COLLECTIVE ANTITRUST DAMAGES ACTIONS IN THE EU: THE OPT-IN V. THE OPT-OUT MODEL[1]

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Abstract: The European Commission is currently trying to foster private enforcement of the EU antitrust rules since various studies have shown that the number of antitrust damages actions brought in the EU is low. It is, *inter alia*, proposing the introduction of opt-in collective actions and representative actions in the EU.
This paper aims to demonstrate that the Commission is wrong to completely exclude collective actions based on an opt-out model, which would arguably be necessary in cases involving multiple low value claims. First, the flaws in existing collective actions in a number of EU Member States and the actions proposed by the Commission will be analyzed. Second, the advantages and drawbacks of opt-out collective actions available in several Member States will be assessed. Finally, the paper will assess the feasibility of introducing opt-out collective actions in the EU and recommend what types of collective actions the EU should adopt.

Keywords: Collective action, opt-in collective action, opt-out collective action, class action, antitrust damages action, private enforcement, antitrust rules, European Union.

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1. Introduction

Today it is well established that a victim of an infringement of the EU antitrust rules may seek compensation for the loss he has suffered as a result of the infringement even though the Treaty on the Functioning of the European Union ("TFEU") does not expressly provide damages for infringements of Articles 101 and 102 TFEU. This European Union right to damages was recently confirmed by the ECJ in *Courage*[3] and *Manfredi*[4] where the Court held that any individual that has been harmed as a result of breaches of the EU antitrust rules may bring an antitrust damages action before the national courts seeking compensation for the loss that he has suffered regardless of whether he is a co-contracting party to the illegal agreement or a third party, as long as he can demonstrate the causal relationship between that infringement and the harm that he has suffered.

According to the ECJ, a right to damages for antitrust violations is necessary in order to ensure the full effectiveness of Article 101 TFEU and, in particular, the practical effect of the prohibition laid down in that provision.[5] Although the ECJ only refers to Article 101 TFEU [former Article 81 EC], it is evident that any individual that has suffered harm as a result of a breach of Article 102 TFEU would also be entitled to bring an action for damages, since the full effectiveness of Article 102 TFEU would also be put at risk if any individual could not claim damages for loss caused to him by abusive conduct.[6]

However, despite the European Union right to damages, the number of antitrust damages actions is still very low in the EU and private enforcement[7] of the EU antitrust rules is estimated to only account at most for 10% of all competition law enforcement in the EU.[8] This is somewhat surprising since Articles 101 and 102 TFEU have direct effect, meaning that individuals can rely on those Articles to enforce their rights before national courts.[9] Moreover, the principles of equivalence and effectiveness of European Union law require

[3] Case C-453/99 *Courage Ltd v. Bernard Crehan and Bernard Crehan v. Courage Ltd and Others* (*"Courage")*, [2001] ECR I-6297, § 24.
[4] Joined Cases C-295/04-C-298/04 *Manfredi v. Lloyd Adriático Assicurazion SpA*,[2006] ECR I-6619, § 61.
[5] Case C-453/99 *Courage v. Crehan*, [2001] ECR I-6297, § 26.
[6] *Cf*. LESKINEN, C., "*The possibility of third parties bringing EC antitrust damages actions – the case of Spain and Finland*" in ORTIZ BLANCO, L. and MARTÍN DE LAS MULAS BAEZA, R. (eds.), "*Derecho de la competencia europeo y español. Volumen VIII*", Dykinson, S.L., Madrid, 2008, p. 35-76, at p. 38-39. *Cf.* also Case C-282/95 P *Guérin automobiles v. Commission*, [1997] ECR I-1503, § 39, in which the ECJ held that "any undertaking which considers that it has suffered damage as a result of restrictive practices may rely before the national courts, […], on rights conferred to it by Article 85(1) and Article 86 of the Treaty".
[7] Private enforcement of the antitrust rules refers to the application of the antitrust rules by courts when they declare anti-competitive agreements null and void, grant injunctions and award damages to the victims of antitrust violations. However, for the purpose of this paper, the term "private enforcement" will only be used to refer to antitrust damages actions.
[8] *Cf*. "Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios", Report for the European Commission, Contract DG COMP/2006/A3/012, Final Report prepared by the Centre for European Policy Studies, Erasmus University Rotterdam and LUISS Guido Carli, Brussels, Rome and Rotterdam, December 21st, 2007 (hereinafter "External Impact Study"), at p. 28.
[9] Case 127/73 *BRT v. SABAM*, [1974] ECR p. 51, § 16.

Member States to ensure the same treatment of actions for safeguarding rights derived directly from Community law and similar domestic actions, as well as to ensure the effective exercise of those rights.[10] In addition, under Article 4(3) TEU, Member States have an obligation to ensure the application of European Union law and to refrain from measures contrary to the Union's objectives.

Given that there are no common Community *procedural* rules governing antitrust damages actions and, as a consequence, these actions are governed by national procedural rules, the possibilities of bringing antitrust damages actions vary from Member State to Member State.[11] The national procedural rules are very divergent and the divergences increase the risk of differences in treatment. They also lead to legal uncertainty since it is more difficult for victims and defendants to foresee the outcome of an action.[12] Moreover, the low number of antitrust damages actions that have been brought in the EU to date indicates that the current system of private enforcement is not working satisfactorily. For instance, the burden of proof in damages actions is high but, at the same time, the access to evidence tends to be limited.[13] Proving an infringement of the competition rules and the causal relationship between that infringement and the harm suffered is therefore a very complex task.[14] Other obstacles to bringing antitrust damages include, for example, the definition and quantification of damages, the cost of actions and too short limitation periods.[15]

Consequently, the incentives to bring damages actions are small in the EU. Furthermore, many of the victims of antitrust violations are consumers because they cannot pass on to anybody the overcharge that they have paid for a product or service given that they are at the end of the distribution chain and, therefore, they are likely to suffer most from the negative effects of antitrust violations in the form of increased prices, decreased quality and choice of products, etc. Thus, especially their possibilities of seeking damages should be enhanced.

In addition, even though the individual damages of consumers may often be fairly small, the aggregate damages of all consumers could be very significant. As a consequence, the gains of

[10] Case C-453/99 *Courage v. Crehan*, [2001] ECR I-6297, § 29.

[11] *Cf.* LESKINEN, C., "*The possibility of third parties bringing EC antitrust damages actions – the case of Spain and Finland*" in ORTIZ BLANCO, L. and MARTÍN DE LAS MULAS BAEZA, R. (eds.), "*Derecho de la competencia europeo y español. Volumen VIII*", Dykinson, S.L., Madrid, 2008, p. 35-76, at p. 37. For instance, with regard to collective actions, the Ashurst study on the conditions of claims for damages in case of infringement of EC competition rules found that some sort of collective or representative actions exist in nearly all Member States, but they do not fully correspond to the U.S. class action. *Cf.* Ashurst study on the conditions of claims for damages in case of infringement of EC competition rules. Comparative report prepared by Denis Waelbroeck, Donland Slater and Gil Even-Shoshan, August 31, 2004 (hereinafter "the Ashurst Study"), at p. 2.

[12] *Cf.* Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, at p. 8.

[13] *Cf.* Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM(2005) 672 final, 19.12.2005, at p. 5.

[14] *Cf.* Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, at p. 8.

[15] *Cf.* Commission Staff Working Paper, SEC (2005) 1732, Annex to the Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM (2005) 672 final, 19.12.2005, at p. 12.

the infringers might be considerable. Hence, there is a need for an effective redress mechanism to improve the compensation of losses and damages.
Arguably, the introduction of an effective collective action could help to remedy the current under-enforcement of the antitrust rules in that victims of an antitrust violation combine their individual claims into one collective action and take advantage of economies of scale.

Nevertheless, although some sort of collective action exists in nearly all Member States, they cannot always be used to claim damages but are often only available to request injunctive relief.[16] Collective actions for damages also vary from one Member State to another. In general, "representative actions", *i.e.* actions which are brought by a representative organization, such as a consumer association, on behalf of its members, are fairly common. Some Member States also provide for "group actions" which refer to a single claim brought on behalf of a group of individuals. They are usually based on an opt-in model, which means that the outcome of the action will only be binding upon those individuals who have expressly decided to join ("*opt in*") the group action. Conversely, a collective action based on an opt-out model may also be brought on behalf of unidentified persons and an individual must take active steps to avoid the legal effects of the action by opting out from it in time. The U.S. class action is a good example of a collective action based on the opt-out model.

Furthermore, it should be noted that currently only the United Kingdom has specific legislation expressly allowing representative damages actions in case of breach of the antitrust rules,[17] whereas other Member States merely provide for collective damages actions on behalf of consumers in general or in specific subject matters.[18]

The objective of this paper is to analyze, on the one hand, whether opt-out collective actions would be more suitable than opt-in collective actions for enhancing private enforcement of the antitrust rules and ensure the compensation of losses caused by antitrust violations and, on the other hand, whether they would be feasible in the EU. First, it will analyze the existing forms of collective actions in the EU and their limitations with respect to antitrust cases by focusing on collective actions available in the United Kingdom, France, Spain, Germany and Sweden. Then it will evaluate the European Commission's proposals on collective actions which are included in the "White Paper on Damages actions for breach of the EC antitrust rules"[19] in an attempt to demonstrate why the proposed actions are not alone sufficient to enhance the possibilities of victims of antitrust violations obtaining compensation for their loss but at least in cases involving multiple low value claims opt-out collective actions would

[16] *Cf.* The Ashurst Study, at p. 46-47.
[17] *Cf.* Commission Staff Working Paper, SEC (2005) 1732, Annex to the Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM (2005) 672 final, 19.12.2005, at p. 55.
[18] *Cf.* "An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings", Final Report, A Study for the European Commission, Health and Consumer Protection Directorate-General, Directorate B – Consumer Affairs, prepared by the Study Centre for Consumer Law – Centre for European Economic Law. Katholieke Universiteit Leuven, Belgium, Leuven, January 17, 2007, at p. 278. Hereinafter this study will be referred to as "the Leuven Consumer Redress Study".
[19] *Cf.* Commission White Paper on Damages actions for breach of the EC antitrust rules, COM(2008) 165 final, 2.4.2008.

also be needed. Finally, the paper will assess the feasibility of introducing opt-out collective actions in the EU and recommend what types of collective actions the EU should adopt.

2. The role of collective damages actions in antitrust enforcement in the EU

2.1. General observations

In the EU, collective actions are more typical in other fields of law, such as consumer and environmental protection, than in antitrust cases and they significantly vary from one Member State to another. Many Member States do not impose limits on the type of claims that can be brought,[20] whereas others only allow collective actions for damages in specific subject matters.[21] In general, some form of collective action exists to enforce rights relating to consumer protection.

A difference must also be made between collective actions for damages and collective actions requesting injunctive relief. Collective actions for damages are available in all common law jurisdictions in the EU, whereas that is not the case in all civil law jurisdictions as regards collective actions for individual damages.[22] As to collective actions requesting injunctive relief, both European Union and national law provide for consumer association actions.[23] In fact, representative actions where the action is brought by a designated body are more common in the EU than other forms of group actions. This is true above all in the civil law jurisdictions, which seem to prefer allowing consumer associations or other state bodies to bring actions rather than individuals.[24] However, although representative actions are widely available in the Member States, they have not been brought extensively. The main reason is that consumer associations have lacked sufficient financial means to fund the actions or to accept the risks of the costs of losing.[25]

[20] For instance, in France, a consumer association can bring a claim on behalf of victims of the same unfair practice that can relate to any kind of dispute. *Cf.* the Leuven Consumer Redress Study, at p. 278.

[21] *Cf.* The Leuven Consumer Redress Study, at p. 278. For instance, in Spain, the collective action can be used to claim damages caused by consumption or use of products and to determine the contractual or non-contractual liability of the professional. Cf. Article 11 of the Civil Procedure Law 1/2000 (Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil), BOE No. 7, of January 8, 2000.

[22] *Cf.* The Leuven Consumer Redress Study, at p. 270. At the time when the study was prepared, 12 Member States (Belgium, Cyprus, Denmark, Greece, Hungary, Ireland, Italy, Latvia, Luxembourg, Malta, Slovakia and Slovenia) did not have any type of collective action for damages. *Cf.* The Leuven Consumer Redress Study, at p. 271. However, since then, at least Denmark and Italy have introduced group actions and Belgium has made a proposal for the introduction of a representative collective action for damages.

[23] *Cf.* Commission Staff Working Paper, SEC (2005) 1732, Annex to the Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM (2005) 672 final, 19.12.2005, at p. 55. For instance, Directive 98/27 on injunctions for the protection of consumers' interests allows qualified bodies and organizations, which have a legitimate interest in protecting collective interests of consumers, to bring an action for cessation or prohibition of any infringement, which harms those interests. However, it does not provide for damages awards but only for the granting of injunctions. *Cf.* Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, OJ L 166, 11.6.1998, p. 51–55.

[24] *Cf.* The Leuven Consumer Redress Study, at p. 281.

[25] *Cf.* HODGES, C., "Europeanization of civil justice: trends and issues", *C.J.Q.*, 26(JAN), 2007, p. 96-123, at p. 115.

As regards collective antitrust damages actions, today the different types of collective actions that exist in the Member States usually confer a right to consumers to bring such an action, whereas competitors and customers other than consumers lack standing. What is more, only the United Kingdom has legislation that expressly provides that representative actions may be brought before the Competition Appeal Tribunal on behalf of consumers who must be affected by an infringement of Articles 101 or 102 TFEU or their UK equivalents, Chapters I and II of the UK Competition Act 1998.[26] Therefore, this article will now examine whether the existing forms of collective actions for damages in the Member State could also be used to bring antitrust damages actions and what the potential limitations of the existing collective actions are. This analysis will focus on the situation in the United Kingdom, France, Spain, Germany and Sweden in order to obtain a global vision of different legal systems.

2.2. Collective damages actions in antitrust cases

2.2.1. The United Kingdom

Currently two types of collective actions exist in England and Wales: representative actions brought on behalf of consumers and Group Litigation Orders that courts can use to group together similar actions raising the same issues. Section 47B of the Competition Act 1998 provides for representative follow-on actions brought on behalf of consumers before the Competition Appeal Tribunal. The actions are limited to claims brought on behalf of named consumers who have consented to be bound by the outcome of the litigation and can only be brought by specified bodies that meet the criteria laid down by the Secretary of State.[27] So far, Which? (the former Consumers' Association) is the only specified body that may bring a consumer claim in the Competition Appeal Tribunal (hereinafter "the CAT").[28]

The consumers, on behalf of which the action is brought, must be affected by an infringement of Articles 101 or 102 TFEU or their UK equivalents, *i.e.* Chapters I and II of the Competition Act 1998. Moreover, the Office of Fair Trading or the European Commission must previously have found that an infringement has taken place. All claims must relate to the same antitrust violation and relate to goods and services which the claimant received otherwise than in the course of business.[29] If individual consumers have brought individual claims, a specified body can take over these claims and they can thus be dealt with together. In the event that the CAT awards damages, they must be paid directly to the represented consumers individually.

[26] Section 47B of the UK Competition Act 1998.

[27] The criteria are the following: "1. The body is so constituted, managed and controlled as to be expected to act independently, impartially and with complete integrity; 2. The body is able to demonstrate that it represents and/or protects the interests of consumers. This may be the interests of consumers generally or specific consumers. 3. The body has capability to take forward a claim on behalf of consumers. 4. The fact that a body has a trading arm will not disqualify it from bringing consumer group claims, provided that the trading arm does not control the body, and any profits of the trading body are only used to further the stated objectives of that body". *Cf.* United Kingdom – National Report, 15 November 2006, prepared for the Leuven Consumer Redress Study, at p. 13. Hereinafter this report will be referred to as "United Kingdom – National Report".

[28] *Cf.* Office of Fair Trading, "Response to the European Commission's Green Paper, Damages actions for breach of the EC antitrust rules, OFT844, May 2006, at p. 13-14.

[29] *Cf.* United Kingdom – National Report, at p. 13.

