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ECONOMIC AND SCIENTIFIC POLICY **A**



Economic and Monetary Affairs

Employment and Social Affairs

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Internal Market and Consumer Protection

Collective Redress in Antitrust

STUDY



DIRECTORATE-GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT A: ECONOMIC AND SCIENTIFIC POLICY

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Abstract

Consumers regularly suffer harm in the form of higher prices, lower output, reduced quality and limited innovation as a result of antitrust infringements but they are rarely compensated due to legal and practical obstacles. Collective redress is a mechanism that may accomplish the termination or prevention of unlawful business practices which affect a multitude of claimants or the compensation for the harm caused by such illegal practices. This study analyses the systems of collective redress for breach of competition law in the area of antitrust in the EU. Starting with an overview of the relevant national and EU legislation in this area, it discusses the question of an EU-wide specific system for collective redress in antitrust and the legal basis for a legislative initiative at EU level. Finally, it assesses advantages and limits of different policy options in relation to several procedural rules both generally applying to collective actions and specifically relevant to collective redress in antitrust.

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AUTHORS

Paolo BUCCIROSSI, Lear

Michele CARPAGNANO, University of Trento

Lorenzo CIARI, Lear

Massimo TOGNONI, Lear

Cristiana VITALE, Lear

With contributions by: Luca AGUZZONI, Marco BELLIA, Gaia BELLOMO and
Riccardo ZECCHINELLI

RESPONSIBLE ADMINISTRATORS

Doris KOLASSA

Stephanie HONNEFELDER, Seconded National Expert

Policy Department A - Economic and Scientific Policy/ECON

European Parliament

B-1047 Brussels

E-mail: Poldep-Economy-Science@europarl.europa.eu

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ABOUT THE EDITOR

To contact the Policy Department or to subscribe to its newsletter please write to:

Poldep-Economy-Science@europarl.europa.eu

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LIST OF ABBREVIATIONS

| | |
|---------------|---|
| ACPERA | U.S. Antitrust Criminal Penalty Enforcement and Reform Act |
| ADR | Alternative Dispute Resolution |
| AGCM | Autorità Garante della Concorrenza e del Mercato (Italian Competition Authority) |
| ATE | After-the-event insurance |
| CAT | Competition Appeal Tribunal (UK) |
| CJA | Collective Judicial Action |
| CPC | Consumer Protection Cooperation |
| GCEU | General Court of the European Union |
| CLAF | Contingency Legal Aid Fund |
| ECHR | European Convention for Human Rights |
| ECJ | European Court of Justice |
| ECN | European Network of Competition Authorities |
| ECON | Committee on Economic and Monetary Affairs of the European Parliament |
| EP | European Parliament |
| EU | European Union |
| FTC | Federal Trade Commission (one of two US Competition Authorities) |
| NCA | National Competition Authority |
| OECD | Organisation for Economic Co-operation and Development |
| OFT | Office of Fair Trading (UK Competition Authority) |
| SMEs | Small and Medium-Sized Enterprises |
| TEC | Treaty Establishing the European Community |
| TEU | Treaty on European Union |
| TFEU | Treaty on the Functioning of the European Union |
| US | United States of America |

GLOSSARY

Alternative Dispute Resolution (ADR)

ADR is a term used for a wide variety of mechanisms aimed at resolving conflicts without the (direct) intervention of a court. ADR schemes usually use a third party such as an arbitrator, mediator or an ombudsman to help the two parties, e.g. consumer and the trader, to reach a solution to their dispute.

Antitrust

Antitrust in the EU context refers only to the specific part of competition law deriving from Articles 101 and 102 TFEU, i.e. anticompetitive agreements and abuse of dominant position and excludes merger control, state aid, etc., which are however an integral part of competition law. In the US, the terms antitrust and competition law are often used synonymously.

Blackmail settlement (and discovery)

Blackmail settlement refers to the risk that a defendant in a collective action prefers to settle, even if the merits of the claim are dubious, to avoid the expenses and the negative publicity that will stem from the trial. A settlement may also be induced by the prospective cost of complying with a disproportionate request for disclosing documents and information in those jurisdictions (like the US) where the discovery phase occurs before the trial and the court has none or limited supervisory power.

Collective redress (or collective judicial action)

Collective redress refers to any mechanism that *'may accomplish the termination or prevention of unlawful business practices which affect a multitude of claimants (consumers and/or SMEs) or the compensation for the harm caused by such illegal practices'* (see Commission Staff Working Document, Public Consultation: *Towards a Coherent European Approach to Collective Redress*).

Conditional fees

Conditional fees refer to arrangements between lawyer and client whereby the client pays a premium to the lawyer, above the agreed fixed or hourly fees, in case of success.

Contingency fees

Contingency fees refer to arrangements between lawyer and client whereby the latter pays the former only if the case is successful, usually with a share of the sum received.

Disclosure

In a civil action each party can obtain evidence from the opposing party by requesting the disclosure of relevant information as and if foreseen in national legislation. Disclosure also includes any specific document that the judges may order to produce.

Pre-trial discovery

Pre-trial discovery refers to the compulsory (pre-trial) disclosure of all documents relevant to a case; it is common in the US.

Forum shopping

Forum shopping refers to the practice of some litigants of bringing their action to the court that is considered the most convenient one, i.e. where they will be most likely to obtain a favourable judgement.

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| Group/class action | An action brought by one (or more) members of the group of victims; the US term is class action. |
| Leniency programmes | Depending on the legal framework, competition authorities may be allowed to offer reduced penalties or even immunity to the first company (whistleblower) disclosing information about a cartel in which they are involved. |
| Limitation period | The period of time during which a claim can be made. Normally this period is calculated with respect to the moment in which the cause of the harm is deemed to have arisen, or when a claimant had reason to know of the harm. |
| Micro businesses | Micro businesses are defined as companies having less than 10 employees and either a turnover of less than EUR 2 million or a balance sheet total of less than EUR 2 million (according to the Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises 2003/361/EC; OJ L 124 of 20.5.2003, p. 36). |
| Opt-in model | Victims only become parties to a collective action if they take some affirmative step to be included. Hence only those who 'opt in' are bound by the judgment (and eventually receive compensation). |
| Opt-out model | All the victims become parties to the litigation automatically, unless they take an affirmative step to 'opt out' of the action. Hence, unless a victim opts out of the litigation, he or she will be bound by any judgment issued by the court, or by any settlement between the representative claimants and the defendant. |
| Passing-on | The term 'passing-on' refers to the mechanism by which a downstream supplier increases its selling price following a price increase in one of its inputs. |
| Passing-on defence | The passing-on defence can be invoked by defendants against the direct purchasers when they claim for compensation for a cartel price overcharge. According to the passing-on defence, the direct purchaser is not entitled to receive compensation for the part of the overcharge that he or she has passed on to the next layer of indirect purchasers. |
| Passing-on offence | A passing-on offence argument can be raised in two circumstances. First, the indirect purchaser may claim damages even if the relevant product was not purchased from the infringer but from an intermediary, to the extent that the latter passed on the overcharge to him. Second, the direct purchaser may claim damages for lost sales due to the increase in price charged in the downstream market due to the input overcharge caused by the infringement. |

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| <i>Prima facie</i> evidence | Evidence 'at first sight' that is deemed sufficient to raise a presumption of fact or to establish a fact but is not conclusive and can be rebutted. |
| Punitive damages | Punitive damages are damages which, according to national legislation, may be imposed in excess of the claimant's actual harm with the intention of punishing the offender (e.g. in the US system). |
| Representative action | An action brought by an association or a representative body on behalf of a group of victims. |
| Settlement | Victims of an infringement may finish, i.e. 'settle' the case with the defendants, thus avoiding a judicial decision (an arrangement can be made either before reaching the trial phase or after the initiation of a court proceeding). This has to be distinguished from the administrative settlement procedures available for and used by companies to settle their cases with the competent authority without court proceedings initiated by the authority. |
| Small and medium-sized enterprises (SMEs) | A company is a small-sized enterprise if it has less than 50 employees and either a turnover of less than EUR 10 million or a balance sheet total of less than EUR 10 million. A company is a medium-sized enterprise if it has less than 250 employees and either a turnover of less than EUR 50 million or a balance sheet total of less than EUR 43 million (according to the Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises 2003/361/EC; OJ L 124, 20.5.2003, p. 36). |
| Standing | The right to sue, i.e. the legal prerequisites that a claimant must have in order to bring a court action. |
| Stay of proceedings | A ruling by a court to stop or suspend a proceeding either temporarily or permanently. |
| Consolidation of proceedings | When related proceedings are pending before different courts, they may be consolidated in one single proceeding and heard together in one of the courts. |
| Treble damages | Treble damages are a form of punitive damages whereby any damage awarded by a court is automatically tripled. |

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EXECUTIVE SUMMARY

Efficient and effective schemes for collective actions are considered as a vital component of a well-functioning judicial system. In the area of antitrust where illegal conducts may cause scattered and low-value damage to a multitude of individuals and where the individual cost for redress might not be proportionate to the damage suffered, this holds true all the more.

Much of the debate on collective redress has centred on whether an action at EU level is needed, and which legislative instrument would be the most suitable one. This study aims to contribute to the debate through an assessment of the legal and economic issues surrounding the adoption of an EU-wide instrument and the choice of the relevant procedural rules that should govern collective actions, specifically in the field of antitrust.

In the majority of Member States a system for collective redress exists but national schemes differ significantly in terms of institutional features and procedural rules. Based on evidence collected from public sources and the responses to a questionnaire we submitted to a number of scholars, practitioners, judges, national competition authorities and national consumer protection institutions across the EU, we provide an overview of the existing national legislations. We consider several aspects of the collective redress systems, taking into account the institutional features and the procedural rules that apply, both generally to all areas, such as the nature of the system (opt-in vs. opt-out), the filter mechanisms, the allocation of costs between opposing parties, funding mechanisms, and specifically to antitrust actions, such as the treatment of leniency applicants and the legal status of decisions by the European Commission or by national competition authorities.

As part of our overview, we also gathered information on the collective redress cases that have been already dealt with. Respondents to our questionnaire pointed out some interesting cases brought to national courts. However, the number of actions related to antitrust infringements is still very limited. This may be in part due to the fact that most of the national collective redress systems in Europe have been introduced only recently, but it might also suggest that existing legislation is scarcely effective in promoting consumer and SME access to collective redress instruments.

Collective redress systems in the EU appear in general to be apt to discourage unmeritorious claims, as they do not, in general, envisage the combination of procedural rules, such as treble damages, pre-trial discovery, and conditional fees, that have been indicated by many commentators as the primary causes in the surge of meritless collective actions in the US. But there are concerns that the existing schemes might be tilted in favour of defendants, thereby restricting the ability of claimants to make effective use of collective redress tools. In particular, in our view the limits of a pure opt-in system and the lack of sufficient and alternative sources of funding may represent significant obstacles to bringing collective actions. We also consider that some further steps towards a more efficient system could be made by extending the binding effect of national competition authorities' decisions in all countries. This could significantly foster the proposition of follow-on collective claims, especially those arising from cartel infringements. As case law increases, more meaningful indications will arise. We thus recommend the continuous monitoring of the emergence of collective actions in the Member States so as to identify areas for improvement.

Following the assessment of the national collective redress systems, the study discusses the potential added value of a harmonised approach towards collective redress in antitrust across Europe. We consider the key legal objectives of an antitrust collective redress system:

- (i) to discourage unmeritorious actions, while guaranteeing that those who have actually suffered harm obtain an adequate and fair compensation;
- (ii) to ensure a fair trial by providing legal certainty and consistency;
- (iii) to lower the financial and organisational hurdles that consumers and small businesses face.

We argue that an EU-wide system may produce significant benefits for both claimants (i.e. consumers and SMEs) and defendants (in particular, large undertakings). More effective judicial rights' protection and cost/time savings for claimants when bringing actions in foreign countries, as well as more legal certainty for defendants when faced with claims in different jurisdictions, are the major benefits that could result from a harmonised mechanism across Member States. While implementing an EU-wide system might also entail some costs, in our opinion these costs would be to a large extent of a transitory nature and are likely to be offset by the long-term benefits.

Two different legislative instruments may support an initiative at EU level: a horizontal instrument that would apply generally to consumer protection law violations and an antitrust-specific provision only relevant to EU competition law infringements. We discuss advantages and limits of the two options. In our view, an antitrust-specific measure would be preferable as it would enhance private antitrust enforcement by removing inequality among the Member States in the level of judicial protection of individual rights directly stemming from Articles 101 and 102 TFEU. The major limit of a horizontal instrument is that it would require further interventions in some specific sector-related issues, such as, for instance, passing on defence, access to evidence and discovery rules, and interaction with leniency programmes.

We also consider the legal basis under which an EU initiative could be undertaken. Article 103 TFEU seems to be the most appropriate Treaty provision for an EU legislative action in the field of collective redress in antitrust. As a further merit, Article 103 TFEU appears to be more consistent with the ECJ case law that requires that every legislative act should be based on one single legal basis, in particular that basis which can be considered of major relevance for the scope of the act considered as a whole. A dual legal basis (Articles 103 and 114 TFEU in conjunction with Article 169 TFEU) could also be an option. However, this may raise concerns over the potential incompatibility between the ordinary legislative procedure provided for by Article 114 TFEU and the special legislative procedure provided for by Article 103 TFEU.

As far as the type of legislative act is concerned, we argue that a regulation should be preferred to a directive. As most of the existing national collective redress systems have a general scope and are not limited to competition law enforcement, the introduction of an *ad hoc* special mechanism by means of a regulation would not raise any problem of compatibility. By contrast, a directive, which would require the implementation by national legislators, may be more prone to this problem, and as a consequence it could lead Member States to adopt different solutions at national level.

We then turn to the assessment of the institutional features and the procedural rules that may govern the functioning of collective redress systems. The ability of a collective redress mechanism to bring effective compensation to the victims of a competition law infringement depends in fact on how the procedural and substantive rules affect the incentives of the parties. Ideally a well-functioning mechanism should provide incentives to encourage well-grounded actions while at the same time envisaging safeguards that protect from meritless claims. In short, our major conclusions are:

- (a) an opt-in model has the advantage of limiting the risk of unmeritorious actions, but it entails a low participation rate. To overcome the risk of low participation, an opt-out mechanism may be permitted under very specific and regulated conditions, when consumers cannot be reasonably expected to opt in in a collective action;
- (b) both representative actions and collective actions should be allowed and no restriction should be placed on the ability of any subject to bring a collective action to claim compensation;
- (c) the collective redress system should also be open to small enterprises as they may be in the same situation of asymmetry with respect to the defendants as final consumers;
- (d) private funding mechanisms may foster consumer and small enterprise access to collective redress and they are unlikely to induce excessive litigation, provided that the relevant market is open and competitive;
- (e) the 'loser party pays' principle is commonly adopted in the EU and it seems efficient and apt to discourage frivolous claims;
- (f) striking the balance between the interest of the claimants to obtain access to documents and information that are in the hands of the infringers and the interest of the defendants to avoid blackmail discovery is very complex. We concur with the solution suggested by the European Commission proposing to extend the legislation on the enforcement of intellectual property rights that discipline the disclosure of evidence to the opponent in civil litigation to the subject of antitrust;
- (g) in accordance with EU legal tradition whereby private damages actions must provide compensation for loss suffered by claimants while deterrence is mainly pursued through public enforcement, punitive damages should be excluded and all '*passing on*' arguments should be allowed.

Finally, we look at how public enforcement of competition law interacts with private enforcement. We identify four main areas of interest:

- *the binding vs. non-binding nature of public authorities' decisions*: while the decisions of the European Commission are binding for all national courts, the legal character of NCAs' decisions varies across Member States and differs depending on whether the NCA is from that Member State or not. This may result in legal uncertainty and give rise to forum shopping. To overcome this problem it seems advisable to adopt a uniform approach within the EU on the binding effect of decisions made by national competition authorities.

- *the interaction with leniency programmes:* leniency programmes have shown their effectiveness in fighting cartels. Actions for damages may reduce the attractiveness of leniency programmes for cartel participants if their cooperation with the competition authority increases the chance that the cartel's victims will bring a successful suit. To preserve the incentives for whistleblowers, some consideration should be given to the possibility of reducing the risk and costs stemming from civil responsibility for the first leniency applicant, either by excluding the obligation to be jointly liable for the whole amount of the damage, or by granting immunity from civil responsibility, unless the other cartelists become insolvent and the first leniency applicant is the only firm that can repay the cartel's victims.
- *the access to information held by public authorities:* the documents collected by competition authorities during the administrative proceedings are an important source of information for the purposes of follow-on actions. The current Regulation regarding public access to documents held by the European Parliament, the Council and the Commission provides a good balance of the various interests. Access to documents provided by leniency applicants should be limited to protecting this enforcement tool, unless there are other forms of protection in favour of leniency applicants, such as immunity from civil responsibility.
- *the role of competition authorities as amicus curiae: and the role of competition authorities as amicus curiae:* in order to strengthen the public-private enforcement interaction in collective antitrust claims, it seems advisable to establish a mandatory notification of claims to the NCA of the Member State where the claim has been brought. The mandatory notification will be made by the claimant as a preliminary condition of the claim. Once the NCA receives the notification, it would be allowed (but not obliged) to intervene in the process (producing documents and evidence) within an established time limit in the name of public interest (i.e. the defence of the competitive structure of the market and the effectiveness of antitrust law enforcement).

INTRODUCTION

The aim of the study is to analyse and develop the issues of collective redress in antitrust, taking into account the points raised by ECON in its opinion issued on 20 October 2011¹ on the staff working document of the European Commission '*Towards a Coherent European Approach to Collective Redress*'. In particular, the study will:

- describe the state of play of private enforcement of EU and national antitrust rules in terms of both the relevant national legislation and practices and of the relevant case law, with the aim of assessing the efficiency and effectiveness of these systems;
- discuss the legal admissibility and added-value of an EU-wide system of collective redress for the private enforcement of antitrust rules, including a discussion of the admissibility of rules on safeguards;
- analyse the available instruments to provide the proper incentives to the victims of an antitrust infringement to bring an action for damages and to implement safeguards against abusive litigation in the EU judicial system, with the aim of identifying the difficulties, the challenges and the possible solutions;
- assess the specificities of the antitrust sector that derive from the interaction between the public and the private enforcement of competition law;
- identify the policy options and provide recommendations for improved regulation in this area.

According to the definition given by the European Commission in its recent public consultation,² **collective redress is any mechanism that 'may accomplish the termination or prevention of unlawful business practices which affect a multitude of claimants (consumers and/or SMEs) or the compensation for the harm caused by such illegal practices'.**

Collective redress mechanisms concern situations where the same infringement committed by the same company (or group of companies) has harmed (or might have harmed) a group of consumers and/or businesses. Establishing a collective redress mechanism does not necessarily preclude the possibility for consumers and/or businesses to file lawsuits individually. However, without a collective redress facility, consumers and businesses may be reluctant to bring an action for damages if the individual harm is small compared to the costs of litigation. The lack of an effective and efficient mechanism of collective redress may result in a large number of EU consumers not being compensated for the harm they have suffered because of antitrust infringements. By allowing individuals to bundle their claims into a single procedure, or consenting such a claim to be brought by a representative entity or body acting in the public interest, collective redress mechanisms could reduce the cost of damages actions and thus enhance victims' access to justice.

Although the terms 'collective redress' and 'class actions' are often used synonymously, class actions constitute a specific form of collective redress common in the US where actions are brought on behalf of a defined class, but without all members of the class being identified to the Court.³ Throughout the study we will use the terms according to their original meanings.

¹ European Parliament, 'Opinion on Towards a Coherent European Approach to Collective Redress' (2011).

² http://ec.europa.eu/justice/news/consulting_public/0054/ConsultationpaperCollectiveredress4February2011.pdf.

³ See the box in Section 1 for a more detailed definition of 'class' under the US system.

Consumers and businesses may be harmed by a wide range of anticompetitive behaviour. Collective action procedures are more common in the case of cartels as the direct effect of cartels is to soften competition among all, or a large part, of the companies operating in a given market. Cartels can then be expected to have a wide impact affecting most of the buyers, either consumers or businesses, of the good/service produced by the infringers. Horizontal as well as vertical agreements in breach of Article 101 TFEU may also damage a large number of consumers. Infringements of Article 102 TFEU, while they may be intended to harm one or more competitors in the first place, can indirectly, or in the longer term, cause damage to consumers and/or businesses, in particular SMEs, once the exclusion has been achieved. In conclusion, collective redress can apply to the full range of antitrust infringements.

Collective redress proceedings also encompass situations where the victims of an antitrust infringement settle the case with the defendants before reaching the trial stage (out-of-court settlements). These situations have to be distinguished from the administrative settlement procedures available for and used by companies to settle their cases with the competent authority without court proceedings. Mechanisms that encourage the resolution of out-of-court disputes are often favourably viewed as they provide quicker and less costly alternatives to court trials and thus constitute an important additional element of a well-functioning system of private litigation. For this reason, although this study will primarily focus on the judicial redress schemes, we will also discuss the merit of out-of-court mechanisms for the resolution of disputes.

In competition law cases both the establishment of liability and the quantification of the harm often require complex economic analyses and involve a significant degree of uncertainty. The effectiveness and efficiency of a collective redress system thus depend on a number of institutional features that affect the ability of the injured parties to group their claims together and prove the harm they suffered because of the antitrust infringement, and the ability of the courts to decide on these claims in an efficient and consistent way. They also depend on the existence of measures that provide appropriate safeguards against unmeritorious claims brought by claimants hoping for a favourable, but unjustified, judgment by the court, or trying to induce the defendant to negotiate a settlement to avoid the risk of an unfavourable judgement.

The relevant institutional features of a collective redress system can be divided into three categories:

- 1) civil law;
- 2) civil procedural law;
- 3) specific competition law.

Below we identify the elements included in each category. These elements will be discussed separately throughout the study.

Civil law:

- identification of claimants (opt-in, opt-out or hybrid model);
- limitation periods;
- presence of punitive damages;
- whether the parties are permitted to bring passing-on arguments;
- use of other forms of settlement, including ADR mechanisms.

Civil procedural law:

- availability of Collective Judicial Action;
- standing (i.e. who is allowed to bring an action);
- filter mechanisms in place (e.g. what level of commonality of interest there should be among the claimants);
- distribution of burden of proof;
- disclosure of information;
- allocation of legal and other procedural costs;
- funding mechanisms allowed.

Competition law:

- treatment of leniency applicants;
- legal status of decisions by the European Commission or by NCAs;
- access to documents held by competition authorities
- the participation in the trial of national competition authorities as *amicus curiae*.

1. STATE OF PLAY

There are significant differences in the approach of Member States towards collective redress schemes. The purpose of this section is to provide a picture of the state of play in the Member States, pointing out the main features of the collective redress legislation currently in place, in particular in relation to:

- availability of Collective Judicial Action (CJA) and applicability to antitrust infringements;
- identification of claimants (opt-in, opt-out or hybrid model);
- standing;
- filter mechanisms in place;
- legal status of decisions by the European Commission or by national competition authorities.
- limitation periods;
- disclosure of information (e.g. leniency applications);
- allocation of legal and other procedural costs;
- permitted funding mechanisms;
- use of other forms of settlement, including ADR.

The information on the national legislations has been drawn from several public sources⁴ as well as from the responses to a questionnaire that was submitted to scholars, practitioners, judges, national competition authorities and national consumer protection institutions in all Member States.⁵

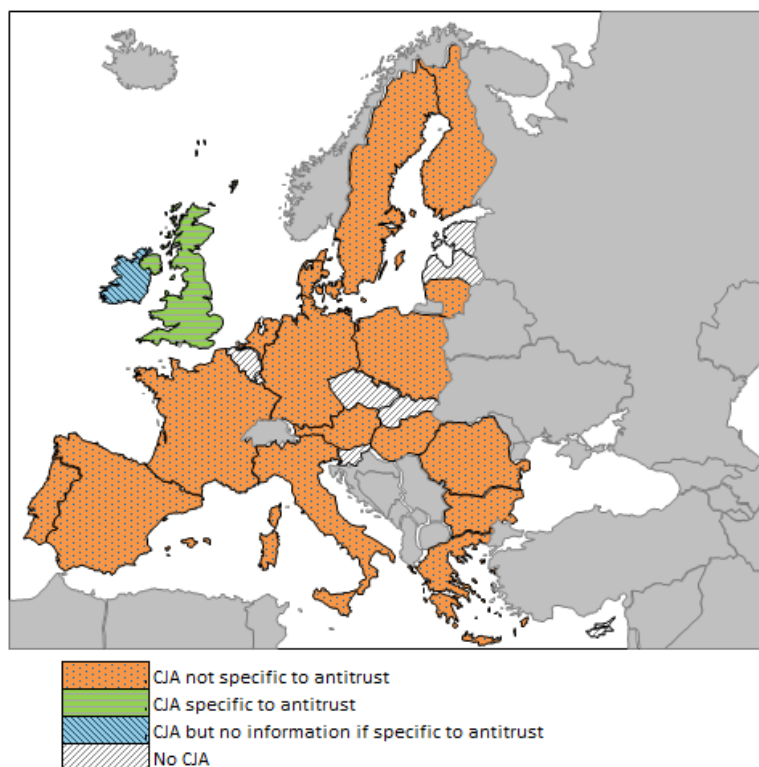
⁴ European Parliament, 'Overview of existing collective redress schemes in EU', (2011); European Justice Forum, 'Collective Redress'; Osservatorio Permanente sull'Applicazione delle Regole di Concorrenza (www.osservatorioantitrust.eu); Civic Consulting (2008); Stanford University (2011); European Commission, 'Responses to the public consultation on Collective Redress' (2011); Global Legal Group (GLG)(2011).

