to Scenario 2, the Proposal welcomes the protection of leniency statements. The EU leniency policy has proved to be successful in fighting cartels.⁶⁵ It would be highly unjustifiable if the leniency programme would be put at risk when the incriminating material can potentially be disclosed under the current disclosure mechanism. It allows access to explanatory evidence, such as prices, sales volumes, profit margins, or costs.⁶⁶ In turn, it facilitates quantification of overcharges caused by antitrust infringements.

Another viewpoint is that the Proposal should provide more basis for stand-alone actions. In their present form, stand-alone claims are only facilitated by the general rules on disclosure.⁶⁷ A crucial issue is that national courts are required to limit the disclosure by performing the proportionality test on a case-by-case basis, i.e., the court-ordered disclosure. In fact, no one can predict how a national court will treat requests for access. In order to increase the motivation to bring stand-alone actions, the EU should consider the disclosure more directly as a party-initiated scheme in the US.⁶⁸ Within the respective legal frameworks of member states, the claimant should be granted disclosure

⁶⁵ See, e.g., A. Stephan, ECJ Ruling in Pfleiderer Heightens Concerns about Encouraging Private Enforcement', *Competition Policy Blog*, 2011, available at: <<https://competitionpolicy.wordpress.com/2011/06/23/ecj-ruling-in-pfleiderer-heightens-concerns-about-encouraging-private-enforcement/>> (last accessed 10 August 2018) (noting that around two thirds of European cartel violations are uncovered after the leniency). On this issue it is further discussed by the same author in 'Four key challenges to the Successful Criminalization of Cartel Laws', *Journal of Antitrust Enforcement*, Vol. 2, No. 2, 2014, p. 333.

⁶⁶ In many cases, this type of documents will be under the category of 'white-listed' documents (Directive, *supra* note 1, Art. 6).

⁶⁷ Directive, *supra* note 1, Arts. 5(2)-(5).

⁶⁸ See, e.g., Crane, 2010, pp. 700-701.

to all evidence available that can help quantifying the harm in stand-alone damages actions. The court in this respect should only observe the exchange of documents, and should only interact in exceptional circumstances; for example, when the claimant undermines the proportionality of disclosure measures. However, such disclosure may raise difficulties for the courts to determine the balance between feasible and unfeasible disclosure requests. As a safeguard against frivolous access to evidence, the set of material that is accessible to claimants can be defined. The availability of this list would ensure the extent of disclosure even before the claimant starts an action.

7.4.2 The Best Possible Compensation v. Full Compensation: A Study

The Proposal discussed above should score many points in compensating victims. Thus, the major question needs to be answered: to what extent can the best possible collective redress mechanism fulfil the objective of full compensation?

To begin with, it should be emphasized that many victims would be able to obtain compensation under the proposed model. But the objective of compensation should provide not only some form of award, rather it has to deliver full compensation to direct and indirect purchasers. However, for various reasons, the achievement of full compensation is determined to fail to a large extent, even under the principles of the most feasible collective antitrust redress scheme.

First, an opt-out remedy is imperfect in reaching indirect purchasers. But the primary fault is not of an aggregation mechanism, rather it is the fault of the highly complex nature of competition law infringements. The antitrust overcharge can cause widespread harm at different levels of distribution, making the identification of victims a very complicated task. A good example is the Canadian case *Sun-Rype Products Ltd v Archer Daniels Midland Company*.⁶⁹ On the basis of an infringement, it was obvious that an overcharge was passed to indirect purchasers, but it was impossible to determine the direct relationship between indirect purchasers (end consumers) and overcharged products.⁷⁰ Furthermore, class members may fail to obtain a compensation award due to the complex recovery procedure. For example, the US favours a multifaceted approach (sometimes even requiring notarization⁷¹) in order to prevent frivolous litigation.

