COLLECTIVE REDRESS FOR ANTITRUST DAMAGES IN THE EUROPEAN UNION: IS THIS A REALITY NOW?

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Collective Redress for Antitrust Damages in the European Union: Is this a Reality Now?

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Abstract

Private antitrust litigation is now a reality in the EU and the implementation of the 2014 Directive on actions for damages from competition law infringements will further stimulate such litigation. In 2013, the Commission also adopted a Recommendation on Collective Redress, which takes the form of a horizontal framework whose principles are set to apply to claims regarding rights granted under EU law in a variety of areas, including competition law. The Recommendation takes a conservative approach to collective redress, largely due to the fear that Member States may adopt mechanisms triggering unmeritorious litigation. Many in the EU consider that the US class actions regime has led to excessive litigation by entrepreneurial lawyers that, in the end, produce limited benefits to victims while creating significant costs to society. This view is, however, questionable since district courts, which are called to certify class actions, have in recent years exercised a more rigorous analysis of the claims presented to them. In addition, by opting for an “opt in” regime and the “loser pays” principle, while not authorizing contingency fees and punitive damages, the Recommendation may have made it harder for victims with small claims (i.e., individual consumers that have been overcharged for the goods they purchase) to obtain compensation for the harm suffered.

JEL: K21, K41, K42, L40

I. Introduction

Private antitrust litigation has always played a major role in the United States. Antitrust rules are primarily enforced by private litigants and even when the antitrust agencies, i.e. the Antitrust Division of the Department of Justice (“DoJ”) and the Federal Trade Commission (“FTC”), intervene their decisions (in the case of the FTC) or the judgments that result from their

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intervention (in the case of the DoJ) are often followed by subsequent litigation in which private plaintiffs seek to obtain damages from antitrust infringers.\(^1\)

In contrast, private antitrust litigation has historically played a minor role in the European Union ("EU"). The vast majority of enforcement actions are taken by the European Commission (the "Commission") or the national competition authorities and, until recently, follow-on actions by private plaintiffs were few and far between. Private antitrust litigation is, however, bound to play a greater role in the EU as a result of legislative developments, including the 2014 Directive on actions for damages from competition law infringements (the "Damages Directive").\(^2\) While competition authorities are likely to continue to be the driving force of competition law enforcement in the years to come, follow-on litigation has significantly increased in recent years and has a bright future ahead. For instance, while there were only 18 ongoing damages claims in 2009, the number increased to 59 by 2015.\(^3\)

Collective redress mechanisms are also being developed in the EU as a number of Member States have adopted statutes providing for such mechanisms. In 2013, the Commission adopted a Recommendation on common principles for injunctive and compensatory collective redress mechanisms concerning violations of rights granted under Union law (the "Collective Redress Recommendation").\(^4\) This Recommendation, which does not only cover breach of rights under EU competition law, but also EU legislation in the fields of consumer protection, environmental protection, protection of personal data, financial services legislation and investor protection, takes a conservative approach to collective redress, largely due to the fear that Member States may adopt mechanisms triggering unmeritorious litigation. Many in the EU consider that the US class actions regime has led to excessive litigation by entrepreneurial lawyers that, in the end, produce limited benefits to victims while creating significant costs to society.\(^5\) As will be seen, this view is, however, questionable since district courts, which are called to certify class actions, have in recent years exercised a more rigorous analysis of the claims presented to them.\(^6\) In addition, by opting for an "opt in" regime and the "loser pays" principle, while not authorizing contingency fees and


\(^4\) O.J. 2013, L 201/60.


\(^6\) See infra text accompanying notes 58 et seq.
punitive damages, the Recommendation may have made it harder for victims with small claims (i.e., individual consumers that have been overcharged for the goods they purchase) to obtain compensation for the harm suffered.  

Against this background, this short essay discusses the Commission Recommendation and the various national legislative measures dealing with collective redress mechanisms and contrasts these initiative with the US class action system. This essay is divided into four parts. Part II briefly discusses the main features of the Damages Directive in order to set the framework under which private damages actions will develop in the EU. Part III summarizes the main features of the US class actions regime and contrasts this regime with the approach proposed by the Commission in its Recommendation on collective redress. It argues that the Recommendation takes an excessively cautious attitude that, if followed by the Member States, will often impede rather than enhance that form of redress in the future at least as far as small claims are concerned. It also discusses the recently adopted UK Consumer Rights Act, which is the most ambitious collective regime adopted so far. Part IV concludes.

II. The EU Directive on actions for damages from competition law infringements

Europe’s journey towards encouraging and facilitating private antitrust claims essentially started with the Court of Justice of the EU’s (“CJEU”) ruling in the _Crehan_ case in 2001. In _Crehan_, the CJEU held that private antitrust litigation contributes to effective competition law enforcement, such that “victims” should have the right to seek compensation for harm suffered as a result of anti-competitive behavior. The CJEU also stressed that, in the absence of EU legislation on this matter, it was up to each Member State to set up its legal framework for antitrust damages claims, provided that such national regime does not render damages claims excessively difficult or practically impossible.  

A. The aftermath of _Crehan_

In the aftermath of _Crehan_, the European Commission started looking more closely into ways to bring more effective civil redress in the competition law field. Its first step was to commission a study designed to identify existing obstacles to effective private enforcement in the EU. The study report, which was released in 2004, concluded that national regimes on antitrust damages

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7 See Part III, C.


9 Id., at § 29.

actions were of an “astonishing diversity” and in “total underdevelopment.” The Commission followed up with a Green Paper in 2005, in which it took the view that the “underdevelopment” of antitrust damages litigation was primarily a result of procedural and other legal obstacles. The Commission proposed a number of options to address these obstacles and facilitate damages claims, and invited comments from the public.