⁵ We wish to thank all the respondents to the questionnaire and in particular: Tanja Bratina (Slovenia), Judit Budai (Hungary), Bogdan Chiritoiu (Romania), John Connor (USA), Yvan Desmedt (Belgium), Olga Drousioti Papachrysanthou (Cyprus), Jesper Fabricius (Denmark), Gábor Fejes (Hungary), Miguel Gorjão-Henriques (Portugal), Olga Georgiades (Cyprus), Ulrike Ginner (Austria), Anna Gulinska (Poland), Lionel Lesur (France), Jana Jesenská (Czech Republic), Toni Kalliokoski (Finland), Aleksandra Kinaneva (Bulgaria), Márton Kocsis (Hungary), Robert Lande (USA), Florian Neumayr (Austria), Beata Ordowska (Poland), Vladimir Penkov (Bulgaria), Michal Petr (Czech Republic), Aidan Robertson QC (United Kingdom), Luisa Scorciarini (Italy), Miguel Sousa Ferro (Portugal), Agnieszka Stefanowicz-Baranska (Poland), Randy Stutz (USA), Julia Suderow (Germany), Kristína Sýkorová (Slovakia), Dimitris Temperis (Greece), Ola Wiklund (Sweden). We wish also to thank: the Office for Competition within the Malta Competition and Consumer Affairs Authority, Österreichische Bundesarbeitskammer (Austrian Federal Chamber of Labour), Επιτροπής Προστασίας Ανταγωνισμού (Cypriot Commission for the Protection of Competition), Konkurrence- og Forbrugerstyrelsen (Danish Competition and Consumer Authority), Autorité de la concurrence (French Competition Authority), Bundeskartellamt (German Competition Authority), Gazdasági Versenyhivatal (Hungarian Competition Authority), and Autorità Garante della Concorrenza e del Mercato (Italian Competition Authority).

1.1. Collective redress schemes in the EU

Collective redress mechanisms exist in most, but not all, Member States (Figure 1). There are eight countries that currently do not have a collective redress scheme: Belgium, Cyprus, Czech Republic, Estonia, Latvia, Luxembourg, Slovakia and Slovenia. The collective redress mechanisms in place are usually not specific to antitrust infringements as they encompass a wide variety of violations. There is only one Member State (the UK) in which there is collective redress legislation specific to antitrust infringements.

Figure 1: Availability of Collective Judicial Action (CJA)

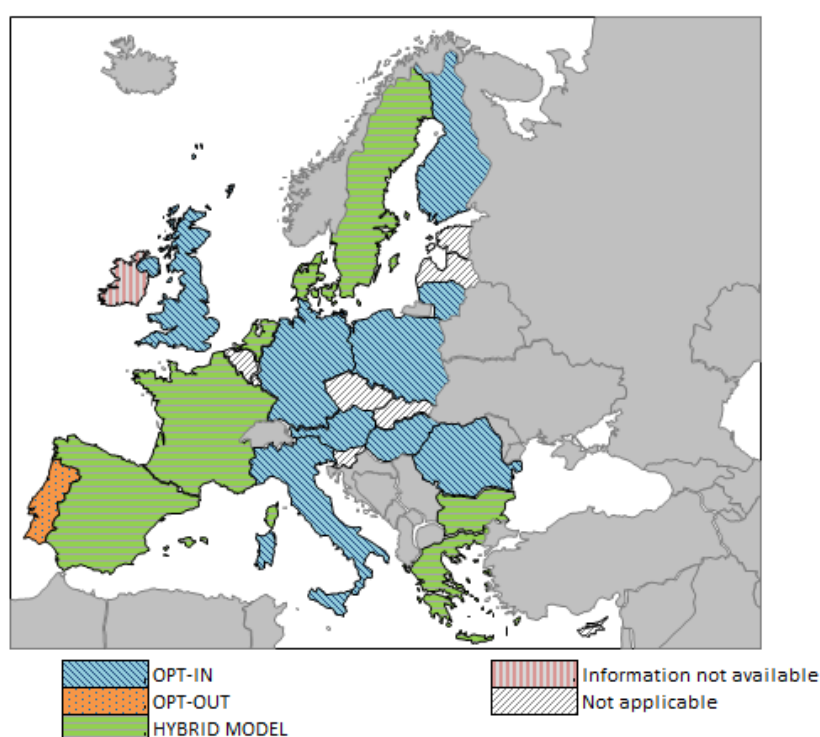


Source: Lear

1.1.1. Identification of claimants

In the majority of EU27 countries (Figure 2) the mechanism in place for the identification of claimants requires victims to expressly consent to the proceedings ('opt-in') while only in Portugal the decision becomes binding for all members of the group unless they opt out. Some countries (Bulgaria, Denmark, France, Greece, Spain, Sweden and The Netherlands) adopt hybrid solutions that mix characteristics of the two models. In Denmark, for example, if the number of individual claims is high enough to make it burdensome to individually pursue them, the competent court may decide that the collective redress will encompass all group members which have not opted out within a deadline set by the court. In Bulgaria the decision of the court is binding for those who have submitted a claim as well as for the potential victims who did not opt in, but did not bring separate actions on their own either.

Figure 2: Mechanism for the identification of claimants



Source: Lear

Note: 'Not applicable' as there is no collective redress system.

1.1.2. Legal standing: who is allowed to sue?

Table 1 (below) provides a description of the type of legal standing in compensatory redress proceedings. The entities that might have standing, i.e. which are allowed to sue, are the following:

- a single injured consumer;
- a single injured small or medium enterprise;
- a group of injured individual consumers;
- a group of injured small and medium enterprises;
- designated bodies (e.g. consumer association, trade association, *ad hoc* committee) on behalf of the injured parties, where the bodies have been designated by legislation;
- designated bodies (e.g. consumer association, trade association, *ad hoc* committee) on behalf of the injured parties, where the bodies are designated by the court at the permission stage;
- other (legal standing given to entities different from the above mentioned), as for example, Consumer Ombudsmen who, in some Member States (Denmark and Sweden), are authorised to act as group representatives.

In the majority of Member States the legislation has vested particular bodies with the standing for collective redress actions. Nevertheless, these bodies are often not the only entity with standing. For instance, in many countries also single injured consumers (or groups of them) or single injured SMEs (or groups of them) have legal standing for collective actions.

Table 1: Type of Standing

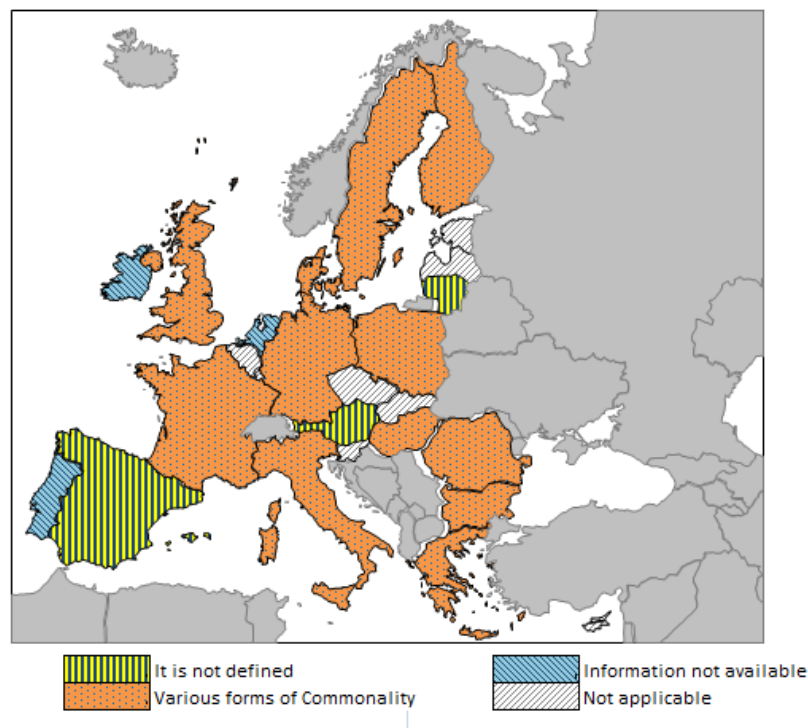
| States | Single injured consumer | Single injured or SME | Group injured individual consumers | Group injured SMEs | Bodies designated by legislation | Bodies designated by court at permission stage | Other |
|----------------|------------------------------|-----------------------|------------------------------------|--------------------|----------------------------------|--|-------|
| Austria | • | • | • | • | • | | |
| Belgium | no collective redress system | | | | | | |
| Bulgaria | • | • | • | • | • | | |
| Cyprus | no collective redress system | | | | | | |
| Czech Republic | no collective redress system | | | | | | |
| Denmark | • | • | • | • | • | • | • |
| Estonia | | | | | | | |
| Finland | | | | | • | | |
| France | | | | | • | | |
| Germany | | | • | • | • | | • |
| Greece | • | • | • | • | • | | |
| Hungary | | | • | • | • | | |
| Ireland | | | | | | | |
| Italy | • | | | | | | |
| Latvia | no collective redress system | | | | | | |
| Lithuania | | | | | • | | • |
| Luxemburg | no collective redress system | | | | | | |
| Malta | • | • | | | • | | |
| Netherlands | | | | | • | | |
| Poland | | | • | • | • | | • |
| Portugal | • | • | • | • | | • | • |
| Romania | • | • | • | • | • | • | |
| Slovakia | no collective redress system | | | | | | |
| Slovenia | no collective redress system | | | | | | |
| Spain | • | • | • | | • | | |
| Sweden | • | • | • | | • | • | • |
| United Kingdom | • | | • | | • | | |

Source: Lear**Note:** For Estonia and Ireland the information is not available (n/a).

Collective redress schemes can impose an initial filter mechanism that aims to identify any claims that can be dealt with on a collective basis. The majority of countries have indeed adopted a filter based on a certain level of commonality of interests (see Figure 3 below). Austria, Lithuania and Spain do not have a clearly specified filter in place. The commonality criteria can be broadly distinguished in:

- (i) uniformity in law, which implies that the court has jurisdiction over each defendant and that all the claimants have the same rights with respect to the defendant; and
- (ii) uniformity in fact; that is, the damage has to have a common origin, has to be caused by the same subject and has to be of the same nature.

Figure 3: Type of Filter Mechanism



Source: Lear

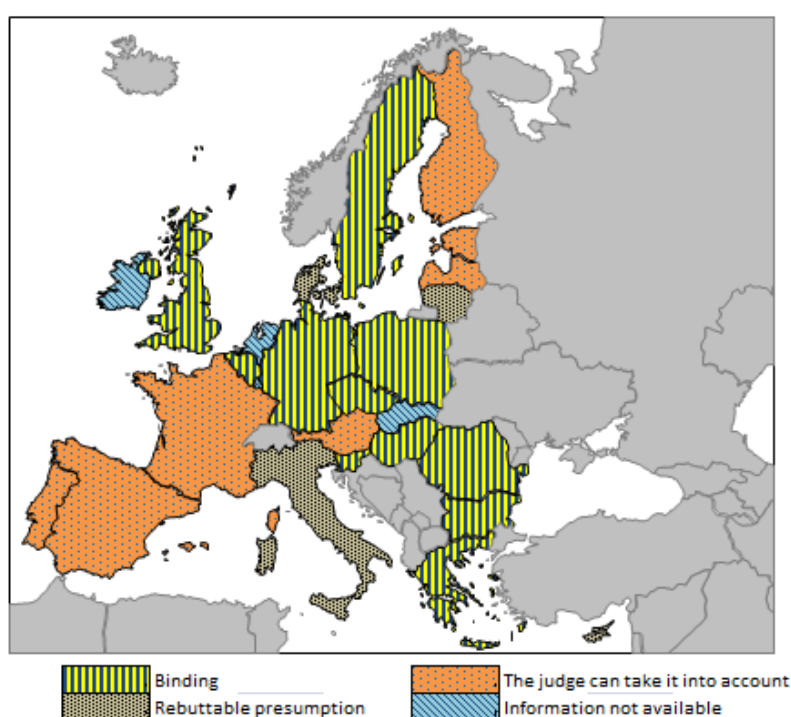
Note: 'Not applicable' as there is no collective redress system.

1.1.3. Binding or non-binding antitrust infringement decision

Collective redress actions related to antitrust infringements often follow an antitrust decision taken either by an NCA or by the European Commission. According to Article 16(1) of Regulation 1/2003, the decision taken by the European Commission is binding in all Member States and represents a non-rebuttable presumption as far as the existence of the infringement is concerned. However, this is not valid for the decisions adopted by certain NCAs as this binding effect is subject to the legal provisions of Member States.

Figure 4 shows that the decision adopted by an NCA is binding in most of the Member States. Yet there are some countries in which it only establishes a rebuttable presumption (e.g. Cyprus, Denmark, Italy, Latvia) or it is just an element that the judge can take into account (Austria, Estonia, Finland, France, Lithuania, Portugal, Spain).

Figure 4: Legal Status of own country NCA's decisions⁶

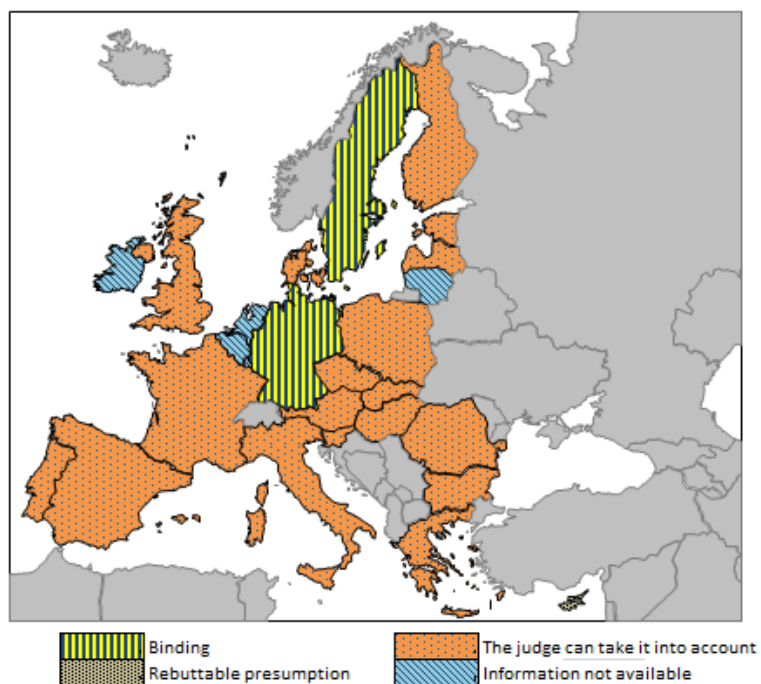


Source: Lear

⁶ For countries where no collective redress system exists, we have nonetheless collected and reported the answers to the questionnaire in relation to national judicial systems' features that apply to all actions irrespective of whether they are collective or individual, i.e. the legal status of the NCA's decision, the limitation period, the disclosure of information, the allocation of legal costs, the funding mechanism allowed and the forms of settlement available.

Only in two countries (Germany and Sweden) are national courts bound by the decisions taken by a foreign NCA. In the majority of countries such a decision only represents an element that courts can take into consideration (see Figure 5).

Figure 5: Legal Status of foreign NCA's decisions

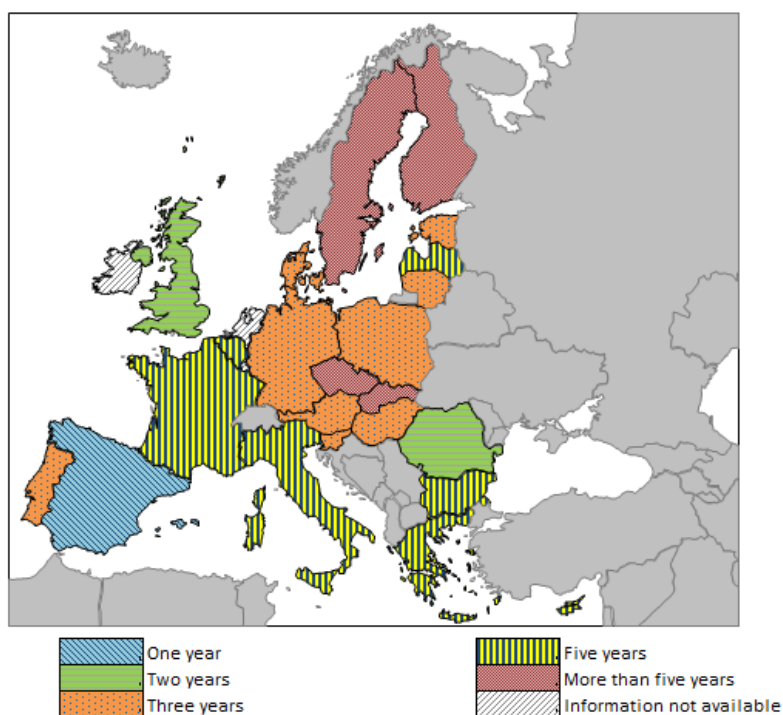


Source: Lear

1.1.4. Limitation period for introduction of claims

The period of time during which a claim can be made, the so-called limitation period, is usually clearly determined. Normally this period is calculated with respect to the moment in which the cause of the harm is deemed to have arisen, or when a claimant had reason to have gained knowledge of the harm. In the case of antitrust infringements the claimants often become aware of the cause of the harm after a delay. Figure 6 shows the length of the limitation period that is envisaged in each Member State's legislation. There is a significant variation in the length of the limitation period that spans from one year (e.g. in Spain), to more than five years (e.g. in Czech Republic, Finland, Slovakia and Sweden).

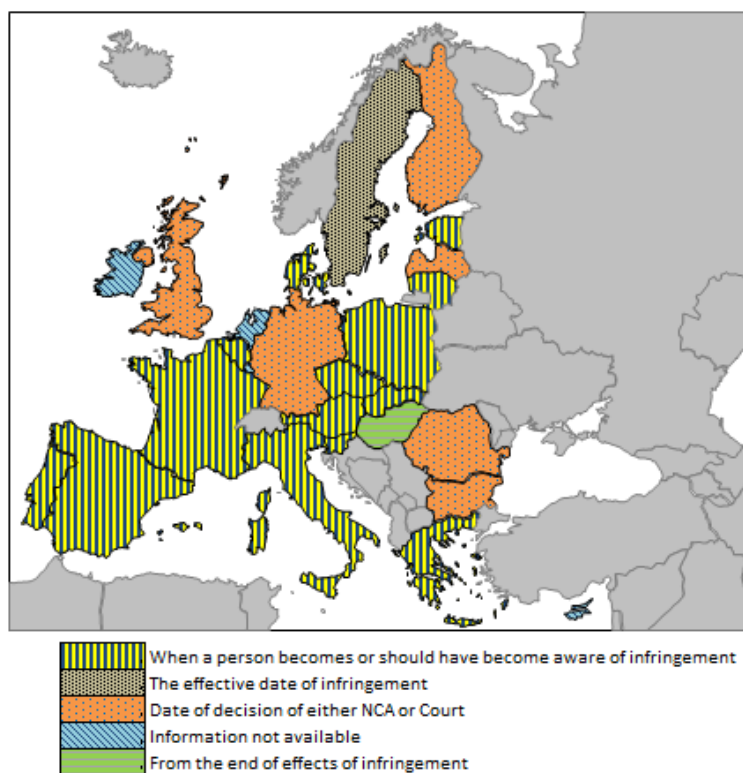
Figure 6: Limitation period



Source: Lear

In the majority of countries the date on which the clock starts is when a person becomes or should have become aware of the infringement (see Figure 7).

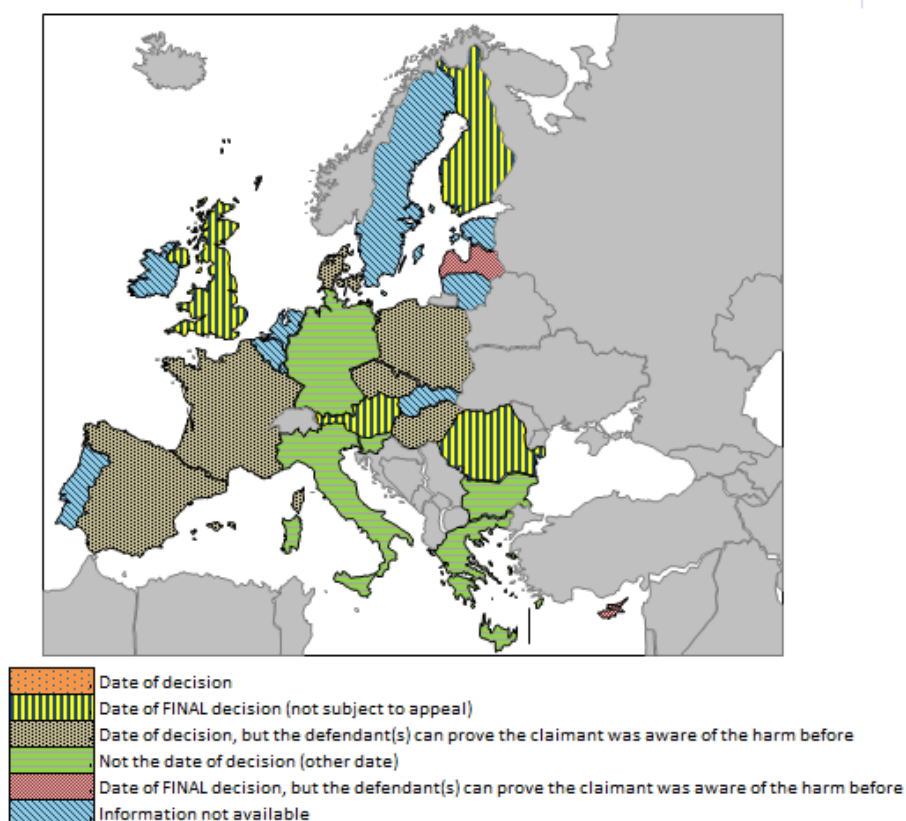
Figure 7: Date on which the time limit clock starts



Source: Lear

In almost all Member States the issuing date of these decisions is considered to be the date on which the claimants should have become aware of the infringement. However, there are some important differences. In some countries it is only the date of the legally binding decision (after possible appeals) that matters. In other Member States, while the date of the decision is relevant, the defendant might claim that the claimants had been aware of the infringement before the decision. Finally, in some countries (Bulgaria, Germany, Greece, Italy, Slovenia), other dates are deemed relevant to establish when the claimant had reason to know of the harm (see Figure 8).

Figure 8: Date when the claimant had reason to know of the harm, in case of EC or NCA's decisions



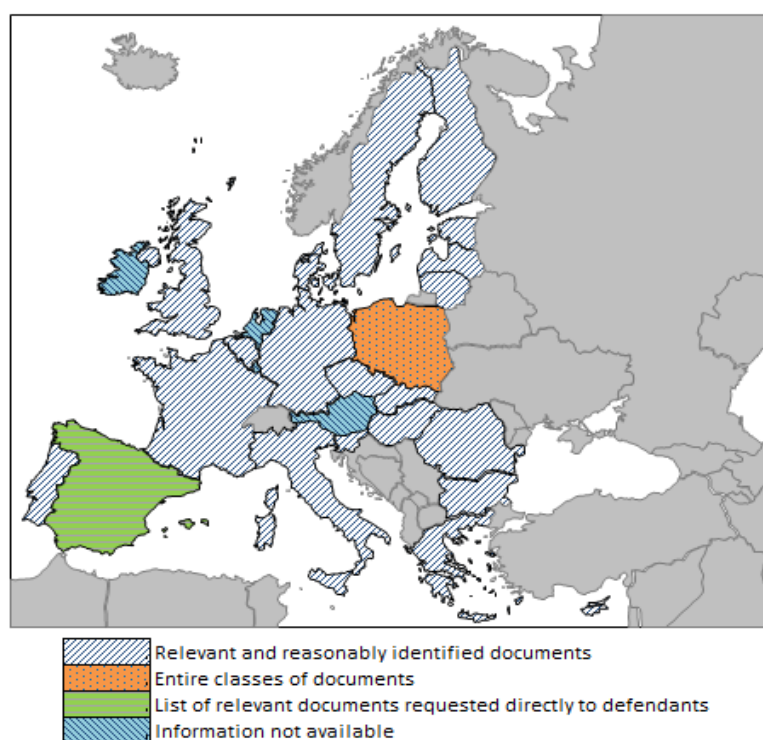
Source: Lear

1.1.5. Gathering evidence and disclosure of information

During an action for damages there is usually a phase in which each party can demand evidence from the opposing party by various means, including requests for: answers to interrogatories, production of documents, admissions and depositions. This phase may occur before or during the trial and can involve different degrees of judicial oversight.

Figure 9 summarises the characteristics of this phase in relation to the production of documents. In most Member States courts can request the disclosure of relevant and reasonably identified documents. Only Poland applies a broader discovery rule that allows courts to request the disclosure of entire classes of documents with no need for clear identification. In Spain a claimant can directly ask the defendant to disclose a list of relevant documents, unless the court considers that their disclosure may be harmful to the defendant.

Figure 9: Procedural rights in gathering evidence and disclosure of information



Source: Lear

Table 2 presents results regarding the gathering of evidence phase. It shows whether the legislation in force in each country excludes particular documents from disclosure. In very few Member States (Czech Republic, Latvia and Slovakia) no documents can be excluded from disclosure. In the majority of the Member States there are some documents that can be excluded from the discovery phase. In particular, corporate statements, given as part of the leniency application, are excluded in ten Member States. Several Member States protect other documents, determined by law or by the judge.

Table 2: Documents that are protected from disclosure

| States | No | Yes: corporate statements given as part of a leniency program | Yes: other documents determined by law | Yes: other Documents determined by the judge |
|----------------|-----|---|--|--|
| Austria | | • | • | • |
| Belgium | | | • | |
| Bulgaria | | • | • | |
| Cyprus | | • | • | • |
| Czech Republic | • | | | |
| Denmark | | | • | • |
| Estonia | | • | • | |
| Finland | | • | • | • |
| France | | | • | • |
| Germany | | • | • | • |
| Greece | | | • | • |
| Hungary | | | | • |
| Ireland | n/a | n/a | n/a | n/a |
| Italy | | | | • |
| Latvia | • | | | |
| Lithuania | | | | • |
| Luxemburg | n/a | n/a | n/a | n/a |
| Malta | | | • | • |
| Netherlands | n/a | n/a | n/a | n/a |
| Poland | | | • | |
| Portugal | | • | • | • |
| Romania | | • | • | • |
| Slovakia | • | | | |
| Slovenia | | | • | |
| Spain | | • | | • |
| Sweden | | | • | • |
| United Kingdom | | • | • | |

Source: Lear

Note: For Ireland, Luxemburg and The Netherlands the information is not available (n/a).