However, the CAT may order the damages to be paid to the specific body, if all the individuals and the specified body agree on this.[30]

In England and Wales, the courts can also use Group Litigation Orders to group together similar actions that raise common or related issues of fact or law.[31] Nevertheless, every claimant is required to initially bring his own action before a Group Litigation Order can be issued to determine the factual and legal questions that are to be managed as a group. The claimants thus become parties to the legal dispute independently from other group members.[32] Furthermore, after liability has been established for the part of the claim that affects the whole group, the individual damages are assessed separately.[33] Consequently, the Group Litigation procedure does not qualify as an autonomous collective procedure but merely integrates collective elements into individual procedure.[34]

It should also be noted that the Office of Fair Trading (hereinafter "the OFT") has published recommendations on ways of enhancing redress for individuals harmed by breaches of competition law, as it considers that the current system leaves room for improvement. The OFT recommends that representative actions for damages should be possible for consumers as well as businesses because they all face obstacles to private redress. Since the resources of competition authorities are limited, consumers are in certain cases obligated to pursue the cases alone, but they often lack resources or skills to do so and are, consequently, disadvantaged vis-à-vis the infringing companies. Similarly, businesses may face significant barriers to bringing damages claims and representative damages actions would be needed to balance the economic harm caused by the infringers.[35]

Moreover, it should be possible to bring representative damages actions both as stand-alone and follow-on actions. A stand-alone action refers to an action which is brought by victims or a representative body regardless of whether a decision by the competition authorities finding an antitrust violation exists or not, whereas a follow-on action is brought only after the competition authorities have established the existence of an infringement of the antitrust rules.

The OFT also notes that there is evidence that representative actions exclusively on behalf of named consumers fail to optimize economies of scale and result in unnecessary costs and complexity. Therefore, meritorious cases might not be brought or might only be brought by a small number of the victims.[36] If it were instead possible to bring representative actions on

[30] *Cf.* United Kingdom – National Report, at p. 3.
[31] *Cf.* Civil Procedure Rules, Part 19:10.
[32] *Cf.* MICKLITZ, H.-W., and STADLER, A., "The Development of Collective Legal Actions in Europe, Especially in German Civil Procedure", *EBLR*, Vol. 17, Issue 5, 2006, 1473-1503, at p. 1489.
[33] *Cf.* Office of Fair Trading, "Private actions in competition law: effective redress for consumers and business, Discussion Paper, OFT916, April 2007, at p. 18.
[34] *Cf.* MICKLITZ, H.-W., and STADLER, A., "The Development of Collective Legal Actions in Europe, Especially in German Civil Procedure", *EBLR*, Vol. 17, Issue 5, 2006, 1473-1503, at p. 1489.
[35] *Cf.* Office of Fair Trading, "Private actions in competition law: effective redress for consumers and business", Recommendations from the Office of Fair Trading, OFT916resp, November 2007, at p. 15-16 and 19.
[36] *Cf.* Office of Fair Trading, "Private actions in competition law: effective redress for consumers and business", Recommendations from the Office of Fair Trading, OFT916resp, November 2007, at p. 23.

behalf of consumers or businesses at large, this would encourage a larger number of well-founded actions being brought.[37] The OFT is thus recommending that a form of opt-out collective action should be introduced. It advocates that the judge should be able to decide whether given claims should be brought as representative actions on behalf of consumers or businesses at large or on behalf of named consumers or businesses or as individual actions. Nevertheless, this case-by-case assessment would be made on the basis of appropriately defined criteria and filters.[38]

The first representative action in an antitrust case in the United Kingdom was brought in March 2007 by the consumer association Which? on behalf of approximately 130 individual consumers against JJB Sports plc.[39] The consumers had purchased replica Manchester United football shirts at their launches for the 2000/2001 and 2001/2002 seasons, or replica England shirts in the month before and at the time of the Euro 2000 tournament. The action arose after the OFT and the CAT had found three price-fixing arrangements involving JJB Sports plc in the sale of replica football kit in 2000 and 2001. The claimant sought compensatory damages for each shirt bought by a consumer from a participant in one of the three infringements during the period of the infringement found by the OFT and the CAT, as well as exemplary or restitutionary damages to the sum of 25% of the relevant turnover of JJB Sports net of VAT or such other sum found appropriate by the CAT.[40]

However, in January 2008, JJB Sports plc settled the case with Which?.[41] Fans who had paid up to £39.99 for the football shirts and joined the case against JJB Sports received a payment of £20 each, while other customers who were not part of the case were able to claim back £10.[42] This case demonstrates that although the action did not go to trial, already the fact that a representative action was brought resulted in a positive pragmatic outcome at least for some of the harmed consumers in the form of a settlement, enabling them to obtain some form of compensation for their loss although, as R. Mulheron has pointed out, due to the difficulty in defining the customers the possibility of most of the victims to profit from the action

[37] *Cf.* Office of Fair Trading, "Private actions in competition law: effective redress for consumers and business", Recommendations from the Office of Fair Trading, OFT916resp, November 2007, at p. 27.
[38] *Cf.* Office of Fair Trading, "Private actions in competition law: effective redress for consumers and business", Recommendations from the Office of Fair Trading, OFT916resp, November 2007, at p. 29.
[39] Due to jurisdictional reasons in relation to the date of introduction of its new powers, Which was not able to bring a claim against the other eight undertakings that the OFT had found in its decision of August 1st, 2003 that had participated in the cartel together with JJB Sports plc. *Cf.* HODGES, C., "*The Reform of Class and Representative Actions in European Legal Systems. A New Framework for Collective Redress in Europe*", Hart Publishing, Oxford and Portland, Oregon, 2008, at p. 24-25 and the Decision of the Office of Fair Trading No. CA98/06/2003, August 1st, 2003.
[40] *Cf.* Competition Appeal Tribunal, Notice of a claim for damages under section 47B of the Competition Act 1998, Case No: 1078/7/9/07. However, it should be noted that nether the OFT nor the CAT had identified the amount of illicit gain or overcharge to consumers. *Cf.* HODGES, C., "*The Reform of Class and Representative Actions in European Legal Systems. A New Framework for Collective Redress in Europe*", Hart Publishing, Oxford and Portland, Oregon, 2008, at p. 24.
[41] *Cf.* "JJB Sports PLC - Agreement With Which?", Reuters, Wed Jan 9, 2008, available at http://www.reuters.com/article/pressRelease/idUS114080+09-Jan-2008+RNS20080109.
[42] *Cf.* HODGE, N., "EC acts on antitrust breaches", *Financial Director*, Jun 2008, p. 42.

depended on their willingness to come forward and claim their compensation during the settlement period.[43]

Therefore, the case also shows the shortcomings of the U.K. representative action remedy. As C. Hodges has observed, the opt-in model forced Which? to attract individual consumers to join the action by launching a media campaign. But only 130 consumers signed up although Which? had estimated that approximately 2 million consumers had purchased football shirts for a price inflated by the cartel. Another difficulty refers to evidence in that the claim form had to include all essential documents but not all claimants could adduce proof of purchase. The final compensation of each consumer thus varied depending on their possibility of, and interest in, proving the claim. Moreover, gaining access to evidence from OFT and JJB Sports plc was both considerable and expensive. In addition, in order to fund lawyers, a competition was held for lawyers to act on behalf of claimants on a conditional fee agreement providing for a 100% success fee. Finally, the costs of the action were outside the control of the court since the proceeding was stayed whilst the parties were intending to settle the case. [44]

Finally, it is worth mentioning that, recently, Emerald Supplies Ltd tried to bring a representative claim under r.19.6 of the Civil Procedure Rules against British Airways seeking damages for losses that it claimed that agreements and concerted practices between British Airways and certain other international airlines that violated Article 81(1) EC [now Article 101(1) TFEU], Article 53 EEA and s.2 of the U.K. Competition Act 1998 had caused it and direct and indirect purchasers of air freight services the prices for which were inflated by the antitrust violation.[45] However, British Airways issued an application seeking the Chancery Division of the High Court to strike out the claim and the Chancellor of the High Court granted the order. The judge argued that a representative action could only be brought under r.19.6 if the claimants held the same interest at the time when the claim is begun and not when judgment is given.[46] Moreover, not only must the represented parties have a common interest, but the grievance suffered must also be common and the relief sought must be beneficial to all of them.[47] As the class is described as 'direct or indirect purchasers of air freight services the prices of which were inflated by the arrangements or concerted practices' the judge concluded that the criteria for inclusion in the class depended on the outcome of the action and it was therefore impossible to determine which persons were members of the class when the claim was issued.[48] In addition, in a case where the claimants are situated at different levels in the chain of distribution and their possibilities of establishing a damage varies, there will be conflicts between the claims of the different members of the class and, consequently, the relief sought would not be equally beneficial for all members of the class.[49]

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[43] *Cf.* MULHERON, R., "The case for an opt-out class action for European Member States: a legal and empirical analysis", 15 *Colum. J. Eur. Law*, Summer, 2009, p. 409-453, at p. 439.
[44] *Cf.* HODGES, C., "*The Reform of Class and Representative Actions in European Legal Systems. A New Framework for Collective Redress in Europe*", Hart Publishing, Oxford and Portland, Oregon, 2008, at p. 25-26.
[45] Emerald Supplies Ltd v. British Airways Plc [2009] C.P. Rep. 32.
[46] *Ibidem*, at § 31.
[47] *Ibidem*, at § 33.
[48] *Ibidem*, at § 34-35.
[49] *Ibidem*, at § 36.

Nevertheless, it might be possible later to use a Group Litigation Order since, under rule 19.10 of the Civil Procedure Rules, it is sufficient that the claims give rise to common or related issues of fact or law.[50] But as argued above, the Group Litigation Order has its limitations in that all claimants must first bring their own actions before a Group Litigation Order can be issued and they therefore become parties to the legal dispute independently from other group members.[51] In addition, it leaves considerable discretion with the judge to decide which aspects of a case should be treated as Group Litigation issues and which ones as individual matters so it is difficult for the parties to predict to which extent a judge will make use of a Group Litigation Order.[52]

2.2.2. France

Although France does not provide for specific collective actions for antitrust damages, a collective action for antitrust damages could, in principle, be brought by consumer associations under Article L.422-1 of the Consumer Code. Under that Article, a consumer association can bring a representative action on behalf of several individuals when at least two consumers have been injured as a result of the actions of the same professional.[53] Only approved consumer associations who represent consumers at a national level are entitled to bring these actions. Furthermore, the association needs a prior authorization of at least two consumers to sue on their behalf.[54] The association can then solicit the authorization of more potential victims in newspapers and magazines, but not on television or radio, nor by distributing tracts or personalized letters.[55] It is not clear whether it is possible to use the Internet since the law is silent on this issue,[56] but an attempt by a commercial company to create a website (ClassAction.fr) to encourage victims to join in pending court proceedings was deemed illegal by the First Instance Civil Court of Lille, which held that the offers constituted illegal acts of solicitations amounting to unfair competition with the rest of the legal profession.[57] However, it should be noted that the services were offered by a commercial company, not a legal entity, so the outcome might not necessarily be the same, if a legal entity advertized the possibility to join in a pending collective action.

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[50] *Cf.* BROWN, C., "Procedure – Private Litigation – Action for Damages", *E.C.L.R.* Vol. 30, Issue 8, 2009, p. 135-136, at p. 136.

[51] *Cf.* MICKLITZ, H.-W., and STADLER, A., "The Development of Collective Legal Actions in Europe, Especially in German Civil Procedure", *EBLR*, Vol. 17, Issue 5, 2006, 1473-1503, at p. 1489.

[52] *Cf.* United Kingdom – National Report, at p. 11.

[53] Article L.422-1 of the Consumer Code. Apart from the possibility of bringing a representative action on behalf of consumers, such an action is also possible for investors pursuant to Article L.452-2(1) of the Monetary and Financial Code and, pursuant to Article L.142-3(1) of the Environmental Code, for the protection of the environment.

[54] Article L.422-1 of the Consumer Code.

[55] Article L.422-1 of the Consumer Code.

[56] *Cf.* MAGNIER, V., "Class Actions, Group Litigation & Other Forms of Collective Litigation. Protocol for National Reporters. France", at p. 10, available at:
http://globalclassactions.stanford.edu/PDF/France_National_Report.pdf.

[57] *Cf.* MAGNIER, V., "*The French Civil Litigation System, the Increasing Role of Judges, and Influences from Europe*" in HENSLER, D.R., HODGES, C. and TULIBACKA, M. (eds.), "*The Annals of the American Academy of Political and Social Science. The Globalization of Class Actions*", Sage Publications (CA), Volume 622, March 2009, p. 114-124, at p. 121, note 9.

A consumer may withdraw his authorization to a consumer association and pursue the action himself. If the representative action is unsuccessful, consumers may no longer bring the action themselves if they have not chosen to withdraw their authorization before the outcome. If the consumer association wins the action, the damages and interests awarded must be attributed to the injured consumers because only the repair of the individual injuries of consumers is allowed under this type of action.[58]

However, there have only been a handful of actions of this type.[59] This is due to the burdensome procedure that requires every consumer to give a mandate and that they be personally informed. Furthermore, the procedure is too costly for the organizations since they must bear the costs as insurance companies are not willing to cover them.[60] The consumer associations therefore find that their action is paralyzed by the heaviness and costs of the administration of the mandates.[61]

Recently several initiatives have been taken with a view to improving the possibility of using collective actions. One was the creation of the ClassAction.fr website in May 2005 with a view to enabling the general public to go online to join in pending court proceedings. However, as explained above, it failed because the company was ordered to end its practices.[62]

Furthermore, the previous French government under president Chirac promised to enhance collective actions but the introduction of a collective action in France was postponed[63] since the law on the modernization of the economy,[64] which originally envisaged the introduction of a collective action, was amended on the request of the French government on June 12th, 2008. As a result, the introduction of a collective action was rejected shortly before the law was approved on June 17th, 2008. Instead, a working group on collective actions was to be established by the Secretary of State for Industry and Consumption and a new draft was to be

[58] *Cf.* LUTFALLA, E. and MAGNIER, V., "French Legal Reform: What is at Stake if Class Actions are Introduced in France?", 73 *Def. Couns. J.*, July 2006, p. 301-311, at p. 303.
[59] At the time when the Leuven Consumer Redress Study was conducted there had only been five cases in 15 years. *Cf.* the Leuven Consumer Redress Study, at p. 274.
[60] *Cf.* The Leuven Consumer Redress Study, at p. 274.
[61] *Cf.* LONGUET, A. and DIGUERES, D., "*Travaux pour l'introduction d'une action de groupe en France*" in BUNDESMINISTERIUM FÜR SOZIALE SICHERHEIT GENERATIONEN UND KONSUMENTENSCHUTZ, "*Band I: Effektiver Rechtsschutz – Die Verbraucherrechtlichen Instrumente der Unterlassungsklage und der Gruppenklage. Effective Legal Redress – The Consumer Protection Instruments of Actions for Injunction and Group Damages Actions*", Conference on 24.2.2006 in Vienna, p. 55-58, at p. 56.
[62] *Cf.* LUTFALLA, E. and MAGNIER, V., "French Legal Reform: What is at Stake if Class Actions are Introduced in France?", 73 *Def. Couns. J.*, July 2006, p. 301-311, at footnote 9. Also several consumer associations brought an action against Class Action.fr. arguing that the services offered by it constituted illicit solicitation. The Tribunal de Grande Instance of Paris ruled in favor of the claimants and prohibited the company to collect mandates to sue online. *Cf. op. cit*, at p. 304.
[63] *Cf.* LUTFALLA, E. and MAGNIER, V., "French Legal Reform: What is at Stake if Class Actions are Introduced in France?", 73 *Def. Couns. J.*, July 2006, p. 301-311, at p. 305.
[64] Loi sur la modernisation de l'économie.

presented later that year.[65] The latest development to date has been the decision by the Legal Committee of the French Senate on October 21st, 2009 to create a working group for examining the possibility and the conditions for the introduction of a group action into French law.[66]

However, since it would be contrary to constitutional and procedural principles inherent to French law, it appears very unlikely that France would adopt a collective action that would allow one person the sue on behalf of a group of persons without requiring any prior mandate.[67] First, according to the "due process" rule, an individual cannot be a plaintiff without his knowledge and, second, pursuant to the doctrine of "*nul ne plaide par procureur*", the identity of all individuals involved in a lawsuit must be known. Consequently, all group members must be identified before the beginning of the action.[68] One possible model could be to first bring an action to establish the liability of the defendant and then to invite parties who have suffered an injury to come forward with their damages claims.[69] This is also the option that lawyers and consumers representatives seem to favor in general.[70]

The first collective antitrust damages action in France was brought before the Commercial Court of Paris on October 13th, 2006 by the consumer association UFC-Que-Choisir[71] on behalf of subscribers of mobile phone services after the French Competition Council had fined three mobile operators, *i.e.* Orange France, SFR and Bouygues Télécom, for price-fixing and market sharing. With a view to bringing legal proceedings to repair the losses suffered by consumers as a result of the price fixing, the consumer association UFC-Que-

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[65] " *Cf.* Actions de groupe: le rendez-vous manqué de la LME", usinenouvelle.com, 18/06/2008, available at http://www.usinenouvelle.com/article/actions-de-groupe-le-rendez-vous-manqu-de-la-lme.141271.