Second, many collective actions are likely to be settled when the certification stage is passed.⁷² Indeed, the settlement agreement is attractive for the participants of collective actions. Defendants often find it prudent to settle a class action rather than continue costly legal proceedings with unpredictable jury trial: a loss might put a defendant out of business. The class counsel, who is acting under the contingency fee agreement, is always happy to settle rather than continue very long

⁶⁹ 2013 SCC 58 [2013] 3 S.C.R. 545. The claim alleged that the defendants unlawfully fixed the price of high fructose corn syrup sold to direct purchasers and that some of the overcharge was passed on to indirect purchasers, mainly end consumers.

⁷⁰ *Ibid.*, para. 65.

⁷¹ W.M. Ackerman, 'Class Action Settlement Structures', *Federation of Defense & Corporate Counsel, 2013 Winter Meeting*, Westin La Cantera Resort, San Antonio, Texas, 2013, p. 5, available at: <www.thefederation.org/documents/13.Class%20Action-Structures.pdf> (last accessed 10 August 2018).

⁷² Taking the US example, more than 90% of cases are settled. See R. Wasserman, 'Cy Pres in Class Action Settlements', *Southern California Law Review*, Vol. 88, 2015, 2015, p. 97, at 102 (citing T. E. Willging & E. G. Lee III, 'Class Certification and Class Settlement: Findings from Federal Question Cases, 2003-2007', *University of Cincinnati Law Review*, Vol. 80, 2011, p. 315, at 341-342; T.E. Willging & S. R. Wheatman, 'Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?', *Notre Dame Law Review*, Vol. 81, 2006, p. 591, at 647).

and complex collective actions. In the end, the attorney receives a percentage of the recovery, which is typically high, given that the size of the group is large under an opt-out action. The judge has no reason not to end a complex antitrust case (often requiring economic assessments) when both parties agree on terms. As mentioned in Scenario 1, a doubling of damages is highly unlikely in settlements; the awards should be lower than actual damages. Although the aggregation mechanism is not jeopardized, the award of full compensation to individual victims is strongly diminished. One solution would be to cap the settlement awards for amounts higher than the actual damages. However, the issue is that defendants might refrain from settling at all. Likewise, it may lead to dissuasive effects for the plaintiff side, given that there would be no intention to bring antitrust actions, which typically last for many years. In that case, the group lawyer should assess the risks of losing the long-lasting case: the money invested, compensating the other side's costs, and receiving no compensation from group members.

Third, the Proposal is insufficient to increase the rate of stand-alone actions to the extent that it would fill the gap of under-enforcement of public enforcers. In fact, lawyers are rational actors who deal with cases that have a high chance of success. The combination of measures in the Proposal does not motivate private litigators to take actions against cartel violations. Even if the disclosure is facilitated in stand-alone actions, cartel violations remain covert, thereby requiring comprehensive investigative tools. On this point, it ought to be stressed that US class actions are still more forceful than the Proposal. First, the 'loser pays' principle is abandoned in the US mechanism and instead one-way fee shifting is allowed. Second, the predictability of jury trials creates a strong ground for the plaintiffs' lawyers to blackmail the defendants. Regardless, it is of utmost importance to note that only up to 33% of cartel violations are detected in the United States.⁷³ It is hard to imagine that the Proposal would under any circumstances have more impact on detection than its counterpart in the United States.

To sum up, it must be borne in mind that the best possible mechanism in the EU context has been presented. Despite its mixture, the achievement of full compensation is predetermined to fail. This is because violations of competition law are so complex and disguised that there is no rational decision to identify all victims: both direct and indirect purchasers. In addition, victims, who are detected and automatically involved in the group, are unlikely to be fully compensated due to high litigation costs, the low worth of settlements, and costly distribution of damages. It demonstrates that regardless of what the EU collective redress scheme is, the failure of full compensation to antitrust victims seems predetermined. Yet, the extent of the failure is very different. On the one hand, if collective redress schemes are designed following the Proposal, many victims, but not all, can expect compensation (albeit not full compensation). On the other hand, if a collective redress mechanism was framed following the proposed principles of the Recommendation, its failure would be absolute: very few (if any) actions would be brought on behalf of antitrust victims. Therefore, most (if not all) victims would remain uncompensated. With regard to deterrence, the Proposal would ensure some sort of discouragement to potential wrongdoers. This is due to the increased magnitude of the liability and the ensured follow-on litigation. However, the full effectiveness of deterrence is diminished, because stand-alone actions would be rare. Therefore, rational wrongdoers would first consider how effective public enforcement is, while private enforcement would be a secondary measure in the sequence of deterrence.