1.1.6. Allocation of cost

Table 3 describes how legal and other procedural costs are allocated between the winning and the losing party. In general, the '*loser party pays*' rule is the most widely adopted allocation method for legal costs. However, in some Member States, the court might provide cost protection for the claimant or protect the loser parties from unreasonable expenses. In other Member States the court has to determine who pays the legal costs. Notably, there is no example of the 'American rule' (i.e. each party pays its own costs) in the EU.

Table 3: Allocation of legal costs

| States | loser pays rule | each party pays rule | loser pays rule with cost-protection claimants | loser pays rule but court exonerates unreasonably expenses | the court determines who pays |
|----------------|-----------------|----------------------|--|--|-------------------------------|
| Austria | • | | | | |
| Belgium | • | | | | |
| Bulgaria | | | | • | |
| Cyprus | | | | • | |
| Czech Republic | • | | • | | |
| Denmark | • | | • | • | • |
| Estonia | • | | | | |
| Finland | • | | • | • | • |
| France | | | • | | |
| Germany | • | | • | • | • |
| Greece | • | | | | |
| Hungary | | | | • | |
| Ireland | n/a | n/a | n/a | n/a | n/a |
| Italy | | | • | | |
| Latvia | | | | • | |
| Lithuania | • | | | | |
| Luxemburg | n/a | n/a | n/a | n/a | n/a |
| Malta | | | • | • | • |
| Netherlands | • | | | | |
| Poland | • | | | • | • |
| Portugal | • | | | | |
| Romania | | | | • | |
| Slovakia | • | | | | |
| Slovenia | • | | | • | |
| Spain | | | | • | |
| Sweden | | | • | • | |
| United Kingdom | | | | • | |

Source: Lear

Note: For Ireland and Luxemburg the information is not available (n/a).

1.1.7. Sources for funding legal expenses

Individuals or SMEs may be deterred from bringing actions for damages if they do not have the finances to pursue such claims, or if they are unwilling to take the risk of having to pay legal expenses. Hence in some countries alternative forms of funding for legal expenses are possible. Table 4 presents the different forms of financing that are available in Europe. Insurance and legal aid seem to be the two most commonly available sources of funding in the Member States. Contingency/conditional fees and private commercial funds are less common. Some countries, Austria, Denmark, Finland, Germany, Greece, Hungary and UK, permit the recourse to a wide range of funding mechanisms.

Table 4: Funding opportunities for collective redress actions

| States | Contingency / Conditional fees | Insurance | Legal aid | Other forms of public funding (e.g. Contingency Legal Aid Funds) | Private commercial funds |
|----------------|--------------------------------|-----------|-----------|--|--------------------------|
| Austria | • | • | • | • | • |
| Belgium | no collective redress system | | | | |
| Bulgaria | | | • | | |
| Cyprus | no collective redress system | | | | |
| Czech Republic | no collective redress system | | | | |
| Denmark | • | • | • | | • |
| Estonia | no collective redress system | | | | |
| Finland | • | • | | • | • |
| France | | • | • | | |
| Germany | | • | • | | • |
| Greece | • | | • | • | |
| Hungary | • | • | • | • | |
| Ireland | n/a | n/a | n/a | n/a | n/a |
| Italy | • | | | • | |
| Latvia | no collective redress system | | | | |
| Lithuania | • | | • | | |
| Luxemburg | no collective redress system | | | | |
| Malta | | | • | | |
| Netherlands | | | | • | |
| Poland | | • | • | | |
| Portugal | | | • | | |
| Romania | | | | • | |
| Slovakia | no collective redress system | | | | |
| Slovenia | no collective redress system | | | | |
| Spain | • | | • | | |
| Sweden | | • | | | |
| United Kingdom | • | • | | | • |

Source: Lear

Note: For Ireland the information is not available (n/a).

1.1.8. Provisions to facilitate settlement

Table 5 contains information on the different provisions available in the Member States that may help in reaching settlements. ADR mechanisms are present in almost all countries. Many jurisdictions provide for a requirement for compulsory attempts at reconciliation of the parties in court. Few Member States also envisage other types of provisions, such as, for instance, the possibility for the parties to jointly request the court to appoint a mediator, or the possibility to bring a case for a friendly settlement before the Ombudsman.

Table 5: Available provisions to facilitate settlements

| States | Alternative Dispute Resolution mechanisms | Compulsory attempt at reconciliation of parties | Other type of settlement |
|----------------|---|---|--------------------------|
| Austria | • | | • |
| Belgium | • | | |
| Bulgaria | • | • | |
| Cyprus | • | | |
| Czech Republic | • | • | • |
| Denmark | • | • | • |
| Estonia | • | | |
| Finland | • | | • |
| France | • | • | |
| Germany | • | • | • |
| Greece | • | | • |
| Hungary | • | • | • |
| Ireland | n/a | n/a | n/a |
| Italy | • | • | |
| Latvia | • | | |
| Lithuania | n/a | n/a | n/a |
| Luxemburg | n/a | n/a | n/a |
| Malta | • | | |
| Netherlands | • | | |
| Poland | • | • | |
| Portugal | • | • | |
| Romania | • | | |
| Slovakia | • | | |
| Slovenia | • | | |
| Spain | • | | |
| Sweden | • | • | |
| United Kingdom | • | • | |

Source: Lear

Note: For Ireland, Lithuania and Luxemburg the information is not available (n/a).

The US system

The US have been one of the first countries to introduce a collective litigation instrument⁷ and thus represents a natural point of reference and an important benchmark to assess the potential implications of changes to the EU system. Collective redress for infringements of competition law in the US is jointly ruled by:

- the *Federal Rules of Civil Procedure* which govern the conduct of all civil actions brought in Federal District Courts, including collective actions;
- the *Clayton Antitrust Act*, which is a civil statute that prohibits mergers or acquisitions that are likely to lessen competition and also prohibits other business practices that may harm competition.

In the US, the collective redress mechanism takes the form of a 'class action' where in order to be certified as a class by a court, the claimants have to meet the four requirements set out by the Federal Rules of Civil Procedure (Rule 23(a)). Initially, there must be a class representative who proposes to take the lead and litigate the case on behalf of the class. The four prerequisites of Rule 23(a) are:

- (a) the class has to be so numerous that the joining of other parties would be impractical;
- (b) there are questions of law or fact common to the class;
- (c) the claims or defences of a represented party are typical of those of the class; and
- (d) the representative party can adequately represent the interests of the entire class.

Following the classification set out above, the main elements of the US system are:

Civil law:

- *opt-out model*: the US system envisages an opt-out model whereby all the victims become parties to the litigation, unless they take an affirmative step to opt out of the action;
- *limitation period*: cases must be filed within four years from the moment the injured claimant knows, or should know, of the existence and source of the injury;
- *punitive damages*: any victim of antitrust law infringements is entitled to recover threefold the damages he/she suffered (treble damages);⁸
- *passing-on defence*: according to the Supreme Court's 'Illinois Brick'⁹ decision, indirect purchasers are not entitled to bring damages actions in cases of violations of federal antitrust law, thereby implicitly negating the possibility for the defendants to raise the passing-on defence. However, many states oppose this provision and recognise indirect purchaser standing, and therefore also the passing-on defence;
- *use of other forms of settlement*: several forms of settlement are possible including voluntary ADR, compulsory attempt at reconciliation of parties in court and also private negotiations without either voluntary or compulsory ADR. In a class action, the judge must review and approve any settlement as fair, reasonable, and adequate with respect to the class;

⁷ Class actions were codified for the first time in 1849 with the Field codes of New York and California (see Calabresi and Schwartz, 2011).

⁸ See Section 4 of the US Clayton Act.

⁹ *Illinois Brick Co v Illinois* 431 US 720 (1977).

Civil procedural law:

- *standing/right to sue*: a single or a group of individuals or SMEs are allowed to bring collective redress actions. Consumers' associations, trade associations, trade unions are typically not permitted to sue on behalf of their members;
- *commonality of interest*: claimants wishing to bring a collective action in federal court must satisfy six requirements: numerosity, commonality, typicality, adequacy of representation, predominance, and superiority;
- *disclosure of information*: the US civil procedure provides for various pre-trial discovery possibilities which authorise discovery of 'any matter, not privileged, relevant to any claim or defence'.¹⁰ Failure to comply with this rule may result in serious punishments;
- *allocation of legal and other procedural costs between winning and losing parties*: the US applies the principle of 'each party bears its own costs' irrespective of the final outcome of the judicial procedure. There is however an exception for antitrust litigation where the successful claimant can recover attorneys' fees and costs together with treble damages. This is a one-way fee-shifting rule that does not apply to the defendant in general;
- *funding mechanism allowed*: several funding mechanisms are available in the US, ranging from conditional/contingency fees to insurance products to cover legal expenses and public and private commercial funds;

Competition law:

- *treatment of leniency applicants*: corporate statements given as part of a leniency application are protected from discovery; leniency applicants are not exempted from or fully protected from civil litigation. However, the Antitrust Criminal Penalty Enforcement and Reform Act (ACPERA) allows a leniency applicant that cooperates with the claimants in any related private claim to reduce his/her damages exposure to single rather than treble damages;
- *legal status of decisions by the Competition Authorities*: decisions of public authorities in follow-on cases serve as *prima facie* evidence, but this does not apply to 'consent judgments or decrees entered before any testimony has been taken'.

Collective actions in antitrust are widespread in the US. Some interesting statistics on the number of cases brought and the amount of awards can be found in academic research. For example, information on 34 collective redress cases, collected by US scholars,¹¹ reveal that collective redress returned almost USD 30 billion to victims. Some of them resulted in very high monetary awards, such as Visa Check/Mastermoney Antitrust Litigation, and Wal-Mart Stores, Inc. v. Visa U.S.A. Inc. & MasterCard Int'l Inc. that returned awards of USD 3,383 million.¹² The vast majority of antitrust class action recoveries in the US are obtained through settlement rather than damages awards made by a court.

¹⁰ See The Federal Rules on Civil Procedure, Art. 26 (b).

¹¹ Lande and Davis (2008).

¹² The highest single monetary award is Discover Fin. Servs. v. Visa U.S.A. Inc. and American Express Co. v. Visa U.S.A. Inc., et al., with a monetary award of USD 6.813 billion.

1.2. Overview of case law

So far there have been very few cases of collective action related to breach of competition law in the Member States. It is therefore premature to derive general lessons from case law. Nonetheless, the respondents to our questionnaire pointed to some interesting cases that may shed some light on the impact of certain specific features of European collective redress systems.

In 2006 the French consumers' association *UFC Que Choisir* brought a damages claim against three mobile operators (Orange France, SFR and Bouygues Telecom) following on a cartel decision of the French Competition Authority - Conseil de la Concurrence (Decision issued in November 2005). The case raised two interesting points:

1. Despite its efforts, *UFC Que Choisir* only managed to collect claims for 12,350 consumers - although according to the NCA's decision the infringement had potentially a negative impact on almost 20 million consumers. The association spent nearly 2,000 hours to prepare the action and incurred EUR 500,000 of legal expenses¹³ for a claim amounting overall to EUR 750,000 (roughly EUR 60 per consumer participating in the claim). The case suggests that an opt-in model may be inadequate to ensure compensation when victims are too dispersed and the individual damage is small and also that, under these circumstances, consumer associations might find it is not worth bringing a collective action.
2. The French Supreme Court (Judgement of 26 May 2011, *UFC Que Choisir*) held *UFC Que Choisir* liable for a violation of the French law which prohibits any public offering by means of mass communication. *UFC Que Choisir* had in fact contacted injured consumers via Internet and/or by personalised letters. This judgement, by reaffirming the prohibition for associations to advertise their proposed course of conduct, could make it more difficult to file collective actions by representative consumer bodies which are already encountering problems reaching critical mass.

A similar outcome arose in the UK when *Which?*, the only UK consumer association with government-granted power to represent consumers in antitrust damages actions, brought a collective action against JJB Sports in 2007 to obtain compensation for consumers who overpaid for certain football shirts as a result of a price fixing cartel.¹⁴ After a complex instruction of the case, the parties reached a settlement in 2008: JJB agreed to pay GBP 20 per shirt to each consumer who bought the shirts in question during the cartel period. However, despite an extensive media campaign, *Which?* managed to collect claims from only about 600 consumers, which were a minority of the consumers who were allegedly harmed by JJB's price-fixing conduct. In its response to the consultation on 'Towards a Coherent European Approach to Collective Redress' *Which?* states that '*insufficient consumers signed up to make the action proportionate*'. As in the French case, the opt-in system has been indicated as a major cause behind the limited success of the UK action.

¹³ See http://ec.europa.eu/competition/consultations/2011_collective_redress/ufc_que_choisir_de_rennes_fr.pdf.

¹⁴ JJB was among the seven companies fined by the Office of Fair Trading in 2003 for unlawfully fixing the price of Manchester United and England shirts sold during 2000 and 2001. See the Office of Fair Trading, *Decision No. CA98/06/2003 - Football kit price-fixing*.

A third relevant case concerns a number of actions brought by a Belgian company named Cartel Damage Claims (CDC). CDC purchased cartel-related damage claims from several claimants and filed actions under its own name and on its own account. In 2009 the German Federal Court of Justice (Bundesgerichtshof), in its judgment related to an action for damages against German cement cartel members,¹⁵ admitted the possibility of transferring damages claims to a third party and the standing of the company in court. While it is not yet clear whether this form of funding can successfully apply to mass actions (i.e. those involving final consumers), claims transfer to a third party may help to overcome the problem of lack of participation by injured parties and represent an alternative and effective way of stimulating collective actions.

The cases discussed above suggest that a major concern in antitrust collective redress relates to the difficulties of having a significant number of allegedly injured parties opt into an action. Consumer associations face large costs in collecting claims and filing a suit which may not be proportionate to the amount claimed if only a few consumers opt in. This may discourage consumer associations from bringing actions. The case law also seems to suggest that a wider availability of alternative sources of funding may support the development of a well-functioning collective redress system in the EU.

1.3. Conclusions

Collective redress schemes exist in most of the Member States, but only the UK has a mechanism specific to antitrust infringements. National legislations differ considerably in terms of the institutional features and procedural rules that govern the collective redress systems.

Although the number of collective actions related to breach of competition law in the Member States is still very limited, we discussed some cases that in our view provide useful indications of the impact of certain specific features of European collective redress systems.

¹⁵ See German Federal Court of Justice, Case No. KZR 42/08, 7 April 2009.

2. EVALUATION OF NATIONAL SYSTEMS

KEY FINDINGS

- The features of collective redress systems in Europe are apt to discourage unmeritorious claims. However, there is a concern that the systems in place are scarcely effective in promoting consumers' and SMEs' access to collective redress instruments. In particular, lack of sufficient and alternative sources of funding may represent a significant obstacle to bringing collective actions.
- On the efficiency side, while ADR mechanisms are provided in the majority of the Member States, it is not clear whether the parties actually make use of them to reach out-of-court settlements in the context of collective redress cases.
- The binding effect of NCAs' decisions may alleviate the evidentiary burden on claimants, thereby facilitating the proposition of follow-on collective claims. In a large part of Member States, NCAs' decisions are not binding.
- The added value of an EU-wide collective redress system in antitrust can be significant. Claimants (i.e. consumers and SMEs) as well as defendants (in particular, large undertakings) would benefit from a more harmonised approach, the former in terms of more effective judicial rights' protection, costs and time savings in bringing actions in foreign countries; the latter in terms of more legal certainty when faced with claims in different jurisdictions.
- There might be costs in implementing an EU-wide system as this may require the Member States to intervene in other areas of legislation to ensure consistency. However, these costs appear to a large extent to be of a transitory nature and are likely to be offset by the long-term benefits arising from a coherent approach to collective actions in antitrust across Europe.

2.1. Evaluation of national systems

Most of the national collective redress systems in Europe have been introduced only recently (in the last ten years) and this makes it difficult to evaluate to what extent they have achieved their intended goals. The respondents to our questionnaire confirm that the number of collective actions related to antitrust infringements that have been brought so far is very limited and there is, therefore, very little quantitative evidence that may guide the evaluation.

Our assessment will necessarily be based mainly on qualitative data, more precisely on the analysis of the institutional features of the national systems in place,¹⁶ on the comments provided by stakeholders to the European Commission's public consultation on 'Towards a Coherent European Approach on Collective Redress' and also on the comments provided by the respondents to our questionnaire.

¹⁶ The analysis of the potential impact of different institutional features will largely draw on the relevant 'law and economics' literature which is presented and discussed in the following Sections 4 and 5.

The legal setting and the case law are assessed by considering their effectiveness and their efficiency. The **effectiveness** will be judged in light of the key legal objectives of an antitrust collective redress system:

- (i) to discourage unmeritorious actions while guaranteeing that those who have actually suffered harm obtain adequate and fair compensation;
- (ii) to ensure a fair trial by providing legal certainty and consistency;
- (iii) to lower the financial and organisational hurdles consumers and small businesses face in bringing a damages action.

The **efficiency** of the various antitrust collective redress systems will be assessed considering the following objectives:

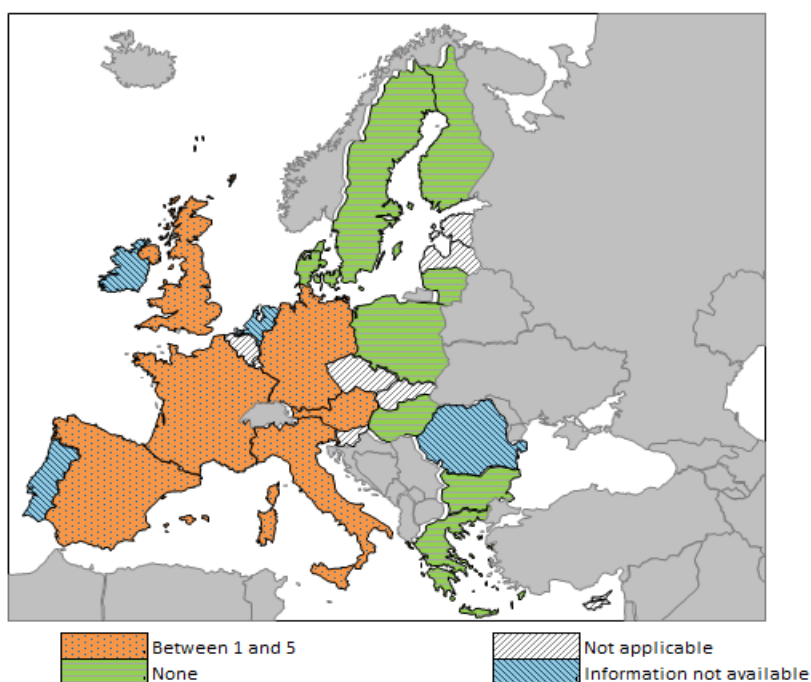
- (i) to reduce the cost of litigation;
- (ii) to favour out-of court settlements and alternative dispute resolution mechanisms to the extent that they are in the interest of all the parties concerned, and
- (iii) to minimise the social cost.

2.1.1. Effectiveness evaluation

So far there have been very few collective redress cases for antitrust infringements across Europe. Collective actions on antitrust have been brought only in six countries (Austria, France, Germany, Italy, Spain and UK), but in none of them were there more than five of these actions over the last five years (see Figure 10).

Moreover, only in Austria, Spain, France and the UK some collective actions have been admitted by courts and have reached the trial stage. To date collective actions resulting in damages awarded to the victims have been observed only in Austria and in the UK.

Figure 10: Number of collective redress actions for damages related to violations of EU competition law brought from 2008 onwards (EU 27)



Source: Lear

Note: 'Not applicable' as there is no collective redress system.

Although this paucity of cases can be partially explained by the fact that collective redress schemes have been introduced only recently, it also suggests that the implemented systems have not been very successful. There is no indication at the moment that the collective redress systems have significantly improved consumers' access to justice and damages compensation.

This is confirmed by the responses to the questionnaire we submitted to a number of national stakeholders. In response to the question of *'How successful do you think the system for collective redress in place in your country has been in ensuring appropriate compensation to victims, in particular with respect to damages due to infringements of EU competition law?'*, the majority of respondents share the view that those systems have been rather unsuccessful.

Among the most cited causes of this disappointing outcome, respondents mention the **lack of awareness** of collective redress mechanisms by potential injured consumers and more generally the lack of a competition culture which prevents the development of private antitrust enforcement. This may suggest that the lack of cases is not related to the weaknesses of the collective redress instrument in itself, but rather to a transitional phase in which consumers and SMEs are gaining confidence with the tool and its application. For example, a respondent claims that one or two test cases with a successful outcome for the claimants would stimulate interest in the collective redress system.

However, other respondents point to some specific procedural features as potential obstacles to the development of collective actions. For example, some have argued that the **opt-in rule** is not very effective in stimulating participation in collective actions. The *Consumers' Association v JJB Sports plc* case (No 1078/7/9/07) in the UK is often cited as an example of the sort of difficulties that representative bodies may encounter in attracting potential claimants under an opt-in rule. Following an OFT decision finding price-fixing in the supply of certain replica football kits, the Consumers' Association brought a claim on behalf of a few hundred consumers against JJB Sports. The case settled, but the number of consumers who benefited from the action was a very small proportion of the consumers who purchased the football kit during the cartel period. As a result, the costs incurred in pursuing the claim turned out to be disproportionate to the claim's value. This led the Consumers' Association to state publicly that they would not bring a similar 'opt-in' action in future. At the moment only Portugal envisages an opt-out rule. It will be interesting to assess in the next few years whether this provision can actually stimulate collective actions more than in the countries with an opt-in model.

Some respondents have invoked a greater involvement of consumer associations through a **closer interaction with NCAs** as a way to improve awareness among consumers and foster collective actions. Other respondents have proposed to enlarge the role of NCAs, for example by granting NCAs the mandate to bring antitrust collective actions or to require damages compensation as part of final decisions in antitrust proceedings (the latter with the intent to reduce at least the need for follow-on actions).

In our view, although a more active role of consumer associations may enhance consumers' access to collective redress mechanisms, consumer associations, like individuals, may suffer to some extent from **lack of sufficient funding** unless they reach large membership numbers, which is not very common. In addition, associations in representative actions stand to gain from litigation only indirectly (increased popularity, larger revenue from membership fees, etc.); their incentive to pursue a claim may therefore be limited. The UK and French experience, in the JJB Sports and UFC Que Choisir cases respectively, suggests that collecting claims from individual consumers can be extremely onerous and costly, and consumer associations may not find it worthwhile.

Funding of legal costs is another relevant procedural aspect that may affect the ability and the incentives of consumers and SMEs to initiate collective actions (see the following Section 4). **Third-party funding** has usually been seen with scepticism in Europe; in particular, contingency and conditional fees have been said to encourage the filing of unmeritorious claims. However, recently some Member States have opened the door to these alternative sources of funding, recognising that the availability of several funding options for consumers and SMEs is crucial to enable access to justice. 12 out of 27 Member States now permit arrangements between claimants and their lawyers on the basis of some form of success fee. Interestingly, German law also allows for the transfer of damages claims to a third party, who may then enforce them collectively. Currently there are a few pending claims that have used this model.

All countries adopt the **'loser pays' rule** in relation to the allocation of the procedural and legal costs between the winning and the losing parties. While in principle this might increase the costs associated with unsuccessful actions and thereby may discourage filing in the first place, the majority of Member States gives discretion to the courts that may exonerate claimants from paying the legal expenses or limit their liability. Claimants are then protected to some extent from vexatious requests from defendants.

It is widely accepted that some forms of collective redress may create **social costs** if they facilitate the filing of unmeritorious claims aimed at wringing unwarranted settlements from defendants (the so-called blackmail settlements).¹⁷ This represents a severe concern in the US. Several commentators argue that the proliferation of frivolous claims is due to a combination of features and procedural rules of the US collective redress system that tilt the balance excessively in favour of claimants. Those features and rules include: treble damages, broad pre-trial discovery, contingency fees and the allocation rule of litigation costs. Such a combination is not adopted by any of the Member States and thus none of the European systems, at the moment, appears to be particularly vulnerable to extortive claims.

Yet we are concerned that **excessive precaution against meritless actions** may come at the expense of lower incentives to bring meritorious claims. In particular, the lack of alternative funding mechanisms could be, in our view, a major cause of the limited number of collective actions brought so far. Success fees and damages claims transfer to third parties may boost collective actions in the Member States and ensure better access to justice for consumers and SMEs. As long as the 'loser party pays' rule remains valid and punitive damages are prohibited, we consider it unlikely that the introduction of some forms of entrepreneurship, either by lawyers or by third parties, may provoke a surge in meritless actions.

2.1.2. Efficiency evaluation

Out-of-court settlements are widely thought to be a vital component of a well-functioning private litigation system. Settlements provide parties with cheaper and quicker alternatives to court trials. This not only benefits claimants and defendants, but also has the merit of reducing the burden on the judicial system as a whole. For these reasons, an efficient collective redress system should envisage mechanisms that favour the recourse to settlements instead of court trials.

The majority of Member States provides for **ADR mechanisms**. Some countries (Bulgaria, Czech Republic, Denmark, France, Germany, Hungary, Poland, Portugal, Sweden and the UK) complement ADR mechanisms with the possibility for courts to mandate attempts at reconciliation of parties. The overall picture suggests that national systems are in general

¹⁷ Ulen (2011).

equipped with mechanisms to facilitate settlements. Whether, and to what extent, these mechanisms are used in practice is, however, still too early to judge. According to the study commissioned by the DG Health and Consumers of the European Commission in 2009 to Civic Consulting¹⁸ which investigates the use of ADR in the European Union (though not specifically in antitrust), a very small proportion of ADR schemes at the time of the study provided a collective procedure for consumers who have similar claims against the same business and ‘few collective ADR cases have been brought so far’.