[66] *Cf.* SÉNAT, "La commission des lois du Sénat crée un groupe de travail destiné à examiner l'opportunité et les conditions de l'introduction de l'action de groupe en droit français", communication of October 21, 2009, available at http://www.senat.fr/presse/cp20091021c.html.

[67] *Cf.* LUTFALLA, E. and MAGNIER, V., "French Legal Reform: What is at Stake if Class Actions are Introduced in France?", 73 *Def. Couns. J.*, July 2006, p. 301-311, at p. 306.

[68] *Cf.* MAGNIER, V., "Class Actions, Group Litigation & Other Forms of Collective Litigation. Protocol for National Reporters. France", at p. 10, available at: http://globalclassactions.stanford.edu/PDF/France_National_Report.pdf.

[69] *Cf.* LUTFALLA, E. and MAGNIER, V., "French Legal Reform: What is at Stake if Class Actions are Introduced in France?", 73 *Def. Couns. J.*, July 2006, p. 301-311, at p. 306.

[70] This was, for example, the opinion of most of the members of a working group established in April 2005 which was composed of representatives from consumer associations and legal practitioners to make proposals aimed at improving the system for bringing actions on behalf of several individuals and setting up new mechanisms for enabling consumer associations to bring actions on behalf of a group of consumers in order to ensure compliance and obtain compensation for individual injuries. *Cf.* LONGUET, A. and DIGUERES, D., "*Travaux pour l'introduction d'une action de groupe en France*" in BUNDESMINISTERIUM FÜR SOZIALE SICHERHEIT GENERATIONEN UND KONSUMENTENSCHUTZ, "*Band I: Effektiver Rechtsschutz – Die Verbraucherrechtlichen Instrumente der Unterlassungsklage und der Gruppenklage. Effective Legal Redress – The Consumer Protection Instruments of Actions for Injunction and Group Damages Actions*", Conference on 24.2.2006 in Vienna, p. 55-58, at p. 57 and LUTFALLA, E. and MAGNIER, V., "French Legal Reform: What is at Stake if Class Actions are Introduced in France?", 73 *Def. Couns. J.*, July 2006, p. 301-311, at p. 305.

[71] *Cf.* IDOT, L., "*Private Enforcement of Competition Law – Recommendations flowing from the French Experience*" in BASEDOW, J. (ed.), "*Private Enforcement of EC Competition Law*", Kluwer Law International, Alphen aan den Rijn, 2007, p. 85-106, at p. 96 and http://www.cartelmobile.org/.

Choisir set up a website where consumers could join the action and calculate their damages.[72] UFC-Que-Choisir claimed that it would not be able to deal with more than 40,000 files if the collective action procedure was not amended.[73] The potential number of claimants was 20 million (*i.e.* the number of mobile phone service subscribers) but eventually less than 1% of the subscribers decided to join the action.[74] Moreover, the cost of the action involved the engagement of 20% of the staff during six months and financial resources amounting to half a million euros.[75]

The action was challenged by the mobile operators, which claimed that the action was inadmissible since UCF-Que-Choisir had appealed to the consumers to join the joint representative action which, in their opinion, is not allowed under Article L.422-1 of the Consumer Code. On 6th, December 2007, the Commercial Court of Paris held that the action brought by UCF-Que-Choisir against Bouygues Télécom was a disguised joint representative action ("*action en representation conjointe*") and therefore not admissible.[76] UFC-Que-Choisir appealed the decision but, on January 22nd, 2010, the Court of Appeal of Paris upheld the decision of the Commercial Court of Paris. The Court of Appeal of Paris thus held that the action brought by UCF-Que-Choisir and the victims of the antitrust violation was void since it was brought as an action for the financial reparation of the consumer collective interest (Article L.421-1 of the Consumer Code) although it was in fact a disguised joint representative action (Article L.422-1 of the Consumer Code), under which it is not permitted to solicit consumers to join the action. However, UCF-Que-Choisir has claimed that a joint representative action involves a procedure that is too burdensome to bring an action and does not present any advantage vis-à-vis the action for the financial reparation of the consumer collective interest, which it has systematically used for over 30 years, and therefore it intends to appeal the decision of the Court of Appeal of Paris.[77]

Since French consumer associations are not able to handle all the claims involved in certain group actions, it appears that changes to the current rules governing collective actions are needed. In particular, the costs of collective actions are usually very high[78] and the prohibition on advertising and solicitation may explain why collective actions have not been successful in France.[79] Furthermore, contigency fees are illegal in France,[80] which arguably

[72] *Cf.* HODGES, C., "*The Reform of the Class and Representative Actions in European Legal Systems. A New Framework for Collective Redress in Europe*", Hart Publishing, Oxford and Portland, Oregon, 2008, at p. 84.
[73] *Cf.* LUTFALLA, E. and MAGNIER, V., "French Legal Reform: What is at Stake if Class Actions are Introduced in France?", 73 *Def. Couns. J.*, July 2006, p. 301-311, at p. 305-306.
[74] *Cf.* UCF-QUE-CHOISIR, "Trade practices and competition / Mobile telephone cartel", presentation at the CLEF meeting on May 17-18, 2007, Brussels, available at:
http://www.clef-project.eu/media/d_GaellePatettaUFCcasecartelmobile_75402.pdf.
[75] HODGES, C., "*The Reform of the Class and Representative Actions in European Legal Systems. A New Framework for Collective Redress in Europe*", Hart Publishing, Oxford and Portland, Oregon, 2008, at p. 84.
[76] *Cf.* HODGES, C., "*The Reform of the Class and Representative Actions in European Legal Systems. A New Framework for Collective Redress in Europe*", Hart Publishing, Oxford and Portland, Oregon, 2008, at p. 84.
[77] *Cf.* http://www.cartelmobile.org/.
[78] *Cf.* LUTFALLA, E. and MAGNIER, V., "French Legal Reform: What is at Stake if Class Actions are Introduced in France?", 73 *Def. Couns. J.*, July 2006, p. 301-311, at p. 310.
[79] *Cf.* France – National Report, 15 November 2006, at p. 14.

decreases the incentives to bring antitrust damages actions. The prohibition on parties being represented in court by bodies other than lawyers is also considered to make the introduction of class actions difficult.[81]

The French Competition Council has also submitted an opinion on the possible introduction of a collective action and its effects on competition law enforcement. It claims that the number of cartel or abuse of dominance cases in which collective actions could be made use of in an efficient manner is limited due to certain difficulties inherent to the implementation of civil procedures that could even be increased by the specific character of antitrust cases.[82] This is so because the French judge, unlike the penal judge or the Competition Council, neither has compulsory investigative powers at his disposal nor can he, in general, resort to discovery. Especially the civil rules on administration of proof are not sufficient as regards secret cartels, which require active investigation of elements of proof that are not identified by the claimant, and cases in which the judge must demonstrate an abuse of a dominant position. According to the Competition Council, claimants should thus virtually be able to provide all evidence to establish the infringement and the causal relationship and to quantify damages. Consequently, private actions would only be efficient as follow-on actions and would therefore not really contribute to compensating consumers unless the judge was given sufficient means to sanction and remedy anti-competitive practices.[83]

It hence seems that the introduction of a collective action would not as such alone suffice to improve private enforcement in France but other procedural rules governing antitrust damages actions must also be modified.

2.2.3. Spain

In Spain, a collective antitrust damages action could be brought under Article 11 of the Civil Procedure Law 1/2000.[84] Under this Article, an action can be brought to claim compensation for damages caused by the consumption or use of products and to determine the contractual and non-contractual liability of the professional.[85] Both consumer and user associations can

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[80] Article 10 of Act n°71-1130 of December 31st, 1971 on the reform of certain legal professions (*Loi n°71-1130 du 31 décembre 1971 portant réforme de certaines professions judiciaires et juridiques*). However, "complementary fees", which can be calculated on the result of the action are allowed as long as they do not exceed a reasonable portion of fixed fees. *Cf.* MAGNIER, V., "*The French Civil Litigation System, the Increasing Role of Judges, and Influences from Europe*" in HENSLER, D.R., HODGES, C. and TULIBACKA, M. (eds.), "*The Annals of the American Academy of Political and Social Science. The Globalization of Class Actions*", Sage Publications (CA), Volume 622, March 2009, p. 114-124, at p. 122, note 20.

[81] *Cf.* France – National Report, 15 November 2006, at p. 16.

[82] *Cf.* Conseil de la Concurrence, "Avis du 21 septembre 2006 relatif à l'introduction de l'action de groupe en matière de pratiques anticoncurrentielles", at p. 5.

[83] *Cf.* Conseil de la Concurrence, "Avis du 21 septembre 2006 relatif à l'introduction de l'action de groupe en matière de pratiques anticoncurrentielles", at p. 11-12.

[84] Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil, BOE No. 7, of January 8, 2000. Cf. Asociación Española para la Defensa de la Competencia, "Observations to the Green Paper on Damages actions for breach of the EC antitrust rules, at p. 8.

[85] *Cf.* Spain – National Report, 15 November 2006, prepared for the Leuven Consumer Redress Study, at p. 16. This type of action is usually used in large-scale consumer claims that affect a significant number of consumers but it is also applied to many consumer contracts.

bring actions to protect the rights and interests of their members and the association as well as the general interests of consumers and users.

Article 11 distinguishes between the situation where the members of the group of consumers and users that have suffered loss are fully identifiable or easy to identify and where there is a plurality of consumers or users or it is impossible or difficult to identify the group that has suffered harm. When the members of the group are identified or are easily identifiable, both the consumer and user associations and legally formed entities whose purpose is the defense or protection of consumers and users as well as the affected groups are entitled to bring actions for damages. But when the group consists of consumers or users who are not identified or are difficult to identify, only consumer and user associations which represent general consumer interests are entitled to bring damages actions.[86]

Furthermore, pursuant to Article 6 (1) (7) of the Civil Procedure Law 1/2000, in order to be entitled to bring a collective actions, the group of affected consumers or users wishing to do so must consist of most of the affected members. This has rightly been criticized for limiting the capacity of affected persons to sue to situations where a majority of them are willing to do so. This majority requirement also increases the burden of proof for potential claimants since they must be able to identify all the affected members in order to know how many they are and to verify that the ones wishing to bring the claim constitute a majority of the affected members.[87] Under Article 256 (6) of the Civil Procedure Law 1/2000, a party wishing to bring a collective action could request that the court undertakes the steps necessary to identify the members of the affected group, including by obligating the defendant to cooperate in their identification. But this makes the proceedings unduly complex since it should not really matter that only a minority of the identified or easy identifiable affected members of the group wish to bring a collective damages claim and, consequently the requirement that the claimants constitute a majority of the affected group members should be abolished.

Only consumer and user associations, which belong to the Council of Consumers and Users (Consejo de Consumidores y Usuarios) may bring collective actions for damages. The most representative consumer and user associations, taking into account their territorial scope of activity, number of members, performance in the field of consumer protection, and programs of activity to be developed, are admitted to the Council of Consumers and Users.[88]

It is also possible for other interested parties, who were not original parties to the proceedings, to be admitted as claimants in the proceedings as long as they prove that they have a direct and lawful interest in the outcome of the proceedings. In particular, any consumer may intervene in any proceedings brought by the entities legally entitled to defend their interests.[89] There are two ways of informing potential claimants about an action. If the injured parties are

[86] Article 11 of the Civil Procedure Law 1/2000.
[87] *Cf.* GUTIÉRREZ DE CABIEDES, P., "Group Litigation in Spain. National Report", at p. 12-13, available at http://www.law.stanford.edu/display/images/dynamic/events_media/spain_national_report.pdf.
[88] Articles 22 and 22 bis of the Law for the improvement of consumer and user protection 44/2006, of December 29, (Ley 44/2006, de 29 de diciembre, de mejora de la protección de los consumidores y usarios).
[89] Article 13(1) of the Civil Procedure Law 1/2000.

identified or can easily be identified, the claimant or claimants must give prior notice of the filing of the claim to all those parties that may be interested in joining the action.[90] If they are not identified or easily identified, the advertisement of the claim will stay the proceedings during a period not exceeding two months, decided in each case depending on the circumstances and complexity of the facts and the difficulty in identifying and locating the injured parties.[91] The advertisement of the claim must be made in the media available in the territory where the rights or interests were injured.[92] As the Civil Procedure Law does not provide how this advertisement shall be made, it is for the court to decide in each case.[93] Any consumer who has responded to the advertisement within the time limit decided by the court will become party to the proceedings.[94]

Any award following a collective or class action is made in respect of each individual claimant, not the whole group. As a consequence, after a favorable judgment has been given, each claimant must apply to the court in order to be recognized as a member of the group and for individual damages to be quantified.[95] The former requirement could discourage consumers from opting in since they must take action in order to participate in the collective action. If their claim is very small, some claimants might not bother to take the steps necessary to join the action. The latter requirement in turn might constitute a supplementary hurdle for the individual claimant to actually obtain compensation for the loss that he has suffered given that quantum is often difficult to calculate.[96]

A further problem with the Spanish style collective action is that it is limited to consumers. Also competitors and customers other than consumers, small and medium-sized enterprises in particular, may lack incentives to bring an individual stand-alone damages action.[97]

Finally, the principle of *res judicata* is partly interpreted differently in Spain than in other countries, especially common law jurisdictions, regarding the possibility of bringing individual actions after a representative action has been brought. Consequently, although *res judicata* normally affects the parties to the proceedings, Article 222 of the Civil Procedure Law 1/2000 provides that in collective actions, *res judicata* also affects individuals who are not parties to the dispute even though they are holders of the rights that grant legal standing to the parties. This means that, in Spain, the *res judicata* effect also extends to parties who have not participated in the collective action brought by an association which defends their

[90] Article 15(2) of the Civil Procedure Law 1/2000.
[91] Article 15(3) of the Civil Procedure Law 1/2000.
[92] Article 15(1) of the Civil Procedure Law 1/2000.
[93] *Cf.* TORRES, E., "In unity, is there strength? Representative claims – overview of some European developments", *I.C.C.L.R.*, 12(6), 2001, p. 178-182, at p. 181.
[94] Article 15(3) of the Civil Procedure Law 1/2000.
[95] *Cf.* National Report on Spain prepared for the Ashurst Study on the conditions of claims for damages in case of infringement of EC competition rules, at p. 7.
[96] *Cf.* e.g. judgment of the High Administrative Court of Madrid No. 130/2006, of December 18, 2006 and judgment of Commercial Court No. 5 of Madrid No. 85/2005, of November 11, 2005.
[97] *Cf.* National Report on Spain prepared for the Ashurst Study on the conditions of claims for damages in case of infringement of EC competition rules, at p. 7.

interests. Thus, in Spain, consumers would be barred from bringing an individual action if a consumer association had already brought a collective action.[98]