⁷³ Connor & Lande, 2012, pp. 486-490.

7.5 THE POTENTIAL LEGISLATIVE MEASURE IN THE FUTURE

Despite all its failures, antitrust collective litigation should not be denied under any circumstances. It is an indispensable element to any reform of damages actions. In order to start an era of antitrust collective litigation across the EU, legislators should follow two guiding principles.

First, collective redress schemes should be foremost framed at defending the rights of vulnerable victims: indirect purchasers with small damages and indirect purchasers. If there was no effective collective redress mechanism, these claims would probably never be brought to the courts, as individual litigation is unprofitable financially. On the contrary, the current EU approach is useful primarily for large corporations, which were harmed as direct purchasers. Ironically, these corporations have been suing for damages even before the adoption of the Directive on damages actions.⁷⁴

Second, EU legislators should admit that the current careful approach to collective redress is likely to fail to a large extent in ensuring full compensation in competition law. If this failure was recognized, the next step for the EU would be to attempt incorporating forceful measures for making collective actions viable across the union. Indeed, the member states' experiences with opt-out actions might serve as an inspiration to the EU, demonstrating that forceful aggregation tools are possible and necessary in the EU context. Moreover, the availability of forceful funding tools in member states (third party funding and contingency fees) can be considered encouraging.⁷⁵ In addition, as shown before, multiple damages do not inherently lead to overcompensation of victims.

Considering all the criticism surrounding the policy on collective redress, it should be considered a big success if the EU adopted a sector-specific recommendation (a non-binding instrument) on antitrust collective litigation, yet this time proposing more forceful tools than the ones proposed in the Recommendation in 2013. The following measures may be proposed:

- Flexibility/encouragement for opt-out schemes;
- Flexibility/encouragement for multiple damages;
- Flexibility/encouragement for private funding (third party litigation and contingency fees);
- Encouragement for stand-alone actions.

It is telling that this approach would encourage member states to take more forceful actions in the field, while the most reluctant countries would be given the possibility to simply opt out. It will show whether member states with unworkable collective redress schemes are willing to follow the experiences of proactive member states, especially opt-out schemes and forceful funding tools. If there was an EU-wide interest, there would be a possibility to consider the possibilities for adopting a binding instrument, such as a Directive, in the nearest future. If this test was negative, it would mean that collective litigation should remain the domain of national jurisdictions.

⁷⁴ BarentKrans, 'Cartel Damages Claims in Europe', 2015. In 2015, there have been 64 pending cartel damages claims in the EU.

⁷⁵ For the discussion on contingency fees in the EU member states, *see* Juška, 2016, p. 368.

7.6 CONCLUSION

The research question of this Chapter was the following:

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

When addressing this question, it was found that the European Commission is overambitious in trying to achieve full compensation in antitrust damages claims with a careful approach on collective redress. On this basis, the following findings were made.