Building on these initial efforts, the European Commission issued a White Paper in 2008, in which it proposed policy choices and measures to facilitate antitrust damages claims. The Commission advocated for mechanisms to make claims more effective, while respecting the European legal systems and traditions. The Commission proposed, for instance, to fully compensate victims via single damages, as opposed to multiple damages. Other proposed measures concerned, inter alia, collective redress, protection of corporate leniency statements, and improved access to evidence under judges’ control. The Commission started preparing a directive on private antitrust litigation. However, some of the Commission’s contemplated proposals raised concerns from other stakeholders, notably the European Parliament. In particular, the European Parliament pressed that it had to be involved in any legislative activity touching upon collective redress. The Commission ultimately renounced to present its draft directive.

While the Commission’s plans for a Directive on antitrust damages claims were temporarily stalled, a growing number of damages claims started to be filed in the Member States and, in particular, in Germany, the Netherlands and the United Kingdom given that these jurisdictions have a number of features that were attractive to claimants. Among these jurisdictions, the United Kingdom has become the most active antitrust litigation center in Europe. As noted above, the number of claims, usually taking the form of follow-on actions, dramatically increased in the last few years, although still lagging behind the United States.

B. The Damages Directive

In June 2013, the Commission released its long awaited legislative “package” on antitrust damages claims. The Commission’s objective with this package was clear: it sought to strike a balance between (i) ensuring effective enforcement of the rights of those harmed by anti-competitive

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11 Id., at 1.
conduct across the EU and (ii) preserving the effectiveness of the Commission’s and national competition authorities’ enforcement activities, their leniency programs in particular.\textsuperscript{16}

This package contained two main documents:\textsuperscript{17} The draft of the Damages Directive that was adopted in November 2014 and a Recommendation on collective redress that concerns all breaches of EU law, including violations of EU competition law. We briefly discuss the Damages Directive in this part and then deal with a greater degree of attention to the Collective Redress Recommendation in the next part of the paper.

One of the reasons that led the Commission to propose this Directive was that, while the CJEU had recognized the right for victims of antitrust infringements to be compensated for the harm suffered, only few victims actually obtained compensation due to national procedural obstacles and legal uncertainty. For instance, access to evidence is a critical elements for bringing actions for damages, but disclosure rules are inadequate in most Member States. Moreover, the procedural rules governing damages litigation were widely diverging across EU and, therefore, the chances of victims to obtain compensation largely depended on the Member State in which they happen to be located.\textsuperscript{18} The Commission thus considered that a Directive setting common principles, while leaving flexibility to the Member States as to the manner in which these principles should be implemented, needed to be adopted for damages actions from competition law infringements in the EU.

The main features of this Directive are highlighted hereafter:

First, the Directive provides that Member States have to ensure that anyone who has suffered harm through an infringement of competition law has a right to full compensation.\textsuperscript{19} Full compensation is defined expansively to cover not only actual loss, but also loss of profits and payment of interest from the time the harm occurred until compensation is paid.\textsuperscript{20} Importantly, the Directive provides that compensation should not lead to “over-compensation”, including by means of punitive damages.\textsuperscript{21} Thus, unlike US antitrust law, the Directive does not conceive damages as a tool to punish and deter those who breach competition rules. As will be seen in Part III below, the lack of treble damages reduces the size of the damages awards that may be obtained and thus may have


\textsuperscript{17} The package also contained a document on the quantification of harm in antitrust infringements. See Commission 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 SWD(2013) 205, 11 June 2013.

\textsuperscript{18} See paragraph 7 of the recital of the Directive.

\textsuperscript{19} Article 3.1.

\textsuperscript{20} Article 3.2.

\textsuperscript{21} Article 3.3.
an impact on the incentives for lawyers and third-party funders to bring collective actions against companies that have breached EU competition law.22

Second, the national courts can, upon request of a claimant, order the defendant or a third-party to disclose relevant evidence which lies under their control, subject to a series of conditions. Insufficient access to evidence is indeed one of the major barriers damages claims in some Member States. To obtain access, the claimant must provide a “reasoned opinion” containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages.23 The evidence or categories of evidence requested must be circumscribed as precisely and as narrowly as possible in the reasoned justification and the national courts must limit the disclosure of evidence to that which is proportionate,24 hence avoiding “fishing expeditions”. Thus, the Directive seeks to prevent situations where extremely large number of documents are unnecessarily exchanged between the parties. Member States must ensure that national courts ordering the disclosure of such information have at their disposal effective measures to protect such information from being disclosed during the proceedings (e.g., possibility of redacting some sensitive passages in documents, conducting in-camera sessions, etc.).25 A similar regime applies to disclosure of evidence requests made by the defendant.26

In addition to the above standard rules, special rules apply to disclosure of evidence included in the file of a competition authority. Key to maintain the incentives of infringers to voluntarily collaborate with the Commission,27 the Directive provides that leniency statements and settlement submissions can never be disclosed.28 Certainty that these documents would never be disclosed was seen particularly necessary not to harm the Commission’s leniency program, which is an effective tool to detect cartel activities.29 In addition, three categories of evidence can only be disclosed once the investigation is closed: information prepared by a person specifically for the proceedings of a competition authority (such as replies to questionnaires sent by the authority), information drawn up by the authority and sent to the parties (such as statement of objections), and

22 See Part III, C.
23 Article 5.1.
24 Article 5.2.
25 Article 5.4.
26 Article 5.1.
28 Article 6.6.
29 Commission Notice on Immunity from fines and reduction of fines in cartel cases, O.J. 2006, C 298/17.
settlement submissions that have been withdrawn.\textsuperscript{30} Finally, additional restrictions apply on the disclosure and subsequent use of evidence in the file of a competition authority.\textsuperscript{31}

Third, the Directive provides that the finding of an infringement in a final decision of a national competition authority constitutes irrefutable proof of the infringement before national courts in the same Member State as the competition authority and at least \textit{prima facie} evidence of the infringement before national courts in other Member States.\textsuperscript{32} This provision is designed to facilitate the task of claimants, which can thus piggyback on the decision of national competition authorities to establish that competition law has been infringed by the defendants. However, it is not easy to understand why there is a difference of treatment in the way national courts have to treat decisions taken by national competition authorities, depending on whether they belong to the same Member State or different ones.