However, in general, the legal doctrine outside Spain seems to consider that the principle of *res judicata* can only be applied to impede those consumers bringing actions who joined the collective action brought by the association because in that case there would be an identity of parties. On the contrary, a collective action could not bar those individuals who did not participate in that action from bringing claims individually. This right to individual action would also be in compliance with the right to due process of law that is recognized by Member States' constitutions.[99] In contrast, the extension of the *res judicata* effect by Article 222 of the Civil Procedure Law to all consumers whose interests are defended by a consumer association appears to be incompatible with the constitutional principle of right to due process of law unless the consumers are first given the possibility of opting out from the collective action brought on their behalf by a consumer association and bringing themselves an individual action instead. However, as the law stands, individual consumers and users are not allowed to opt out from collective actions brought by consumer or user associations, which is not reasonable in cases involving identified or easily identifiable affected individuals since the association could easily inform these individuals about its intention to bring a collective claim and could give them an opportunity to opt-out. In cases involving affected consumers or users who are difficult or impossible to identify, the extended *res judicata* effect of a collective action brought by a consumer association might not be so problematic since it is probable that the individual claims would be so small that they could not in any case be viably enforced individually.[100]

The first collective damages action for an antitrust violation in Spain was brought by Ausbanc Consumo against Telefónica España in October 2007. It was a follow-on action brought after the European Commission had imposed a fine for 151.8 million Euros on Telefónica for the margin squeeze on ADSL prices charged to competing wholesale companies.[101] Ausbanc filed for compensation in the amount of 458 million Euros in order to indemnify users for sustained damages. This sum refers to the overcharge paid by consumers for five years for broadband Internet access after deducting from the sum the 151.8 million Euro fine already imposed by the Commission. Once Ausbanc had been granted leave to proceed in respect of the action by Commercial Court number 4 of Madrid, Telefónica made a submission claiming that the European Commission had already imposed a sanction on it for the conduct in question. But the Provincial High Court of Madrid (Audiencia Provincial de Madrid) held on September 14th, 2009 that the fine imposed by the Commission did not preclude the possibility of

[98] *Cf.* GARCÍA CACHAFEIRO, F., "Las asociaciones de consumidores ante el abuso de posición dominante en la Unión Europea", *Cuadernos Europeos de Deusto*, No. 38/2008, p. 155-175, at p. 161.
[99] *Cf.* GARCÍA CACHAFEIRO, F., "Las asociaciones de consumidores ante el abuso de posición dominante en la Unión Europea", *Cuadernos Europeos de Deusto*, No. 38/2008, p. 155-175, at p. 160-161.
[100] If the individual claims were significant, it would be likely that there would be some trace of the transaction in which the consumers have suffered harm in the form of an overcharge since they would probably have paid for the product or service in question with some kind of credit or debit card, thus making it possible to identify them later.
[101] Commission Decision of July 4, 2007 in Case COMP/38.784 – *Wanadoo España v. Telefónica*.

imposing civil sanctions and, as a consequence, Commercial Court number 4 of Madrid shall continue the proceeding against Telefónica.[102]

2.2.4. Germany

In Germany, limited forms of representative actions exist in which an association represents numerous plaintiffs that have suffered harm in the fields of environmental protection, unfair competition law or consumer protection.[103] But these actions are only available for applying for injunctions[104] and can only be brought by associations for the promotion of commercial interests, whereas consumer associations lack standing.[105] Hence, collective actions for damages can neither be brought for competition infringements nor for any other type of harm suffered.[106]

However, a German court has allowed several claims to be bundled into one legal person by allowing the Belgian company, Cartel Damage Claims SA, specifically founded for the purpose of antitrust litigation,[107] to bring in its name damages claims that it had bought from several customers of the cement cartel, who had allegedly been harmed by the cartel.[108] The admissibility of this bundling of numerous claims has been upheld by the German Federal Court of Justice[109] but the case is still pending.[110]

When Germany recently amended its Competition Act, it excluded the possibility of bringing collective damages actions, probably because it feared that this would result in excessive litigation and unmeritorious claims being brought. Instead, the amended Act against

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[102] *Cf.* "La Audiencia Provincial de Madrid ordena reanudar el juicio contra Telefónica, demandada por 458 millones", available at: http://www.ausbanc.es/index_ae.htm.

[103] *Cf.* DEGOS, L. and MORSON, G.V., "Class system. The Reforms of Class Action Laws in Europe Are as Varied as the Nations Themselves", *Los Angeles Lawyer*, 29-NOV, 2006, p. 32-38, at p. 34-35.

[104] *Cf.* MIEGE, C., "*Modernisation and Enforcement Pluralism – The Role of Private Enforcement of Competition Law in the EU and the German Attempts in the 7th Amendment of the GWB*", in the Workshop "*Remedies and Sanctions in Competition Policy*", Amsterdam Centre for Law & Economics (ACLE), Universiteit van Amsterdam, Thursday, February 17, 2005, at p. 50.

[105] *Cf.* WURMNEST, W., "A New Era for Private Antitrust Litigation in Germany? A Critical Appraisal of the Modernized Law against Restraints of Competition", *German Law Journal*, Vol. 06, No. 08, 2005, p. 1173-1190, at p. 1187.

[106] *Cf.* MIEGE, C., "*Modernisation and Enforcement Pluralism – The Role of Private Enforcement of Competition Law in the EU and the German Attempts in the 7th Amendment of the GWB*", in the Workshop "*Remedies and Sanctions in Competition Policy*", Amsterdam Centre for Law & Economics (ACLE), Universiteit van Amsterdam, Thursday, February 17, 2005, at p. 50.

[107] *Cf.* THOMAS, S., "Damages claims under the revised German Act against restraints of competition (§ 33 Gesetz gegen Wettbewerbsbeschränkungen), *e-Competitions*, January 2007-I, N° 12706.

[108] *Cf.* THOMAS, S., "De facto class action for cartel damages in Germany? A German Court rules on procedural key issues for cartel damages suits (Cartel Damage Claims SA), *e-Competitions*, February 2007-II, N° 13224.

[109] Judgment of the Federal Court of Justice (*Bundesgerichtshof*) of April 7th, 2009 in Case No. KZR 42/08.

[110] *Cf.* MÜHLBACH, T. and RINNE, A., "Germany: Private Antitrust Litigation", The European Antitrust Review 2010, available at http://www.globalcompetitionreview.com/reviews/19/sections/69/chapters/759/germany-private-antitrust-litigation/.

Restraints of Competition[111] only confers representative associations a right to order an undertaking that has infringed the antitrust rules to pay an amount equivalent to the additional proceeds which it has incurred through its anti-competitive behavior. Nevertheless, the additional proceeds are to be paid to the Treasury and the representative association is only entitled to having its legal costs reimbursed, which in practice does not provide any incentive to bring such a claim because in the best-case scenario the costs of the representative association will only be reimbursed.[112] In addition, the right to deprive infringers of their profits is subsidiary to the German competition authority's right to order the skimming off of benefits.[113] The role played by associations in this type of procedure is hence expected to be minor.[114]

The main problems for consumers harmed by antitrust violations therefore remain: they lack incentives to sue and there is no real possibility of obtaining compensation for their loss since the costs of individual stand-alone actions would by far exceed the possible compensation awarded.

2.2.5. Sweden

The Swedish Group Proceedings Act 2002 provides a group procedure that is similar to the US class action, although it is based on an opt-in model.[115] Under this act, the group action can be brought as a private group action, an organization action or a public group action.[116] The private group action is the action that the most corresponds to the class action and it may be brought by natural persons or a legal entity.[117] The prerequisite for bringing a group action is that the circumstances on which the action is based must be common or similar to the entire group. Moreover, it must be evaluated whether the claims could be pursued more efficiently by individual actions by the members of the group than by a group action.[118] In general, the affected group must be named as precisely as possible and the parties must be represented by a lawyer.[119]

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[111] The 7th Amendment to the German Act against Restraints of Competition, which entered into force on July 1, 2005.

[112] *Cf.* MIEGE, C., "*Modernisation and Enforcement Pluralism – The Role of Private Enforcement of Competition Law in the EU and the German Attempts in the 7th Amendment of the GWB*", in the Workshop "*Remedies and Sanctions in Competition Policy*", Amsterdam Centre for Law & Economics (ACLE), Universiteit van Amsterdam, Thursday, February 17, 2005, at p. 52-53. *Cf.* also "Das allgemeine Wettbewerbsrecht in der Siebten GWB-Novelle", Sondergutachten der Monopolkomission gemäss § 44. Abs. 1 Satz 4 GWB, at. p. 51.

[113] Section 34a of the Act against Restraints of Competition.

[114] *Cf.* WURMNEST, W., "A New Era for Private Antitrust Litigation in Germany? A Critical Appraisal of the Modernized Law against Restraints of Competition", *German Law Journal*, Vol. 06, No. 08, 2005, p. 1173-1190, at p. 1188.

[115] *Cf.* MICKLITZ, H.-W., and STADLER, A., "The Development of Collective Legal Actions in Europe, Especially in German Civil Procedure", *EBLR*, Vol. 17, Issue 5, 2006, 1473-1503, at p. 1493-1494.

[116] Article 1 of the Group Proceedings Act (2002:599) (Lag (2002:599) om grupprättegång).

[117] *Cf.* MICKLITZ, H.-W., and STADLER, A., "The Development of Collective Legal Actions in Europe, Especially in German Civil Procedure", *EBLR*, Vol. 17, Issue 5, 2006, 1473-1503, at p. 1493.

[118] For other prerequisites for bringing a group action, *cf.* Article 4 of the Group Proceedings Act (2002:599).

[119] *Cf.* MICKLITZ, H.-W., and STADLER, A., "The Development of Collective Legal Actions in Europe, Especially in German Civil Procedure", *EBLR*, Vol. 17, Issue 5, 2006, 1473-1503, at p. 1494.

After an action has been filed, notice is sent to potential group members.[120] They must choose to be included as members of the group. By giving a written notice to the court to opt-in, the members can participate in the proceedings as passive members and the final decision of the court will be binding on them.[121] Only the group claimant becomes a party to the proceedings. The passive group members will have an extensive right of information and limited participation rights but are mainly represented by the group claimant.[122] The passive members do not, as a general rule, have any obligation to pay legal costs in case the defendant is successful. On the contrary, the group claimant must pay the winning party's cost if he loses the action.[123] The Group Proceedings Act also provides the possibility of group members concluding a so-called risk agreement with their lawyer, conditioning the amount of remuneration on the extent to which their claims have been successful. However, this agreement must be approved by the court in order to be valid and the court may only approve the agreement if the remuneration is reasonable taking into account the nature of the case.[124] Thus, a moderate form of contingency fee has been introduced into the Swedish legal system.[125]

The court maintains a comparatively strong position during the proceedings. It must control whether the group claimant represents the interests of the group members not immediately involved in an adequate way. Regarding a possible settlement of the case, all members must be given the opportunity to express their opinions about the proposed settlement agreement and it must be then admitted by the court in order to be binding on all group members.[126]

Swedish courts pay the costs for sending notice to group members. Alternatively, they may require claimants to issue notice. The costs are then reimbursed from public funds. Moreover, the courts must keep a register with the names of all members who have opted in to a group action. This requirement has resulted in the expenditure of Swedish human resources because court clerks are needed over the entire duration of the litigation. To date, the participation rate in opt-in group actions has been higher in Sweden than in other countries. It has been suggested that this could be a result of short-lived media attention of the first group action cases.[127]

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[120] Article 13 of the Group Proceedings Act 2002 (2002:599).
[121] *Cf.* Commission Staff Working Paper, SEC (2005) 1732, Annex to the Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM (2005) 672 final, 19.12.2005, at p. 54.
[122] *Cf.* MICKLITZ, H.-W., and STADLER, A., "The Development of Collective Legal Actions in Europe, Especially in German Civil Procedure", *EBLR*, Vol. 17, Issue 5, 2006, 1473-1503, at p. 1494.
[123] *Cf.* Commission Staff Working Paper, SEC (2005) 1732, Annex to the Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM (2005) 672 final, 19.12.2005, at p. 54.
[124] *Cf.* Articles 38-39 of the Group Proceedings Act 2002 (2002:599).
[125] *Cf.* MICKLITZ, H.-W., and STADLER, A., "The Development of Collective Legal Actions in Europe, Especially in German Civil Procedure", *EBLR*, Vol. 17, Issue 5, 2006, 1473-1503, at p. 1495.
[126] *Cf.* MICKLITZ, H.-W., and STADLER, A., "The Development of Collective Legal Actions in Europe, Especially in German Civil Procedure", *EBLR*, Vol. 17, Issue 5, 2006, 1473-1503, at p. 1493-1494.
[127] *Cf.* GAUDET, R., "Turning a blind eye: the Commission's rejection of opt-out class actions overlooks Swedish, Norwegian, Danish and Dutch experience" *E.C.L.R.*, Volume 30, Issue 3, 2009, p. 107-117, at p. 111-112.

Contrary to fears that a group action would result in numerous lawsuits in Sweden, only few group actions have been brought[128] and there is no evidence of defendants being blackmailed under the threat of a collective lawsuit.[129] This demonstrates that it is possible to combine new types of collective remedies with continental legal systems,[130] although its efficiency still leaves room for improvement. The limited number of group actions that have been brought is believed to be due to the choice of an opt-in model, the allocation of the legal costs and the limited possibilities to gain access to evidence.[131]

However, to the best of this author's knowledge, no collective actions have been brought for antitrust damages, although they would be possible under the Swedish Group Proceedings Act if the circumstances on which the action was based were common or similar to the entire group and the action can be pursued more efficiently by the group action.

3. The Commission's proposals on collective damages actions in antitrust cases

As the brief review of collective damages actions in five Member States has demonstrated, the existing collective actions in the EU leave much to wish for and today collective actions barely play a role in enforcing the European Union right to damages for antitrust violations. The European Commission (hereinafter "the Commission") is therefore envisaging enhancing the redress options in antitrust damages actions. On April 2nd, 2008 it adopted a White Paper on Damages actions for breach of the EC antitrust rules[132] in which it proposes the introduction of two mechanisms for collective redress for antitrust violations: representative actions and opt-in collective actions. The first action would be brought by qualified entities, for instance consumer associations, on behalf of some or all of their members. In the second action victims would expressly decide to combine their individual claims into one single action.[133]

According to the Commission, the aim of a representative action brought by a qualified entity would be to obtain compensation for the individual harm caused to the interests of all those represented and not to the representative entity. Moreover, standing should be limited to specific types of entities in order to ensure a certain degree of public control over the representative entities, including verification of the legitimacy of the interests to be

[128] To date, only 12 opt-in collective actions have been brought. *Cf.* LINDBLOM, P.H., "Global class actions. National report: Group Litigation in Sweden, update paper sections 2.5 and 3", at p. 2, available at: http://globalclassactions.stanford.edu/PDF/Sweden_Update_paper_Nov%20-08.pdf.

[129] *Cf.* GAUDET, R., "Turning a blind eye: the Commission's rejection of opt-out class actions overlooks Swedish, Norwegian, Danish and Dutch experience" *E.C.L.R.*, Volume 30, Issue 3, 2009, p. 107-117, at p. 111.

[130] *Cf.* MICKLITZ, H.-W., and STADLER, A., "The Development of Collective Legal Actions in Europe, Especially in German Civil Procedure", *EBLR*, Vol. 17, Issue 5, 2006, 1473-1503, at p. 1493.

[131] *Cf.* ANDERSSON, H. and LEGNERFÄLT, E., "Effective private enforcement: The Swedish experience, a lesson for the EU?" *Concurrences*, Nº 2, 2009, pp. 156-162, at p. 161.

[132] *Cf.* Commission White Paper on Damages actions for breach of the EC antitrust rules, COM(2008) 165 final, 2.4.2008.