- 1) The failure of the EU's full compensation goal demands overstepping the bounds of the compensatory policy

Considering the EU experience and standpoints, the grand compensation goal is to a large extent determined to fail. First, the Directive on damages actions preserves the strong protection of public enforcement, while at the same time limiting damages actions. Second, the measures proposed in the Recommendation on collective redress are not designed to collect a large group of antitrust victims, and there are no rational players who could serve as group representatives. Considering these weaknesses of the aggregation tool, most victims with small damages (both direct and indirect purchasers) are doomed to receive no compensation. And for the ones who obtain an award, the amount is much lower than full compensation. Looking at the perspectives of antitrust collective actions, the only way to achieve compensation effectiveness is to overstep the bounds of the compensatory mechanism by allowing more forceful measures for antitrust collective actions. At first glance, it may seem to be an undesirable approach, but this Chapter has shown that there are grounds for more forceful scenarios.

- 2) The best possible antitrust collective redress mechanism has much potential, but with closer examination still fails to achieve full compensation

The best possible mechanism (Proposal) should include two indispensable elements: opt-out schemes and double damages. The first measure is the most effective in gathering victims, while the second one is necessary to compensate the costs of complex antitrust collective actions. Another measure of equal importance is contingency fee agreements. This financing model creates a sufficient basis for lawyer's investment in small-stakes collective actions regardless of the magnitude of the case, particularly when combined with opt-out schemes and double damages. At first sight, it may seem like a purely deterrence-oriented proposal. However, it is designed to exercise the effective right to compensation with the support from deterrence-based measures.

Despite its potential, the possible introduction of the Proposal would not suffice to achieve full compensation. This is because of the unique nature of competition law violations, which generate a widespread overcharge. Furthermore, many collective actions are doomed to be certified for low awards, meaning that group members are determined to receive less than full compensation. Finally, the proposed framework is unable to remedy low detection rates, even though it includes a

combination of deterrence-based measures. This is notably because stand-alone actions would remain dissuasive, as detecting violations and proving damages would remain highly complex.

- 3) Despite the determined failure in fully compensating victims, antitrust collective actions should not be denied under any circumstances

Antitrust collective litigation is an indispensable element of antitrust enforcement. If not for collective actions, a large majority of victims, especially direct purchasers with small losses and indirect purchasers, would remain uncompensated. Indeed, if higher effectiveness is achieved in compensating victims, collective actions may contribute to deterrence. In order to pursue antitrust collective litigation in practice, the European Commission should change its careful approach. Instead, it should allow flexibility in utilizing forceful tools: opt-out schemes, contingency fees, and third-party funding. Member states' positive experiences with opt-out schemes and the possibility of contingency fees in some states may serve as an inspiration. At present, it would be a great success if political consent was achieved for a more forceful sector-specific recommendation on antitrust collective actions. This approach would allow for testing the member states' willingness to rely on a more forceful approach. If they are not interested, they could simply opt out. But if they are interested, there will be a chance to consider the adoption of a binding instrument, such as a Directive, in the near future.

7.7 APPENDIX: SUMMARY OF AMENDMENTS

Page	Description of amendment	Explanation
174	Additional debate about the joint and several liability in the US system.	This element of the American system was overlooked in the published article.
177-179	Additional discussion on the abusive litigation in the EU context.	ILR Report, issued in March 2017, was overlooked in the original article. It is the most comprehensive study about abusive litigation in the EU context. Additional references are added, numbered 30-36.
181	Discussion on the possibility for introducing the first scenario from the EU law perspective and what practical enforcement problems this scenario would face.	It gives a more insightful picture about the possibility of introducing multiple damages and contingency fees in the EU context.
184	Discussion on the possibility for introducing second scenario from the EU law perspective.	It gives a more insightful picture about the possibility of allowing leniency documents for disclosure in the EU context.
186	Discussion on the possibility for introducing third scenario from the EU law perspective what practical enforcement problems this scenario would face.	It gives a more insightful picture about the possibility of introducing opt-out schemes in the EU context.
189	Additional clarification on wrongdoers' harm internalization for anticompetitive actions.	Needed for clarifying that internalization includes not only damages, but also case-related costs.

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 States 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 disproportionately 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 combining 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. Ironical 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.