As to the limitation period for actions for damages, it cannot begin to run before the infringement has ceased,\textsuperscript{33} as well as before the claimant knows or can be expected to know of (i) the behavior and the fact that it constitutes an infringement, (ii) the fact that it caused harm to it; and (iii) the identity of the infringer.\textsuperscript{34} The limitation period should last five years and should be suspended (or interrupted) during the investigation by a competition authority.\textsuperscript{35} As to the latter point, the suspension is to last at least one year after the infringement decision is final or proceedings are otherwise terminated.\textsuperscript{36}

Fourth, undertakings that have infringed competition law through joint behavior are jointly and severally liable for the harm caused, i.e. each co-infringer is liable to compensate for the entire harm and an injured party has the right to require full compensation from any of the co-infringers until it has been fully compensated.\textsuperscript{37} The amount of contribution between the co-infringers is to be determined in their relative responsibility for the harm caused.\textsuperscript{38} Special liability rules apply to immunity recipients,\textsuperscript{39} once again to avoid that damages claims interfere with the companies’ incentives to collaborate with the Commission.

\textsuperscript{30} Article 6.5.
\textsuperscript{31} Article 7.
\textsuperscript{32} Articles 9.1 and 9.2.
\textsuperscript{33} Article 10.2.
\textsuperscript{34} Article 10.3.
\textsuperscript{35} Article 10.4.
\textsuperscript{36} Id.
\textsuperscript{37} Article 11.1.
\textsuperscript{38} Article 11.5.
\textsuperscript{39} Article 11.6.
Fifth, a defendant in an action for damages should be able to invoke as a defense against a claim for damages the fact that the claimant passed on the whole or part of the overcharge resulting from the competition law infringement to its customers (the so-called “pass-on” defense). The burden of proving that the overcharge was passed should, however, be on the defendant, who may reasonably require disclosure from the claimant or from third parties. When the claimant is an indirect purchaser, it will be regarded as having proved that an overcharge paid by the direct purchaser has been passed on to its level when it is able to make a prima facie case that such passing-on has occurred. This presumption of pass-on can, however, be rebutted by the infringer.

Finally, as to the quantification of the harm, the directive provides that neither the burden nor the standard of proof required for the quantification of harm should render the exercise of the right to damages practically impossible or excessively difficult. The national courts should also have the power to estimate the amount of harm if it is established that a claimant suffered harm but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available. In order to remedy the information asymmetry and the difficulty of quantifying harm, the Directive provides that cartel infringements are presumed to cause harm, although the infringer should have the right to rebut that presumption.

In sum, the Damages Directive seeks to achieve a balance between different objectives. It clearly aims to facilitate private actions for antitrust damages while protecting the rights of defense of the defendants. It also seeks to ensure that the disclosure of the evidence claimants need to prove their claims does not jeopardize the enforcement of competition rules by competition authorities, by for instance protecting leniency applications and withdrawn proposed settlements by companies engaged in cartel behavior. In other words, damages claims should be facilitated, but they should not interfere with the public enforcement of competition rules.

While the framework put into place by the Damages Directive will certainly help corporate victims (i.e., buyers of intermediary products that have been overcharged by their suppliers) to obtain redress, it does little for individual consumers (i.e., “mom-and-pop” shoppers) or small and medium size companies as their harm will generally be too small to justify the costs of litigation.
It is for that reason that, in parallel with the Damages Directive, the Commission elaborated the Collective Redress Recommendation to which this paper now turns.

III. The Collective Redress Recommendation

Collective redress mechanisms are necessary to ensure that consumers are able to obtain compensation for the harm they suffer as a result of competition law infringements.\textsuperscript{47} The challenge when designing such mechanisms is to ensure that they will not trigger large amounts of unmeritorious litigation. As noted above, there is a widely held belief among corporate and government stakeholders that the US class actions regime is not the right fit for Europe.\textsuperscript{48} Whether this belief is well founded or not, we will see that it has fundamentally influenced the design of the collective action regimes adopted at Member States level, as well as the Commission’s Collective Redress Recommendation.

This part is divided in four sections. Section A defines some concepts that are central to collective redress regimes by reference to the US class action regime, which is the most developed collective redress scheme in the world. Section B analyses the Commission’s Collective Redress Recommendation. Section C discusses the issue of whether the regime proposed by the Commission in its Recommendation creates sufficient financial incentives for collective actions to be launched. Finally, Section D looks at the recently adopted UK Consumer Rights Act, which introduces a novel, more ambitious, approach to collective redress in the United Kingdom.

A. Collective Redress – The main features of the US class action regime

The US class action regime provides a solution to the economic obstacle faced by individual claimant whose claims are too small to support the cost of litigation by aggregating a large number of individual claims into a single action.\textsuperscript{49} The prospect of recovering the large damage awards that may result from these aggregated claims in turn attracts law firms willing to pay all the costs

\textsuperscript{47} Collective redress is defined as a “procedural mechanism that allows, for reasons of procedural economy and/or efficiency of enforcement, many similar legal claims to be bundled into a single court action.”). Communication from the Commission to the European Parliament, the Council, the European economic and Social Committee and the Committee of Regions, “Towards a European Horizontal Framework for Collective Redress”, COM(2013) 401/2, p. 4.