[133] *Cf.* Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, at p. 18.

represented.[134] Two types of entities should be able to bring representative actions for antitrust damages. First, entities representing legitimate and defined interests, officially designated in advance by their Member State and meeting specific criteria set in the national law could bring representative actions for damages on behalf of identified victims. In restricted cases they could also bring a representative action on behalf of identifiable victims. Second, entities could also be certified on an *ad hoc* basis according to national procedures of their Member State to bring a representative action in relation to a particular infringement. In order to avoid abusive litigation, the Commission proposes that only entities whose primary task is to protect the defined interests of their members, other than by pursuing damages claims, should have standing to bring a representative action. For instance, a trade association in a given industry could be eligible to bring an *ad hoc* representative action. *Ad hoc* certified entities could only bring an action on behalf of identified members, but if they decided only to bring an action on behalf of a subgroup of its members, it would also be possible to represent identifiable victims of the antitrust violation.[135]

In addition, both entities designated in advance and those certified on an *ad hoc* basis having standing in one Member State should automatically have standing in all other Member States in order to ensure that a representative entity could also bring a damages action before the courts of other Member States.[136]

Opt-in actions, in turn, aim to remedy situations in which representative entities, such as consumer associations, are not able or willing to pursue the claim. The victims must express their intention to join the action in order to be bound by the judgment. The fact that the claimants must be identified aims to avoid possible excesses in bringing action and that lawyers will only pursue their own interests instead of those of the claimants. Given that an opt-in collective action is more similar to traditional litigation than an opt-out action is, the Commission believes that a collective action based on such a model would be easier to implement at national level.[137]

The damages in a representative action would be awarded to the representative entity but, where possible, it should use the damages to directly compensate the harm suffered by the victims represented in the action. The Commission is therefore suggesting that only in exceptional cases might it be necessary to consider awarding damages to the representative entity which would then make a so-called *cy pres* distribution of the damages to related entities or use them for related purposes in order to achieve a result which would be as close as possible to compensating the victims. In an opt-in collective action the damages would be

[134] *Cf.* Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, at p. 18-19.
[135] *Cf.* Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, at p. 19-20.
[136] *Cf.* Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, at p. 20.
[137] *Cf.* Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, at p. 20-21.

distributed to the individually identified claimants corresponding to the harm that each of them has suffered.[138]

3.1. Advantages

In general, a collective action increases the social fairness, *i.e.* it enables individuals to seek damages in situations where they would not be able to enforce their rights individually, even though the possibility of a fair outcome in an individual proceeding might be greater with regard to the individual plaintiff in cases which the courts are able to effectively decide individually.[139] As a consequence, the access to the justice system would be better if collective actions were available.[140] Collective actions also have a market regulating function in that they compliment the control of markets carried out by public enforcers[141] when they are used to seek damages for illegal conduct which public enforcement has not detected or has chosen not to pursue. The use of collective actions for damages caused by antitrust violations would thus enhance the level of deterrence as the financial risk of the infringer would be increased.[142]

Furthermore, as cartels are usually secret, many affected victims of the price-fixing agreement might not be aware of the economic loss that they have suffered. Also in this respect, collective actions could serve to facilitate the distribution of information about anti-competitive conduct and make it possible for affected purchasers to seek redress. Consequently, a collective action is often the only means to both inform victims of their rights and provide a viable option for seeking damages for the loss that they have suffered.[143]

The collective group of plaintiffs also gains a stronger position vis-à-vis large defendants,[144] which decreases the asymmetry between large groups and consumers with regard to the

[138] *Cf.* Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, at p. 20-21.

[139] *Cf.* MICKLITZ, H.-W., "Gruppenklagen auf Schadensersatz – offene Fragen und mögliche Lösungen" in BUNDESMINISTERIUM FÜR SOZIALE SICHERHEIT GENERATIONEN UND KONSUMENTENSCHUTZ, "*Band I: Effektiver Rechtsschutz – Die Verbraucherrechtlichen Instrumente der Unterlassungsklage und der Gruppenklage. Effective Legal Redress – The Consumer Protection Instruments of Actions for Injunction and Group Damages Actions*", Conference on 24.2.2006 in Vienna, p. 92-103, at p. 93.

[140] *Cf.* LUTFALLA, E. and MAGNIER, V., "French Legal Reform: What is at Stake if Class Actions are Introduced in France?", 73 *Def. Couns. J.*, July 2006, p. 301-311, at p. 306.

[141] *Cf.* MICKLITZ, H.-W., "Gruppenklagen auf Schadensersatz – offene Fragen und mögliche Lösungen" in BUNDESMINISTERIUM FÜR SOZIALE SICHERHEIT GENERATIONEN UND KONSUMENTENSCHUTZ, "*Band I: Effektiver Rechtsschutz – Die Verbraucherrechtlichen Instrumente der Unterlassungsklage und der Gruppenklage. Effective Legal Redress – The Consumer Protection Instruments of Actions for Injunction and Group Damages Actions*", Conference on 24.2.2006 in Vienna, p. 92-103, at p. 93.

[142] *Cf.* Conseil de la Concurrence, "Avis du 21 septembre 2006 relatif à l'introduction de l'action de groupe en matière de pratiques anticoncurrentielles", at p. 9.

[143] *Cf.* HAUSFELD, M., OLSON, S. and GASSMANN, S., "Antitrust Class Actions: continued Vitality", *The Antitrust Review of the Americas*, 2008, p. 71-73, at p. 71-72.

[144] *Cf.* MICKLITZ, H.-W., "Gruppenklagen auf Schadensersatz – offene Fragen und mögliche Lösungen" in BUNDESMINISTERIUM FÜR SOZIALE SICHERHEIT GENERATIONEN UND KONSUMENTENSCHUTZ, "*Band I: Effektiver Rechtsschutz – Die Verbraucherrechtlichen Instrumente der*

possibility of taking action.[145] This could, in turn, encourage infringers to resolve the claims made against them and, consequently would encourage compliance more generally.[146]

Moreover, collective actions address the problem of potential litigation costs outweighing the individual loss of claimants in cases where the total loss of consumers and undertakings may be very significant but the individual losses are too small to make it viable to enforce them individually.[147] Collective actions enable the realization of economies of scale for claimants since the higher the number of claimants is, the lower the average costs of representation will be. Similarly, all claims can be heard by a single judge,[148] which is likely to speed up the litigation for all claimants. Furthermore, collective actions also enhance the consistency and finality of rulings in that the same issue is resolved in an identical manner, and save the economic resources of courts and defendants by eliminating or reducing multiple claims.[149] Consequently, the possibility of realizing economies of scale through a collective action model could be very useful in private antitrust litigation, as private enforcement of the antitrust rules requires significant economic resources and technical expertise.[150]

Apart from these benefits, there are other additional advantages of collective actions that depend on the type of action. Therefore, the potential advantages related to the two models of collective actions proposed by the Commission, *i.e.* representative actions and opt-in collective actions, will now be analyzed.

3.1.1. Representative actions

As to actions brought by a representative entity, one advantage is that they reduce the risk of frivolous actions in that the representative entity must be an entity that has been authorized to bring representative actions and because the representative entity does not have a financial interest in the outcome of the litigation but acts in a quasi public interest capacity.[151] On the other hand, the possibility of an *ad hoc* certified entity to also bring a representative action in relation to a particular infringement helps remedying situations where no officially designated representative entity exists or is unwilling to pursue the infringement in question. As the entity must be certified, there would still be a possibility to control the legitimacy of the interests that it will represent.

Unterlassungsklage und der Gruppenklage. Effective Legal Redress – The Consumer Protection Instruments of Actions for Injunction and Group Damages Actions", Conference on 24.2.2006 in Vienna, p. 92-103, at p. 94.

[145] *Cf.* Conseil de la Concurrence, "Avis du 21 septembre 2006 relatif à l'introduction de l'action de groupe en matière de pratiques anticoncurrentielles", at p. 6.

[146] *Cf.* Office of Fair Trading, "Private actions in competition law: effective redress for consumers and business, Discussion Paper, OFT916, April 2007, at p. 14.

[147] *Cf.* Office of Fair Trading, "Private actions in competition law: effective redress for consumers and business, Discussion Paper, OFT916, April 2007, at p. 13.

[148] *Cf.* Office of Fair Trading, "Private actions in competition law: effective redress for consumers and business, Discussion Paper, OFT916, April 2007, at p. 21.

[149] *Cf.* The Leuven Consumer Redress Study, at p. 265-266.

[150] *Cf.* POLVERINO, F., "A Class Action Model for Antitrust Damages Litigation in the European Union", August 28, 2006, at p. 36, available at: http//ssrn.com/abstract=927001.

[151] *Cf.* Office of Fair Trading, "Private actions in competition law: effective redress for consumers and business, Discussion Paper, OFT916, April 2007, at p. 24.

If the representative action could be used to bring an action in the interests of the group at large, such as the consumers in a given country, by seeking a common solution to the grievance instead of requiring mandates from each affected individual and attempting to seek compensation for every individual damage, it would also have the advantage of avoiding the difficulty of finding all affected individuals.[152] Representative actions for victims at large should be possible on behalf of individuals with very small claims. In these cases, the individuals might not receive compensation for their individual loss but instead at least some other type of a more indirect benefit; the damages awards could, for example, be used to create a fund protecting consumer interests in general. However, the White Paper neither specifies in which cases a representative body which has officially been designated in advance could bring a representative action on behalf of identifiable members nor does it define the meaning of "identifiable members". Thus it is not clear that the representative action envisaged by the Commission could be used for claiming damages for consumers at large. Given that the "identifiable victims" do not necessary have to be members of the qualified entities, it would nevertheless appear that the Commission is not excluding the possibility of bringing a damages claim even for consumers at large, although only in restricted cases. Again, the White Paper abstains from defining what "restricted cases" may refer to.

Finally, representative actions will reduce the financial risk for consumers since consumer associations normally pay the trial costs and consumers will be compensated in case the action is successful.[153]

3.1.2. Opt-in collective actions

The opt-in collective action has the advantage that it preserves the liberty of an individual to choose whether to bring the action or not[154] and if he has not opted in, a judgment can never have a preclusive effect on his right to bring an individual action. In this manner, it does not violate the due process rights which are guaranteed by Article 6 of the ECHR.[155] In contrast to the representative action, the claimant also has more liberty to decide whether to bring an action since there is no need for an involvement of a representative entity which could, for example, prefer not to bring a claim that appears too complex or costly because it is afraid of losing the case.

Moreover, lawyers and group representatives would have greater incentives to litigate the case in a way that would encourage more claimants to opt in and thus increasing their leverage power. This would in turn reduce the conflicts of interest between the group representative and group members. Consequently, potential claimants would only opt in if they believed that

[152] *Cf.* MILUTINOVIC, V., "*Private Enforcement. Upcoming Issues*" in AMATO, G. and EHLERMANN, C-D, "*EC Competition Law*", Hart Publishing, Oxford and Portland, Oregon, 2007, p. 725-757, at p. 753-754.
[153] This is the situation, for example, in France. *Cf.* France – National Report, 15 November 2006, prepared for the Leuven Consumer Redress Study, at p. 15.
[154] *Cf.* MULHERON, R., "Some difficulties with Group Litigation Orders – and why a class action is superior", *C.J.Q.*, 24(JAN), 2005, p. 40-68, at p. 50.
[155] European Convention for the Protection of Human Rights and Fundamental Freedoms.

the possibilities of winning the case would be greater than the risk of losing it.[156] The possibilities of group members to defend their interests are also better than in an opt-out action as the members are identified and cannot be as easily ignored.[157]

3.2. Problems related to representative and opt-in collective actions

The potential risks and difficulties related to collective actions depend on the action introduced. Drawbacks common to collective actions include the risk of unmeritorious claims and vexatious litigation, which result in costs, diversion of management time and chilling effects.[158] Furthermore, a large number of claims could make the issues, such as the quantification of damages, more complicated[159] and longer.[160] Similarly, the identification of indirect purchasers and final consumers may be difficult and, in practice, it might be difficult to reach all individual claimants before the action is initiated. It is particularly difficult to identify indirect purchasers when the good or service is part of another product or service, since it would be necessary to trace the indirect effects of the antitrust violation in the whole distribution chain.[161] What is more, the identification of victims can never be complete because it is not possible to take into account the potential customers who abstained from purchasing the product as a consequence of the anti-competitive conduct.[162] In order to remedy this problem, additional consumers should be given an opportunity to join the action at a later stage once they have learned about its existence,[163] or an opt-out model should be considered.

There is also a risk of conflicts of interest between group representatives and the group members in that lawyers might be tempted to rather act in their own interest in order to obtain financial gains that are as large as possible. Therefore, the court must ascertain that the representative or representatives are not only pursuing their own interests but also those of the other group members.[164] In order to avoid conflicts of interest, the incentives of the

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[156] *Cf.* POLVERINO, F., "A Class Action Model for Antitrust Damages Litigation in the European Union", August 28, 2006, at p. 35-36, available at: http//ssrn.com/abstract=927001.

[157] *Cf.* GARCÍA CACHAFEIRO, F., "Las asociaciones de consumidores ante el abuso de posición dominante en la Unión Europea", *Cuadernos Europeos de Deusto*, No. 38/2008, p. 155-175, at p. 165.

[158] *Cf.* Office of Fair Trading, "Private actions in competition law: effective redress for consumers and business, Discussion Paper, OFT916, April 2007, at p. 18.

[159] *Cf.* Office of Fair Trading, "Private actions in competition law: effective redress for consumers and business, Discussion Paper, OFT916, April 2007, at p. 22.

[160] *Cf.* The Leuven Consumer Redress Study, at p. 266.

[161] *Cf.* WILS, W.P.J., "Should Private Antitrust Enforcement Be Encouraged in Europe" *World Competition*, 26(3), 2003, p. 473-488, at p. 487.

[162] *Cf.* GARCÍA CACHAFEIRO, F., "Las asociaciones de consumidores ante el abuso de posición dominante en la Unión Europea", *Cuadernos Europeos de Deusto*, No. 38/2008, p. 155-175, at p. 170.

[163] *Cf.* Office of Fair Trading, "Private actions in competition law: effective redress for consumers and business, Discussion Paper, OFT916, April 2007, at p. 22-23.

[164] *Cf.* MICKLITZ, H.-W., "Gruppenklagen auf Schadensersatz – offene Fragen und mögliche Lösungen" in BUNDESMINISTERIUM FÜR SOZIALE SICHERHEIT GENERATIONEN UND KONSUMENTENSCHUTZ, "*Band I: Effektiver Rechtsschutz – Die Verbraucherrechtlichen Instrumente der Unterlassungsklage und der Gruppenklage. Effective Legal Redress – The Consumer Protection Instruments of Actions for Injunction and Group Damages Actions*", Conference on 24.2.2006 in Vienna, p. 92-103, at p. 95.

representative should, consequently, be aligned with those of the group. Similarly, it would be necessary to ensure that no sub-group is inappropriately favored at the cost of another similarly situated sub-group.[165] It would also be necessary to ascertain that group members are informed throughout the proceedings about the initiation and development of different phases of the litigation.[166] In addition, an EU specific drawback in multi-state claims would be the need to provide translations of the notification of the action and the relevant trial material, which would result in additional costs and would delay the proceedings.[167]

Another difficulty is how to finance the collective actions and how to distribute the proceeds. This involves making a policy choice about whether or not to permit contingency fee arrangements or some other form of private funding. Since the calculation of damages is often complicated and it is not always possible to distribute the damages awards directly to the victims, it is also necessary to decide whether undistributed funds could be used to the benefit of the victims and how this should be realized.

3.2.1. Representative actions

As regards particular difficulties depending on the type of collective action, a drawback of representative actions (as they are envisaged by the European Commission) is that, in principle, they could only be brought on behalf of identified victims and, as a consequence, they fail to optimize economies of scale and result in unnecessary costs and complexity and might prevent meritorious cases from being brought.[168] However, this could be avoided, if it were allowed to bring a representative action in the collective interests of a large group, to the benefit of the whole group, without aiming at providing redress for the individual claims as such,[169] but using the damages awards to the benefit of the victims or to fund future actions, if it were not possible to find a cause that would benefit all victims.