Another feature of the system that may affect the cost of litigation is whether a **competition authority decision is binding** or not. A preceding public body investigation alleviates the procedural burden that lies on the victims’ shoulders when they bring private actions. The binding effect of authorities’ decisions may not only facilitate the task for claimants in courts, but may also reduce the complexity and length of court proceedings as the judges just have to focus on the damages quantification, given that liability for the infringement has already been established.

To date, in 12 out of 27 Member States a competition authority’s decision is binding for courts. In four Member States, Cyprus, Denmark, Italy and Lithuania, the decision represents a rebuttable presumption that shifts the burden of proving the absence of infringement on to the defendants. In Austria, Finland, France, Latvia, Portugal and Spain, the decision is instead an element that the judge can take into consideration during the trial but is not binding, nor does it constitute a rebuttable presumption of infringement.

2.2. Added value of an EU-wide system of collective redress in antitrust

In our view a common system across all Member States would generate significant benefits not only for consumers and SMEs, but also for the potential defendants as well as for the EU antitrust law enforcement system as a whole. There might be costs in implementing an EU-wide system; for instance, some Member States may have to amend their national legislations to ensure consistency with the EU provisions. However, we consider that these costs would mainly be transitory in nature and would be offset by the benefits in the longer term.

2.2.1. Potential benefits of an EU-wide system

Potential benefits for consumers and SMEs

- *Effective judicial EU rights protection (i.e. the right to obtain full compensation for any damage suffered) for the victims of antitrust law infringements.* In the absence of EU-wide legislation on collective redress, the effective judicial rights protection for the victims of antitrust infringements is remitted to national courts that apply national laws and procedures. The ECJ in *Manfredi* (2006)¹⁹ and *Courage* (2001)²⁰ established that national substantive rules and procedures must be in line with the EU principles of equivalence and effectiveness. In practice the lack of harmonisation of national laws jeopardises the effective judicial EU rights protection for consumers. This is more evident in the field of collective redress, where national collective redress mechanisms are widely divergent in terms of scope and procedural characteristics and do not often provide for cross-border solutions. Hence an EU-wide legislation on collective redress would deliver significant added value both in domestic and in cross-border litigations, because it will

¹⁸ Civic Consulting (2009).

¹⁹ Judgement of the Court of Justice of 13 Jul. 2006, Joined Cases C-295/04 to C-298/04, *Manfredi*, ECR I-6619.

²⁰ Judgement of the Court of Justice of 20 Sept. 2001, Case C-453/99, *Courage*, ECR I-6297.

provide for a uniform legal framework and a common standard of judicial protection for EU competition law violations in the common market. According to Renda et. al (2007), enhanced private enforcement has significant potential in terms of corrective justice: economic actors suffering antitrust injury may recover up to EUR 22 billion yearly, net of legal expenses.²¹

- *Cost and time savings in judicial EU rights protection.* Individual and collective judicial actions for damages in antitrust cases may require the claimants to have relevant financial means to cover the cost of legal services and, in case of loss, the whole procedural costs. An EU-wide collective redress system may lower this hurdle as it will allow consumers and SMEs to bring a court case more easily and more cheaply even in countries other than their domicile.
- *More legal certainty (in term of applicable law, judicial procedures and jurisdiction).* In antitrust litigation (especially in cross-border cases) the absence of full harmonisation of national rules on the applicable law and jurisdiction may seriously jeopardise the joint proposition of individual claims by consumers and SMEs. EU-wide legislation on collective redress will provide injured parties with a clear legal framework that establishes applicable law, judicial procedure and jurisdiction in antitrust collective claims. Also, the uniformity of the legal solution will offer more legal certainty in the choice of law and jurisdiction rules, avoiding a rush to different national courts (forum shopping) and preventing defendant's objections on the lack of competence of the court.

Potential benefits for large undertakings

- *More legal certainty in relation to both the risk of several claims based on the same infringement in different jurisdictions and the risk of conflicting decisions by national courts.* A higher degree of legal certainty across the EU in the field of collective redress would be beneficial for large undertakings as well. Large undertakings operate simultaneously in several Member States and can therefore be exposed to multiple consumer litigations in different jurisdictions. This may increase their cost for risk assessment related to judicial actions and for compliance programmes. A harmonised system of collective redress will make the risk of being sued by a group of consumers in the EU more predictable for large undertakings. The uniform collective redress system will also make the **defensive efforts** of large undertakings **more efficient**, as they may thus rely on uniform substantive and procedural rules in different EU jurisdictions and on a coherent and consistent interpretation of these rules by national judges.

Potential benefits for the EU antitrust law enforcement system

- *Strengthening EU antitrust law enforcement.* Although national competition authorities and the European Commission play a crucial role in the enforcement of EU competition law, a real possibility of private actions will increase the deterrence towards anticompetitive behaviour. To the extent that an EU-wide system enhances consumers' and SMEs' access to justice, it would also strengthen private antitrust enforcement in the EU and ultimately improve the effectiveness of the whole competition law system. According to Renda et al (2007), the impact on deterrence of a more effective private enforcement system is significant, although it would not completely discourage the formation of cartels or other antitrust infringements. Prospective infringers may face an expected cost of up to EUR 29.4 billion yearly (including opponents' legal fees). The same authors argue that, overall, more effective enforcement of antitrust laws in Europe

²¹ The same study estimates that expected legal fees range between EUR 1.5 and EUR 3.7 billion per party; however they never offset the corrective justice impact of enhanced private enforcement.

(with public and private enforcement) could bring about yearly social benefits as high as 1% of the GDP.

- *Increasing legal certainty across Member States.* A coordinated approach at European level would provide greater legal certainty for claimants, defendants and the judicial system as a whole. Expected benefits would include: limiting parallel litigations of identical claims and, in principle, different outcome of the judgments and also avoiding excessive litigation and possibly duplication of actions.
- *Enhancement of judicial cooperation between national judges and consistency in the Member States court rulings.* Finally, an EU-wide system of collective redress based on uniform substantive and procedural rules may strengthen judicial cooperation between national judges. This might benefit the EU judicial cooperation in terms of:
 - i) consistency of the interpretation of substantive rules;
 - ii) more coherent application of the rules; and
 - iii) the creation of 'specialised' national judges in collective litigation that may share their experiences within an *ad hoc* network, like the European Competition Network (ECN) for competition authorities.

2.2.2. Potential costs of an EU-wide system

The implementation of an EU-wide system for collective redress in antitrust is not without costs. First, **creating a uniform mechanism** at EU level may conflict with national legislations and would require the Member States to amend national laws in relation to some substantive and procedural issues, such as, for instance, questions of evidence, discovery, third-party funding, quantification of damages, jurisdiction and applicable law. In this respect a regulation would be more cost-effective than a directive as the former would not require additional implementation activities by national legislators.

Second, considering the lack of significant experiences in Europe, any decision taken at this stage involves a **large degree of uncertainty** over the outcome. Having different national systems may permit practically testing and comparing the efficiency and effectiveness of various provisions, and may thus help in identifying the most suitable scheme for the Member States. A rush towards a harmonised system across Europe may deprive legislators of an important benchmark. Moreover, in our view, some form of competition between national judicial systems, even though potentially creating a forum shopping problem, may constitute a stimulus for improvements and may lead to the adoption of best practices at national level.

Also, as we will discuss in Section 3.3.2., to support effective redress, especially in cross-border antitrust cases, it would be of help to **set up a network of national agencies** that promotes connection and facilitates the organisation of potential claimants domiciled in different Member States. This would constitute a further cost towards a full integration of collective redress systems across Member States. The magnitude of this cost would depend, however, on the extent to which Member States can rely on some existing networks such as, for instance, the European Competition Network, enlarging their scope of activities rather than setting up a new network from scratch.

In spite of this necessary **significant legislative activity** in the short term, in a longer-term perspective the benefits resulting from a more harmonised system at EU level are likely to outweigh the costs. This will be true especially if, as is likely, the integration of European markets will drive a further increase in cross-border activities, thereby enhancing the risk that, in the absence of an effective mechanism at EU level, victims of antitrust infringements will not receive full compensation for the damages suffered. We also consider that while the lack of significant experience in this area may initially result in suboptimal

choices, the goal of an effective and efficient collective redress system may be achieved over time through continuous improvements, provided that the European institutions are willing to be flexible in adapting the system design in response to future observed outcome.

2.3. Conclusions

It is still too early to evaluate the extent to which the national collective redress systems in Europe are effective and efficient, as since their introduction only few cases have been dealt with. While the existing collective redress systems in Europe seem to be adequate in discouraging unmeritorious claims, they do not seem to be effective in promoting consumer and SME access to collective redress schemes. In particular, the limits of a pure opt-in system and the lack of sufficient and alternative sources of funding could constitute major barriers to the development of a well-functioning system for collective actions. On efficiency, the functioning of ADR mechanisms should be further scrutinised to identify possible areas of improvement. Also, ensuring that NCAs' decisions are binding may facilitate the proposition of follow-on collective claims and contribute to the overall efficiency of the system.

An EU-wide collective redress system may deliver more effective judicial rights' protection, costs and time savings in bringing actions in foreign countries, more legal certainty when faced with claims in different jurisdictions. An EU initiative is not without costs, as this may require the Member States to intervene in other areas of legislation to ensure consistency. Yet the costs appear to a large extent to be transitory in nature and the long-term benefits are likely to be such as to offset them.

3. LEGAL ISSUES RELATED TO AN EU-WIDE SYSTEM OF COLLECTIVE REDRESS IN ANTITRUST

KEY FINDINGS

- A collective redress system in antitrust might be introduced in the European Union either through a sectorial legislative initiative or through a horizontal initiative. An antitrust sector-specific measure may be preferable for a number of reasons: it would ensure greater uniformity across Member States in the application of Articles 101 and 102 TFEU; it would create a more level playing field for businesses; and finally it would not require additional legislative initiatives at national level.
- Article 103 TFEU seems to be the most appropriate Treaty provision for an EU legislative measure specifically targeted to collective redress in antitrust as it would apply to cross-border litigation as well as to domestic litigation. Also, Article 103 does not imply any subjective restriction thereby making a collective redress system available to both consumers and SMEs.
- As regards the type of legislative act that could be adopted, we consider a regulation to be a more suitable instrument than a directive. The latter, indeed, could give rise to incompatibility issues with the existing national legislations and could result in the adoption of divergent solutions at national level.

In order to determine to what extent EU-wide legislation on collective redress in antitrust is admissible, it is essential to discuss the general law principles for an EU legislative measure in civil substantive and procedural rules (i.e. subsidiarity and proportionality principles). There is also a need to assess whether a horizontal (i.e. for general consumer protection law violations) or an antitrust sector-specific legal instrument (i.e. only for EU antitrust law provisions) is the most appropriate legal basis for such a measure. The legal basis assessment takes into account the following Treaty Articles:

- Judicial cooperation in civil matters (Article 81 TFEU);
- Consumer protection (Article 114 TFEU and Article 169 TFEU);
- Competition rules (Article 103 TFEU);
- Dual legal basis (Articles 103 and 114 TFEU).

3.1. General law principles for an EU initiative in civil substantive and procedural rules

3.1.1. The principle of subsidiarity

The principle of subsidiarity, Article 5(3) TEU, defines the limits of EU and national competence, providing that decisions must be made as close as possible to the citizens.²² It applies to all EU institutions and plays a fundamental role in the European Union legislation-making process. This principle determines in what circumstances the EU is competent to

²² The principle pursues two opposing aims. On one hand, it allows the EU institutions to act if a question cannot be adequately settled by the Member States acting on their own. On the other hand, it seeks to uphold the authority of the Member States in the areas that cannot be dealt with more effectively by Union action.

legislate. The principle of subsidiarity does not apply to areas which fall within the exclusive competence of the Union or those which fall exclusively within national competence.²³

A collective redress system in antitrust should be designed to render effective a right which is part of the *acquis communautaire* and which directly stems from Articles 101 and 102 TFEU. The need for a level playing field is implicit in the concept of the internal market, which relies on a system that ensures that competition is not distorted. Isolated initiatives by Member States are not capable of reducing the uncertainty created by the currently large differences between national legal systems. Especially the procedures currently in place are often either inadmissible or impracticable in cross-border cases.

3.1.2. The principle of proportionality

Proportionality requires that the form and content of a measure must not '*exceed what is necessary to achieve the objectives of the Treaties*', Article 5(4) TEU. Hence, whilst the subsidiarity principle defines whether or not an action must be taken at Union level, the proportionality principle applies only to cases where a Union action is necessary and aims to define its scope.²⁴

The EU initiative should include only the minimum necessary to effectively achieve its objective, namely to guarantee that across the EU victims of infringements of EU competition law have access to a truly effective mechanism for obtaining full compensation for the harm they suffered. Furthermore, the costs imposed on citizens and businesses should be proportionate to the stated objective. A collective redress system should be arranged so as to exclude more radical and costly measures.

3.1.3. Competence of the EU to legislate on collective redress - principle of conferred powers

According to the principle of conferred powers, every legally binding act must be based on a grant of power. The Union has to justify any legal action and reason why this could not have been adopted at national level. The legal basis thus serves as the Union's legal justification to act, and the failure to respect the limits of competence derived from the particular legal basis infringes the principle of conferred powers. The Treaty articles which serve as the legal bases for Union acts are either sectorial, being the enabling provision for a specific policy field (e.g. Article 103 TFEU), or functional, in that they can be used in different fields to pursue specific objectives (e.g. Article 81 TFEU).

In certain instances EU law creates rights and obligations for private parties, which have direct effect either between one party and a Member State or between two private parties.²⁵ This is the case of Articles 101 and 102 TFEU.

Articles 101 and 102 TFEU are applicable to undertakings' conducts which '*may affect trade between Member States*'. The 'effect-on-trade' is a jurisdictional criterion, which defines the scope of application of EU competition law. EU competition law is not applicable to agreements and practices that are not capable of appreciably affecting trade between Member States. This requirement implies that there must be an impact on cross-border

²³ The issue is discussed in detail in paragraph 3.1.3.

²⁴ The principle of proportionality was originally developed by the European Court as a general principle of Union law, as tool for gaining the annulment of legal acts that run counter to it. Moreover, this approach has been included in article 5(4), first paragraph TEU and now forming the legal basis for the principle of proportionality; this article states that '*Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of this Treaties*.'

²⁵ E.g. in areas like employment law, consumer contract law, product liability law, and competition law.

economic activity involving at least two Member States.²⁶ Accordingly, in general, **the EU is competent to legislate on competition law only in matters having a cross-border dimension.**²⁷

With reference to the necessity of granting remedies for breach of EU rights, the '*principle of national procedural autonomy*', whereby the remedies and procedures available before national courts are a matter of national law, is taken into account. As a matter of fact, traditionally EU legislation did not lay down a general scheme of procedure or remedies for the enforcement of these rights, which is considered a matter to be devolved to the national procedural systems.

However, the national procedural systems might not always provide for such procedural and remedial rules, or the existing national rules might have a limiting effect on the realisation of EU rights. Moreover, litigants are treated unequally in different national jurisdictions; therefore a potential conflict with the fundamental EU law principle of uniform application and equality may arise.

In conclusion, in the area of enforcement of EU-law-based rights, the autonomy of national legislators is subject to considerable requirements and restrictions by the ECJ²⁸ and, in the light of the principle of conferred powers, there is room for the initiative of the EU legislator. In the specific matter of this study, such an initiative, provided that it complies with the principles of subsidiarity and proportionality, might be either a horizontal instrument or an antitrust-specific initiative.

A collective redress system in antitrust should therefore apply to infringements of EU competition rules, which by definition have cross-border implications, and should provide for civil remedies able to give effectiveness to EU competition law enforcement.

3.1.4. General principles on civil and procedural law

The direct effect of EU rights entails that these rights, such as, for example, those provided for by Articles 101 and 102 TFEU, can be invoked before national courts by individuals. The ECJ has clarified that, within this 'national procedural autonomy' two requirements must be satisfied as set in the 'principle of equivalence' and in the 'principle of effectiveness'. The former provides that the forms of action must be the same as for national law rights. The latter provides that the procedural rules must not make the exercise of the EC right impossible.²⁹

The national courts which have to apply the provisions of EU law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which

²⁶ It is not required that the agreement or practice affect trade between the whole of one Member State and the whole of another Member State. Articles 101 and 102 TFEU may be applicable also in cases involving part of a Member State, provided that the effect on trade is appreciable. Moreover, the application of the effect-on-trade criterion is independent of the definition of relevant geographic markets. Trade between Member States may be affected also in cases where the relevant market is national or sub-national. See Commission Notice Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (Text with EEA relevance) in OJ C 101, 27.4.2004, p. 81-96, par. 12, 21 and 22.

²⁷ The dividing line is blurred, however, because Article 352 TFEU (ex Article 308 TEC) may extend the Union's areas of competence if, for instance, action by the Union proves necessary to attain Treaty objectives. Even if the Union has the competence to act, it should not do so unless there is a specific reason why action at Union level is preferable to action at national, regional, or local level.

²⁸ First, the principle of equivalence provides that the forms of action must be the same as for national law rights. Second, the principle of practical possibility provides that the procedural rules must not make the exercise of the EU right impossible. On this issue, see E Storskrubb (2008); and Michal Bobek in de Witte and Micklitz (2011).

²⁹ Case 33/76 Rewe-Zentralfinanz EG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland [1976] ECR 1989.

they confer on individuals.³⁰ In this perspective, in *Courage* (2001) and *Manfredi* (2006) the ECJ stated that the full effectiveness of EU competition law and, in particular, the practical effect of the prohibition laid down in Article 101 and 102 TFEU would be put at risk if it were not open to any individual to claim damages for the loss caused to him by any conduct liable to restrict or distort competition.³¹

According to the ECJ, however, in the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Union law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Union law (principle of effectiveness).

3.2. Specific legal issues related to the parallel competence to apply EU competition law by the European Commission and by National Competition Authorities

The Commission is empowered by the Treaty to apply the prohibition rules provided for by Articles 101 and 102 TFEU. Since 1 May 2004, all national competition authorities are also empowered by Regulation no. 1/2003 to fully apply the provisions of the Treaty in order to ensure that competition is not distorted or restricted. National courts may also apply these prohibitions so as to protect the individual rights conferred to citizens by the Treaty. The Regulation also provided that the application of national competition laws may not lead to the prohibition of agreements and conducts if they are not also prohibited under EU competition law.

The concept of 'effect on trade' is the ground of jurisdiction which determines whether the EU competition rules apply. This is of particular importance in the new system for applying the rules, as it obliges national courts and competition authorities to apply the EU competition rules to all agreements and practices capable of affecting trade between EU countries.³² As a result, NCAs apply the EU competition rules to agreements and practices capable of affecting trade between EU countries, and apply national competition rules to agreements and practices having a domestic dimension.

The European Commission and the NCAs in all EU Member States cooperate through the ECN. As European competition rules are applied by all members of the ECN, the ECN provides means to ensure their effective and consistent application. Through the ECN, the competition authorities inform each other of proposed decisions and receive comments from the other competition authorities. In this way, the ECN allows the competition authorities to pool their experience and identify best practices.

Problems of equality and coordination between EU and national competition law may theoretically arise when an NCA has to treat similar cases differently under EU and national competition law, based on the dimension of the infringement's effects. However, according to the principles of conferred powers and subsidiarity, the Member States must align their legislation to the EU one, in order to give full effectiveness to national competition law.

³⁰ See Szyszczak and Delicostopoulos, 'Intrusions into national procedural autonomy: the French paradigm', *ELRev.*, 1997, pp. 141-149.

³¹ See case C-453/99, *European Court reports* 2001, Page I-06297, and case C-295/04, *European Court reports* 2006 I-06619.

³² In this context, the guidelines summarise the copious case law of the EU courts and clarify the application of the rules for the implementing authorities and undertakings.

It should be avoided for such differences to have consequences on private enforcement. Hence harmonisation of national competition rules concerning collective redress in antitrust would be desirable in order to foster competition in the internal market.

According to the principles of conferred powers and subsidiarity, the enforcement of national competition law is reserved to Member States initiative. **Hence a collective redress system applicable also to national antitrust violations could not be introduced on the basis of Article 103 TFEU.**

However, a collective redress system applicable to both EU and national antitrust infringements would be possible on the basis of other EU provisions:

- Article 81 TFEU on judicial cooperation in civil matters would be an appropriate basis to introduce collective actions aimed at facilitating mass litigation in cross-border matters;
- Article 114 TFEU on approximation of laws, in conjunction with Article 169 TFEU on consumer protection, would be an appropriate basis for introducing collective actions aimed at harmonising national procedural laws on consumer protection.

In both cases the EU initiative would have a broader scope than antitrust law, and would consequently result in being less focused on antitrust specificities (the evaluation of the above-mentioned legal bases is discussed in paragraph 3.5).

3.3. Specific legal issues related to the cross-border dimension of an EU initiative

3.3.1. Information issues: opening of procedure(s)

A mechanism of notification of the procedure's opening will be required to guarantee the efficiency of the collective redress system. Under the opt-out model, a mechanism of notification would impede uninformed people being bound by unknown judgements. Under the opt-in model, a mechanism of notification will limit the problem of excessively low participation rates. Moreover, with reference to the opt-in model, a mechanism of notification seems to be necessary to make the collective redress system an accessible instrument for consumers in order to obtain full compensation for damage. Within the European juridical experience, the Insolvency Regulation³³ offers an example of a publication system aiming at informing all the creditors in the EU territory of the opening of proceedings (see Annex 2).

3.3.2. Information issues: network to connect and organise potential claimants

A network should be created in order to connect and organise potential claimants domiciled in different Member States. Regulation (EC) No 2006/2004 on Consumer Protection Cooperation (CPC),³⁴ adopted to tackle the growing cross-border problems in the Internal Market, offers the most relevant example of an existing enforcement network in the EU.³⁵

³³ Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, of OJ L 160, 30.6.2000, p. 37, see also Annex I Table A.

³⁴ Council Regulation No. 2006/2004 of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation), OJ L 364, 9.12.2004, p. 1, see also Annex I Table B.

³⁵ It lays down the framework and general conditions under which authorities, responsible for enforcement in the Member States, are to cooperate. The Regulation links up national public enforcement authorities in an EU-wide CPC Enforcement Network which has been given the means to exchange information and to work together to

The Consumer Protection Cooperation (CPC) Enforcement Network is a network of public authorities which aims to ensure compliance with the consumer protection legislation and the smooth functioning of the internal market.

Currently, the complexities of cross-border enforcement derived from diverging national consumer legislations and differences in the national procedural rules have become more apparent.³⁶ One issue that needs to be examined in this context is the impact that the fairly broad scope of the CPC Regulation's annex is having on the effectiveness and efficiency of the network, especially in areas where other cooperative frameworks exist. For that reason, a collective redress system in antitrust could look at the experience of the existing CPC Enforcement Network. However, an **autonomous different network seems to be necessary**.

An alternative enforcement network is the ECN that includes the European Commission and the national competition authorities in all EU Member States. This network creates an effective mechanism to contrast anticompetitive practices that have cross-border effects. As European competition rules are applied by all members of the ECN, the ECN provides means to ensure their effective and consistent application. The ECN is nevertheless a public enforcement network, and currently it seems to not be equipped to develop the role of connector between potential claimants.

3.3.3. Jurisdiction conflicts and duplication of judgements

Collective redress procedures involving the same anticompetitive conduct that are brought in the courts of different Member States may result in duplication of judgements and conflicting decisions. Unlike the US judicial system, Europe does not have a federal court system with the power to control litigation between consumers of different Member States.

Transnational litigation in Europe is ruled by Articles 27 and 28 of Regulation No 44/01 (**Regulation Brussels I**).³⁷ The stay of proceedings, as well as the consolidation of proceedings, aims at avoiding the risk of conflicting decisions resulting from separate proceedings. However, only consolidation prevents duplication of judgements; moreover, it better guarantees the right of a public hearing within a reasonable time. In light of this, consolidation seems to be a more effective remedy.

A critical problem relates to the danger of a negative jurisdiction conflict. The court first seized is not bound by the decision made by the court second seized; a conflict may then arise when the court first seized does not admit consolidation or declines jurisdiction over the claim pending before the court second seized. It has been suggested that stronger cooperation and information between courts may help avoid this risk.³⁸

stop rogue traders or any other cross-border breach to consumer protection laws. It tackles breaches in a variety of areas such as misleading advertising, package holidays, timeshares and distance selling.

³⁶ See Commission Report of 12 March 2012 on the application of Regulation (EC) 2006/2004 on consumer protection cooperation. In some instances, the difficulties encountered by the authorities could be a first indication that the legislative framework established by the CPC Regulation needs to be adapted in order to enhance cross-border enforcement. It may also suggest that national procedures need to be reviewed further in the light of the CPC cooperation framework to ensure that authorities are able to meet the Regulation's objectives in full.

³⁷ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001 p. 1.

³⁸ Also, the amendment of Article 28(2) Regulation Brussels I has been proposed in order to place the court second seized under the duty to reopen the case after the court first seized declines jurisdiction, see Hess, Pfeiffer and Schlosser (2008).

There exists a more general concern about consolidation in that consumers may face additional costs in bringing actions in other countries and encounter practical problems because, for instance, they do not speak the official language of the State where the trial has been initiated. Representative bodies, such as consumer associations, can play an important role in helping to overcome these problems and in ensuring that consumers are placed in the conditions to fully pursue their rights even in countries other than their own.

3.3.4. Forum shopping - location of court action

In antitrust collective litigation rules on jurisdiction in cross-border litigation are established at EU level by Regulation Brussels I. According to Article 2 of Regulation Brussels I, persons domiciled in a Member State may be sued in that State irrespective of their nationality. The Regulation also provides for a series of alternative bases for jurisdiction which the claimant can choose.