\textsuperscript{48} Id. at p. 3. (“For the Commission, any measures for judicial redress need to be appropriate and effective and bring balanced solutions supporting European growth, while ensuring effective access to justice. Therefore, they must not attract abusive litigation or have effects detrimental to respondents regardless of the results of the proceedings. Examples of such adverse effects can be seen in particular in ‘class actions’ as known in the United States.”) and p. 8 (“‘Class actions’ in the US legal system are the best known example of a form of collective redress but also an illustration of the vulnerability of a system to abusive litigation.”)

of litigation from their own pockets in return for a share of the class recovery when the action is successful.

The US class action regime has been a subject of controversy both within and outside the United States. On the one hand, this regime presents a series of advantages. First, it allows individual consumers who may have small claims to obtain some monetary compensation for the damages caused by the defendants. Second, by aggregating a large number of claims in a single action, class actions are generally efficient by allowing defendants to save the time, energy and resources to have to litigate hundreds or thousands of individual claims, although it is of course questionable whether these claims would ever be brought in the absence of class actions. Finally, class actions may have a deterrent effect as infringers will often have to pay stiff damages to claimants, notably due to the treble damages that play in antitrust actions.

On the other hand, critics of the US class actions regime argue that plaintiff law firms leverage the significant risks class actions create to defendants to extract large settlements from them regardless of whether their claims are meritorious or not. This may in turn incentivize lawyers to file unmeritorious claims in the expectations that risk-averse defendants will prefer to settle for a reasonable amount of money rather than face the minor, but catastrophic, risk of having to pay extremely large damages if these actions go to trial and succeed. In addition, some observe that individual claimants may only obtain minimal rewards, generally a few dollars, or even in some case a coupon for a good or service that they will not necessarily be able or willing to use. Class actions would thus essentially benefit plaintiff lawyers rather than the victims of the illegal conduct.

Although these criticisms are not entirely unfounded, it is important to observe that class actions are disciplined by Rule 23 of the US Federal Rules of Civil Procedure, which is designed to ensure only reasonable well-grounded actions are allowed to proceed.

First, Rule 23(a) requires that the actions meet the requirements of “numerosity” (the class must be “so numerous that joinder of all members if impracticable”), “commonality” (the action must raise “questions of law or fact common to the class”), “typicality” (one or more persons who are members of the class may sue on its behalf if their claims are “typical of the claims … of the

50 See Issacharoff & Miller, supra note 5, at 180.
51 Id. at 182-183.
52 See infra text accompanying note 66.
Second, if the Rule 23(a) requirements are met, the action must be brought under one of the categories of actions comprised in Rule 23(b). Most actions for monetary damages are brought under Rule 23(b)(3), which requires that the actions meet two additional requirements. First, the questions of law and fact that are common to the class must “predominate” over individual questions. In addition, class treatment must be “superior to other available methods for fair and efficient adjudication of the controversy.” In this respect, courts will have to take into account the “manageability” of the class action.

Third, Rule 23(c) provides that “at an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.” Class certification is typically the defining moment in a class action. If the class is certified, it can proceed to discovery and resolution on the merits. This will typically incentivize defendants to settle the action rather than litigate the case. If the action is not certified, it will typically collapse as the individual claims are too small to justify the cost of litigation. While historically most courts favored class certification, in more recent years courts have been required to perform a more rigorous analysis of the class certification factors. For instance, in its Hydrogen Peroxide judgment, the 3rd Circuit established that the evidence and arguments a district court considers in the class certification decision call for “rigorous analysis”, and that “[a]n overlap between a class certification requirement and the merits of a claim is no reason to decline to resolve relevant disputes when necessary to determine whether a class certification requirement is met.” Similarly, in Comcast Corp. v. Behrend, the Supreme Court found that:

“By refusing to entertain arguments against respondents’ damages model that bore on the propriety of class certification, simply because those arguments would also be pertinent to the merits determination, the Court of Appeals ran afoul of our precedents requiring precisely that inquiry. And it is clear that, under the proper standard for evaluating

55 See Rule 23(b)(3).
56 Id.
57 Rule 23(c)(1)(A).
58 See 23(b)(3).
59 In re: Hydrogen Peroxide Litigation, 552 F.3d 305 (3rd Cir. 2008).
60 Id. 318.
61 Id. 316.
certification, respondents’ model falls far short of establishing that damages are capable of measurement on a classwide basis.”

Thus, district courts have to act as true gatekeepers of the certification process to ensure that the requirements contained in Rule 23 of the US Federal Rules of Civil Procedure are met in practice.

Fourth, in Rule 23(b) cases, notice must be given to the members of the class that a class action on their behalf has been certified. The notice must inform class members of their rights to “opt out” of the class action. If they do not want to be part of the class, they can either decide to file their own suit or leave their claims expire. Because when claims are small, individual actions are illusory, few members of the class will typically opt-out. This opt-out regime is to be contrasted with the “opt-in” regime that has been adopted in other nations, whereby claimants have to voluntarily elect to be part of the class. The opt-out regime facilitates the creation of large classes and thus the funding of the litigation.

Finally, pursuant to Rule 23(e), a class action may not be dismissed or settled without notice to the class and the approval of the court. This is to protect class members against settlement the lawyers of the class that pursue their economic interests rather than those of the class. Class action lawyers may, for instance, be tempted to agree to an early settlement, which will generate a large fee for the amount of work done on the case. As pointed out by an author, the “class counsel’s economic interest is in maximizing their hourly fee.” In that case, the District Court may simply refuse to approve the settlement and force class counsel to return to the Court with a more attractive deal for the claimants.