A further drawback of representative actions is that the financial resources available to consumer associations and other representative bodies are likely to restrain their possibilities of taking actions. As the Commission points out, representative entities might be forced to prioritize their action if they do not have the resources to simultaneously handle several actions related to distinct antitrust violations.[170] Moreover, the incentives to bring actions would also be smaller than for collective actions initiated by individuals or lawyers in that the

[165] *Cf.* The Leuven Consumer Redress Study, at p. 266.
[166] *Cf.* MICKLITZ, H.-W., "Gruppenklagen auf Schadensersatz – offene Fragen und mögliche Lösungen" in BUNDESMINISTERIUM FÜR SOZIALE SICHERHEIT GENERATIONEN UND KONSUMENTENSCHUTZ, "*Band I: Effektiver Rechtsschutz – Die Verbraucherrechtlichen Instrumente der Unterlassungsklage und der Gruppenklage. Effective Legal Redress – The Consumer Protection Instruments of Actions for Injunction and Group Damages Actions*", Conference on 24.2.2006 in Vienna, p. 92-103, at p. 95.
[167] *Cf.* MILUTINOVIC, V., "*Private Enforcement. Upcoming Issues*" in AMATO, G. and EHLERMANN, C-D, "*EC Competition Law*", Hart Publishing, Oxford and Portland, Oregon, 2007, p. 725-757, at p. 753.
[168] *Cf.* Office of Fair Trading, "Private actions in competition law: effective redress for consumers and business", Recommendations from the Office of Fair Trading, OFT916resp, November 2007, at p. 23.
[169] *Cf.* MILUTINOVIC, V., "*Private Enforcement. Upcoming Issues*" in AMATO, G. and EHLERMANN, C-D, "*EC Competition Law*", Hart Publishing, Oxford and Portland, Oregon, 2007, p. 725-757, at p. 753-754.
[170] *Cf.* Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, at p. 21.

financial gains would either go to the victims or, where this would not feasible, they would probably be designated to funds established to the benefit of the group or to finance future actions. Similarly, the financial risks involved in bringing an action would in all likelihood encourage the representative body to only bring actions that it would be certain of winning, while it would avoid bringing complex cases. In addition, the fact that representative actions have not been brought extensively despite that they are widely available in the Member States[171] also shows that improvements are needed to make these actions work in practice.

Conflicts of interests could further restrain representative entities' possibilities of bringing an action, for example, when their members are both infringers and victims of an antitrust violation or when subgroups of victims have different interests from the ones that the representative entities decide to pursue. Similarly, it is possible that the interests of some victims are not represented by any existing qualified entity.[172]

Given that representative entities must be officially designated in advance or certified *ad hoc* by the Member States, there is also a risk that political interests might influence on the representative entities' possibilities of bringing a representative action.

3.2.2. Opt-in collective actions

In the opt-in collective action, claimants must take an active step to join the action, which could reduce the number of claimants willing to join the action or who would bother to take the necessary steps. There is also a risk in the opt-in model that claimants will wait for the outcome of the action before they initiate their own actions in order to know whether the outcome is favorable.[173] Arguably, this in turn would make the action less attractive, since a small group of plaintiffs would not have any deterrent effect if their individual claims were small. An opt-in model would thus not be possible for small damages claims.[174] A study conducted by the University of Leuven on alternative means of consumer redress other than redress through ordinary judicial proceedings has pointed out that economic, psychological and social barriers might impede potential group members from opting in.[175] In fact, to date, the participation of consumers in opt-in collective actions in general (*i.e.* not necessarily in order to claim antitrust damages but including also compensation for harm caused by some other type of infringement) in the EU has been less than 1%, whereas the participation rate in opt-out collective actions has been significant. According to the European Consumers'

[171] *Cf.* HODGES, C., "Europeanization of civil justice: trends and issues", *C.J.Q.*, 26(JAN), 2007, p. 96-123, at p. 115.
[172] *Cf.* Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, at p. 21.
[173] *Cf.* GARCÍA CACHAFEIRO, F., "Las asociaciones de consumidores ante el abuso de posición dominante en la Unión Europea", *Cuadernos Europeos de Deusto*, No. 38/2008, p. 155-175, at p. 164.
[174] *Cf.* MICKLITZ, H.-W., and STADLER, A., "The Development of Collective Legal Actions in Europe, Especially in German Civil Procedure", *EBLR*, Vol. 17, Issue 5, 2006, 1473-1503, at p. 1499.
[175] *Cf.* The Leuven Consumer Redress Study, at p. 289.

Association, the participation rate in opt-out collective actions, for example, in the Netherlands has been 97% and almost 100% in Portugal.[176]

From the defendant's point of view, opt-in collective actions have the drawback that he will not know how many individual actions he might face later as he will not know the total number of possible claimants. Similarly, for courts there is a risk that numerous individual claims brought later will prove burdensome.[177]

Furthermore, consumers are not necessarily aware that they have been victims of a cartel, because cartels are normally secret and detecting and proving their existence is challenging even for public enforcers of the antitrust rules. Since access to evidence for private litigants is limited and the burden of proof is high, proving the existence of an anti-competitive conduct is very difficult. For example, in Spain, the obligation to quantify damages and the unwillingness of courts to award compensation for the loss of profit[178] renders private antitrust litigation complicated and risky. The risk of losing, associated with the obligation to pay the other party's costs of litigation, serve as disincentives for claimants with small damages claims to initiate proceedings. In other words, it would seem that there is a need for a collective action that would reduce the costs and risks of litigation and make economies of scale possible. Consequently, the paper will now examine whether the opt-out model could be the solution.

4. The Opt-Out collective model

An opt-out collective action refers to an action which is brought by a representative party or parties on behalf of a larger group of unidentified or identifiable individuals who are all concerned by the same or similar issue. If a group member does not opt out from the collective action within an established time limit, he will be bound by the judgment.

The best known example of a collective action is the U.S. class action. Consequently, the U.S. class action can be used as a reference when analyzing whether an opt-out collective action should be implemented in the EU in order to improve redress for victims of antitrust violations. However, it should be borne in mind that additional features of the U.S. civil procedure, such as treble damages, liberal discovery rules and contingency fees, which in general do not exist in the European legal systems, also influence on the effectiveness of the class action. It is therefore necessary to briefly explain how the U.S. class action works before analyzing its advantages and drawbacks.

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[176] *Cf.* BEUC, The European Consumers' Association "European Group Action. Ten Golden Rules", available at: http://www.euractiv.com/ndbtext/European_Group_Action_10_Golden_Rules.pdf and MULHERON, R. "Reform of collective redress in England and Wales: a perspective of need", Civil Justice Council of England and Wales, 2008, at p. 153, available at http://www.civiljusticecouncil.gov.uk/files/collective_redress.pdf.

[177] *Cf.* MULHERON, R., "Some difficulties with Group Litigation Orders – and why a class action is superior", *C.J.Q.*, 24(JAN), 2005, p. 40-68, at p. 54.

[178] *Cf. e.g.* judgment of the High Administrative Court of Madrid No. 130/2006, of December 18, 2006 and judgment of Commercial Court No. 5 of Madrid No. 85/2005, of November 11, 2005.

4.1. The class action

There is no specific provision for class action in the US antitrust laws, but antitrust class actions are mainly filed under rule 23(b)(3) of the Federal Rules of Civil Procedure.[179] A class action can be initiated by a person or several persons filing an action as class representative for a defined class. Class action representatives are usually self-appointed, although many class actions are, in fact, initiated by a lawyer or a law firm that recruits the class representatives and pays the costs of the litigation.[180]

When a person has sued or has been sued as a class representative, the court must, as soon as feasible, determine by order whether to certify the action as a class action.[181] The class certification determines who will be bound by the final judgment and aims to ensure that the class is sufficiently cohesive to justify a class action.[182] The court will certify an action as a class action if the action fulfills the four requirements of Federal Rules of Civil Procedure 23(a), *i.e.* 1) numerosity of parties so that joinder of all members is impracticable, 2) the existence of common questions of law or fact, 3) the claims or defenses of the representative parties are typical of the claims or defenses of the class,[183] and 4) the representative parties will fairly and adequately protect the interests of the class.[184]

In class actions for damages, there is an additional requirement that must be satisfied before the judge can certify the class: the requirement that "questions of law or fact common to the members of the class predominate over questions affecting only individual members".[185] In other words, the question is whether the litigants will focus most of their efforts on the common issues so that a single class trial with class-wide evidence is possible and it will not be necessary to conduct multiple trials on issues and facts that are relevant only to individual class members.[186] In order to assess whether this is the case, the court looks into the following issues: a) the class members' interest in individually controlling the prosecution or defense of separate actions; b) the extent and nature of any litigation concerning the controversy already

[179] *Cf.* LANG, C., "Class Actions and the US Antitrust Laws: Prerequisites and Interdependencies of the Implementation of a Procedural Devise for the Aggregation of Low-Value Claims", *World Competition*, 24(2), 2001, p. 285-302, at p. 287.

[180] *Cf.* SHERMAN, E.F., "American class actions: significant features and developing alternatives in foreign legal systems", 215 Federal Rules Decisions 130.

[181] Fed. R. Civ. P. 23(c)(1)(a).

[182] *Cf.* POLVERINO, F., "A Class Action Model for Antitrust Damages Litigation in the European Union", August 28, 2006, at p. 9-10, available at http//ssrn.com/abstract=927001.

[183] The typicality of claims and defenses means that the interests of the class representative are sufficiently aligned with those of the class members, but it does not exclude that the plaintiffs are in different purchasing positions with respect to the manufacturer. *Cf.* POLVERINO, F., "A Class Action Model for Antitrust Damages Litigation in the European Union", August 28, 2006, at p. 7, available at: http//ssrn.com/abstract=927001,and *Sumitomo Copper Litigation*, 182 F.R.D. 85, (S.D.N.Y., 1998).

[184] The adequacy requirement refers to the prerequisite that there are no significant conflicts of interest between the representative party and the absent class members. *Cf.* POLVERINO, F., "A Class Action Model for Antitrust Damages Litigation in the European Union", August 28, 2006, at p. 7, available at: http//ssrn.com/abstract=927001.

[185] Fed. R. Civ. P. 23(b)(3).

[186] *Cf.* SHERMAN, E.F., "American class actions: significant features and developing alternatives in foreign legal systems", 215 Federal Rules Decisions 130.

begun by or against class members; c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and d) the likely difficulties in managing a class action.[187]

After the class has been certified, "the court must give to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort".[188] The members of the class must be given an opportunity to opt out of the class if they wish. If they opt out, they can instead bring an individual claim. But in the majority of cases the number of plaintiffs who opt out is small.[189] Finally, the possible damages awarded will be made to the entire class and the costs of class action litigation must also be carried by the whole class.[190]

4.1.1. Advantages

The class action offers more additional advantages compared with the representative action and the opt-in collective action. First, no active steps are required by class members to benefit from the class action.[191] Thus, the risk of the number of plaintiffs being too small for the action to pay off as a consequence of the potential claimants being too passive to take the required measures to join the action is reduced. The rights of individuals are still safeguarded to a certain extent in that, under the Class Action Fairness Act of 2005, they are given the possibility to opt out from the class action that has been brought when they are informed of its existence[192] and they may decide to opt out even later in the proceedings when a settlement is proposed.[193]

Second, the class action can be efficient also for the defendant, since he can settle disputes with numerous plaintiffs in one single case. Consequently, his litigation expenses are reduced and he obtains legal certainty and avoids potentially inconsistent outcomes of several trials.[194] Further, the defendant will know the exact number of potential individual proceedings, which he might later face, *i.e.* the number of individuals who have opted out, which enables him to know the extent of the preclusive effect of the judgment or settlement.[195]

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[187] Fed. R. Civ. P. 23(b)(3).
[188] Fed. R. Civ. P. 23(c)(2)(b).
[189] *Cf.* SHERMAN, E.F., "American class actions: significant features and developing alternatives in foreign legal systems", 215 Federal Rules Decisions 130.
[190] *Cf.* LANG, C., "Class Actions and the US Antitrust Laws: Prerequisites and Interdependencies of the Implementation of a Procedural Devise for the Aggregation of Low-Value Claims", *World Competition*, 24(2), 2001, p. 285-302, at p. 288.
[191] *Cf.* MULHERON, R., "Some difficulties with Group Litigation Orders – and why a class action is superior", *C.J.Q.*, 24(JAN), 2005, p. 40-68, at p. 48.
[192] Fed. R. Civ. P. 23(c)(2)(b)(v).
[193] Fed. R. Civ. P. 23(e)(5).
[194] *Cf.* POLVERINO, F., "A Class Action Model for Antitrust Damages Litigation in the European Union", August 28, 2006, at p. 9, available at: http//ssrn.com/abstract=927001.
[195] *Cf.* MULHERON, R., "Some difficulties with Group Litigation Orders – and why a class action is superior", *C.J.Q.*, 24(JAN), 2005, p. 40-68, at p. 54-55.

However, the greatest advantage of the class action is seen in cases involving small individual claims since it is possible to bring an action also for the benefit of unidentified plaintiffs. This is likely to be the most efficient way to deter anti-competitive conduct because the defendant will, if the antitrust violation is detected, face a sufficiently large number of plaintiffs, the claims of which will constitute an important financial deterrent to breaching competition laws in the first place. Moreover, the possibility of numerous plaintiffs bundling economic resources and taking advantage of the economies of scale as well as coordinating their behavior is particularly advantageous for plaintiffs with small claims as their individual claims are too small to be enforced individually.[196] Consequently, class actions could efficiently reduce litigation cost, which usually constitute an obstacle to private enforcement.[197]

A practical example serves to show that class actions enable multiple victims of price-fixing cartels to recover their losses much more efficiently than other means available in other jurisdictions. In the global *Vitamins* cartel, thousands of victims in the U.S.A could recover approximately $2.4 billion, which were distributed to class members on a prorate basis. In Canada, the class action resulted in the largest settlement to date for price-fixing in Canada, amounting to over €107 million. Also in Australia, the class action recovery was approximately €23.3 million. On the contrary, in the EU, fewer than ten victims have recovered a total of less than €7.6 million.[198]

4.1.2. Drawbacks and risks

Because of the possibility in the U.S.A. of obtaining treble damages, the potentially large contingency fees for lawyers and no obligation for the unsuccessful plaintiff to pay the defendant's costs and legal fees, frivolous class actions might be brought.[199] The incentives for competitors to bring an antitrust damages action are high because the potential high costs for the defendant to defend himself and the risk of treble damages may induce the defendant to settle the lawsuit even if his conduct were not anti-competitive.[200]

Moreover, class action litigation form part of the litigation culture in the United States that some commentators consider to be excessively litigious. But this litigation culture, supported by procedural rules on discovery, one-way fee shifting etc., existed already before private antitrust enforcement significantly increased and, in fact, antitrust class actions only amount

[196] *Cf.* LANG, C., "Class Actions and the US Antitrust Laws: Prerequisites and Interdependencies of the Implementation of a Procedural Devise for the Aggregation of Low-Value Claims", *World Competition*, 24(2), 2001, p. 285-302, at p. 286.
[197] *Cf.* POLVERINO, F., "A Class Action Model for Antitrust Damages Litigation in the European Union", August 28, 2006, at p. 35, available at http//ssrn.com/abstract=927001.
[198] *Cf.* HAUSFELD, M., OLSON, S. and GASSMANN, S., "Antitrust Class Actions: continued Vitality", *The Antitrust Review of the Americas*, 2008, p. 71-74, at p. 72.
[199] *Cf.* POLVERINO, F., "A Class Action Model for Antitrust Damages Litigation in the European Union", August 28, 2006, at p. 34, available at http//ssrn.com/abstract=927001.
[200] *Cf.* GINSBURG, D.G., "Comparing antitrust enforcement in the United States and Europe", *Journal of Competition Law and Economics*, 1(3), 2005, p. 427-439, at p. 435-436.

to a modest share of all federal class actions. Even during its peak, antitrust class actions represented less than 8% of the total number of class actions.[201]

What is more, class action abuse normally occurs in other types of cases, such as securities actions and business tort cases. This is so because the outcome of antitrust cases is too uncertain and it is too expensive to bring unfounded antitrust cases. Further, defendants are usually not prepared to settle early, since there is first a possibility to motion to dismiss the case, then to oppose class certification and finally to motion for a summary judgment. It is very difficult that a frivolous antitrust case will pass all these stages. Thanks to the Class Action Fairness Act of 2005, class actions are also considerably more difficult to bring in state courts in which abuses have traditionally occurred.[202] In addition, parties and their counsel can be sanctioned under Rule 11 for bringing frivolous cases.[203]

Nevertheless, in case there is not sufficient commonality of interests between class members, there is a risk that the class action leads to a result that is worse for the class member and the defendant than individualized decisions on the disputes. Moreover, the plaintiffs' bargaining power is increased in class actions, which may give them an advantage over the defendant.[204] However, this is not necessarily a negative thing, especially when the plaintiffs have small claims that would not be economically viable to pursue on their own, but the aggregate damages are considerable.