SUMMARY

The central objective of the European Union's competition law is to prevent the distortion of competition in its internal market. In that context, the enforcement of competition law is pursued through public enforcement, which is principally aimed at deterrence, as well as private enforcement, primarily aimed at compensation. With regard to public enforcement, its principal purpose is to punish and deter antitrust violations, cartels especially. Despite extensive efforts, the objective of deterring wrongdoers is not as effective as perceived. As regards private enforcement, the objective of effectively compensating victims has not been reached; claims have been brought by large corporations (acting as direct purchasers) and typically in the most favourable forums, such as Germany, the Netherlands and the United Kingdom. In order to remedy this underdevelopment, the EU adopted the Directive 2014/104/EU on antitrust damages actions, which enshrines the objective of fully compensating all types of victims, including indirect purchasers. By emphasising full compensation, the EU demonstrates that it views deterring a violator of competition law only as a welcome side effect of damages claims. However, the achievement of full compensation is significantly limited for victims who have suffered small harm, since the Directive does not include provisions on collective redress actions. Instead, the European Commission published the horizontal Recommendation for collective redress schemes. This is not a legally binding document, and as such has had little impact on member states' incentives to introduce the proposed principles in their national jurisdictions. The fact that the Commission's approach on collective redress avoids any connection with the class action mechanism of the United States is of great significance, as the latter is accused of raising incentives for abusive litigation. Therefore, robust safeguards are proposed in order to prevent litigation abuses, yet they simultaneously serve as barriers for bringing collective actions for compensation. Nevertheless, it is clear that effective collective redress schemes are vital in contributing to achieving full compensation in private enforcement of EU competition law.

This PhD dissertation is based on 'a collection of separate scientific treatises' under article 13 of the Leiden University PhD Regulations. The dissertation consists of 6 chapters, which were published in peer-reviewed legal journals. The research question of the dissertation is the following:

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?

The answer to this question demands an analysis of different collective actions and their effectiveness for achieving full compensation. Additional objective is to assess the potential of these actions to contribute to deterrence through an increased impact on detection and liability.

Chapter 1 is General Introduction, while Chapter 8 is General Conclusion.

Chapter 2 gives a general introduction to the existing obstacles and shortcomings in the enforcement of competition law. With regard to public enforcement, the impact of the EU leniency policy and administrative (public) fines on deterrence is discussed. As regards private enforcement,

this Chapter scrutinises the major obstacles that victims face when bringing antitrust damages actions. Given the possible attractiveness of opt-out collective actions, Chapter 2 provides arguments why this litigation model can be seen as a potential tool to solve, or at least diminish, the shortcomings of public and private enforcement.

Chapter 3 deals with the class action system in the United States. This research offers a comprehensive study of the effectiveness of class actions in fulfilling the objectives of compensation and deterrence. It explores the predominant controversies in the United States by assessing the views of critics and proponents of class actions. The debate over compensation focuses on how effective class actions are for compensating class members, and whether contingency fees overpay class counsel. As to deterrence, the theory of optimal deterrence is used to assess the impact of class actions on deterring wrongdoers.

Chapter 4 discusses contingency fees' impact on the effectiveness of compensation in antitrust collective actions. By providing a comparative analysis between Lithuania and Poland on the one hand, and the United States on the other, the Chapter discusses the importance of incentivising attorneys to invest in collective litigation. Additionally, it discusses the potential of contingency fees to attract litigation abuses, and whether Lithuania and Poland are prepared to prevent these abuses, or at least limit their likelihood.

Chapter 5 provides an overview of the principles outlined in the Recommendation on collective redress. It presents the surrounding controversies as regards its non-binding approach and the proposed safeguards. The focus is also on the mechanisms of the pro-active EU member states that ignore some principles of the European Commission's approach, and instead have introduced some US-style measures in order to achieve effectiveness in collective litigation. This allows for the exploration of how insights from the EU member states and the US should influence the development of a common collective antitrust redress in the EU.