Two important features of US class actions should finally be noted as they do not have any equivalent in Europe. First, with respect to antitrust actions, the Clayton Act permits plaintiffs to recover treble damages, i.e. three times the amount of the actual/compensatory damages. This, of course, contributes to attract class actions lawyers as the amount they will be able to recover can be very significant. Thus, an important difference between the private actions for antitrust damages in the US and in the EU systems is that while in the former damages actions have both compensatory and deterrent functions, in the latter such actions are only aimed at ensuring compensation for the damage actually incurred. Second, in US actions, each side bears its own

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63 Id. at 1433.
64 See Cooper Alexander, supra note 49, at 17.
65 For a recent illustration, see Order Denying Without Prejudice Motion for Final Approval of Proposed Settlement, Alice H. Allen et al. v. Dairy Farmers of America, Inc. and Dairy Marketing Services, LLC, United States District Court for the District of Vermont, March 31, 2015 (“Analyzing the Grinnell factors collectively, the court cannot find that the Proposed Settlement's monetary relief of $50 million is on its face inadequate or unreasonable. However, when this amount is considered from the class's perspective, in light of the broad Proposed Release, and the absence of what the remaining Subclass Representatives contend is meaningful injunctive relief, the receipt of approximately $4,000 per dairy farm could reasonably be perceived as a modest recovery.”)
costs, regardless of who wins. This contrasts with the “loser pays” principle that generally applies in Europe. The “loser pays” rule makes it more difficult to bring class actions as the risks of having to pay the costs of the defendants has to be factored in the equation by class actions lawyers (see Section C below).

B. The Collective Redress Recommendation

Collective Redress is not a new issue in the European Union. First, prior to the Recommendation, some Member States had developed collective redress mechanisms with various degrees of sophistication. Collective redress actions remained, however, marginal in the Member States due to the features of these systems (essentially based on the “opt-in” approach). Second, the Commission’s Green and White papers on antitrust damages action, respectively adopted in 2005 and 2008, included policy suggestions on antitrust-specific collective redress. In addition, in 2008, the Commission published a Green Paper on consumer collective redress and, in 2011, it carried out a public consultation “Towards a more coherent European approach to collective redress.” Finally, the European Parliament adopted a Resolution bearing the same title in February 2012.

These various documents expressed a clear hostility towards the US class actions regime, which is perceived as a source of excessive litigation and unmeritorious claims. Whether or not this hostility is justified is a difficult question as class actions are controversial even within the United States. We have seen, however, that US courts now carry a more rigorous analysis of the evidence at the certification stage than they did in the past, hence filtering out claims that have no or little chance to succeed, or for which other forms of litigation may be more appropriate. Some aspects of the US litigation regime, such as the fact that each party pays its costs or treble damages in antitrust cases, are also alien to the European system, hence making class actions an unlikely source of inspiration for the development of collective redress in the European Union.

Against this background, we summarize hereafter the main features of the Collective Redress Recommendation.

First, it is important to note that the Recommendation is not a binding act on the Member States. As its name indicates, it recommends a series of principles regarding collective redress that should

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67 See supra footnotes 12 and 13.
71 See supra text accompanying notes 58 et seq.
be common across the EU. Unlike in the case of the Damages Directive, the Member States cannot be condemned for failing to implement these principles, although it is expected that they will generally follow them as these principles largely reflect the legal traditions of the Member States. In addition, the Recommendation takes the form of a horizontal framework whose principles are set to apply to claims regarding rights granted under EU law in a variety of areas, such as consumer protection, competition, data protection, environmental protection, etc. Thus, although these principles are intended to apply to collective redress for antitrust claims, there are not specific to the competition law field.

Second, in terms of standing to bring collective actions, the Recommendation provides that the Member States should designate “representative entities” to bring “representative actions” on the basis of clearly defined conditions of eligibility, which should at least include the requirements that (i) the entity should have a “non-profit making character”; (ii) there should be a “direct relationship” between the main aims of the entity and the rights granted under EU law that are deemed to have been violated; and (iii) the entity should have sufficient expertise and resources to “represent multiple claimants in their best interests”. The Recommendation does not, however, prevent Member States to maintain other forms of collective actions, such as group actions, where the action can be brought jointly by those who have suffered the harm, but leave it to the Member States to address issues of standing in such cases as they are generally more straightforward.

Third, in terms of admissibility, the Recommendation provides that Member States “should provide for verification at the earliest possible stages of litigation that cases in which conditions for collective actions are not met, and manifestly unfounded cases, are not continued.” Because of the restrictive features of collective redress mechanisms recommended by the Commission, the number of unmeritorious claims is likely to more be limited than it is in the United States, but in any event it remains important to weed out such claims as early as possible in the litigation process.

Fourth, in terms of funding collective actions, the Recommendation provides that, subject to some exceptions, Member States should not permit contingency fees, which risk creating an incentive to litigation that is “unnecessary from the point of view of the interest of any of the parties.” The Recommendation thus has a litigation funding model that is very different from the one used in US class actions, which is based on contingency fees. The Recommendation nevertheless allows third-party funding for representative actions under strict conditions. There can be no conflict of

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72 Recommendation, § 7.
73 Recommendation, § 4.
74 Recommendation, recital 17.
75 Recommendation, § 8.
76 Recommendation, § 29.
77 Recommendation, § 28.
interest between the third-party funder and the claiming party and its members, and the third-party must have sufficient resources to meet its financial commitments to the claimant party initiating the procedure, as well as to cover any adverse costs should the collective redress procedure fail.  

Private third-party funding is developing in Europe with a variety of firms, such as IMF Bentham, Claims Funding International plc, Caprica or Harbour Litigation Funding now offering funding for litigation in the UK and in Europe. The Recommendation, however, provides for the imposition of additional rules when an action for collective redress is funded by a private third-party. For instance, a private third-party funder is also not allowed to attempt to influence procedural decisions of the claimant party. Moreover, its remuneration or the interests it charges cannot be based on the amount of the settlement reached or the compensation awarded “unless the funding arrangement is regulated by a public authority to ensure the interests of the parties”.  