Claims based on antitrust law infringements brought by consumers and SMEs most probably have an extra-contractual nature (tort).³⁹ For tort-related claims, Article 5(3) Regulation Brussels I establishes that the claimants may also choose as an alternative forum the place where the harmful event occurred.

In antitrust cases, the place where the harmful event occurred can be either:

- i) the place where the event giving rise to the damage occurred, or
- ii) the place where the damage itself occurred.

In antitrust collective litigation, the rule of Article 2 of Regulation Brussels I seems to be the most practical option because it establishes the jurisdiction in the place where the defendant is domiciled. The solution of Article 5(3) Regulation Brussels I, instead, would be impractical. As stated above, this rule provides for the jurisdiction of the court where the major part of the damage occurred. This criterion is problematic since in many cases it is difficult if not impossible to determine where the major part of the damage was caused. In addition, providing for the courts to have jurisdiction where the majority of victims are domiciled might seem easy only at first sight in an opt-in procedure, given that the victims have to be clearly identified. However, this clause would leave room for forum shopping, as there would be no way of avoiding situations in which a critical mass of victims from jurisdictions where the procedural law was perceived as being more claimant-friendly was encouraged to join the action.

3.3.5. Applicable law

In private litigation the problem of identifying the applicable law emerges where there is a transnational or cross-border element. For collective actions based on EU antitrust infringements, the problem of choice of applicable law is limited to establishing under which national law any questions pertaining to civil liability for damages are to be decided. This is because the EU substantive competition rules (i.e. Articles 101 and 102 TFEU) are already the same in all Member States and must be applied in the same way by all national judges.⁴⁰

³⁹ Depending on the facts of the case, the contractual nature of the infringement is also conceivable as a basis for an antitrust claim. Yet this is unlikely, especially for violations that occur at the level of the production/distribution chain that are far from the end consumer and where no direct contractual relationship exists between the consumer and the competition law infringer. According to Article 5(1) of Regulation Brussels I, in matters relating to contracts, the action can be brought in the courts of the place of performance of the contractual obligation in question.

⁴⁰ Komninos (2008)

The identification of the national applicable law is an important issue that may affect the final outcome of the claim. Regulation (EC) No 864/2007 (**Regulation Rome II**) establishes the rules on applicable law to non-contractual infringements (e.g. antitrust violations that affect consumers and SMEs).

- Article 6(1) of Regulation Rome II establishes that the law applicable to a non-contractual obligation arising from an act of unfair competition shall be the law of the country where the competitive relations or the collective interests of consumers are, or are likely to be, affected.
- According to Article 6(3)(a) of Regulation Rome II: the law applicable to a non-contractual obligation arising from a restriction of competition shall be the law of the country where the market is, or is likely to be, affected.

In collective litigation the above-mentioned rules would be difficult to apply because at the same time several different countries and/or markets may result in being affected by a given conduct. A possible solution is to align the rules on the applicable law with the rules on jurisdiction (see section 3.3.3). This would have the advantage that the court would give its ruling on the basis of a single law with which it is familiar.

3.3.6. Execution of court decisions

According to Regulation Brussels I, a judgment given by a Court of an EU Member State is to be recognised without special proceedings in all Member States, unless the recognition is contested. A declaration that a foreign judgment is enforceable is to be issued following purely formal checks of the documents supplied. Under no circumstances may a foreign judgment be reviewed as to its substance.

A judgment will not be recognised only in limited exceptions like:

- i) such recognition is manifestly contrary to public policy in the EU country in which recognition is sought;
- ii) the defendant was not provided with the document that instituted the proceedings in a timely manner and in a such way as to enable the defendant to arrange for his/her defence;
- iii) it is irreconcilable with a judgment given in a dispute between the same parties in the EU country in which recognition is sought;
- iv) it is irreconcilable with an earlier judgment given in another EU or non-EU country involving the same cause of action and the same parties.

In the absence of a uniform set of procedural rules in all Member States, problems of recognition may arise when the foreign decision may result in a contrast to public policy in the EU Member State in which recognition is sought. This may be the case, for instance, when the Member State does not at all allow the possibility to award damages to a collective entity and/or when the criteria to award damages in the foreign country (e.g. punitive damages), resulting in a contrast to the public policy of the Member State.

3.4. Legal instrument: horizontal or antitrust-sector specific EU initiative?

The merits and limits of a sector-specific or horizontal initiative are as follows:

3.4.1. Horizontal initiative

Advantages:

- Avoidance of judicial remedies differentiation in Member States: Procedural law usually determines the rules applicable to all kinds of proceedings and they do not distinguish between industrial sectors and/or different areas of law.
- More effectiveness, equality and legal certainty for all EU rights and not only those provided for by Articles 101 and 102 TFEU: The horizontal instrument will also allow the asking in Court for a multitude of claims only partially based on antitrust violations (e.g. based also on violations of Intellectual Property Rights or unfair commercial practices, health rights, environmental law etc.).
- Avoidance of fragmentation of national procedural laws: Uncoordinated legislative initiatives in the field of collective redress might result in a fragmentation (or even absence) of national procedural and damages laws which will weaken access to justice within the EU.

Disadvantages:

- The harmonisation process has encountered specific difficulties within the legal community in relation to civil procedural rules and national procedural codes. There are inherent limits to procedural harmonisation (e.g. judicial structure and organisation) and the case law reveals that the procedural divergences in the EU are significant and that there is heterogeneity in the internal market for the enforcement of individual European law rights when disputes arise.
- A general system for collective redress would need further interventions in some specific sector-related issues (in antitrust cases e.g. passing on, access to evidence and discovery rules, interaction with leniency).

3.4.2. Sector-specific initiative in antitrust

Advantages:

- Enhance private antitrust enforcement. The act shall be designed to make equally effective in all Member States a right which is part of the *acquis communautaire*, directly stemming from Articles 101 and 102 TFEU.
- Remove inequality between the Member States in the level of judicial protection of individual rights directly protected by Articles 101 and 102 TFEU. Indeed, differences in the level of legal protection of the rights also distort the competitive environment for businesses, as the likelihood and scope of claims for damages against undertakings affect their competitive strength.
- Permit drawing up a definitive legislative instrument with no need of further specific initiatives.
- Isolated initiatives by Member States are not capable of producing a more uniform field of action for businesses and of reducing the uncertainty created by the currently existing major differences between the national legal systems. On the contrary, national individual initiatives may even widen the gaps and increase the risk of negative impacts resulting from forum shopping.

Disadvantages:

- Not applicable to non-antitrust matters. It could require a number of specific collective redress instruments in order to offer equal justice in other fields of law.
- In countries where the NCAs also have powers of intervention in unfair commercial practices, symmetry between public and private enforcement should be achieved through a collective redress instrument that is wider in scope and applicable also to unfair commercial practices.

3.5. Legal basis for a coordinated European approach to collective redress in antitrust

When assessing the legal basis for EU initiative in collective redress, it is important to consider that:

- The choice of a legislative instrument may require different legal bases. A problem may arise when a given act affects different areas of regulation. Where a measure pursues several aims but a main or predominant purpose can be identified, the act must be based on a single legal basis.⁴¹ Exceptionally, if the act simultaneously pursues a number of objectives or has several components that are strictly linked, without one being secondary and indirect in relation to the other, the act will have to be grounded on the various corresponding legal bases.⁴² Finally, a double legal basis is not admissible when it would result in the combination of incompatible procedures.⁴³
- The designation of the legal basis has consequences for the relevant procedure to be followed by the legislator in the adoption of the act. The Lisbon Treaty has considerably reduced the procedural fragmentation of the Union's powers, particularly by generalising the ordinary legislative procedure. To date, the ordinary legislative procedure applies to more than 80 sectors of EU law, including the area of judicial cooperation in civil matters (Articles 81(2), 81(3) TFEU) and the area of approximation of laws relating to the internal market (Article 114 TFEU, Article 169 TFEU). A special legislative procedure instead applies for some important areas of EU law, such as the competition law area (Article 103 TFEU).

3.5.1. Judicial cooperation in civil matters (Article 81 TFEU)

The main objective of judicial cooperation in civil matters is to improve cooperation between Member State authorities in order to eliminate the obstacles stemming from incompatibility between the various judicial and administrative systems.⁴⁴ The introduction of a collective redress system under the legal basis of Article 81 TFEU could represent a

⁴¹ ECJ case C-211/01 *Commission v. Council*, I-8913.

⁴² ECJ case C-411/06, *Commission v. European Parliament and Council*, on an action for annulment of Regulation (EC) No 1013/2006 on shipments of waste, OJ C 294, 02.12.2006.

⁴³ In the Titanium Dioxide Case, the Commission proposed that Directive 89/428 on the Titanium Dioxide industry should be based on 'old' Article 100a of EC (Maastricht) Treaty (now 114 TFEU) as it related to the harmonisation of rules relating to an industrial process. In contrast, the Council, acting unanimously, adopted it under Article 130s on the basis that the Directive related to environmental protection. The ECJ agreed with the Commission and held that an environmental measure which also contributed to the establishment of the internal market should be based on the 'old' Article 110a EC (Maastricht) Treaty, and so should be subject to qualified majority voting. See, ECJ case 300/89 of 11.6.1991, *Commission v. Council*, I-2895.

⁴⁴ These measures strive to achieve simplification, modernisation and efficiency through streamlined standard forms, deadlines, use of information technology and limited opportunities and grounds for rejection or appeal; minimum standards and mutual recognition are central elements of the measures. The EU Legislative measures enacted on the basis of Article 81 TFEU are listed in Annex 1 Table A.

further step towards transnational procedural cooperation. Moreover, Article 81 TFEU provides for judicial cooperation in civil matters and thus includes the adoption of measures for the approximation of the laws and regulations of the Member State. A horizontal legal instrument of collective redress for general consumer protection law violations, and not limited to antitrust matters, could also be introduced under the legal basis of Article 81 TFEU, since this provision encompasses all '*measures aimed at ensuring effective access to justice*', with no limitation in scope.

Table 6: Judicial cooperation in civil matters, Article 81 TFEU

| QUESTION | ANSWER | COMMENT |
|--|--|---|
| The choice of the legislative act? | DIRECTIVE | With reference to a collective redress mechanism, a directive would be a measure able to avoid the diversity of existing national systems and their different levels of effectiveness without exceeding the powers conferred to EU institutions by Article 81 TFEU. This would comply with the principles of subsidiarity and proportionality, and would be consistent with the evolving concept of national procedural autonomy. ⁴⁵ |
| The relevant legislative procedure? | ORDINARY LEGISLATIVE PROCEDURE | Article 81 TFEU requires the European Parliament and the Council to act in accordance with the ordinary legislative procedure. |
| Who could be allowed to bring a collective action? | LARGE COMPANIES, SMEs, CONSUMERS | All market players, included SMEs, would be legitimated to bring a collective action in Court under Article 81 as this provision does not imply any subjective restriction. |
| When could market players be allowed to bring a collective action? | EU LAW INFRINGEMENTS NATIONAL LAW INFRINGEMENTS | On this basis, a collective redress system would apply not only where the rights alleged to have been infringed are granted by EU legislation (infringement of EU law), but also in cases of infringements of national law, even though in practice they would rarely give rise to litigations having cross-border implications. |
| Possible advantages for collective redress in antitrust? | IMPROVED CROSS-BORDER PROCEDURES | An initiative based on Article 81 TFEU would promote harmonisation and transnational procedural cooperation for collective redress in general. This legal basis could cover general collective redress mechanisms and not be limited to antitrust. |
| Possible disadvantages for collective redress in antitrust? | CROSS-BORDER LIMITATION | The collective redress system would be limited to cross-border litigations, defined as cases where the defendant and victims represented are not domiciled in the same Member State (cross-border dimension according to Article 81 TFEU). ⁴⁶ This might bring about the paradoxical effect of granting a procedure available to claimants domiciled in a Member State different from that of the defendant, but not available to claimants domiciled in the Member State where the defendant is domiciled . Furthermore, this legal basis would not allow for the harmonisation of national competition law. |

⁴⁵ The experience in the field of judicial cooperation in civil matters shows that, in most cases, the institutions opted for the legislative instruments of regulations. However, those measures regarded problems of specific transnational procedural rules, introducing new rules at a European level and not entailing any approximation of laws. On the contrary, it is significant that the measure regarding mediation, which is closer in objective and material content to the collective redress system, was adopted through a directive.

⁴⁶ The cross-border dimension required by Article 81 TFEU is a procedural condition that justifies the EU legislative initiative for judicial cooperation in civil matters. It differs from the cross-border dimension underpinned by Article 101 and 102 TFEU concerning the effects of the anticompetitive conduct on the internal market.

The introduction of a collective redress system under the legal basis of Article 81 TFEU may represent a further step towards transnational procedural cooperation. Nevertheless, a collective redress system under Article 81 would not be a really efficient mechanism to strengthen the enforcement of both EU and national antitrust rules.

The cross-border limitation set forth by Article 81 seems to be excessively broad in relation to the objectives that the collective actions in antitrust is to pursue. Such a limitation would make the EU initiative inapplicable to litigations between parties domiciled in the same Member State, thus **excluding many of the potential claimants** in relation to infringements of Articles 101 and 102 TFEU and excluding most of the potential claimants in relation to infringements of national antitrust rules.⁴⁷

3.5.2. Approximation of laws (Article 114 TFEU in conjunction with Article 169 TFEU)

Article 114 TFEU is a residual legal basis that should be chosen when no other specific legal basis applies.⁴⁸ Moreover, the measures adopted under Article 114 TFEU must be for the approximation of laws (also known as 'harmonisation').⁴⁹ In practice, Article 114 TFEU can be used to adopt EU measures in two situations:⁵⁰ first, where such measures contribute to the elimination of obstacles to the exercise of fundamental freedoms⁵¹ and second, where the Union adopts measures to remove distortions of competition arising from the diverse national rules.⁵² According to Article 169 TFEU on consumer protection, the Union shall protect economic interests of consumers with measures adopted pursuant to Article 114 TFEU in the context of the completion of the internal market. Also a horizontal legal instrument of collective redress for general consumer protection law violations, not limited to antitrust matters, can be introduced under the legal basis of Article 114 TFEU in the context of the approximation of laws.

⁴⁷ The issue of claims from victims in various Member States is dealt with in more detail in sections 3.2. and 3.3.

⁴⁸ The importance of this limitation was emphasised in Case C-533/03, *Commission v. Council (VAT)* [2006] ECR I-1025 where the Court said that if the Treaty contained a more specific provision suitable as legal basis for the measure, the measure had to be founded on that provision (see Annex 1 Table B for a list of all relevant legislative measures based on Art. 114).

⁴⁹ Measures not aimed at harmonisation, should therefore not be introduced under Article 114. See Case C-436/03 EP and *Commission v. Council (ECS)* [2006] ECR I-3733, where the Court affirmed that European Cooperative Society could not be introduced under Article 114 since national laws remained unchanged by the regulation.

⁵⁰ Case *Tobacco Advertising I*, C-376-98 [2000] ECR I-8419.

⁵¹ The Court said that Directive 98/43's ban on advertising of tobacco products in some media could be adopted on the basis of Article 114 since this would help to ensure the free movement of press products.

⁵² The Court ruled for the adoption of Directive 98/43 under Article 114 on the grounds of the distortion of competition caused to the advertising industry.

Table 7: Approximation of Laws

| QUESTION | ANSWER | COMMENT |
|---|---|--|
| The choice of the legislative act? | DIRECTIVE | The most widely used and suitable legislative measure seems to be a directive. A directive allows Member States to achieve the objectives and implement the measures into their national substantive and procedural law systems, leaving to them the choice of the most appropriate tools to do so. This allows Member States to ensure consistency of these rules with their wider substantive and procedural law. Furthermore, a directive is a flexible tool to introduce a minimum standard while leaving room for the individual Member State for further reaching measures if they elect to adopt them. Finally, a directive avoids intervention in any cases where the domestic provisions in the Member States are already in line with the proposed measures. |
| The relevant legislative procedure? | ORDINARY LEGISLATIVE PROCEDURE | Article 114 TFEU requires the European Parliament and the Council to act in accordance with ordinary legislative procedure. |
| Who could be allowed to bring a collective action? | CONSUMERS | Article 114 TFEU does not provide for any subjective limitation. However, a collective redress measure under this legal basis might be placed in the more specific context of consumer protection law, as provided for by Article 169 TFEU, which expressly refers to Article 114 TFEU. In this respect, the new measure might be limited in application to consumers, with the exclusion of SMEs. |
| When could market players be allowed to bring a collective action? | EU LAW INFRINGEMENTS NATIONAL LAW INFRINGEMENTS | A collective redress system adopted under Article 114 TFEU for the approximation of laws could be drafted so as to be applicable not only where the rights alleged to have been infringed are granted by EU legislation (infringement of EU law), but also in cases of infringements of national law. Moreover, both domestic and cross-border disputes (defined as cases where the defendant and victims represented are domiciled in the same Member State) could be included in the application of the collective redress measure. |
| Possible disadvantages for collective redress in antitrust? | EXCLUSION OF SMES NECESSITY OF FURTHER INITIATIVES | The potential exclusion of SMEs from the application of a collective redress system under Article 114 TFEU is a significant side effect of the choice of this provision as a legal basis. A general system for collective redress would need further initiatives on some specific sector-related issues (as far as antitrust matters are concerned, these may include passing on, access to evidence and discovery rules, interaction with leniency). |

The development of a well-functioning collective system within the Union will strengthen consumer confidence in the retail internal market. Action at Union level should provide European consumers with the same level of protection and promote competitive practices amongst businesses, thus increasing the exchange of products or services across borders. Defining common principles and rules for collective redress across Member States may have the advantage of ensuring an effective treatment of consumer disputes arising from domestic or cross-border transactions.

Nevertheless, a collective redress system under Article 114 TFEU in conjunction with Article 169 TFEU seems to be an unfulfilling measure as it would **not be available to SMEs** harmed by anticompetitive conducts. Moreover, a measure aiming at fostering consumer protection would have a broader scope than antitrust law, and **further initiatives on specific sector-related issues may be needed.**

3.5.3. Competition law area (Article 103 TFEU)

Article 103 TFEU constitutes the legal basis for the implementation of the provisions set forth by Articles 101 and 102 TFEU. Article 103 TFEU can be used as a legal basis for the introduction of legislative acts aiming to ensure effective competition in the internal market. In light of the case law of the ECJ, Article 103 TFEU should be a privileged legal basis for competition law infringements. EU institutions should guarantee that in all Member States there is full access to effective redress mechanisms by removing the major obstacles that prevent the victims from obtaining compensation.

Table 8: Competition Law

| QUESTION | ANSWER | COMMENT |
|--|---|---|
| The choice of the legislative act? | REGULATION | Article 3 TFEU stipulates that EU institutions have exclusive competence in the field of EU competition law. Provided that a sectorial measure under Article 103 should be limited in scope to infringements of EU competition law (Articles 101 and 102 TFEU), the most effective legislative act seems to be a regulation. In most of Member States, existing collective redress systems have general scope and are not limited to competition law enforcement. A regulation could be more effective than a directive because the latter would imply an unnecessary further activity of implementation by national legislators. |
| The relevant legislative procedure? | SPECIAL LEGISLATIVE PROCEDURE | Article 103 provides for a special procedure requiring the Council to adopt measures after consulting the European Parliament. |
| Who could be allowed to bring a collective action | SMEs, CONSUMERS | Since Article 103 TFEU does not imply any subjective restriction, a collective redress system under this provision would be available for both consumers and SMEs. |
| When could market players be allowed to bring a collective action? | EU LAW INFRINGEMENTS | Consumers and SMEs could be allowed to bring a collective action in relation to any infringement of competition law within the internal market. The EU collective redress system in antitrust should concern infringements of Articles 101 and 102 TFEU, with the exclusion of national competition law infringements. No limitation needs to be introduced in relation to the cross-border dimension. |
| Possible disadvantages for collective redress in antitrust? | EXCLUSION OF GENERAL CONSUMER PROTECTION LAW AND NATIONAL COMPETITION LAW | A collective redress system under the legal basis of Article 103 should be limited in application to violations of Articles 101 and 102 TFEU. Infringements of national competition law rules would not be subject to the application of the new collective procedure. This could create a potentially unequal system of treatment as to violations of European competition law and national competition law. Member States should provide for equivalent measures in their respective legal systems. |

Given the diversity of existing national systems and their different levels of effectiveness, the lack of a consistent approach to collective redress at EU level may undermine the enjoyment of rights (directly granted by Article 101 and 102 of the Treaty and broadly analysed by the ECJ) by consumers and businesses.

However, according to the principles of conferred powers and of subsidiarity, an EU initiative in antitrust should be limited in scope to the application and enforcement of EU competition rules. The potential unequal system of treatment with reference to violations of EU competition law and national competition law should be avoided by Member States through the introduction of equivalent measures in their respective legal systems.

Therefore, a collective redress system under Article 103 TFEU seems to be a **suitable and workable choice** for an EU initiative in private antitrust enforcement matters.

3.5.4. Dual basis: Articles 103 and 114 (in conjunction with Article 169) TFEU

When the Union's regulatory power derives from overlapping Treaty provisions, without one being secondary and indirect in relation to the others, the principle of conferred powers requires recourse to a double legal basis and the combination of their procedural provisions, provided that such a combination is possible. The main purpose of a European collective redress system in antitrust matters is the effective enforcement of EU competition rules, because such a system would foster private antitrust enforcement in the European Union by making consumers and SMEs more willing to claim damages before the relevant Courts. In this respect, such a measure also implements consumer protection in the European Union. A legislative act aimed at harmonising national measures intended to favour the effective enforcement of consumer rights before national courts is directly linked to consumer protection too. Therefore, a collective redress measure in the field of antitrust might be linked to both Article 103 and Article 114 TFEU in conjunction with Article 169 TFEU.

However, this may raise some concerns, especially in relation to the general principle affirmed by the ECJ that every legislative act should be based on a single legal basis, the one that can be considered of major importance with regard to the act considered as a whole.⁵³ The choice of a legal basis for a measure must be based on objective factors which are amenable to judicial review.⁵⁴ The choice of the correct legal basis requires an analysis of the aim and the material content of the legislative act to be adopted.⁵⁵ Only exceptionally, if the act simultaneously pursues a number of objectives or has several components that are strictly linked, without one being secondary and indirect in relation to the other, should the act be founded on the various corresponding legal bases. However, the legal basis which derives from the aim and content may in certain circumstances be ousted, in particular when a dual legal basis would result in the combination of incompatible procedures.⁵⁶ Therefore, a **dual legal basis could be problematic** due to potential incompatibility between the general procedure provided for by Article 114 TFEU and the special procedure provided for by Article 103 TFEU.

⁵³ See ECJ C-2011/01 of 11.9.2003, *Commission v. Council*, I-8913.

⁵⁴ See ECJ 45/86 of 26.3.1987, *Commission v. Council (Generalised Tariff Preferences)*, I-1520.

⁵⁵ See cases ECJ C-300/89 of 11.6.1991, *Commission v. Council*, I-2867; C-155/91 of 17.3.1993, *Commission v. Council*, I-939; C-271/94 of 26.4.1996, *Commission v. Council*, I-1689; C-42/97 of 23.2.1999, *Commission v. Council*, I-869; C-269/97 of 4.4.2000, *Commission v. Council*, I-2257.

⁵⁶ See *Titanium Dioxide*, ECJ case 300/89 of 11.6.1991, *Commission v. Council*, I-2895.

Table 9: Competition Law and Approximation of Laws

| QUESTION | ANSWER | COMMENT |
|--|--|--|
| The choice of the legislative act? | DIRECTIVE | A directive allows the Member State to achieve the objectives and implement the measures into their national substantive and procedural law systems. This approach limits the freedom of the Member States less than other options (such as a regulation) and allows Member States to preserve consistency of these rules with their wider substantive and procedural law. A directive, furthermore, is a flexible tool for introducing a minimum standard in any areas of national law that are crucial for the functioning of damages actions, ensuring common minimum guarantees all across the EU while leaving room to the Member States for more far-reaching measures. Finally, a directive avoids initiative in any cases where the domestic provisions in the Member States are already in line with the proposed measures. |
| The relevant legislative procedure? | ORDINARY LEGISLATIVE PROCEDURE | Article 114 TFEU requires the European Parliament and the Council to act in accordance with the ordinary legislative procedure while Article 103 TFEU provides for a special procedure requiring the Council to adopt measures after consulting the European Parliament. The combination of both Articles should eventually lead to the adoption of the act in accordance with the ordinary legislative procedure. ⁵⁷ |
| Who could be allowed to bring a collective action? | SMEs, CONSUMERS | Since Article 103 TFEU on competition rules and Article 114 TFEU on harmonisation of laws do not imply any subjective restriction, a collective redress system under these provisions might be drafted so as to be available for both consumers and SMEs. ⁵⁸ |
| When could market players be allowed to bring a collective action? | EU LAW INFRINGEMENTS NATIONAL LAW INFRINGEMENTS | The choice of a dual legal basis would avoid the problem of the exclusion of infringements of national competition rules from the scope of the new measure. A collective redress system adopted under Articles 103 and 114 TFEU could be drafted so as to be applicable not only where the rights alleged to have been infringed are granted by EU legislation (infringement of EU law), but also in cases of infringements of national law . Moreover, both domestic and cross-border disputes (defined as cases where the defendant and victims represented are domiciled in the same Member State) could be included in the application of the collective redress procedure. |
| Possible disadvantages for collective redress in antitrust? | LEGAL BASIS | It is in general more difficult to choose a double legal basis, especially in regard to the applicable procedure. |

The adoption of a collective redress system under Articles 103 and 114 in conjunction with Article 169 TFEU would allow the introduction of a measure applicable to both EU and national competition law infringements, available for consumers as well as SMEs, and applicable to both cross-border and domestic litigations. Nevertheless, according to ECJ jurisprudence, it is in general more difficult to choose a dual legal basis, especially with reference to the choice of the relevant procedure.