Chapter 6 discusses the rationale of the principle of full compensation. This includes an examination of the extent of this principle, and especially what the effect the indirect purchaser rule has on full compensation. It also examines whether the provisions embedded in the EU private antitrust reform (in the Directive and in the Recommendation) are likely to achieve the objective of full compensation or not. The Chapter also investigates the importance of the American-style deterrence-based measures in EU compensatory collective actions. This Chapter is important for understanding the particular requirements for achieving full compensation.

Chapter 7 aims to design the best possible collective redress mechanism (Proposal) that stays within the borders of the achievement of full compensation, in addition to keeping with legal traditions (at least of some member states). This Chapter explores the potential impact of the Proposal on full compensation, and whether it would bring additional effects on deterrence. The Chapter ends with a proposal on how the potential legislative measure on collective redress should be framed, if the EU decides to take action.

SAMENVATTING (DUTCH SUMMARY)

Volledige schadeloosstelling voor inbreuken op het EU-mededingingsrecht: de rol van collectieve vorderingen

Het EU-mededingingsrecht heeft als hoofddoelstelling het voorkomen van concurrentievervalsing binnen de interne markt. De handhaving van de mededingingsregels kan zowel publiek- als privaatrechtelijk plaatsvinden. De publiekrechtelijke handhaving beoogt het bestraffen en voorkomen van inbreuken op het mededingingsrecht, in het bijzonder kartelvorming, en is voornamelijk gericht op ontmoediging. Uitgebreide inspanningen ten spijt, is deze handhaving echter niet zo ontmoedigend als vaak wordt aangenomen. De privaatrechtelijke handhaving is in de eerste plaats gericht op herstel. De schadeloosstelling van benadeelden blijft echter vaak uit, met uitzondering van schadevorderingen ingesteld door grote bedrijven in de meest gunstige fora, zoals Duitsland, Nederland en het Verenigd Koninkrijk. Om deze tekortkoming te verhelpen, heeft de EU richtlijn 2014/104/EU aangenomen inzake schadevorderingen wegens inbreuken op het mededingingsrecht. Het doel van deze richtlijn is het garanderen van de daadwerkelijke uitoefening van het EU-recht op schadevergoeding voor alle benadeelde partijen (zowel de directe als de indirecte afnemer). Door de nadruk te leggen op volledige vergoeding voor alle geleden schade, maakt de EU duidelijk dat ontmoediging slechts een bijwerking is van schadevorderingen, zij het een gunstige bijwerking. Volledige vergoeding van slachtoffers die een geringe schade hebben geleden, wordt echter aanzienlijk bemoeilijkt doordat de richtlijn geen bepalingen bevat inzake collectieve schadevorderingen. In plaats daarvan heeft de Europese Commissie de horizontale Aanbeveling inzake collectieve vorderingen tot schadevergoeding gepubliceerd. Het gaat hier niet om een juridisch bindend document en het heeft om die reden weinig invloed gehad op de lidstaten om de voorgestelde beginselen in de nationale rechtsordes op te nemen. Het feit dat de Commissie elke gelijkenis met het ‘class action’ mechanisme van de Verenigde Staten uit de weg gaat, is bovendien veelzeggend. Dat mechanisme zou aanzetten tot misbruik van procesrecht. Om dergelijk misbruik te voorkomen, werd voorgesteld om in aanzienlijke waarborgen te voorzien. Deze waarborgen zijn echter meteen ook drempels voor het inleiden van collectieve schadevorderingen. Wat er ook van zij, het is duidelijk dat doeltreffende regelingen voor collectief-verhaalmechanismes van vitaal belang zijn om bij te dragen tot volledig herstel bij de private handhaving van het mededingingsrecht van de EU.