Fifth, the Directive provides that Member States should follow the “loser pays” principle, whereby “the party that loses a collective redress action reimburses necessary legal costs borne by the winning party.” That can represent an insurmountable problem for insufficiently-funded third-parties initiating collective actions on behalf of victims of infringement. For instance, in December 2013, the Düsseldorf District Court dismissed follow-on damage claims by a special purpose vehicle, Cartel Damage Claims (“CDC”), which had brought damages claims against various German cement producers following an infringement decision by the German Federal Cartel Office. The claims were dismissed on two main grounds. First, the assignments of damage claims to CDC were in violation of German law to the extent they were made at a time (i.e., prior to June 2008) they were not allowed. More importantly, the District Court considered that these assignments violated public policy as, under the German loser pays provisions of the Civil

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78 Recommendation, § 14 et seq.
79 Bentham Europe “provides funding to plaintiffs for large scale commercial disputes in the UK and Europe. It offers law firms and their clients the benefits of strong financial backing and risk mitigation, extensive experience in litigation funding and a proven record of success unmatched globally by any other commercial litigation funder”. See http://www.benthamimf.com/about-us/bentham-europe
80 CFI’s mandate is to “identify, fund, manage, and resolve multi party (class action) and other significant legal claims in Europe and elsewhere.” See http://www.claimsfunding.eu/
81 Caprica Litigation Funding provides “a cost effective third party litigation funding solution for lawyers’ fees and disbursements on a non-recourse basis.” See http://www.caprica.co.uk/
82 Harbour provides Litigation Funding “to finance part, or all, of the costs of any type of commercial litigation or arbitration. In return Harbour receives a share of the proceeds of the case but only if there is a successful outcome.” See http://www.harbourlitigationfunding.com/
83 Recommendation, § 32.
84 Recommendation, § 13.
Procedure Code, the losing party is required to pay the court fees and reimburse the winning side for its costs, and CDC was insufficiently funded to cover such costs.

Sixth, as far as compensatory damages are concerned, the claimant party should be formed on the basis of the “opt-in” principle, i.e. the natural or legal persons claiming to have been harmed must provide express consent to join the claimant party.\textsuperscript{86} Exceptions to this principle, by law or court order, “should be duly justified by reasons of sound administration of justice.”\textsuperscript{87} Although the opt-in system has been the approach traditionally followed by the Member States, which have developed collective redress regimes, some Member States have in place regimes that allow for some form of opt-out.\textsuperscript{88} Yet, the Recommendation provides that the opt-in principle should be the rule, subject to exceptions.

The opt-in should cause the claimant party to be smaller than it would be under an “opt-out” system since individual victims with small claims may lack sufficient incentives to take “positive” steps to join the claiming party.\textsuperscript{89} It may also make the funding of collective actions more difficult.\textsuperscript{90} The general lack of responsiveness of the victims of mass harm is illustrated by the fact that in the United States consumer class actions rarely see more than a small percentage (less than 10\%) of the class members to file a claim after a settlement is approved, even though they are entitled to an award.\textsuperscript{91}

Moreover, anecdotal evidence suggests that when individual claims are small, it may be hard to constitute a group of claimants that is sufficiently large to make the action worthwhile. For instance, in 2006, the French consumers’ association UFC Que Choisir brought a damages claim against three mobile communication operators following on a cartel decision of the French Competition Authority.\textsuperscript{92} Despite considerable efforts, UFC Que Choisir only managed to aggregate claims for 12,350 consumers although the infringement had potentially affected 20 million consumers. The association spent nearly 2,000 hours to prepare the action and incurred € 500,000 of legal expenses for a claim amounting overall to € 750,000. In the end, the action was

\begin{itemize}
  \item[86] Recommendation, § 21.
  \item[87] Id.
  \item[90] See infra text accompanying notes.
\end{itemize}
rejected by the French courts. Similarly, in 2007, UK consumer’s association Which?, which was the only association entitled to bring collective actions on behalf of consumers, brought proceedings against JJB Sports to obtain compensation for consumers who had been overcharged for replica football shirts as a result of a price-fixing cartel. Despite a major media campaign, Which? only managed to collect claims for 600 consumers. In the end, it negotiated a settlement whereby consumers who had bought the shirts received £20 in compensation for each shirt. Given the difficulty experienced in collecting claims, Which? never brought a collective action on behalf of overcharged consumers again.

Finally, the Recommendation provides that the compensation awarded to the victims “should not exceed the compensation that would have been awarded, if the claim had been pursued by means of individual actions.” In addition, “punitive damages” leading to overcompensation of the claimants should be prohibited. Once again, the approach taken in the Recommendation differs from US litigation where in a number of fields, such as antitrust, defendants can be subject to treble damages.

In sum, the Recommendation urges Member States to adopt collective redress mechanisms to allow natural and legal persons to seek redress in “mass harm” situations. The key features of the model preconized by the Recommendation are quite distinct from those characterizing the US class actions system. The different path taken by the Commission is largely due to the fear shared by European corporate and government stakeholders that US class actions lead to over-litigation and the bringing of unmeritorious claims. The risk of over-litigation is, however, linked to what make US class actions such as an effective mechanism in bringing creators of mass harm to pay for their wrongdoing, which is that it offers strong financial incentives to entrepreneurial law firms to pursue such actions.

C. Does the Recommendation Create Sufficient Financial Incentives for Collective Actions?

While the Recommendation seeks to stimulate collective redress by urging Member States to adopt legal regimes making such form of redress possible and practicable, it is questionable the approach recommended will offer sufficient financial incentives for these actions to be launched. I address this question by using simple numerical examples contrasting the economics of US class actions with the economics of the approach that is recommended by the Commission.