⁵⁷ In Titanium Dioxide Case the ECJ affirmed that, in case of dual legal basis, 'use of both of them as a joint legal basis would divest the cooperation procedure of its very substance, the purpose of that procedure being to increase the involvement of the European Parliament in the legislative process of the Community. That participation reflects a fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly. It follows that in such a case recourse to a dual legal basis is excluded.'. Such a conclusion might be avoided by adopting the legislative act with the ordinary procedure, ensuring the full involvement of all EU institutions.

⁵⁸ Article 114 TFEU does not imply any restriction to the consumer protection field: such a restriction is rather contained in Article 169 TFEU.

Table 10: Summary Table

| Article | Field | Legislative Act | Legislative Procedure | Type of initiative | Advantages | Disadvantages |
|--|--|-----------------|-----------------------|--------------------|---|---|
| Articles 103 and 114 in conjunction with Article 169 TFEU | Approximation of competition and consumer protection law | Directive | Ordinary Procedure | Sector-specific | <ul style="list-style-type: none"> • Focused on antitrust • Available for SMEs and consumers • Available for EU law infringements and national law infringements | <ul style="list-style-type: none"> • restrictions on dual legal basis |
| Article 103 TFEU | Competition law | Regulation | Special Procedure | Sector-specific | <ul style="list-style-type: none"> • Focused on antitrust • Available for SMEs and consumers | <ul style="list-style-type: none"> • Available for EU law infringements, not national competition law infringements |
| Article 114 in conjunction with Article 169 TFEU | Approximation of laws on consumer protection | Directive | Ordinary Procedure | Horizontal | <ul style="list-style-type: none"> • Wider scope of application for consumer protection | <ul style="list-style-type: none"> • Subjective limitation (limited to consumers, no SMEs) • Less effective for antitrust litigation • Necessity of further initiative |
| Article 81 TFEU | Judicial Cooperation in Civil Matters | Directive | Ordinary Procedure | Horizontal | <ul style="list-style-type: none"> • Enhance transnational procedural cooperation | <ul style="list-style-type: none"> • Less effective for antitrust litigation • Necessity of further initiative • Cross-border limitation |

3.6. Conclusions

In order to grant full effectiveness to private antitrust enforcement, a collective redress system should:

- apply to both EU and national competition law;
- be available for both consumers and SMEs;
- apply to both cross-border and domestic litigations;
- be focused on antitrust specificities.

In our view an EU initiative would best pursue these goals through a measure specifically targeted to antitrust matters rather than through a horizontal measure that would apply to all sectors. A sector-specific measure would have a number of advantages. First, it would ensure greater uniformity across Member States in the application of Articles 101 and 102 TFEU. Second, it would create a level playing field for businesses that would face similar conditions with respect to the risk of being sued for damages. Third, unlike a horizontal tool, a sector-specific measure would not require further legislative initiatives at national level, which otherwise would run the risk of producing significant procedural divergences across the EU and exacerbate the forum shopping's problem.

Among the legal basis analysed in this section, Article 103 TFEU seems to be the most appropriate Treaty provision for a sector-specific EU legislative initiative in the field of collective redress in antitrust. Besides being focused on antitrust specificities, an initiative under Article 103 TFEU would have the merit to apply to cross-border litigation as well as to domestic litigations, and to extend its effects to both SMEs and consumers. Also a legislative initiative under Article 103 TFEU would satisfy the subsidiarity principle since the objectives of the proposed measure could be sufficiently achieved by the Member States as well as the proportionality principle in that it would ensure that full effect is given across the EU to Articles 101 and 102 TFEU in damages actions, without going beyond what is necessary to achieve those objectives.

Under this legal basis, the most effective legislative act seems to be a regulation. In most Member States, existing collective redress systems have general scope and they are not limited to competition law enforcement. The introduction of an ad hoc special mechanism for the competition law sector by means of regulation would create a proper EU procedural instrument (similarly to the one provided for by Regulation 1346/2000 on insolvency proceedings) to be added to the existing national ones. On the contrary, a directive which would require the implementation by national legislators may raise possible problems of compatibility and the risk that different solutions will be adopted at national level.

4. INCENTIVES AND SAFEGUARDS

KEY FINDINGS

- The opt-in model has the clear advantage of limiting the risk of unmeritorious actions, but it entails a low participation rate. Hence, it may render the collective redress system ineffective when the infringement causes low value harm to a multitude of individual consumers.
- Representative and collective actions can be considered complementary tools to guarantee an adequate enforcement of consumers' right to compensation.
- It may be advisable to allow small or medium enterprises to participate in collective actions insofar as they are in a situation of asymmetry vis-à-vis the infringer similar to that of consumers. This may require the adoption of a specific definition for very small companies (micro businesses) and the establishment of specific thresholds.
- There are clear indications that private funding mechanisms are unlikely to induce excessive litigation, provided that the relevant market is open and competitive. Contingency and conditional fee arrangements are efficient funding solutions that allocate the risk to the subject that can bear it more efficiently and force lawyers to act as gatekeeper to justice pre-assessing the merits of a case.
- The 'loser pays' principle seems efficient and apt to discourage frivolous claims.
- Access to evidence and disclosure procedures are complex issues and it is very difficult to strike the right balance between the various interests at stake. It seems important to prevent the defendant being subject to disproportionate requests for documents and information that would not cure the asymmetry between the alleged infringer and the victim but rather create an opposite and no less dangerous asymmetry.
- If the aim of action for damages is solely corrective justice, punitive damages should be excluded and 'passing on' arguments should be allowed.

The ability of a collective redress mechanism to bring effective compensation to the victims of a competition law infringement depends essentially on how the procedural and substantive rules affect the incentives of the parties. The choice of which option has to be preferred should be based on a deep understanding of whether each solution provides the right incentives, that is, whether it encourages well-grounded actions and discourages the others. In this sense 'incentives' and 'safeguards' are two sides of the same coin.

We base our analysis of the incentives and safeguards provided by the institutional features of a collective redress system in antitrust on the following three considerations.

First, each of the main institutional features of a collective redress system has an impact on the number of meritorious and unmeritorious actions that are brought. If a specific element raises the expected return for the claimants of going to court, it clearly incentivises actions. Hence the decision to adopt a certain institutional solution should be based on the balance between the expected social benefits of the incremental meritorious cases it will engender and the expected social costs of the incremental unmeritorious ones it will prompt. The size

of these benefits and costs hinges on a number of factors, most of which relate to the social preferences of the country's citizens, as well as on the current state of play of the collective redress system.⁵⁹

Second, in assessing the expected social benefits and costs of a specific institutional feature, it should be borne in mind that it may affect the number of meritorious and unmeritorious actions in different ways. Hence, if a certain feature increases the expected claimants' gain from bringing a meritorious case, but not the costs and benefits of bringing unmeritorious ones, it should be definitely adopted; whereas a solution should be discarded if the opposite is true.

Third, it is also necessary to factor in the impact that a specific institutional feature may have on the costs imposed on the judiciary system. In general, any features that increase the incentives to settle tend to reduce these costs.

4.1. Identification of claimants (opt-in/opt-out)

An important feature of a collective redress system in antitrust is how precisely the claimants need to be identified for an action to be accepted by a court. Two basic options are available: the 'opt-in' and the 'opt-out' model.⁶⁰ Some countries adopt hybrid mechanisms that combine some features of both models.⁶¹

Under the opt-in model potential claimants become parties to a case only if they take some affirmative step to be included. Hence only those who opt in are bound by the judgment.

Under the opt-out model all the victims become parties to the litigation, unless they take an affirmative step to opt out of the action. Group members need not know about the litigation in order to be a part of it. Hence, unless a victim opts out of the litigation, he or she will be bound by any judgment issued by the court, or by any settlement between the representative claimants and the defendant.

The main advantage of the opt-in system is that it better preserves the liberty of individuals to decide when and whether to take part in a judgment,⁶² and it does not preclude individuals who have not opted in from pursuing a case at a later stage. The opt-out system 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. This element is rather important in the light of the right of access to the courts under Article 6 of the European Convention for Human Rights (ECHR),⁶³ which would probably prevent the introduction of a pure opt-out system in the EU (see Hodges 2012).

⁵⁹ If the existing collective redress system is such that very few actions are attempted, the benefits of more well-grounded suits are likely to exceed the costs of more frivolous suits and, therefore, an institutional change that improves the claimant's expected return should be backed; vice-versa if damages actions are already widespread.

⁶⁰ For the various solutions adopted in the Member States see Figure 2 in Section 1.1.1.

⁶¹ Just to mention an example, in Denmark if the individual claims are such that it is unlikely they will be individually pursued and therefore an opt-in model does not appear feasible, the competent court may decide that the collective redress encompasses all group members which have not opted out within a deadline.

⁶² See Leskinen (2010).

⁶³ Article 6 par. 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'.

Opt-in tends to reduce the participation rate in collective actions because the victims need to take action and spend time and money to adhere to it.⁶⁴ Especially when the individual value at stake is low, the potential gains from the action do not cover the costs for the victims to take part in it.⁶⁵ Low participation rates imply that neither the compensation nor the deterrence goals of collective actions are effectively pursued.

A problem which is correlated to the low participation rates of opt-in systems is that opt-in procedures might discourage the decision to become a representative claimant (Coffee Jr. 2010; Issacharoff & Miller 2009). As long as a passive party gains from a collective action while avoiding the risk borne by the representative party, claimants have an incentive to free-ride on someone else's action.

A further problem associated with the opt-in model is that of 'insufficient finality': defendants are not able to extinguish their liability when they settle a collective action (global peace). This 'global peace' is generally achieved (also through the use of appropriate clauses generally included in a settlement agreement) in the US opt-out system. The goal of global peace also indirectly benefits the members of the group because defendants will pay more for settlements that offer assurances against future litigation. In an opt-in environment, the threat of additional lawsuits is not merely theoretical. If only a small percentage of the group opts in to a collective action, it may be possible for another collective action to be brought on behalf of those who did not opt in.⁶⁶

Finally, the main drawback of the opt-out model is that it may increase the number of unmeritorious claims, as the pay-off of starting a law suit increases with the number of alleged victims of the anticompetitive conduct. Table 11 below summarises the main findings of this section by identifying the impact of the opt-in and opt-out models on some relevant issues.

⁶⁴ It would be wrong to compare US opting-out rates (0.2 per cent on average in consumer cases) with the average opt-in rates. As correctly pointed out by Coffee Jr (2010), while opting-out makes no sense for a person holding a negative value claim (i.e. when the value of the damage suffered is so small that even the cost of the minor activities the victim must perform to obtain the payment exceeds the compensation so that the net value of the claim becomes negative), deciding not to opt in is entirely rational. Moreover, when looking at participation rates in opt-out procedures, it should be borne in mind that the actual claims for refunds after a judgment or a settlements are much lower than the participation rates. This means that even if a large set of consumers participate in a settlement in the US, often a very low percentage of people who have the right to claim for refund actually do it. These rates, rather than the opt-out rates, should be the figures to compare with the opt-in participation rates.

⁶⁵ See Issacharoff & Miller (2009).

⁶⁶ Of course this cannot be avoided by introducing a special provision in the overall collective redress in antitrust design that excludes further action if a case was already decided, as this would deprive victims not opting in of their right to be compensated. The only conceivable way to achieve 'global peace' is to adopt a full opt-out system.

Table 11: Impact of opt-in and opt-out models on some relevant issues

| Issues | Opt-in | Opt-out |
|--|-----------|-------------------------------------|
| Preserving individual liberty | High | Low |
| Access to court and right to a fair and public hearing | No risk | High risk of being severely limited |
| Participation rate | Low | High |
| Free-riding behaviour | High risk | Moderate risk |
| 'Global peace' | Unlikely | Likely |
| Unmeritorious claims | Low risk | Moderate risk |

In conclusion, there are no clear reasons to prefer one model over the other. The opt-in model seems more compatible with both national constitutions and the right to a court hearing as laid down in the ECHR. For these reasons, the introduction of a pure opt-out model does not seem politically achievable. However, the opt-out solution may still be adopted in limited circumstances. For example, the court may be given the possibility to extend the case to any potential claimants that do not opt out within a certain deadline, if the value of the damage suffered by each allegedly injured person is likely to be low and the court ascertains that very few victims will decide to opt in or to pursue the case on their own.

4.2. Commonality of interest among the claimants

A relevant safeguard stems from the requisite that claimants must have a certain level of commonality of interest. Access to the courts should be controlled by the judiciary in such a way that time and costs are minimised. Some similarity between the members of the group bringing any action is necessary to ensure that the competition case can actually be dealt with on a collective basis and that compensation can be awarded without the need for individual follow-on actions. However, requirements which are too stringent may render it too difficult to bring a case before court, thus discouraging rightful claims and leaving individuals and firms without compensation for the harm suffered.

The responses to the EU public consultation on '*Towards a coherent European approach to Collective Redress*' suggest that there is a shared concern. Several respondents point out that the courts should ensure that common issues predominate over individual ones, and that the group is clearly defined in order to assess the propriety of group resolution as opposed to individual resolutions. There is also a generally accepted view that the rules that preside over the implementation of a collective action should provide courts with clear criteria to make the determination of the predominance of common issues over individual ones. In particular, the court should assess whether the action refers to the same facts and the same infringement based on the same legal ground and whether the case can be decided following a common reasoning for all the claimants, using the same body of evidence provided by the parties.

4.3. Standing: who should be allowed to bring a collective action?

To strengthen the position of consumers and ensure their representation, both representative actions and collective actions could be allowed (see Dayagi-Epstein 2006; Kalven & Rosenfeld 1941; Schaefer 2000).⁶⁷ These are defined as follows:

- Representative action: an action brought by an association or a representative body on behalf of a group of victims.
- Collective action: an action brought by one member of the group of victims.

The relevance of representative actions led by consumers' associations or other representative bodies for antitrust cases has been recently recognised by the European Commission. Indeed, in the 2008 Commission's White Paper⁶⁸ the associational actions are regarded as a complementary procedure to the opt-in collective action, with both being brought side-by-side in many cases. The justification for such an integrated approach is that a pre-existing association would be a more adequate representative than any individual litigant because it would be incentivised by its organisational mission, membership support, and diminished fear of retaliation. These associations might have standing to recover damages only to the extent of their members' losses, but they could also be authorised by statute to sue more generally for all losses caused by the defendant.

As argued by Issacharoff & Miller (2009), the rules limiting the lead claimant role to consumer organisations or similar groups appear designed to serve several objectives. Two of these are particularly relevant. First, these rules select as the group representative a party who is expected to provide competent and loyal services to other group members. Second, they try to ensure that the group representative has the resources to pay the expenses of the case under the prevailing rules on cost allocation and litigation funding.

4.3.1. Competence and loyalty of consumers' associations

As far as the first objective is concerned, consumers' organisation are in principle more competent in the representation of consumers' interests. Of course, merely having the status of a consumer organisation does not mean that this condition is fulfilled. Courts should have discretion to assess whether the candidate organisation has the necessary qualifications. More problematic is the issue of whether consumer organisations provide loyal service to the group, acting as faithful fiduciaries of group interests (see Dayagi-Epstein, 2006). This problem is exacerbated whenever the organisations are entitled to sue on behalf of all consumers, so that their representational status is not limited to their own members. The interests of non-profit consumer organisations may reflect ideological considerations that do not necessarily coincide with the economic interests of consumers.⁶⁹

4.3.2. The ability of collecting funds

The use of organisations as representative claimants is a potential solution to the litigation funding problem (see Section 4.4. below). The advantage of these organisations is that they may have a budget to cover the costs of consumer suits and therefore may not be as liquidity-constrained as the average consumer. Even so, organisations may face difficulties in funding collective action litigation if contingent fees or similar arrangements are prohibited.

⁶⁷ For the solutions adopted in the Member States see Table 1 in section 1.1.2.

⁶⁸ European Commission, *White Paper on Damages Actions for Breach of the EC antitrust rules*, COM(2008) 165, 2.4.2008.

⁶⁹ For instance, consumer organisations may take a stance against large multinational companies and pursue a case against them even if this would not be a priority for the consumers they represent.

If organisations are not funded from the proceeds of successful cases, they must find other financial sources. Group members are an obvious possibility. Such organisations could condition membership on payment of dues. With the money in hand, the organisations would not face the challenge of collecting it post hoc. But dues paid in advance also pose problems. If the consumer organisations represent everyone who is harmed by a defendant's conduct rather than just their membership, severe free-rider problems might arise. Consumers would be better off not joining the organisation and getting its services for free. Even if the consumer organisations represent only their members, they would have to charge sufficiently high dues to compensate for anticipated litigation expenses and it is unlikely that consumers would be willing to pay these costs in advance.

A possible solution to the resources problem would be for the Member States to fund consumer associations. However, several commentators suggest that consumers' associations must maintain their economic independence in order to sustain their sovereignty and credibility.

4.3.3. Small and medium-sized enterprises

A separate standing issue is whether small and medium enterprises (SMEs) should be treated like consumers regarding the right to resort to collective redress mechanisms. This issue is particularly sensitive, as shown by the opposing views expressed in response to the EU public consultation. Some respondents strongly oppose the idea of allowing SMEs to bring collective actions, arguing that collective redress mechanisms find their legitimacy in the need to protect consumers' interests. Other respondents support the idea of SMEs being allowed to bring collective actions, because SMEs (and especially micro businesses) are often in a situation of asymmetry similar to that of consumers with regard to large companies when concluding standard-form contracts: for this reason, they should benefit from a similar level of protection.

Two practical issues emerge around the potential involvement of SMEs in collective actions:

- *Threshold:* The first issue relates to the thresholds that define an SME. Currently, an SME is defined as a firm that employs less than 250 employees and which has an annual turnover not exceeding EUR 50 million. This definition appears too broad. Hence it should be considered whether only micro businesses (less than 10 employees) are to be allowed to participate in collective actions, as these companies are more likely to be in a situation of asymmetry vis-à-vis the alleged infringers. Moreover, the harm suffered by micro businesses because of an antitrust infringement is more likely to be modest and these companies may lack the resources to bring an action.
- *Level of commonality:* SMEs may have very different contractual relations with the alleged antitrust infringers. This heterogeneity could create serious difficulties to courts in assessing whether there is indeed a common ground to bring a collective action.

Overall, it seems that the reasons against the extension of the collective redress system for antitrust infringements to SMEs are ideological and rather weak. Hence we believe that a consensus on their involvement in collective actions could be found, provided that a new or special definition is adopted, so that only really small enterprises (those whose situation and needs are comparable to that of consumers) are allowed to participate in collective redress mechanisms.

4.4. Funding of legal costs: what kind of funding should be allowed?

Seeking compensation for the harm suffered because of an antitrust infringement is a costly and risky activity, which may be undertaken only by victims that can rely on substantial financial and organisational resources. Collective actions lower this hurdle by allowing a multitude of victims, who individually may have suffered damages of relatively small value, to share the costs of a lawsuit. Yet in many cases the claimants cannot afford the upfront payments required to initiate a case or cannot easily find a fair mechanism to allocate initial costs and need to rely on external funds. A funding system may also serve the purpose of allocating the risk of an action to those who can bear it more efficiently.

Several (complementary) funding mechanisms have been introduced in various jurisdictions and discussed in the legal and economic literature.⁷⁰ They include:

- Contingency or conditional fees;
- Private insurance products (such as after-the-event 'ATE' insurance);
- Legal aid;
- Contingency Legal Aid Funds-(CLAFs);
- Private funds acting on a commercial basis.

4.4.1. Contingency and Conditional fees

Contingency fees refer to arrangements between a lawyer and his clients whereby the latter pay the former if and only if the case is successful, usually with a share of the sum received; conditional fees refer to similar arrangements whereby the client pays a premium to the lawyer above the agreed fixed or hourly fees in case of success. Both contingency and conditional fees are effective arrangements to facilitate antitrust damage claims. They shift part of the expected costs of the action from the claimant to the lawyer. In the law and economics literature two main advantages of contingency fees have been identified.

- First, while the overall cost of litigating a case is not changed by a contingency fee arrangement, it can encourage the victims to bring a suit because it solves the problem of the lack of financial resources for initial disbursements (see Schwartz & Mitchell 1970; Gravelle & Waterson 1993; Rubinfeld & Scotchmer 1993; Schaefer 2000).
- Second, contingency fees may efficiently allocate the action's risk, putting it on the shoulders of the lawyers who are either less risk-averse or can spread their risk onto a portfolio of cases (see Danzon 1983; Rubinfeld & Scotchmer 1993; Backhaus 2011).

Both advantages are common to contingency and conditional fees. However, Emons & Garoupa (2006) compare the two arrangements and find that contingency fees are more efficient as they induce lawyers to better use the information they have access to.

Contingency fee and frivolous litigation

Bernstein (1996) and Olson (1991) argue that contingency fees encourage speculative litigation and create a legal environment prone to corruption. Their view, however, is quite isolated in the literature. Most scholars agree that, given the asymmetry of information

⁷⁰ For an overview of the funding mechanisms that are available in the Member States see Table 4 in section 1.1.7.

between the client and the lawyer, a contingency fee scheme provides the more informed party, i.e. the lawyer, with the proper incentive to bring a case only if it is grounded (see Clermont & Currivan 1977; Miceli 1994; Helland & Tabarrok 2003). Helland & Tabarrok (2003) argue that whether a lawyer is willing to take a case on a contingency fee basis provides a strong signal to the claimants about the quality of their case. Moreover, they show empirically that limits on contingency fees cause a reduction in legal quality, as a large number of suits are dropped by the claimants. A survey conducted by Kritzer (1997) shows that contingency fee lawyers act as gatekeeper to justice as they turn down at least half of the cases because of lack of merits.

Contingency fee and settlement

The impact of contingency fee on settlement is much less clear. According to some authors such arrangements exacerbate the agency problem that affects the lawyer-client relationship. Gravelle & Waterson (1993) and Schaefer (2000) argue that lawyers will exert less than optimal effort under a contingency fee arrangement and will have an incentive to settle sooner, even when this is not in the client's interest. This view is challenged by Polinsky & Rubinfeld (2002). They maintain that contingency fees have the merit of better aligning the interest of clients and their lawyer. Indeed, hourly fees permit opportunism by lawyers, who may spend excessive time on the case or encourage clients to go to trial even when a settlement would be in the clients' interest, whereas contingency fees, by giving the lawyer an economic interest in the outcome of the case, provide the lawyer with incentives to maximise the expected outcome of the action.⁷¹

4.4.2. Insurance products

Contingency fees limit the costs the claimant has to bear if he loses the case. However, under the loser-pays rule he still faces the prospect of paying the defendant's legal costs. This risk may be high enough to deter complainants from bringing even well-grounded actions. To avoid this outcome the risk may be covered by specific insurance products. ATE insurance is a policy whereby the insurance company pays the opponent's legal costs and expenses if the policyholder loses the case. The premium payments may be deferred until the judgement or settlement, so that in most cases the premium itself is self-insured. ATE insurance costs are often recoverable by the successful party from the losing side.

4.4.3. Legal aid

In all EU jurisdictions access to justice for low-income citizens is guaranteed through some form of legal aid. This solution, however, does not seem adequate for collective antitrust actions.

- First, collective actions usually also concern claimants that are not eligible for legal aid.
- Second, while legal aid may cover one side's costs, it might not protect the party from the risk of bearing the opponent's costs.
- Third, antitrust actions are extremely technical and, since legal aid is often given through the provision of professional services free of charge, such services may be inadequate to deal with the complexities of the case.

⁷¹ Danzon & Lillard (1983) and Cumming (2001) provide empirical evidence showing that contingency fees reduces the rate of settlements.

4.4.4. Contingency legal aid funds (CLAFs)

In some jurisdictions outside the EU (e.g. Canada and Hong Kong), antitrust damages actions can be supported by public funds such as CLAFs. These funds indemnify their clients against the opponent's costs and cover disbursements in return for a share of the awarded damages. In principle, these public funds seem very attractive. Yet there are many open questions and too little experience or literature to deal with them satisfactorily. These questions include: how should applications to the fund be assessed? Who supervises the fund's operation? What kind of supervisory or decision-taking power does the fund have in the definition of the trial strategy or during negotiations? It is apparent that inappropriate solutions to these problems make these funds prone to abuse and manipulation.

4.4.5. Private funds

Private funds, acting on a commercial basis,⁷² are less exposed to these risks, provided that their market is sufficiently competitive. Indeed, in a competitive environment, commercial funds must preserve their vital reputation of acting in their clients' interest. Moreover, competitive pressure limits the share of damages obtained by the fund, curbing its ability to take advantage of its superior financial strength vis-à-vis its clients. Public regulation may still be needed to make the functioning of the fund completely transparent, with the aim of avoiding any conflict of interest. If necessary, this regulation may be extended to strictly commercial aspects, including the introduction of a cap on the fund's share of awarded or settled damages.

A single European market for these funds would be very important to improve European consumers' freedom to choose and to minimise the risk of abuses. To pursue this objective an initiative at EU level might be needed. There are some obstacles to the development of these funds that such an initiative could eliminate. They regard:

- removing the prohibition of the damaged party to 'sell' its right to compensation to a third party (such as the fund);
- amending national procedural rules that might prohibit a third party exercising control over the litigation strategy.

All the solutions to the funding problem discussed in this section may contribute to facilitating the legitimate proposition of collective actions for antitrust infringements. Any initiative in this area should consider that any funding mechanism is likely to perform better if it is in competition with alternative funding mechanisms. Hence we believe that there are no reasons to select only one way of funding collective actions or to restrict the freedom of the parties to choose the funding solution that they deem more appropriate.

4.5. Recovery of legal costs

The issue of how the legal costs should be allocated among the parties is both part of the debate on how collective actions should be funded and a legal issue in itself. Two distinct models can be defined in collective actions in antitrust: 'each party pays', whereby each party bears its own legal costs, irrespective of the final outcome of the judicial procedure, and the 'loser pays' principle, whereby it is the party who loses that has to bear the entire financial cost of the judgment.⁷³ While the first is prevalent in the US (although the judges in some cases can overturn the general principle and impose all the costs on the losing party), the second rule is adopted in all Member States.