Dit proefschrift is gebaseerd op ‘een bundeling van afzonderlijke wetenschappelijke verhandelingen’ onder artikel 13 van het Promotiereglement van de Universiteit Leiden. Het proefschrift bestaat uit 6 hoofdstukken die zijn gepubliceerd in peer-reviewed juridische tijdschriften. De onderzoeksvraag van het proefschrift luidt als volgt:

Kunnen collectieve schadevorderingen bijdragen aan het doel van volledige schadeloosstelling zoals vastgesteld in de richtlijn inzake schadevorderingen wegens inbreuken op het mededingingsrecht? Zo ja, welke mechanismes zouden volledig herstel vanuit een theoretisch en praktisch oogpunt het beste vergemakkelijken? En kunnen deze mechanismes, als bijwerking, bovendien bijdragen aan het doel van ontmoediging?

Om tot een antwoord op deze vraag te komen, is een analyse nodig van verschillende collectieve vorderingen en van de mate waarin ze volledig herstel daadwerkelijk verwezenlijken. Het is bovendien nodig om te beoordelen in hoeverre deze vorderingen kunnen bijdragen aan het doel van ontmoediging door een verhoogde impact op opsporing en aansprakelijkheid.

Hoofdstuk 1 geeft een algemene inleiding, terwijl in hoofdstuk 8 een algemene conclusie staat te lezen.

Hoofdstuk 2 introduceert de bestaande obstakels en tekortkomingen in de handhaving van het mededingingsrecht. Met betrekking tot publiekrechtelijke handhaving worden de ontmoedigende gevolgen van het clementiebeleid en de administratieve (openbare) boetes van de EU besproken. Wat privaatrechtelijke handhaving betreft, wordt in dit hoofdstuk ingegaan op de belangrijkste obstakels waar slachtoffers mee te maken krijgen bij het instellen van schadevorderingen wegens inbreuken op het mededingingsrecht. Gezien de mogelijke aantrekkelijkheid van collectieve vorderingen met een opt-outsysteem, geeft hoofdstuk 2 weer waarom dit procesmodel kan worden gezien als een mogelijk hulpmiddel om de bestaande tekortkomingen van publiek- en privaatrechtelijke handhaving op te lossen althans te verminderen.

Hoofdstuk 3 gaat verder in op het collectief-verhaalmechanisme van de Verenigde Staten. Het biedt een uitgebreid onderzoek naar de effectiviteit van collectieve vorderingen voor het bereiken van de doelstellingen van herstel en ontmoediging. Het verkent de overheersende controverses in de Verenigde Staten door de opvattingen van zowel voorstanders als tegenstanders van collectieve vorderingen te beoordelen. Het debat over herstel focust op de effectiviteit van collectieve vorderingen met betrekking tot de schadevergoeding van eisers en de vraag of resultaatafhankelijke vergoedingen leiden tot overbetaling van advocaten. Wat ontmoediging betreft, wordt de theorie van de optimale ontmoediging gebruikt ter beoordeling van de impact van collectieve vorderingen op de ontmoediging van het plegen inbreuken.

Hoofdstuk 4 bespreekt de impact van resultaatafhankelijke vergoedingen op de effectiviteit van herstel in collectieve schadevorderingen wegens inbreuken op het mededingingsrecht. Door middel van een vergelijkende analyse tussen Litouwen en Polen enerzijds en de Verenigde Staten anderzijds, bespreekt het hoofdstuk het belang van het stimuleren van advocaten om te investeren in collectieve geschillen. Daarnaast bespreekt het hoofdstuk het risico van resultaatafhankelijke vergoedingen om misbruik van procesrecht te stimuleren, en of Litouwen en Polen bereid zijn om dit soort misbruik te voorkomen althans om de kans op dergelijk misbruik te verminderen.