Furthermore, when there are several groups of class members, it could be necessary that different attorneys represent the different classes in order to ensure that there is no conflict of interest regarding the division of a settlement or award between the classes. However, when there are multiple subclasses it might complicate and impede the class action from being effectively pursued. Class counsels have instead recently tended to appoint attorneys who are not associated to them to represent different groups. If a conflict of interest arises, these attorneys then negotiate between themselves to resolve the issues.[205]

Further, class actions do not always result in efficient compensation of indirect purchasers. For example, when those actions are settled, indirect purchasers might be given vouchers, coupons or products instead of monetary compensation, which many of them might not be interested in collecting.[206] There is also a risk that a coupon settlement will intensify the market effects of the antitrust violation in question if the coupons are redeemable on

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[201] BUXBAUM, H.L., "*Private Enforcement of Competition Law in the United States – of Optimal Deterrence and Social Costs in Private Enforcement of EC Competition Law*", in BASEDOW, J. (ed.), "*Private Enforcement of EC Competition Law*", Kluwer Law International, Alphen aan den Rijn, 2007, p. 44-60, at p. 57-58.

[202] *Cf.* SCHNELL, G., "Class Action Madness in Europe – a Call for a More Balanced Debate", *E.C.L.R.*, Volume 28, Issue 11, 2007, p. 617-619, at p. 618.

[203] 28 U.S.C. §11(c).

[204] *Cf.* SHERMAN, E.F., "American class actions: significant features and developing alternatives in foreign legal systems", 215 Federal Rules Decisions 130.

[205] *Cf.* RICHARDS, J.D., "What makes an antitrust class action remedy successful?: a tale of two settlements", *Tulane Law Review*, 80, December, 2005, p. 621-658, at p. 646.

[206] *Cf.* Antitrust Modernization Commission, Report and Recommendations, April 2007, at p. 273.

purchases from the infringers, so it is also important to take into consideration the market effects in structuring the settlement.[207]

Identifying indirect purchasers and quantifying their claims could also be challenging. But defendants' business records and computer databases together with electronic technologies facilitate the task of locating affected purchasers.[208] Nevertheless, sometimes the individual claims of indirect purchasers are also so small that the amount that the defendant would have to pay in order to send the plaintiff his compensation would by far exceed the amount of the compensation. It has been suggested that individual class members could not bring claims below a minimum amount as such, but the recovered funds related to these claims could be used to fund a so-called *cy pres* award, which would then be used for the benefit of uncompensated class members to the extent that it would be possible.[209] In deciding on the appropriateness of a *cy pres* award, the decisive factor should be that the award should, to the maximum extent possible, benefit the same group of class members who cannot be compensated directly out of impracticality reasons.[210]

4.2. Some examples from other countries

The class action described above must be put in context since it reflects the U.S. legal system and legal and cultural traditions. Therefore, an identical collective action model might not be feasible in the EU, taking into account European legal and cultural traditions. It is thus necessary to examine other collective actions based on the opt-out model existing in some European jurisdictions in order to establish whether there would be further risks related to these actions and how these possible risks could be avoided in the EU.

In the White Paper on Damages actions for breach of the EC antitrust rules, the Commission advocates for the adoption of representative actions and collective actions based on an opt-in model. According to the Commission, the opt-out model would have more disadvantages than the opt-in model and, therefore, the opt-in model should be given preference.[211] First, they would be more expensive because they would entail high court costs and often high lawyers' fees, principal-agent problems, costs linked to the certification of the class, high costs of distribution of damages, etc.[212] The management of opt-out collective actions would require a

[207] *Cf.* RICHARDS, J.D., "What makes an antitrust class action remedy successful?: a tale of two settlements", *Tulane Law Review*, 80, December, 2005, p. 621-658, at p. 655.
[208] *Cf.* RICHARDS, J.D., "What makes an antitrust class action remedy successful?: a tale of two settlements", *Tulane Law Review*, 80, December, 2005, p. 621-658, at p. 638-640.
[209] *Cf.* RICHARDS, J.D., "What makes an antitrust class action remedy successful?: a tale of two settlements", *Tulane Law Review*, 80, December, 2005, p. 621-658, at p. 644.
[210] *Cf.* RICHARDS, J.D., "What makes an antitrust class action remedy successful?: a tale of two settlements", *Tulane Law Review*, 80, December, 2005, p. 621-658, at p. 650. This is the reason why the multi-district litigation settlement failed in the *Microsoft* case, since the proposed settlement consisting in Microsoft donating to a charitable purpose aiming at providing computer technology to the poorest schools in the US would not have benefited the class members. *Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702 (D.Md. 2001).
[211] *Cf.* Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, at p. 18-21.
[212] "Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios", Report for the European Commission, Contract DG COMP/2006/A3/012, Final Report prepared by the Centre for

greater involvement of lawyers and judges since the group would be likely to be larger. The distribution of damages would, in turn, be more expensive because it would be more difficult to identify the class members.[213]

Second, there would be a risk of principal-agent problems in that the claimants might lose control over the proceedings and the agent could pursue his own interests instead of those of the claimants.[214] As the group would tend to be larger, the group of passive claimants would presumably also be larger and some group members might not even be aware of the litigation. It would thus be more difficult to ensure that the representation of all victims would be adequate when some of them are unidentified.[215] Third, the class representative would be overcompensated if it could retain part of the award when all class members did not claim damages.[216] Forth, there are some constitutional concerns about the compatibility of the opt-out model with European legal systems.[217]

In order to assess the Commission's concerns, the existing opt-out collective actions in some European countries will now be briefly analyzed in order to establish whether these concerns are justified.

Among the opt-out collective actions available in the EU, Portugal's "popular action" comes closest to the U.S. class action. The popular action may be brought by any citizen exercising civil or political rights as well as by local authorities or any association or foundation on behalf of collective interests of citizens as long as it has legal personality and its objectives include the protection of the interests at issue.[218] The fields in which the action can be brought relate, for example, to protection of consumer rights related to the use of products and services, and public domain.[219] The class consists of all members who have not opted out within the period established by the court and, consequently, the class representative can represent consumers without an express mandate. If the claim is manifestly unfounded, the judge may dismiss the action,[220] which serves as a safeguard against unmeritorious actions. The cost rules are also quite favorable to claimants in that no costs for preliminary preparations are to be paid and the claimant will only be required to pay 10-50% of the court fess if he loses the whole case, unless he has acted in bad faith. In the latter case, the general costs rules apply.[221]

European Policy Studies, Erasmus University Rotterdam and LUISS Guido Carli, Brussels, Rome and Rotterdam, December 21, 2007 (hereinafter "the External Impact Study"), at p. 570.

[213] The External Impact Study, at p. 315-316.

[214] *Cf.* Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, at p. 21.

[215] The External Impact Study, at p. 315-316.

[216] The External Impact Study, at p. 568 and Commission Staff Working Document, Accompanying document to the White Paper on Damages actions for breach of the EC antitrust rules, Impact assessment, SEC(2008) 405, 2.4.2008, at p. 38.

[217] The External Impact Study, at p. 272.

[218] *Cf.* MULHERON, R, "The case for an opt-out class action for European Member States: a legal and empirical analysis", 15 *Colum. J. Eur. Law*, Summer, 2009, p. 409-453, at p. 421-422.

[219] Article 1(2) of Chapter 1 of Participation and Popular Action Law 83/95 of Aug. 31, 1995.

[220] Article 13 of Chapter 3 of Participation and Popular Action Law 83/95 of Aug. 31, 1995.

[221] Article 20 of Chapter 3 of Participation and Popular Action Law 83/95 of Aug. 31, 1995.

However, only a few damages actions have been brought by the Portuguese consumer associations because their resources are limited. It is also believed that due to insufficient understanding and the duration and cost of court proceedings individual consumers would in practice not be able to bring a popular action without the involvement of consumer associations.[222]

Norway, in turn, introduced collective actions in 2005 by adopting the Act Relating to Mediation and Procedure in Civil Disputes. Collective actions can be brought as an opt-in as well as an opt-out action and it is for the court to determine which model should be adopted in each case. The court may also require that the action be brought as individual actions. However, if the claims are so small that it must be assumed that a considerable majority of them would not be brought as individual actions, the court must chose the opt-out mechanism for the claims in question.[223]

After having certified the class, the court must issue notice to potential class members.[224] The court either orders the class representative to pay for the notice or pays for it itself. In the opt-out model, claimants belong to the class without registration to the class register – unless they choose to opt-out from the collective action –, whereas in the opt-in model, they must register to join the class. In the former case, the court, at its own expense, must keep a register of the persons who have opted out from the action.[225]

There are also safeguards to avoid that the class representative is overcompensated in comparison to other class members since the court may replace him if he cannot properly pursue the interests of the class. Moreover, contingency fees are forbidden in any kind of litigation and lawyers may not be paid a percentage of the amount recovered by the collective action.[226]

In Denmark, the collective action is generally based on an opt-in mechanism, but public authorities may bring an opt-out collective action if the claims of each class member do not exceed 2000 DKK. Class members who have not opted out may be liable for legal costs up to the amount they could recover if the lawsuit succeeded, but are not required to pay security fees.[227]

In the Netherlands, an opt-out collective settlement model for mass monetary damages exists. The relevant rules are laid down in the Dutch Civil Code (Art. 7:907-910 CC) and in the

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[222] *Cf.* CIVIC CONSULTING, "Country Report Portugal", at p. 21, available at http://ec.europa.eu/consumers/redress_cons/pt-country-report-final.pdf.

[223] *Cf.* GAUDET, R., "Turning a blind eye: the Commission's rejection of opt-out class actions overlooks Swedish, Norwegian, Danish and Dutch experience" *E.C.L.R.*, Volume 30, Issue 3, 2009, p. 107-117, at p. 112.

[224] Section 35-5 of the Act Relating to Mediation and Procedure in Civil Disputes.

[225] *Cf.* GAUDET, R., "Turning a blind eye: the Commission's rejection of opt-out class actions overlooks Swedish, Norwegian, Danish and Dutch experience" *E.C.L.R.*, Volume 30, Issue 3, 2009, p. 107-117, at p. 113.

[226] *Cf.* GAUDET, R., "Turning a blind eye: the Commission's rejection of opt-out class actions overlooks Swedish, Norwegian, Danish and Dutch experience" *E.C.L.R.*, Volume 30, Issue 3, 2009, p. 107-117, at p. 113.

[227] *Cf.* GAUDET, R., "Turning a blind eye: the Commission's rejection of opt-out class actions overlooks Swedish, Norwegian, Danish and Dutch experience" *E.C.L.R.*, Volume 30, Issue 3, 2009, p. 107-117, at p. 114.

Dutch Code of Civil Procedure (Art. 1013-1018 CCP) and they only apply to settlements, *i.e.* it is not possible to bring an opt-out collective action. If defendants and representative organizations agree to settle their dispute out of court, they can jointly apply to the Amsterdam Court of Appeals to declare the settlement fair and binding even on non-parties to the agreement, on an opt out-basis. The collective settlement is to be published in a newspaper and everyone who is included within one of the categories of the settlement must be given an opportunity to opt-out. The opt-out period for class members must be at least three months, whereas for the defendant it may not be longer than six months after the expiry of the opt-out period for the class members. The defendant may only opt-out if this is explicitly stipulated in the agreement.[228]

If the settlement is approved, individuals included in one of the categories of the settlement who have not opted out on time are bound by that settlement, even if they do not know about it. Appeal is not possible and only the petitioning parties can jointly and under restricted conditions present their case to the Supreme Court.[229]

In case all class members do not come forward to claim their compensation, any funds that are left after class members have received their share may be re-distributed to class members through a supplemental distribution or go to a charitable goal. If the amount exceeds US$ 5 million and it is not possible to distribute it through supplemental distribution, it is returned to the defendant. To date, the Dutch opt-out model has resulted in the highest recoveries in Europe.[230]

Opt-out collective actions are hence already a reality in Europe and have been deemed as constitutionally compatible in the jurisdictions which currently provide them.[231] The Norwegian and Danish opt-out collective actions increase access to justice in that they offer a remedy in situations where opt-in collective actions tend to have their limitations, *i.e.* in low value claims that would not be viable to be enforced individually. Furthermore, the Dutch opt-out collective settlement mechanism has proven to guarantee the best possibilities of victims receiving compensation for their loss in the EU.

An obligation for group members to pay legal costs could be a problem if all group members are not reached in time for them to choose to opt out from the collective action. However, if the opt-out model were designed so that this obligation was limited to the group representative and those members who have *de facto* had a possibility to exercise their right to

[228] *Cf.* TZANKOVA, I and LUNSINGH SCHEURLEER, D.F., "Netherlands Class Actions, Group Litigation and Other Forms of Collective Litigation", Netherlands National Report, at p. 3 and 7-8, available at: http://globalclassactions.stanford.edu/PDF/Netherlands_National_Report.pdf.

[229] *Cf.* TZANKOVA, I and LUNSINGH SCHEURLEER, D.F., "Netherlands Class Actions, Group Litigation and Other Forms of Collective Litigation", Netherlands National Report, at p. 9, available at: http://globalclassactions.stanford.edu/PDF/Netherlands_National_Report.pdf.

[230] *Cf.* GAUDET, R., "Turning a blind eye: the Commission's rejection of opt-out class actions overlooks Swedish, Norwegian, Danish and Dutch experience" *E.C.L.R.*, Volume 30, Issue 3, 2009, p. 107-117, at p. 115-116.

[231] The compatibility of the opt-out model with European legal systems and the European Convention of Human Rights will be examined in more detail in Chapter 5 of this paper.

opt-out, there would not be a risk of a group member being obligated to pay for something in which he did not wish to take part in the first place.

The fears about the opt-out model being more expensive than the opt-in model expressed in the External Impact Study[232] assessing, *inter alia*, the potential effects of the introduction of an opt-out collective action in the EU also seem unfounded. On the contrary, as R. Gaudet has pointed out, opt-in collective actions can be as expensive or even more expensive as opt-out collective actions. First, for example, the Swedish opt-in collective action requires two or more noticed being issued during the litigation, whereas the Dutch opt-out collective action foresees the distribution of two notices. Second, when class members are allowed to join the collective action at any time, sufficient human resources are needed in order to receive communications and to insert the names of class members into the register. Conversely, in the Dutch opt-out model, class members are only requested to identify themselves for recovery at the end of the litigation, thus reducing the time needed to process the requests.[233]

In all examined opt-out models there are also safeguards put in place in the form of court scrutiny to ensure that class counsels and class representatives do not abuse their positions and to guarantee that settlements are fair. There is also no evidence so far that the existence of opt-out collective actions would have been used in Europe to blackmail defendants to settle in order to avoid a collective action being brought. What is more, there are caps on the fees that lawyers can claim for bringing a collective action.[234] Consequently, the risk of class representatives or class counsels getting overcompensated is also minimized.

In the field of antitrust enforcement, it appears that the advantages of the class actions outweigh their drawbacks. In the U.S.A., private antitrust enforcement represents over 90% of the total enforcement of antitrust laws and some of it can be contributed to the existence of class actions in that private enforcement increased significantly a few years after a more effective class action mechanism was adopted in 1966.[235] However, the number of antitrust class actions of the total number of class actions brought is modest,[236] which would suggest that the class action device is not often being abused in antitrust cases.

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[232] "Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios", Report for the European Commission, Contract DG COMP/2006/A3/012, Final Report prepared by the Centre for European Policy Studies, Erasmus University Rotterdam and LUISS Guido Carli, Brussels, Rome and Rotterdam, December 21, 2007.

[233] *Cf.* GAUDET, R., "Turning a blind eye: the Commission's rejection of opt-out class actions overlooks Swedish, Norwegian, Danish and Dutch experience" *E.C.L.R.*, Volume 30, Issue 3, 2009, p. 107-117, at p. 117.