93 Id.
94 Id.
95 Id.
96 Recommendation, § 31.
97 Id.
98 What follows draws on Ginsburg, supra note 91.
In very simple terms, under the US system, a plaintiff law firm will likely bring an action when the 

\[ \text{Probability of winning} \times \text{number of claimants} \times \text{damages from each claim} \times [3 \text{ (treble damages)}] \times [25\% \text{ (average fee)}] \]

exceeds the 

**Costs incurred in bringing the claim (costs of providing notice to claimants, opportunity costs of time spent on the case, costs of hiring experts, etc.)**

To illustrate numerically the above, I make the following assumptions: The probability of winning the action is 80%. There are 100,000 claimants. The damage from each claim is $50 and the law firm would collect 25% of the amount recovered. The costs incurred in bringing the claims are expected to be $2,000,000. As $80\% \times 100,000 \times $50 \times 3 \times 25\% = $3,000,000 > $2,000,000$, the firm will likely bring this action.

The collective redress approach promoted in the Recommendation, however, has a dramatic impact on the above equation, and thus the incentives to bring actions, since (i) the “opt-in” mechanism will drastically reduce the number of claimants especially when they have small individual claims and (ii) the absence of treble damages will diminish the level of the award. In addition, because of the “loser pays” principle applied in the EU, the law firm (third-party funder) will have to factor in its calculations the risk that it may have to pay the costs of the defendants if the action goes to trial and is unsuccessful. Finally, given the strict conditions that apply to third-party funding, it is not entirely clear the level of compensation that private funders will be able to obtain. Thus, in the EU system, a private law firm will bring an action if the:

\[ \text{Probability of winning} \times \text{number of claimants} \times \text{damages from each claim} \times [25\% \text{ (average fee)}] \]

exceeds 

\[ (1 - \text{Probability of winning}) \times [\text{costs incurred in bringing the claim} + \text{costs of defendants}] \]

Based on the above observations, I make the following assumptions. The number of claimants is lower due to the opt-in system: it decreases to 10,000. The costs of bringing the action are estimated at $2,000,000 and the costs of defending the claims are estimated at $3,000,000. As $80\% \times 10,000 \times $50 \times 25\% = $100,000 < $1,000,000 = [1 - 80\%] \times [$2,000,000 + $3,000,000], the firm will not bring the action.
In practice, this means that the approach preconized by the Collective Redress Recommendation will generally lead to fewer actions being brought than under the US class action regime. The actions that will be brought should typically involve scenarios where (i) the claimants have a significant chance of winning (e.g., a follow-on action), (ii) the potential claimants can be easily identified; (iii) the individual claims are reasonably significant; and (iv) the action can be brought at a reasonable cost (e.g., because the action is not excessively complex and may not require the hiring of economic experts, etc.). The “loser pays” principle should also encourage firms to bring cases that can be settled relatively easily, and thus reduce the risks of losing in court, given the financial risks faced by the defendants.

Let us, for instance, assume that a national competition authority has adopted a decision condemning cement producers for price-fixing and market-sharing. Law firm A contemplates the idea of bringing a collective action on behalf of the construction companies that have been overcharged for the cement they bought from the cartelists during the infringement period. There are 1,000 affected construction companies (and I assume that 50% of them will opt-in). On average these companies suffered a $20,000 prejudice. The chance of winning stands at 90% and the costs of bringing the action amount to $2,000,000, whereas the costs of defending against the action is estimated at $3,000,000. In this scenario, as $90\% \times 500 \times 20,000 \times 25\% \times 10\% \times (2,000,000 + 3,000,000) = $2,250,000 > $500,000 = (1 - 90\%) \times (2,000,000 + 3,000,000)$, Firm A should bring the action.

In the above scenario, the action is likely to be initiated because the claimants are easy to identify and each of them has a significant claim, and thus the incentive to “opt in” even if this requires handling some paperwork. In contrast, in scenarios involving a large number of players, each having small claims, actions will not be likely be brought. Let us, in this case, assume that a national competition authority has adopted a decision condemning consumer care companies for fixing the price of certain types of soap. Law firm A is contemplating the prospect of bringing a collective action on behalf of the consumers that have been overcharged for the soap they bought during the infringement period. There are 500,000 overcharged customers and on average they have suffered a $20 prejudice. Because of the smallness of their individual claim, it is expected that only 10% of them will opt-in, thus 50,000. The chance of winning stand at 90% and the costs of bringing the action amount to $2,000,000, whereas the costs of defending against the action is estimated at $3,000,000. In this scenario, as $90\% \times 50,000 \times 20 \times 25\% \times 10\% \times (2,000,000 + 3,000,000) = $225,000 < $50,000 = (1 - 90\%) \times (2,000,000 + 3,000,000)$, Firm A should not bring the action.

One can, of course, ask the question whether this a problem if this last type of actions are not brought. It depends on the perspective one takes. On the one hand, one could find it regrettable that individual consumers will often be unable to recover the overcharge they have paid to unscrupulous sellers. At the end of the day, they deserve compensation as much as larger actors and even if the amount they obtain is small it may help those with modest means. On the other hand, the US class actions regime suggests that, even when the class action is successful in
recovering a sizeable sum from the defendants, most users do not bother collecting their awards given the smallness of their individual claims. In such cases, the main beneficiary of the action is the plaintiff law firm or the private third-party funder. It is probably in this type of cases that consumer organizations should step in through representative actions, although we have seen with the actions brought by Que Choisir in France and Which? in the UK that these organizations may find it unattractive to pursue such claims under an opt-in regime. Although they may be able to bring actions at a lower cost than private law firms and pursue them even if the planned return is not significant, their resources are limited and they have to be managed carefully.