Hoofdstuk 5 geeft een overzicht van de principes die zijn uiteengezet in de Aanbeveling inzake collectieve schadevorderingen. Het geeft de controverses weer omtrent de keuze voor een niet-bindende aanpak en de waarborgen die werden voorgesteld. De focus ligt ook op de mechanismes geïntroduceerd in proactieve lidstaten die een aantal principes van de Europese Commissie naast zich neer hebben gelegd en zich hebben laten inspireren door het Amerikaanse recht teneinde effectiviteit in hun collectieve procedures te verwezenlijken. Dit maakt het mogelijk om na te gaan hoe inzichten van de EU-lidstaten en de VS de ontwikkeling van een gemeenschappelijk collectief-verhaalmechanisme voor inbreuken op het mededingingsrecht in de EU zouden moeten beïnvloeden.

Hoofdstuk 6 bespreekt de grondgedachte van het principe van volledig herstel. Dit omvat een onderzoek naar de reikwijdte van dit principe, en met name naar het effect van de indirecte-afnemerregeling op volledig herstel. Het onderzoekt ook of de bepalingen die zijn aangenomen in het kader van de hervorming van het private mededingingsrecht van de EU (van de richtlijn en de aanbeveling) het bereiken van de doelstelling van volledige vergoeding voor alle geleden schade al dan niet waarschijnlijk maken. Het hoofdstuk onderzoekt ook het belang van de op Amerikaanse leest geschoeide maatregelen die gericht zijn op ontmoediging voor collectieve schadevorderingen in de EU. Dit hoofdstuk is belangrijk voor een goed begrip van de specifieke vereisten voor het verwezenlijken van volledig herstel.

Hoofdstuk 7 heeft tot doel een zo goed mogelijk (voorstel voor een) collectief verhaalmechanisme te ontwerpen dat volledig herstel moet verwezenlijken en bovendien de juridische tradities, althans van sommige lidstaten, eerbiedigt. Aangezien de Europese Commissie ten laatste in 2019 richtsnoeren moet opstellen met betrekking tot de vraag of collectief verhaal al dan niet op het niveau van de EU zal worden geregeld, onderzoekt dit hoofdstuk de mogelijke impact van het voorstel op volledig herstel en of het bijkomende gevolgen zou hebben met betrekking tot ontmoediging. Het hoofdstuk sluit af met een voorstel over hoe de wetgevende maatregel inzake collectieve vorderingen zou moeten worden geformuleerd, indien de EU besluit actie te ondernemen.

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CURRICULUM VITAE

Žygimantas Juška was born on 19 September 1988 in Klaipėda, Lithuania. Žygimantas attended Mykolas Romeris University in Lithuania from 2007 until 2011, where he obtained the Bachelor in Laws. In 2012, he completed the LLM in European Business Law at Radboud University in the Netherlands. Žygimantas has become a PhD-candidate at Leiden University in 2013 July.

At the moment, Žygimantas works in the European Union Delegation to Ukraine as an Attaché for competition and energy. Prior to that, he worked in the European Union Office in Kosovo as an Attaché for political affairs; as well he was a focal point for Competition and State Aid. Žygimantas became the first Lithuanian to be awarded the EU Fulbright Schuman scholarship. As a consequence, he conducted research at Stanford University and the University of Michigan during the academic year 2015-2016. In 2014-2015, he worked in the Lithuanian law firm as a legal associate in the Dispute Resolution practice group. Before that, he did traineeships in the European Commission DG Competition and in the Asser institute. Žygimantas has also accumulated significant experience in international criminal law. Specifically, he worked in the high profile case *Prosecutor v. Radovan Karadžić* at the International Criminal Tribunal for the former Yugoslavia. He also worked as a legal consultant in the Embassy of Lithuania to the Kingdom of the Netherlands, representing the Embassy at the International Criminal Court and other international tribunals in The Hague.

Žygimantas is also a member of the Justice Research Lab at Mykolas Romeris University. He was a workshop speaker at the 11th ASCOLA Conference, presenting the relationship between antitrust class actions in the US and in the EU. During his time at the University of Michigan Law School, he organised the Student Research Roundtable entitled ‘The Impact of Class Actions on Antitrust Enforcement: Trans-Atlantic Dialogue between the US and the EU’.