⁷² Some examples in the EU are Cartel Damages Claims (www.carteldamageclaims.com), Claims Funding International-CFI (www.claims-funding.eu) or Vannin Capital (www.litigationfunding.com).

⁷³ Of course, in an opt-out system in which the 'loser party pays' principle applies, the legal costs are borne only by the named claimant.

These two rules reflect two different approaches: the US have a unique system of 'entrepreneurial litigation' that fosters private action by reducing the risk for claimants of bearing high costs in case of losing the trial and encourages systems of action funding through investments by law firms, acting as entrepreneurs. This approach has been traditionally viewed with scepticism in Europe for both ethical and efficiency reasons. In terms of ethics, the idea of making a business out of a suffered injury is often rejected; in efficiency terms, the American system is thought to conduce to excessive litigation.⁷⁴

The 'loser pays' rule may exacerbate the problem of funding an antitrust collective action. Yet it rests on a clear principle of justice, as it imposes all costs on the party that was responsible for them. Moreover, this rule has also interesting efficiency properties, as it forces both parties to carefully consider the entire cost of the trial when making decisions. From a theoretical point of view, this should provide the right incentive to bringing a meritorious action, discourage frivolous suits and encourage trying alternative ways to obtain compensation (see Baker 2003; Elzinga & Wood 1988).

The 'loser pays' rule is also called 'two-way' fee shifting. A third approach is a one-way fee-shifting whereby only a defeated defendant pays the opposing party's costs, whereas the claimant never does. This asymmetric solution lowers the financial obstacle faced by collective action, but does not solve the problems of the 'each party pays' rule.

A more interesting solution is to introduce some partial fee-shifting rules. For instance, the English Civil Procedure Rules 1999 introduced the so-called Part 36 offer. This enables the parties to make an offer to settle a claim. If the offer is rejected and the offeror obtains a judgement that is more favourable to him than the offer made, then the opposing party, even if he wins the case, will suffer from a reduction of the costs awarded by the court. This mechanism encourages the parties to make (and accept) credible offers and favours settlements.⁷⁵

4.6. Gathering evidence and disclosure of information

The procedural rules that discipline access to evidence play a crucial role in competition law cases, as the claimants need to collect a rich set of information both to establish liability and to quantify damages.⁷⁶ In follow-on actions the claimant may rely to some extent on the decision of the competition authority and on the documents collected during the administrative proceeding. This possibility raises several questions that will be examined in the next chapter. In stand-alone actions, since the most relevant information is unlikely to be in the public domain, the claimant often has little chance to win the case unless he or she can obtain the disclosure of documentary evidence held by the alleged infringers or by third parties.

The procedural rules on evidence-gathering and disclosure can be examined taking into account the following characteristics:

- the moment in which the evidence is collected and shared;
- the burden of proof imposed on the claimant to support his or her disclosure request;
- the precision with which the documents to be disclosed have to be identified;
- the supervisory role of the judge.

⁷⁴ Snyder & Hughes (1990) provide empirical evidence that shows this effect.

⁷⁵ The benefits of this type of fee-shifting rules have been formally investigated by Spier (1994).

⁷⁶ The type of documents that, in each Member State, a claimant may request to disclose and the documents that are protected from disclosure are described in Figure 4 and Table 2 in section 1.1.3 and 1.1.5 respectively.

In most civil law countries the gathering of documentary evidence normally occurs during the trial, under the direct supervision of the court. In most of these jurisdictions, the requesting party must exactly identify the documents required, must prove their relevance for the case and explain why the same documents cannot be obtained by other means.⁷⁷ In other civil law countries the judge has the power to integrate the party's request and the claimant does not need to specifically identify the needed documents.⁷⁸ In all civil law countries the claimant must meet a quite stringent fact-pleading requirement that mandates the submission to the court, before disclosure, of sufficient evidence to show the robustness of the case and a minimum of probability of success.

In common law countries (UK, Ireland and Cyprus) the gathering of documentary evidence takes the shape of a discovery procedure. The court involvement in this phase, which usually takes place before trial, is minimal as both parties are under two general obligations set by the civil procedural rules: the disclosure obligation and the duty to fulfill discovery requests. Moreover, since no order to disclose information by the judge is required, the requesting party does not need to provide *prima facie* evidence of the alleged infringement.⁷⁹

Although this is probably one of the most crucial aspects of an effective private enforcement system, it is extremely difficult to find the right balance between the various interests at stake.

In the Green Paper on Damages actions,⁸⁰ the European Commission identified three policy options:

- Option 1: Disclosure should be available once a party has set out the relevant facts of the case in detail and has presented reasonably available evidence in support of its allegations (fact pleading). Disclosure should be limited to relevant and reasonably identified individual documents and should be ordered by a court.
- Option 2: Subject to fact pleading, mandatory disclosure of classes of documents between the parties, ordered by a court, should be possible.
- Option 3: Subject to fact pleading, there should be an obligation on each party to provide the other parties to the litigation with a list of relevant documents in its possession, which are accessible to them.

The European Commission also discusses the introduction of obligations to preserve evidence and sanctions for the destruction of evidence. It also considers whether a failure to fulfill a disclosure request should have adverse procedural consequences for the offending party by introducing a reversal of evidence.

In this respect it does not seem advisable to lower the burden of proof for the claimant to prove the infringement and the harm caused, as this may induce the claimants to file disproportionate discovery requests to improve the chance of winning cases that are not meritorious.

⁷⁷ According to Ashurst (2004) these rules are applicable in: Austria, Belgium, Estonia, Finland, Germany, Greece, Italy, Lithuania, Portugal, Slovak Republic, Slovenia and Spain.

⁷⁸ Again according to Ashurst (2004), this is the case in: Czech Republic, Denmark, Latvia, Luxembourg, Malta, The Netherlands, Poland and Sweden.

⁷⁹ The most extreme situation occurs in the US where discovery procedures are deemed particularly burdensome for the defendant and, according to some commentators, have been frequently abused by the claimant (see Wagener, 2003 and Ginsburg, 2005).

⁸⁰ European Commission Green Paper - *Damages actions for breach of the EC antitrust rules*, COM (2005) 0672 19.12.2005.

In the Working Document accompanying the White paper the European Commission noted that there is already Union legislation in place concerning the enforcement of intellectual property rights that disciplines the disclosure of evidence to the opponent in civil litigation. This legislation is a model that can also be followed for competition law matters.

The search for an appropriate solution is not easy. It has to take into account that, especially in the case of collective actions, the victims already suffer strong disadvantages vis-à-vis the infringers and their right to compensation is likely to be void unless they have efficient legal instruments to force the defendants to disclose relevant information.

4.7. How damages should be determined

In June 2011 the European Commission issued a draft Guidance Paper 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*'.⁸¹ The Guidance Paper aims to offer assistance to courts and parties involved in actions for damages by providing economic and practical insights on the main methods and techniques available to quantify the harm. It describes a number of methods and techniques that have been developed in economics and legal practice to establish a suitable reference scenario. Also, the Guidance Paper outlines the underlying assumptions behind the proposed models and the relevant data that may need to be collected to populate the empirical analysis. It goes beyond the scope of this study to discuss these methods and techniques, but it should be stressed that the same methods and techniques apply irrespective of the number of victims of an antitrust infringement; that is, they can be used in the context of both individual and collective actions.

4.7.1. Punitive damages

An important principle in many national jurisdictions is that injured parties are only entitled to be compensated for the harm they actually suffered. The European Parliament stated in its recent resolution of 2 February 2012 '*Towards a Coherent European Approach to Collective Redress*', that this provision should apply also to collective actions, as '*the horizontal framework should cover compensation only for the actual damage caused, and punitive damages must be prohibited*' (para. 20).

Multiple or punitive damages have the merit of increasing the expected costs resulting from illegal conducts and of providing strong incentives for private parties to investigate, detect, and prosecute antitrust violations.⁸² Multiple damages can also affect the rate of settlement. They may encourage defendants to settle early in order to avoid the risk of punitive damages in trial. However, many observers have mentioned punitive trebled damages as one of the major causes behind the proliferation of unmeritorious claims in the US. Trebled damages, especially if coupled with contingency fees payment schemes, may indeed create strong incentives for claimants (and/or for their lawyer) to bring an action even when they are meritless because of the large sum they would gain if they were successful. The fear of losing in trial may induce defendants to accept extorsive settlements by claimants that bring frivolous suits.

⁸¹ European Commission, *Draft Guidance Paper – Quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty*, http://ec.europa.eu/competition/consultations/2011_actions_damages/index_en.html.

⁸² For an in-depth discussion of punitive damages, see Easterbrook (1985) and Cenini et al. (2011).

4.7.2. Passing-on arguments

In cartel cases, or in exploitative abuses, the victims of the anticompetitive conduct pay an inflated price to purchase the relevant product. When the direct purchasers are firms, the overcharge may be partially or fully passed on to indirect purchasers (other firms or end consumers). This phenomenon is called 'passing on' and matters for three reasons.⁸³

1. First (*passing-on defence*), by passing on the overcharge, direct purchasers mitigate their *damnum emergens*, as the extra cost they have borne to purchase the cartelised good/service is partially compensated by the extra revenue they obtain by selling their product at a higher price.
2. Second (*passing-on offence*), the higher price charged to indirect purchasers is likely to reduce the demand for the products of the cartel's direct victims. The lower quantity they sell (referred to as 'output' or 'volume effect') entails the loss of the profits made on these sales (*lucrum cessans*).
3. Third, if passing-on is present, the cartel harms direct purchasers and indirect purchasers.

As pointed out by the European Commission in the draft Guidance Paper on *Quantifying harm*,⁸⁴ calculating the passing-on is very complex. If passing-on arguments were not permitted, damages actions would be greatly simplified. This is a clear advantage of impeding all parties raising this type of issues. However, this advantage comes at the cost of creating significant distortions in the redress system, which would fail to achieve its fundamental goal of allowing all victims to obtain full compensation, but not more than this. In particular, direct purchasers may receive compensation that is above or below their actual harm (depending on the relevance of the output effect) and indirect purchasers would be de facto deprived of their rights to be compensated.

We believe that the calculation of damages in collective claims should follow the same approach as in individual claims. Establishing presumptions or easing the burden of proof of the claimants in collective actions is likely to distort the outcome of the trial and encourage unmeritorious claims.

4.8. Incentives to settle

Out-of-court arrangements provide a quicker and less costly route than court litigation to settle disputes over antitrust infringements. They allow compensating injured parties in a more timely manner, at the same time placing less stress on the judicial system. Procedural rules may facilitate and encourage both claimants and defendants to settle before reaching the trial stage. We summarise our findings in the following table:

⁸³ Even if 'passing on' is generally regarded as a defence, it is not always true that when this economic phenomenon is taken into account the overall amount of damages to be awarded is reduced. This is the reason why we refer to 'passing-on arguments' and also describe a 'passing-on offence' though this latter expression is less widely used.

⁸⁴ European Commission, *Draft Guidance Paper – Quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty*, (http://ec.europa.eu/competition/consultations/2011_actions_damages/index_en.html).

Table 12: Impact of incentives to settle of various procedural rules

| Rule | Impact on incentives to settle | Member States where the rule applies |
|--|---|---|
| Opt-out model | Allows 'global peace' settlement | P (pure opt-out); BG, DK, ES, FR, GR, NL, S, (hybrid) |
| Funding mechanisms: <i>Contingency fees</i> | Still debated, but the prevalent view is that it provides the right incentives to settle | A, DK, FIN, GR, H, I, LT, ES, UK |
| Allocation of costs: | | |
| - <i>each party pays</i> | Creates the risk of nuisance-value settlements | None |
| - <i>loser pays</i> | Encourages settlement | All Member States |
| - <i>partial fee-shifting rule</i> | Encourages good faith negotiations and may further reduce the costs of settling | UK* |
| Recovery of legal costs | Partial-shifting rules encourage parties to make credible offers | UK |
| Punitive damages | Fosters settlements but coupled with other rules (contingency fee, pre-trial discovery) may determine 'blackmail settlements' | None |
| Pre-trial disclosure | Facilitates settlements as it increases convergence of the parties' expectations on the outcome of the process | UK, IR, CY |

Source: Lear; **Note:** * This information is not available for other Member States.

A further procedural rule that can influence the rate of settlement is the joint and several liabilities of the defendants, which is typical in cartel cases. Joint and several liabilities make all defendants fully liable for the damages caused by unlawful joint conduct. Under this rule a claimant may seek to recover the full damage from any one of the cartelists. This may encourage defendants to settle at an early stage and possibly for a relatively low amount of damages, leaving the remaining defendants liable for almost the entire damage caused by the cartel. As a result, it has been said that this rule can cause a 'race' to settle, especially in the presence of multiple damages, and can determine unfair damage distribution among the defendants, leaving *'defendants that had a small or no role in the overall anticompetitive scheme with disproportionately large potential liability'*.⁸⁵

The recourse to out-of-court settlements can be stimulated through the provision of alternative mechanisms to resolve disputes outside the judicial process (ADR) which may encompass different forms ranging from mediation or arbitration to a variety of 'hybrid' processes by which a neutral person/arbitrator facilitates the resolution of legal disputes without formal adjudication. The law and economics theory of settlement suggests that parties may fail to settle because they have divergent expectations about what will happen at trial (Landes 1971, Gould 1973). By facilitating exchange of information between parties and dampening client-lawyer agency problems,⁸⁶ ADR can efficiently help to overcome this problem.

⁸⁵ See AMC *Final Report and Recommendations* (2007), Recommendation n. 46.

⁸⁶ According to Mnookin (1998): '*Principal-agent problems can also act as a barrier to settlement that a mediator may help overcome. A lawyer may want to continue a dispute in order to increase his fees; or a manager, whose conduct gave rise to a dispute, may seek vindication in circumstances where it would serve the interest*

4.9. Conclusions

Various procedural and substantive rules may affect the incentives of the parties in a collective action for antitrust damages. In general there are no solutions that are clearly more desirable than others. Rather, they have advantages and disadvantages. However, we believe that, when possible, the choice should be based on the objective of encouraging collective actions that are well-grounded and discouraging those that are meritless.

- **Opt-in versus opt-out model:** The opt-in model limits the risk of frivolous actions and better preserves individual liberty. Yet this model may also discourage meritorious actions when the value of the harm suffered by each potential claimant is very low and prevents the defendants from extinguishing their liability with a single settlement agreement.
- **Commonality:** It is not possible to devise simple and specific rules to identify any cases that are better treated on a collective basis. A general criterion is that a collective action should be admissible when the action refers to the same facts and the same antitrust infringement and when the court can follow a common reasoning for all the claimants, using the same body of evidence.
- **Standing:** A collective redress system for antitrust infringement may benefit from both representative actions and group actions. Consumers' associations may facilitate a collective action as they may have the ability to collect the required funds and because they can provide competent and loyal services to the group members. However, there seems to be no reason to restrict the ability of other subjects to bring a collective action to claim compensation for diffuse damage suffered because of an anticompetitive conduct.
- The collective redress system should also be opened to **enterprises** insofar as they are in the same situation of asymmetry with respect to the defendants as the final consumers. This means that a new or special definition should be adopted, so that only very small enterprises (i.e. micro businesses whose situation and needs are comparable to that of consumers) are allowed to participate in collective redress mechanisms.
- Particular attention should be devoted to the **funding mechanisms** and the **allocation of costs**. This assessment is based on the belief that the main obstacles to the proper functioning of such a redress system stem from the inability of a dispersed group of victims to fund the action. In order to provide effective protection of consumers' right to compensation, this obstacle still needs to be lowered. This means that any possible funding solution should be allowed. The concern that law firms, through contingency fees arrangements or private funds, may make a business out of these actions is lacking reasoning. However, we believe that it would not be wise to reduce the funding problem by creating an *ad hoc* exception to the 'loser pays' principle. This principle is another way of affirming that those that impose an unjust cost on others should be responsible for it, even if the cost results from a legal action rather than anticompetitive conduct. Respecting this principle might be the most important safeguard against unmeritorious claims.

of the corporation to settle. A neutral person/arbitrator may be able to facilitate settlement by getting the right people to the table and helping them to understand their underlying interests'.

- The tools available to allow the claimant **access to evidence** may play an important role, and yet it is extremely difficult to strike the right balance between conflicting and legitimate interests. On one hand is the interest of the claimants to obtain access to documents and information that are indispensable to proving the antitrust violation and the harm suffered, and that are in the hands of the infringers. On the other hand is the interest of the defendants in avoiding the costs of satisfying a disproportionate request of disclosure and of maintaining confidentiality on documents that contain business secrets and that are vital for their commercial activities.
- The **quantification of damages** in a collective action should follow the same principles that are used in individual actions. Presumptions in favour of the claimants or a reduction of the burden of proof are likely to encourage unmeritorious claims. The same is likely to result from the provision of punitive damages. Moreover, the principle according to which the victims of an antitrust infringement have a right to be fully compensated for the damage they suffered implies that all passing-on arguments should be allowed.
- Finally, out-of-court **settlements** should be encouraged as they provide a quicker and less costly way of resolving a dispute over an antitrust infringement. In general, any rules that impose the litigation costs on each party and that allow them to exchange their views on the merits of the case, and to obtain the required evidence to prove or disprove the anticompetitive infringement and the harm it caused, increase the parties' incentive to find a proper solution to their dispute. In this respect, settlements can be facilitated by the provision of various forms of ADR systems.

5. INTERACTION BETWEEN PUBLIC AND PRIVATE ENFORCEMENT IN ANTITRUST

KEY FINDINGS

- It would be advisable to adopt a uniform approach within the EU on the binding effect of decisions made by the national competition authorities.
- Leniency programmes are crucial to fighting cartels. The private enforcement of competition law should carefully avoid jeopardising the effective functioning of these programmes. In this respect, some consideration should be given to the possibility of providing some protection from civil responsibility to the first leniency applicant.
- The documents collected by competition authorities during the administrative proceeding are an important source of information for the purposes of follow-on actions. It seems that the current Regulation regarding public access to documents held by the European Parliament, the Council and the Commission provides a good balance of the various interests. The principles set in this Regulation could be extended to access to documents held by the national competition authorities.
- Access to documents provided by the leniency applicants should be limited in order to protect this enforcement tool, unless there are other forms of protection in favour of the leniency applicants, such as immunity from civil responsibility.

The private enforcement of competition law interacts with the public enforcement performed by the European Commission and the NCAs. Some procedural features of the public enforcement may have an influence on the actions for damages and vice versa. This raises several issues that concern all actions for damages in antitrust, both individual and collective; hence we shall refer generically to damages actions.

5.1. Binding or non-binding effect of public decisions?

The decisions reached by specialised administrative authorities on infringements of EU competition law could be binding for follow-on damages actions or they could just represent evidence that should be taken into account during follow-on actions.⁸⁷ In the former case, the claimants in a follow-on action for damages have only to prove the harm suffered and the existence of a causal link between this harm and the infringement, but do not have to provide evidence that the infringement took place. In the latter case the decision represents a strong piece of evidence in favour of the existence of the infringement, but the defendants can rebut it.

⁸⁷ For the legal status of the decisions of the national competition authority in each Member State, see Figure 3 in section 1.1.2. Additionally, Figure 7 in section 1.1.4. reports the legal status of a decision made by an NCA in a different Member State.

Whether such decisions should be binding or not is controversial. On one hand there is the claim that making these decisions binding in follow-up damages actions is positive because:

- it saves judicial resources, as it is not necessary to perform a new investigation on the alleged infringement;⁸⁸
- gives an incentive for firms to settle rather than litigate.⁸⁹

On the other hand it is argued that antitrust violations, at EU level and in many Member States, are ascertained through an inquisitorial system in which the prosecutorial function is combined with the adjudicative function. Since this system is more prone to biases,⁹⁰ damages actions would be less 'fair' if they took the conclusions of these investigations for granted.

Currently, under Article 16 of Council Regulation (EC) No 1/2003, if the European Commission has adopted a decision finding that one or more undertakings have violated competition law, a national court ruling on an action for damages, brought against one or more of the same undertakings on the basis of the same infringement, must take the existence of that infringement as proven.

In some Member States⁹¹ national law similarly provides that the decisions on cases concerning violations of EU competition law reached by the NCA of that Member State are binding for the courts who decide on follow-on damages actions. For example, section 58A of the UK Competition Act confers a binding effect on decisions of the OFT and of the CAT. In Germany section 33(4) of the Competition Act goes even further and confers a binding effect not only on all the decisions reached by the Bundeskartellamt, but also on those reached by all the other NCAs in the EU. In other Member States, instead, (e.g. Italy) a final decision by the NCA of the same country represents only *prima facie* evidence that can be rebutted.

Hence the decisions reached by the European Commission are binding for all national courts, whereas the legal value of the decisions reached by NCAs varies across Member States and differs depending on whether the NCA is from that Member State or not.

A uniform approach to this issue within the EU may be needed to give all EU consumers and companies the same level of legal certainty and to limit any form of forum shopping. At the same time firms' right of defence should not be unfairly restricted. Hence it may be considered appropriate to render the decisions made by the NCAs binding, provided that the defendants had been given the same opportunities to defend themselves during the administrative proceeding that they would have had before the European Commission.

⁸⁸ See Komninos (2006) and Wils (2009).

⁸⁹ Baker (2003) argues that the case for such a rule is stronger in countries where private claimants do not have available the full range of discovery devices available to US claimants.

⁹⁰ Indeed there is a risk that the decisions may be affected by a prosecutorial bias (see Wils, 2004) and a self-confirming bias, see Kühn, 2002. See also Neven (2006) for an in-depth discussion of the limits of the inquisitorial system.

⁹¹ See Figure 4 in section 1.1.2.

5.2. Interaction with procedures specific to antitrust infringements

5.2.1. Interaction with leniency programmes

In almost all Member States (except Malta) and at EU level there are leniency programmes in place that reward undertakings that cooperate in detecting and collecting evidence on cartels with immunity from or reduction of fines. These programmes were first established in the US from 1978⁹² onwards, then adopted by the European Commission in 1996⁹³ and subsequently introduced in many Member States, especially thanks to the adoption in 2006, within the ECN, of a Model Leniency Programme. These programmes have proved very successful in increasing the rate of detection and punishment of anti-competitive horizontal agreements, because they reduce the pay-off from continuing the cartel and increase the pay-off from deviating and collaborating with competition authorities in uncovering the cartel.

However, the existing programmes in the EU⁹⁴ do not protect leniency applicants from the civil law consequences of their participation in the cartel (except, to some extent, in Hungary).⁹⁵ Furthermore, the general rules of tort law of all Member States provide that when several parties are responsible for the same damage, as in the case of a cartel, they are jointly and severally liable for it. This means that each victim is entitled to claim their entire loss from each liable party, including the whistleblower, who may afterwards claim from the other co-cartelists a sum corresponding to their share in the liability.

It is generally recognised that damages actions may reduce the attractiveness of leniency programmes for cartel participants if their cooperation with the competition authority increases the chance that the cartel's victims will bring a successful suit. Moreover, since the leniency applicants admit participation in the cartel, they give up one possible and decisive defensive argument in the subsequent civil procedure and therefore become the most convenient target for the action. Hence damages actions, and especially collective actions, may jeopardise the functioning of a leniency programme and contrast with the primary objective of the antitrust public enforcement, i.e. deterrence.

For this reason some academics and commentators have argued that successful leniency applicants should also be protected from actions for damages.⁹⁶ Generally, these proposals also suggest total immunity from civil liability for the first successful leniency applicant (who receives immunity from the fine on an EU level) and call for the introduction of different mechanisms to protect the right of the victims to be fully compensated (see Hammond 2000, McAfee, Mialon and Mialon 2005a and 2005b).⁹⁷ Critics of this proposal argue that it would be unfair and discriminatory that the other co-cartelists should remain jointly and severally liable for the damages caused by the whistleblower. Also, in case the

⁹² The US Leniency Programme was revised in 1993; in addition a new Individual Leniency Programme that provided protection to individuals independently of their company was introduced in 1994.

⁹³ The EU Leniency Programme was significantly revised in 2002 and in 2006.

⁹⁴ See box on US system in section 1.1.

⁹⁵ In Hungary the cartel victims can enforce a claim against the immunity recipient only to the extent that they cannot obtain compensation from the other cartelists. However, the other cartelists, who compensated the victims, remain able to claim contribution from the immunity recipient.

⁹⁶ See Baker (2003), Cauffman (2011) and Kersting (2008).

⁹⁷ For example, it has been suggested that all the other cartelists would remain totally and jointly liable for all the damages (including those caused by the leniency applicant). It has also been proposed that leniency applicants may be required to contribute to the damages only if the other cartelists could not compensate all the victims. See Baker (2003) and Cauffman (2011).

co-cartelists are insolvent, victims may receive only partial compensation (see Cauffman, 2011; Wils, 2009 and CEPS 2008). Moreover, it would be contrary to elementary principles of law if victims could not claim the whole of the damages to be compensated.

So far follow-on damages actions have not impinged on the success of the leniency programmes because of the very limited recourse to damages actions. However, the situation may change rapidly if there is an increase in private litigation and if, as discussed above, claimants are allowed access to leniency statements. Hence the risk of rendering ineffective a powerful policy instrument looms ahead and cannot be overlooked. The way forward consists in determining the relative importance of these two possibly conflicting policy objectives – deterring cartels and ensuring full compensation to their victims – in order to determine the combination of legislative changes that allows ensuring the preferred mix.

We believe that some consideration should be given to the possibility of reducing the risk and costs stemming from civil responsibility for the first leniency applicant. An option would be that of limiting the civil liability of the immunity applicant in the administrative procedure to the damage he caused to his own clients and exclude him from the obligation to be jointly liable for the whole amount of the damage. A more extreme option is to grant immunity from civil responsibility to the first leniency applicant, unless the other cartelists become insolvent and the first leniency applicant is the only firm that can repay the cartel's victims.

The first solution may be seen as a compromise between the two policy objectives: it recognises and rewards the special contribution that the immunity applicant gives to the discovery of the cartel and, at the same time, does not contradict the principle of liability.