It is thus questionable whether the approach taken by the Commission in its Collective Redress Recommendation is not unduly restrictive. As we have seen, federal circuit courts are now called to exercise a rigorous analysis of the compatibility of the claims brought before them with Rule 23 of the US Federal Rules of Civil Procedure, hence acting as gatekeepers against unmeritorious claims.99 They can also reject settlements that are not in the interest of the class members, hence ensuring that plaintiff law firms act in the interests of class members. From that standpoint, there is no reason why European judges could not also act as gatekeepers if proper procedures are put into place.

It is also subject to question whether some of the assumptions that have guided the Commission in its Recommendation are truly realistic. For instance, the Recommendation’s general hostility to contingency fees on the ground that it might lead to “abusive litigation”100 fails to convince as there are many good reasons to believe that contingency fees are the most effective means to fund collective actions.101 In addition, research has revealed that contingency fees better align the interests of lawyers with their clients,102 and that contingency fees reduce the amount of wasteful


100 See European Commission, supra note 47, at p. 9.

101 See Issacharoff and Miller, supra note 5, at 198-199 (“The contingency fee permits the attorney to fund the litigation and thus overcomes problems of liquidity that may make it impossible for an individual to pursue his rights. Attorneys are good litigation funders. As legal specialists, they have the ability to assess the value of suits. They will thus tend to direct valuable resources (their time and energy) to cases that offer the largest expected benefit for class members and society as a whole. Because attorneys handle numerous lawsuits, moreover, they can achieve portfolio diversification in ways not possible for ordinary clients, who are usually involved in only one. And attorneys tend to have better liquidity than consumers. They finance cases through their own efforts. If bank financing is required, they are probably better than their clients at obtaining loans at favorable rates. Accordingly, the contingent fee can generate effective funding of class action litigation. Essentially all U.S. class actions are funded with contingency fees.”)

proceedings. The broad trend in the legal industry is also that clients wish law firms to abandon hourly fees for other forms of value-based compensation. One should finally note that the restrictions against contingency fees have been relaxed in a number of EU Member States.

D. The UK Consumer Rights Act 2015

Since the adoption of the Recommendation, some Member States have adopted new collective redress regimes. For instance, the French Consumer Act was adopted in 2014. It allows actions for follow-on damages, but consumers can only file actions through consumer groups represented by government-approved associations. The French regime is based on the opt-in system. In 2014, the Belgian parliament adopted a Collective Redress Act, which provides for a system whereby collective actions can be initiated by consumer organizations meeting certain criteria. The Belgian system does not allow for punitive damages, contingency fees, and before filing an action parties have to go through a mandatory dispute settlement process. As it is for the judge to decide whether the action can be based on an opt-in or opt-out approach, the Belgian regime goes beyond the approach recommended by the Commission.

The most important development, however, is the adoption of the UK Consumer Rights Act 2015, which obtained royal assent on March 26, 2015 and is expected to enter into force on October 1, 2015. The relevant part of this Act for the purpose of this essay is Schedule 8, which brings significant changes to the Competition Act 1998 with regard to private actions in competition law. Section 47B provides that proceedings may be brought before the Competition Appeals Tribunal (“CAT”) combining two or more claims for damages. Collective proceedings must be initiated by “a person who proposes to be the representative in those proceedings” and can only be pursued if the CAT makes a “collective proceedings order.” The CAT may authorize any person to act


105 See Leskinen, supra note 89, at 98.


109 Section 47(B)(2).

110 Section 47(B)(4).
as the representative of the proposed class, regardless of whether that person falls within the class of persons to be represented. However, the CAT must consider that “it is just and reasonable for that person to act as a representative in those proceedings.”

In order to be eligible for inclusion in collective proceedings, the CAT must consider that “they raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings.”

The CAT must state in the collective proceedings order whether the collective proceeding are either opt-in or opt-out. As in the Belgian regime, it is for the CAT to decide, which of these two approaches is to be retained for the collective action at hand. The Act nevertheless contains a number of safeguards designed to prevent abusive litigation. For instance, the CAT may not award “exemplary damages” in collective proceedings. Moreover, a “damages-based” agreement, i.e. a contingency fee, is unenforceable if it relates to opt-out collective proceedings, although it is permitted for damages actions brought by individual businesses or other claimants.

Although the UK regime does not provide for some of the incentives that facilitate the funding of class actions in the United States, the fact that it allows the CAT to decide that a collective action should be pursued under an opt-out basis represents a significant progress compared to the EU Collective Redress Recommendation, which should facilitate the bringing of collective actions in situations involving a large number of consumers with small claims. Time will, of course, tell the extent to which the CAT will be willing to authorize opt-out actions.

IV. Conclusions

There is little doubt that private actions for antitrust damages have become a reality in the EU and that the implementation of the Damages Directive by the Member States will further stimulate such actions. The Collective Redress Recommendation also urges the Member States to adopt regimes facilitating collective redress. The Commission’s anxiety to avoid the alleged excesses of US class actions has translated into a set of principles that fail to recognize that collective actions will not proceed in the absence of financial incentives. The Recommendation’s aversion for the opt-out system raise significant obstacles to the funding of collective actions when a large number of consumers hold small individual claims. From this viewpoint, the approach adopted by the UK Consumer Rights Act, which leaves it to the discretion of the CAT to allow for a collective action to proceed on an opt-out basis is preferable as in some cases no action will be economically viable under an opt-in regime. Contingency fees or at least some form of third-party funding are also often necessary to fund collective actions. There is no reason to believe that contingency fees

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111 Section 47(B)(8)(b)
113 Section 47C(1).
114 Section 47C(9).
necessarily lead to unmeritorious claims as they force plaintiff law firms or third-party funders to carefully analyze the likelihood of success of the actions they contemplate launching. That is not necessarily the case under an hourly fees system as it gives law firms an incentive to generate as much more billable work as possible.

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