The second, more extreme, solution might be seen as biased towards the deterrence objective. Indeed, it should be borne in mind that, according to the most advanced economic literature,⁹⁸ the leniency programme's effectiveness in deterring secret cartels depends on its ability to differentiate the treatment of the first leniency applicant from that of subsequent leniency applicants. The reason is that a leniency programme deters cartels by increasing the cartelists' incentive to deviate from the common collusive conduct. This occurs if the deviant is significantly rewarded for his deviation. Since the potential cartelists anticipate this effect, the cartel becomes unprofitable. Hence the greater the advantage that the first leniency applicant obtains from his cooperation with the enforcer with respect to how the other cartelists are treated, the stronger the negative impact on the sustainability of a cartel and the stronger the deterrence effect.

5.2.2. Interaction with cartel settlement procedures

Cartel settlement cases also risk being affected by follow-on damages actions for reasons akin to those discussed with respect to leniency programmes. When firms adhere to this procedure they acknowledge their involvement in the cartel in exchange for a 10% reduction of the fine and a fast and less detailed final decision. The risk of a follow-on action that this indirect admission of responsibility may bring could discourage firms from accepting to follow this simplified procedure. Hence the same general considerations made above apply here.

⁹⁸ See Spagnolo (2004) and Buccirosi and Spagnolo (2007).

However, one must consider that the contribution of the settlement procedure to the public enforcement of the cartel prohibition is less crucial. Indeed, while the leniency applicant provides elements that allow the competition authority to uncover a secret cartel or to legally prove its existence and scope, the settling firms only guarantee a less costly administrative procedure. Moreover, it is very likely that firms decide to settle only when the competition authority has gathered strong evidence against them. Therefore the decision to settle will only marginally affect the chance to be involved in a follow-on action. For these reasons, it seems much less advisable to provide any form of protection from civil liability for these firms.⁹⁹

5.2.3. Interaction with commitment decisions

Article 9 of Council Regulation (EC) No 1/2003 provides that the European Commission can close an investigation on an antitrust violation with a so-called 'commitment decision' if the companies under investigation offer commitments which remove the Commission's initial competition concerns.¹⁰⁰ National legislations confer a similar power to many NCAs. Commitment decisions can be adopted in proceedings concerning either Article 101 TFEU or 102 TFEU. However, the case law has clarified that the Commission cannot apply Article 9 to cartels.

Commitment decisions pose a different problem in that, for the sake of quickly removing the distortion to competition, the Commission and the NCAs may close the investigation without ascertaining whether the firms involved have or have not infringed the law before the commitment was made. This deprives the potential victims of a useful source of information (i.e. the NCA's file), and of a legal (in some cases binding) precedent. In order to protect the injured party's fundamental right to adequate compensation, the European Commission and the NCAs may decide to limit the use of this type of decision.

5.3. Access to information held by the Commission and NCAs

In the case of damages actions related to antitrust violations there can be a considerable asymmetry of information between defendants and claimants (in particular when the violation consists in a cartel).¹⁰¹ Hence access to the evidence collected during the antitrust investigation can be essential for bringing a claim.

5.3.1. Access to the file in general

Currently, where the Commission has competence over a case, according to Regulation EC No 1049/2001 regarding public access to documents held by the European Parliament, the Council and the Commission, any third party may claim access to the case files. However, Article 4 provides some exceptions to this right of access. In particular, according to paragraph 2 of this provision, the European Commission should refuse access to a document if its disclosure would undermine the protection of the commercial interests of a natural or legal person, court proceedings and legal advice or the purposes of inspection, investigation and audits, unless there is overriding public interest in disclosure.

⁹⁹ It must be added that generally the settlement procedure involves all the cartelists or most of them. Hence any form of protection from civil liability would severely reduce the victims' ability to obtain compensation.

¹⁰⁰ Commitment decisions are very different from cartel settlements. The former cannot be adopted when the alleged infringement is a hard-core cartel. Moreover, when a commitment decision is adopted, the competition authority does not establish the existence of an infringement and the alleged infringer is not sanctioned.

¹⁰¹ See D'Ostuni & Siragusa (2006).

The scope of this exception has been recently clarified by the General Court in the *CDC Hydrogene Peroxide* case.¹⁰² In this judgement the Court had to establish whether the European Commission had legitimately rejected the applicant's request to access the 'statement of contents' of the case file of the *Hydrogene Peroxide* proceeding that was concluded by the Commission with a decision finding that nine undertakings had formed a cartel. According to the General Court, the refusal to grant access was illegitimate as none of the above-mentioned exceptions could be applied. In particular, first the Court noted the statement of contents, which is just a list of documents and does not in itself contain information that could go against the commercial interests of the addressees of the Commission's decision. Second, the Court rejected the argument made by the Commission that access to the statement of content could have facilitated the preparation of a damages action and this would have diminished the willingness of firms to cooperate with the Commission.

The Court opined that the exceptions set in Article 4(2) of Regulation 1049/2001 must be interpreted strictly and that access to the statement of contents could not undermine the protection of the *purposes* of its investigation because, in that specific case, the Commission, two years earlier, had already closed the proceeding with an infringement decision. The Court added that if the interpretation proposed by the Commission were to be accepted, the right to fullest possible public access to documents established with Regulation No 1049/2001 might be denied by the Commission merely by referring to a possible future adverse impact on its leniency programme. The Court pointed out that this programme is not the only means of ensuring compliance with EU competition law, and that actions for damages make a significant contribution to the maintenance of effective competition in the EU.

5.3.2. Access to leniency applications

Overall, granting access to information allows claimants to better assess their case and reduces the costs of collecting information for the claimants. However, the issue becomes complex when the documents in the file contain sensitive information, in particular when they include the corporate statements submitted to the European Commission/NCA as part of a leniency application. The claimants would clearly benefit from having access to this information. However, its disclosure could negatively influence the incentives to apply for leniency (especially when leniency applicants do not enjoy protection from actions for damages, see Section 5.2.1), which has proved to be a very powerful and effective instrument in fighting cartels.

So far the Commission has strongly protected leniency-related documents. In a recent judgement on a reference from the district court of Bonn in Germany (*Pfleiderer case*)¹⁰³ the ECJ has ruled that EU law does not prohibit a third party, who has been adversely affected by a breach of competition law, from having access to a leniency application by the infringer and has held that it is for the national judge to determine the conditions under which access to leniency material can be granted to someone seeking to obtain damages. The judge needs to take into account and weigh all the interests protected by EU law, namely the need to ensure the effectiveness of leniency programmes and to support antitrust damages actions. On 30 January 2012 the German court which had brought the case before the ECJ concluded that access to leniency documents should be denied.

¹⁰² Judgment of 15 December 2011 in the Case T-437/08.

¹⁰³ Judgement of 14 June 2011 in the case C-360/09.

In an *amicus curiae* observation to the UK High Court relating again to an access to leniency documents,¹⁰⁴ the European Commission has reiterated that it considers that the weighing of the different interests leads to the general conclusion that the information specifically prepared for the purpose of an application under its leniency programme should not be disclosed. However, the Commission also stated that it does not object to the disclosure of other information, such as pre-existing information and documents in the possession of the parties that were used in the preparation of leniency submissions.

To solve this issue, which is particularly important, one must bear in mind that even if public and private enforcement are in general complementary instruments, in the EU the former plays a decisive role, as it is the primary instrument to achieve an effective deterrence and prevent competition from being restricted or distorted in the first place. Hence, while a broad discovery of documents collected during the administrative proceeding has the clear advantage of rendering more effective the right to compensation of the injured parties, it is nonetheless advisable to limit access to the leniency statement to protect an essential tool to fight cartels, unless other forms of protection (discussed below) are in place.

5.4. Limitation periods

All legal systems have a limitation period after which any legal action is forever barred.¹⁰⁵ In the case of antitrust violations, however, there is a risk that such periods may be too short to provide effective protection to the damaged parties because often these may become aware of violations only after a long delay. For example, consider the case of a cartel that causes a rise in prices. Consumers may become aware of it only when a decision by a competition authority is available to the public. In order to prevent this information gap penalising the victims of antitrust infringements and depriving them of the right to a fair trial and to compensation, it is necessary that the 'clock starts ticking' only when it is reasonable to assume that the victim is aware of the infringement. In this respect, it may be advisable to establish a rebuttable presumption that the claimants were in a position to know that they had been the victims of an antitrust infringement since the date in which the final decision of the competition authority was published. Indeed, this decision contains all the factual elements that allow a firm or a consumer to understand whether they made purchases at an inflated price or were excluded from some market opportunities.

5.5. Role of national competition authorities and the European Commission as *amicus curiae* and of the ECJ in preliminary rulings

Pursuant to Article 15(1) of Council Regulation No 1/2003, the Commission and NCAs may submit, on their own initiative, written observations concerning the application of EU competition rules ('*amicus curiae*' observations) to courts of the Member States as well as oral submissions, provided the judge gives permission. Further, national courts may ask the Commission for its opinion on economic, factual and legal questions relating to the application of EU competition law.

¹⁰⁴ Commission observation of 03/11/2011 to the UK High Court in the National Grid Case. National Grid alleged that it had suffered substantial losses resulting from overcharging by the participants in a cartel who fixed the prices of gas-insulated switchgear. To support its case, it requested access to the leniency documents prepared by one of the members of the cartel and to the confidential version of the European Commission's fining decision, which contains information submitted as part of the leniency application.

¹⁰⁵ For a description of the main features of this rule in the Member States see Figures 8-10 in section 1.1.4 and 2.1.1.

Allowing the Commission to play such a supporting role limits the risk of divergence in the application of EU competition law, which is high in a decentralised system, and to benefit from the Commission's experience. A similar role could also be given to NCAs with respect to their national courts, so that judges could benefit from the technical expertise on antitrust matters of the more specialised administrative authorities (see Wright 2008). Moreover, Article 267 TFEU allows for questions of interpretation of Articles 101 and 102 TFEU arising in private litigation before national courts to be referred to the ECJ. In this case the Court of Justice provides an authoritative interpretation of European law which is binding on the national court, whereas the opinion of the Commission issued on the basis of Article 15(1) of Regulation 1/2003 concerns only economic, factual and legal matters and is not binding.

5.6. Conclusions

As recently pointed out by Alexander Italianer, Director General of the European Commission's DG Competition, '*public and private enforcement are complementary tools to enforce competition law and [...] we need both types of enforcement*'.¹⁰⁶ The main objectives of the public enforcement system are to detect infringements, prevent their continuation and, especially, ensure effective deterrence. While the private enforcement system may contribute to deterring anticompetitive behaviours, its main objective is to allow the victims of the infringement to obtain a full restoration of the suffered harm.

These two goals are not necessarily in conflict: the investigative activities of the public enforcers bring to light antitrust violations that would otherwise have remained unknown and thus allow victims to claim damages that they would not even have been aware of. The damages paid by the infringers to the winning claimants increase the value of the overall loss stemming from an ascertained infringement and improve the deterrence properties of the entire law enforcement system.

Yet there are some circumstances in which the public enforcement goals and the private goal conflict. When this situation arises the right balance should be found between the various interests at stake. To do so we believe that one has to bear in mind that effective deterrence is the best way to guarantee that the potential victims of an antitrust infringement are never actually injured. This for two reasons: first, preventing an anticompetitive conduct avoids damage being caused and therefore is obviously the best way to 'restore' the well-being of consumers, competitors and other undertakings; second, even a perfect private enforcement system cannot restore all the social benefits that stem from well-functioning competitive markets and that are lost when competition is lessened or distorted.

¹⁰⁶ Italianer A. (2012), *Public and Private enforcement of competition law*; speech at 5th International Competition Conference, Brussels, 2012. (available at http://ec.europa.eu/competition/speeches/text/sp2012_02_en.pdf).

6. RECOMMENDATIONS

Building on the results of the previous chapters, we provide the following recommendations:

6.1. Legal issues

6.1.1. Legal instrument: horizontal or antitrust-specific

In our view, an efficient collective redress system in antitrust should be introduced through a **sector-specific measure**. An antitrust-specific measure would be focused on enhancing private antitrust enforcement by removing inequality between the Member States in the level of judicial protection of individual rights directly stemming from Articles 101 and 102 TFEU. Moreover, a sector-specific legislative initiative would respect the subsidiarity and proportionality principles, since a legislative act at EU level could best guarantee that full effect is given across the EU to Articles 101 and 102 TFEU in damages actions, without going beyond what is necessary to achieve those objectives. On the contrary, a horizontal system for collective redress would be less functional for antitrust specificities, and further initiatives on some specific sector-related issues would be needed (in antitrust matters e.g. passing on, access to evidence and discovery rules, interaction with leniency).

6.1.2. Legal basis: Article 103 TFEU

Among the legal bases analysed, **Article 103 TFEU** seems to be the most appropriate Treaty provision for an EU legislative initiative in the field of collective redress in antitrust. A collective action under Article 103 TFEU

- (i) would be focused on antitrust specificities,
- (ii) would apply to cross-border litigation as well as to domestic litigations, and
- (iii) would be available for SMEs as well as consumers.

It would not apply to national competition law infringements, which are competence of the Member States, thus

- (iv) it would be an EU competition law specific procedural measure.

The possibility of a dual legal basis (Articles 103 and 114 TFEU to be read in conjunction with Article 169 TFEU) was also considered in this study. However, we think that a dual legal basis may raise **issues of incompatibility between the ordinary legislative procedure** provided for by Article 114 TFEU **and the special legislative procedure** provided for by Article 103 TFEU. Article 103 TFEU as legal basis seems to be more coherent with the ECJ case law, which requires that every legislative act should be based on one single legal basis. The choice of Article 103 TFEU as a legal basis will imply a special legislative procedure with consultation of the European Parliament.

6.1.3. Legislative Act: directive or regulation

In our view, the most effective legislative act for a sector-specific initiative in EU competition law would be a **regulation**. Since existing national collective redress systems have general scope and are not limited to competition law enforcement, the introduction of an *ad hoc* special mechanism by means of regulation would create a uniform, efficient EU procedural instrument to be added to existing national ones. On the contrary, a directive has to be implemented by national legislators. Problems of compatibility with existing national legislations and risk of the adoption of non-harmonised solutions across Member States might then arise.

6.2. Incentives and safeguards

Opt-in vs. opt-out: Besides being more in line with European legal tradition, the opt-in model has the important advantage of limiting the risk of unmeritorious claims, and it appears overall preferable to the opt-out model. However, it might be useful to also consider **hybrid solutions** that, while retaining opt-in as the general rule, permit adopting an opt-out model in some clear and limited circumstances, such as for instance when injured consumers have suffered a damage of small value and are therefore unlikely to opt in a collective action. Courts may be granted 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.

Commonality: A collective action should be admissible when the action refers to the same facts and the same antitrust infringement and when the court can follow a common reasoning for all the claimants, using the same body of evidence.

Standing: Both, **representative actions and collective actions**, should be allowed. There seems to be no reason to restrict the ability of any subject to bring a collective action to claim compensation for a diffuse damage suffered because of anticompetitive conduct. The collective redress system should also be opened to small or medium enterprises provided that a new or special definition is adopted, so that only very small enterprises (i.e. micro businesses whose situation and needs are comparable to that of consumers) are allowed to participate in collective redress mechanisms.

Funding mechanisms: In our view the lack of effective funding mechanisms has been one of the causes behind the so far scanty development of collective actions in Europe. **Contingency and conditional fees** are efficient funding solutions as they allocate the risk to the subject that can bear it more efficiently and force lawyers to act as a gatekeeper to justice pre-assessing the merits of a case. The possibility to transfer claims to a third party, who then brings the action, may provide similar benefits. These forms of funding may pose the risk of distorting lawyers' incentives and promoting excessive/unmeritorious litigations (see some US class actions). However, in our opinion the US experience is the result of a combination of specific features and procedural rules that together create conditions under which claimants are more willing to bring actions and defendants are pressured into settling cases regardless of their merit. Allowing greater flexibility in the choice of the funding mechanism does not in itself seem likely to determine an outcome similar to the US.

Cost allocation between parties: The '**loser party pays**' rule is currently applied in all Member States. This rule is efficient because by forcing parties to consider the entire cost of the trial when making decisions it discourages frivolous claims and promotes the use of cheaper alternatives to obtain compensation (e.g. out-of-court settlements). It has been argued that this rule may increase the risk of bringing an action and reduce the incentives of consumers and SMEs to file a suit. Yet we have found no evidence that this is perceived as a major obstacle to collective actions in Europe.

Access to evidence: It is very difficult to balance the interest of claimants in obtaining access to documents and information that are in the hands of the infringers and the interest of the defendants in avoiding disproportionate requests for disclosure and the dissemination of business secrets. A proper solution may be, as suggested by the European Commission, to extend the legislation on the enforcement of intellectual property rights that discipline the disclosure of evidence to the opponent in civil litigation to antitrust cases.

Quantification of damages, punitive damages and passing-on arguments: Punitive damages are contrary to the principle set out in many national jurisdictions whereby injured parties are only entitled to be **compensated for the harm they actually suffered**. In addition, they tend to encourage unmeritorious litigation because of the large sum the claimants would gain in case of success. Punitive damages are thought to enhance the deterrence effect of private enforcement. However, in the European tradition deterrence has mainly been the objective of public rather than private enforcement. **Passing-on arguments** also respond to the same principle enunciated above. Although we recognise that computing the passing-on rate can be very complex in some cases, this should be nonetheless a crucial element **to take into account** in any damage quantification.

6.3. Interaction between public and private enforcement in antitrust

Legal status of public decisions: while the decisions reached by the European Commission are binding for all national courts, the legal value of NCAs' decisions varies across Member States. A step towards a more uniform approach within the EU on the **binding effects of NCA decisions could be beneficial** as it would provide more legal certainty for both claimants and defendants and it would limit forum shopping.

Treatment of leniency applicants: leniency programmes have proved to be very effective in fighting cartels. Any initiative in the collective redress area should then avoid jeopardising its functioning. Damages actions may reduce the attractiveness of leniency programmes for cartel participants if their cooperation with the competition authority makes them more likely to be exposed to damage claims by the cartel's victims. In this regard some consideration should be given to the possibility of **reducing the civil responsibility of the first leniency applicant**.

Access to information held by the Commission and NCAs: in our opinion the current Regulation regarding public access to documents held by the European Parliament, the Council and the Commission provides in general a good balance of the various interests. With regard to documents provided by the leniency applicants, we share the view of the European Commission that the disclosure of these documents should be **limited** to protect the effectiveness of this enforcement tool.

Strengthen the *amicus curiae* role: in order to strengthen the public-private enforcement interaction in collective antitrust claims, it seems advisable to establish a mandatory notification of the claim to the NCA of the Member State where the claim has been brought. The mandatory notification will be made by the claimant as a preliminary condition of the claim. The claimant may be required to send to the NCA a copy of the writ of summons and all relevant documents. Once the **NCA** receives the notification, it would be allowed (but not obliged) to **intervene in the process** (producing documents and evidence) within an established time limit in the name of public interest (i.e. the defence of the competitive structure of the market and the effectiveness of antitrust law enforcement).

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ANNEX 1: DETAILS ON THE ANALYSIS ON THE LEGAL ADMISSIBILITY OF AN EU-WIDE SYSTEM FOR COLLECTIVE REDRESS

The purpose of the following tables is to list the legal instruments adopted by the EU institutions in various areas. This overview provides references for choosing adequate legal bases on which an EU initiative in the field of collective redress in antitrust could be based.

| TABLE A JUDICIAL COOPERATION IN CIVIL MATTERS | | | | | | |
|---|-----------------|------------------|--|--|------------------------|--|
| Title | Legislative Act | Date | Objective | Legal basis | EU institution | References |
| Insolvency Proceedings Regulation (1346/2000) | Regulation | 30 June 2000 | Establishing common rules regarding the court competent to open insolvency proceedings, the applicable law, and the recognition of the court's decisions | Article 67, 81 TFEU; ex-Articles 61(c) and 65 TEC | Council | Council Regulation (EC) No. 1346/2000 of 30 June 2000 on insolvency proceedings, OJ L-160, 30.6.2000, p. 37. |
| The Service Regulation (1348/2000) | Regulation | 29 May 2000 | Improving and expediting the transmission of judicial and extrajudicial documents in civil or commercial matters for service between the Member States | Article 67 TFEU; ex-Article 61(c) TEC | Council | Council Regulation (EC) No. 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil and commercial matters, OJ L 160, 30.6.2000, p. 37. |
| The Evidence Regulation (1206/2001) | Regulation | 28 May 2001 | Improving, simplifying and accelerating cooperation between courts in the taking of evidence | Article 67 TFEU; ex-Article 61(c) of TEC | Council | Council Regulation (EC) No. 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil and commercial matters, OJ L 174, 27.6.2001, p.1. |
| The Brussels I Regulation (44/2001) | Regulation | 22 December 2000 | Regulating the jurisdiction of courts in civil and commercial matters | Article 67 TFEU; ex-Article 61(c) of TEC | Council | Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001, p.1 |
| Enforcement Order for uncontested claims Regulation (805/2004) | Regulation | 21 April 2004 | Introducing minimum standards to ensure that judgments, court settlements and authentic instruments on uncontested claims can circulate freely | Articles 67 and 81(2) TFEU; ex-Articles 61(c) and 65 TEC | Parliament and Council | No. 805/2004, Council and Parliament creating a European Enforcement Order for uncontested claims, OJ L 143, 30.4.2004, p. 15 |

| TABLE A JUDICIAL COOPERATION IN CIVIL MATTERS | | | | | | |
|--|------------------------|------------------|---|---|------------------------|--|
| Title | Legislative Act | Date | Objective | Legal basis | EU institution | References |
| Legal Aid Directive (8/2003/EC) | Directive | 27 January 2003 | Improving access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes. | Article 81(2) TFEU; ex-Article 65(c) TEC | Council | Council Directive No. 8/2002 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes OJ L 26 of 31.01.03, p. 41 |
| Payment Order Regulation (1896/2006) | Regulation | 12 December 2006 | Simplifying, speeding up and reducing the costs of litigation in cross-border cases concerning uncontested pecuniary claims in civil and commercial matters | Articles 67 and 81 TFEU; ex-Articles 61(c) and 65 TEC | Parliament and Council | Regulation of the European Parliament and of the Council (EC) No 1896/2006 of 12 December 2006, creating a European order for payment procedure, OJ L 399 of 30.12.2006, p. 1 |
| Small Claims Regulation (861/2007) | Regulation | 11 July 2007 | Establishing a European procedure for orders for payment | Articles 67 and 81 TFEU; ex-Articles 61(c) and 65(1)(c) TEC | Parliament and Council | No. 861/2007 Regulation of 11 July 2007 establishing a European Small Claims Procedure, OJ L 199 of 31.7.2007, p. 1 |
| The Mediation Directive (52/2008/EC) | Directive | 21 May 2008 | Making mediation compulsory or refusal to mediate subject to sanctions and allows for parties to make settlements directly enforceable in the courts | Articles 67 of TFEU; ex-Article 61(c) TEC | Parliament and Council | Council Directive No. 52/2008 on certain aspects of mediation in civil and commercial matters OJ L 136 of 24.05.08, p. 3 |
| Matrimonial matters and matters of parental responsibility Regulation (2201/2003) | Regulation | 27 November 2003 | Setting out rules on jurisdiction, recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility | Articles 67 and 81 TFEU; ex-Articles 61(c) 65 TEC | Council | Council Regulation No. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 338 of 23.12.2003, p.1 |
| Maintenance obligations Regulation (4/2009) | Regulation | 18 December 2008 | Providing a series of measures aimed at facilitating the payment of maintenance claims in cross-border situations | Articles 67, 81 TFEU; Articles 61(c) and 65 TEC | Council | Council Regulation No. 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations OJ L 7 of 10.01.09, p. 1 |

| TABLE B | APPROXIMATION OF LAWS | | | | | |
|--|-----------------------|------------------|--|-------------------------------------|------------------------|---|
| Title | Legislative Act | Date | Objective | Legal basis | EU institution | References |
| The Regulation on Consumer Protection Cooperation (2006/2004) | Regulation | 27 October 2004 | Stopping dishonest practices of traders targeting consumers living in other EU countries | Article 114 TFEU; ex-Article 95 TEC | Parliament and Council | Council Regulation No. 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation), OJ L 364 of 9.12.2004, p. 1 |
| The Unfair Commercial Practice Directive (29/2005/EC) | Directive | 11 May 2005 | Protecting the economic interests of consumers who conclude commercial transactions with traders | Article 114 TFEU; Article 95 TEC | Parliament and Council | Directive n. 29/2005 of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market, OJ L 149, 11.6.2005, p. 22 |
| The ADR Directive Proposal (COM/2011/793) | Directive | 29 November 2011 | Ensuring that all disputes between a consumer and a trader arising from the sale of goods or the provision of services can be submitted to an ADR entity | Article 114 TFEU | Commission | Proposal for a Directive of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (directive on Consumer ADR) |

ANNEX 2: NOTIFICATION OF THE DECISION OPENING THE PROCEDURE

The Insolvency Regulation establishes common rules regarding the court competent to open insolvency proceedings, the applicable law and the recognition of the court's decisions for cases where a debtor, whether a company, a trader or an individual, becomes insolvent. It is aimed at dissuading the debtor from transferring his/her assets or the judicial proceedings from one country to another in order to improve his/her legal position.

According to Recital 29 of the preamble to the Insolvency Regulation and Articles 21 and 22 thereof:

- Publication measures may be taken in any other EU country at the request of the liquidator (publication of the decision opening the insolvency proceedings and/or registration in a public register);
- Publication may be mandatory, but in any event it is not a prior condition for recognition of the foreign proceedings.

The publication of the decision opening the collective redress procedure shall follow the same principles:

- Publication measures may be taken in any other EU country at the request of the judge (publication of the decision opening the insolvency proceedings and/or registration in a public register);
- Publication may be mandatory, but in any event it is not a prior condition for recognition of the foreign proceedings.

NOTES

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT ECONOMIC AND SCIENTIFIC POLICY **A**

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