[234] *Cf.* GAUDET, R., "Turning a blind eye: the Commission's rejection of opt-out class actions overlooks Swedish, Norwegian, Danish and Dutch experience" *E.C.L.R.*, Volume 30, Issue 3, 2009, p. 107-117, at p. 117

[235] *Cf.* BUXBAUM, H.L., "*Private Enforcement of Competition Law in the United States – of Optimal Deterrence and Social Costs in Private Enforcement of EC Competition Law*", in BASEDOW, J. (ed.), "*Private Enforcement of EC Competition Law*", Kluwer Law International, Alphen aan den Rijn, 2007, p. 44-60, at p. 45.

[236] *Cf.* BUXBAUM, H.L., "*Private Enforcement of Competition Law in the United States – of Optimal Deterrence and Social Costs in Private Enforcement of EC Competition Law*", in BASEDOW, J. (ed.), "*Private Enforcement of EC Competition Law*", Kluwer Law International, Alphen aan den Rijn, 2007, p. 44-60, at p. 58.

The class action mechanism is necessary in order to make vigorous private enforcement possible in the United States in that it enables private individuals to act as private attorneys general in cases which public enforcers are not willing to pursue for several reasons. First, financial resources of public enforcement bodies are limited. Therefore, public enforcers tend to only pursue cases that are most likely to be successful, and thus avoid complex cases. Second, public enforcement is also dictated by politics, hence making private enforcement an important counterbalance when public enforcement is too lax. Without the class action device, private antitrust enforcement would often be perceived as too risky and expensive, and lacking incentives for individual consumers.[237]

The safeguards in the U.S. system that first gives the plaintiff a possibility to opt out after the class has been certified[238] and a second option to opt out when a settlement is proposed,[239] also ensure that even when larger claims are at stake, plaintiffs are not obligated to accept unfavorable settlements if they think that an individual action could be more successful. But a potential risk remains that it is not possible to reach all class members who cannot be identified through reasonable effort. However, it is likely that such class members would normally mainly include indirect purchasers with small claims who have paid their purchases in cash. These small claims would normally not in any case be viable to be enforced individually, so these plaintiffs would not be any worse off than in the case where no action had been brought.

In general, opt-out collective actions increase access to justice in that claims that would not be viable to be enforced individually can be brought under an opt-out mechanism. Contrary to the opt-in model, the group of claimants will normally be sufficiently large for the action to pay off. Moreover, allowing opt-out collective actions in situations where the individual injuries are small but the gains of the infringers are significant would also contribute to increase the deterrence of antitrust violations. This would, in turn, improve the over-all compliance with antitrust rules. Consequently, opt-out collective actions constitute the only effective redress mechanism for victims in cases where the harm suffered as a result of antitrust violations is dispersed and the individual losses are so small that individual damages claims are not economically viable.

Contrary to what the Commission fears, the opt-out model would not necessarily be any more expensive than the opt-in model as the comparison between the Swedish opt-in collective action and the Dutch opt-out collective settlement mechanism has demonstrated.[240] Similarly, although there could be a risk of group members being bound by a judgment or a settlement without having had the possibility of opting out, the countries that have chosen the opt-out model have not found that it would be problematic from a constitutional point of view

[237] *Cf.* SCHNELL, G., "Class Action Madness in Europe – a Call for a More Balanced Debate", *E.C.L.R.*, Volume 28, Issue 11, 2007, p. 617-619, at p. 617.
[238] Fed. R Civ. P. 23(c)(2)(b).
[239] Fed. R. Civ. P. 23(e)(4).
[240] *Cf.* GAUDET, R., "Turning a blind eye: the Commission's rejection of opt-out class actions overlooks Swedish, Norwegian, Danish and Dutch experience" *E.C.L.R.*, Volume 30, Issue 3, 2009, p. 107-117, at p. 117.

because there are safeguards that minimize that risk. Collective actions are subject to fairly strict court scrutiny in the Nordic countries, which aims to guarantee that possible settlements and lawyers' fees are fair, that group representatives pursue the interests of the whole group and that group members are informed of the existence of a collective action and settlements that are being proposed. Furthermore, the opt-out model could be designed in a way that would further decrease the risks of financial obligations for group members who are not aware of the collective action. Finally, the Dutch opt-out model includes specific rules that aim to ensure that group representatives will not be overcompensated if all group members do not claim damages.

In short, there seems to be no reason for disregarding the opt-out collective action as such, but instead it should be focused on how to reduce the potential risks related to it and determine the situations in which the opt-out model would be appropriate for bringing a collective action for antitrust damages.

5. The feasibility of introducing collective redress mechanisms

5.1. Legal basis for action at Union level

Collective actions form part of national procedural rules. Therefore, the question arises whether the EU would have competence to adopt EU wide collective actions. As the White Paper on Damages for breach of the EC antitrust rules also contains proposals with regard to other procedural measures that should be adopted at Union level, it may be presumed that the Commission is contemplating a general harmonization of national procedural rules governing antitrust damages actions and that a collective action device would be introduced in the framework of such a harmonization.

Although the Treaty on the Functioning of the European Union ("TFEU") does not provide an explicit legal basis for harmonizing national procedural rules governing antitrust damages actions, arguably, Article 103 TFEU could be used in order to ensure a more efficient application of Articles 101 and 102 TFEU. Pursuant to Article 103 TFEU, the Council has the competence, on a proposal from the Commission and after consulting the European Parliament, to lay down appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 TFEU. Article 103(2) TFEU contains a list of situations, in which the adoption of regulations or directives would *in particular* be possible. Even though none of those situations appears to be directly applicable if the Council were to adopt a regulation or a directive aiming to harmonize the national procedural rules governing EU antitrust damages actions, the wording "in particular" seems to indicate that this paragraph is not meant to be narrowly construed, but allows an extensive interpretation. As the enforcement of the prohibitions laid down in Articles 101 and 102 TFEU is currently not as effective as is desirable, there would be a need for giving more effect to these provisions by the means of either regulations or directives at Union level. Moreover, the ECJ has declared that the effectiveness of Articles 101 and 102 TFEU requires that any individual who has suffered harm as a result of an infringement of the EU antitrust rules have a right to damages. This would in turn justify the adoption of harmonizing measures by the Council on the basis

of Article 103 TFEU.[241] It would require an extensive interpretation of Article 103 TFEU, but it would be justified by the need for an effective, efficient and uniform application of the EU antitrust rules throughout the EU that would ensure that individuals could enforce their rights stemming from the Treaty in the same manner,[242] regardless of the Member State in which they are domiciled, and ensure the direct effect of Articles 101 and 102 TFEU.

Another possibility would be to apply Article 81 TFEU as a legal basis since in certain situations it allows taking measures for the approximation of the laws and regulations of the Member States in the field of judicial cooperation in civil matters having cross-border implications. Under Article 81(2) f), it would be possible to eliminate obstacles to the proper functioning of civil proceedings by promoting the compatibility of the rules on civil procedures applicable in the Member States when this is necessary in order to ensure the proper functioning of the internal market. However, as long as Article 103 TFEU can be used as a legal basis, the use of Article 81 TFEU should be disregarded because of the special status of the United Kingdom, Ireland and Denmark since the application of a measure based on Article 81 TFEU in those Member States would depend on their will. Therefore, Article 81 would not be adequate to ensure that the national procedural rules would in practice be applied in a uniform manner throughout the whole EU.[243]

5.2. Possible constitutional obstacles in Member States

In general, the main opinion in the European doctrine appears to be that an individual should be free to choose whether to become involved in litigation and also who should represent him.[244] The possibility of not being bound by the outcome of the litigation would thus guarantee the right to a fair trial enshrined in Article 6 of the ECHR.[245]

The problem with the opt-in model is, however, that if the individual consumer's loss is very small, he might not be interested in joining the collective action once he becomes aware of it and, consequently, it is possible that the action will not be brought at all because there are not

[241] *Cf.* LESKINEN, C., "The competence of the European Union to adopt measures harmonizing the procedural rules governing EC antitrust damages actions", *Working Paper IE Law School*, WPLSO8-01, 15.1.2008, at p. 17-18, available at: http://papers.ssrn.com/abstract=1138797.

[242] *Cf.* LESKINEN, C., "The competence of the European Union to adopt measures harmonizing the procedural rules governing EC antitrust damages actions", *Working Paper IE Law School*, WPLSO8-01, 15.1.2008, at p. 22-23, available at: http://papers.ssrn.com/abstract=1138797, and Cour de cassation, "Observations de la Cour de cassation française sur le livre vert", at p. 1.

[243] *Cf.* JACOBS, F.G., "*Procedural Aspects of the Effective Private Enforcement of EC Competition Rules: A Community Perspective*" in EHLERMANN, C.-D. and ATANASIU, I. (eds.), "*European Competition Policy Annual: 2001, Effective Private Enforcement of EC Antitrust Law*", Oxford – Portland Oregon, 2003, p. 187-232, at p. 225.

[244] *Cf.*, for example, MICKLITZ, H.-W., and STADLER, A., "The Development of Collective Legal Actions in Europe, Especially in German Civil Procedure", *EBLR*, Vol. 17, Issue 5, 2006, 1473-1503, at p. 1499, TARUFFO, M., "Some Remarks on Group Litigation in Comparative Perspective", *Duke Journal of Comparative and International Law*, 11, Spring/Summer 2001, p. 405-421, at p. 416-417 and Office of Fair Trading, "Private actions in competition law: effective redress for consumers and business, Discussion Paper, OFT916, April 2007, at p. 20.

[245] The Convention for the Protection of Human Rights and Fundamental Freedoms.

sufficient claimants to make it worth bringing the action. If the number of potential claimants is large, the total amount of loss not compensated to consumers might be significant although the loss suffered by each individual would be limited.[246] Therefore, it would be important to ensure that actions could also be brought on behalf of consumers at large or that opt-out collective actions were possible in these cases. This would be particularly important in order to deter infringements as the financial risks could be significant if the action could be brought on behalf of a maximum number of claimants.

However, the collective action model that is ultimately adopted in the EU must be compatible with the European legal systems and traditions. Thus, it would be necessary to choose a model that would actually work in practice. For example, constitutional limitations in certain Member States might diminish the possibility of introducing certain types of collective actions and, consequently, some constitutional changes could be required in addition to procedural changes. In Germany, the German Constitution restrains the possibility of an individual being bound by a judgment given in a proceeding in which he did not participate or was not given the possibility to intervene.[247] In France, the doctrine of "*nul ne plaide par procureur*" pursuant to which the identity of all individuals involved in a lawsuit must be known and the "due process" rule that an individual cannot be a plaintiff without his knowledge[248] would render it difficult to initiate efficient collective actions.[249] In general, the traditional legal principle in the EU legal systems is that the outcome of a case is binding only *inter partes*.[250] Consequently, the opt-in model would correspond most closely to this legal understanding[251] and might be preferable due to practicality considerations.

On the other hand, Portuguese law provides for an opt-out collective action since 1995 and several other European countries have recently adopted a collective action device based on the opt-out model. In the Netherlands, concerns about depriving non-parties in opt-out settlements of their 'day in court' were solved by improving the notification requirements.[252] Similarly, before the collective action model was adopted in Norway, a committee held that the opt-out model would not encroach on parties' right to control whether or not their claims shall be brought to court in that group members are given an opportunity to opt out. In Norway, it is in general possible to act after legal notice has been given even though the

[246] *Cf.* Office of Fair Trading, "Private actions in competition law: effective redress for consumers and business, Discussion Paper, OFT916, April 2007, at p. 20.
[247] The External Impact Study, at p. 272.
[248] *Cf.* MAGINIER, V., "Class Actions, Group Litigation & Other Forms of Collective Litigation. Protocol for National Reporters. France", France National Report, at p. 10, available at: http://globalclassactions.stanford.edu/PDF/France_National_Report.pdf.
[249] *Cf.* LUTFALLA, E. and MAGNIER, V., "French Legal Reform: What is at Stake if Class Actions are Introduced in France?", 73 *Def. Couns. J.*, July 2006, p. 301-311, at p. 306.
[250] However, in Spain, it stems from Article 222 of the Civil Procedure Law that a collective action brought by a consumer association would also be binding on the consumers.
[251] The External Impact Study, at p. 272.
[252] *Cf.* TZANKOVA, I and LUNSINGH SCHEURLEER, D.F., "Netherlands Class Actions, Group Litigation and Other Forms of Collective Litigation", Netherlands National Report, at p. 6 and 9, available at: http://globalclassactions.stanford.edu/PDF/Netherlands_National_Report.pdf.

addressee has not actually read the notice. As a consequence, opt-outs are in fact not that different from Norwegian traditional legal notice practice.[253]

In Denmark, the opt-out model only applies to small claims and a collective action may only be brought by a public entity, such as the Consumer Ombudsman. Class members who have not opted out may be liable for legal costs up to the amount they could recover if the lawsuit succeeded.[254] A class member who was not aware of the collective action could thus be worse off if the action is not successful, but this has apparently not been seen as a constitutional problem in Denmark. However, in most European legal systems this possibility would hardly be seen as compatible with due process rights.

Furthermore, in Sweden, the main architect of the Swedish opt-in group action, P.H. Lindblom, has advocated for the introduction of an opt-out model for minor claims, at least in public group actions.[255] Spain, in turn, in some manner, has already accepted that consumers would be barred from bringing an individual action if a consumer association had already brought a collective action since, under Article 222 of the Civil Procedure Law, the *res judicata* effect also extends to parties who have not participated in the collective action brought by an association which defends their interests.[256]

5.3. The compliance of opt-out collective actions with the ECHR

The opt-out model could deprive individuals from 'their day in court' if they are not aware of a collective action brought on their behalf. It could thus breach their right to fair trial under Article 6(1) ECHR. In general, legal systems that provide for opt-out collective actions also require that adequate notice be given to potential group members in order to allow those who wish to opt out from the collective action. Moreover, they may usually also opt out when a settlement is proposed and there are safeguards put in place to ensure that lawyers and group representatives represent group members in an adequate manner.

Nevertheless, it is not always possible to reach all potential claimants, although technological advances, such as computerized databases and the Internet, facilitate the task of locating and contacting potential claimants. But even if it is not possible to reach all potential claimants, in cases where the individual claims would be too small to be enforced individually, the claimants who were unaware of the collective action would normally only benefit from the action. In the worst-case scenario, the claimant would be left without any compensation, which would have been the case also if the action had not been brought on his behalf without his knowledge and, in the best-case scenario, he would receive at least some compensation for

[253] *Cf.* GAUDET, R., "Turning a blind eye: the Commission's rejection of opt-out class actions overlooks Swedish, Norwegian, Danish and Dutch experience" *E.C.L.R.*, Volume 30, Issue 3, 2009, p. 107-177, at p. 113.
[254] *Cf.* GAUDET, R., "Turning a blind eye: the Commission's rejection of opt-out class actions overlooks Swedish, Norwegian, Danish and Dutch experience" *E.C.L.R.*, Volume 30, Issue 3, 2009, p. 107-177, at p. 114.
[255] *Cf.* LINDBLOM, P.H., "National Report: Group Litigation in Sweden", Sweden National Report, at p. 37, available at: http://globalclassactions.stanford.edu/PDF/Sweden_National_Report.pdf.
[256] *Cf.* GARCÍA CACHAFEIRO, F., "Las asociaciones de consumidores ante el abuso de posición dominante en la Unión Europea", *Cuadernos Europeos de Deusto*, No. 38/2008, p. 155-175, at p. 161.

the loss that he has suffered. Hence, the opt-out model in fact increases access to justice in cases where the victims would otherwise not be able to bring an action for damages.

The UK Civil Justice Council has also held that the opt-out collective action would not be incompatible with Article 6(1) ECHR. First, it creates effective access to justice for citizens who would not otherwise have any (effective) access to justice, particularly, in cases involving small claims or individuals lacking financial means to pursue their claims. Second, given the requirement that all members are given proper and effective notice in order to opt-out, if they so wish, members may exercise their right of party autonomy and may opt out from the collective action or any settlement. The Civil Justice Council also rightly stresses that although group members do lose party autonomy in the sense that they do not have active carriage of the action, this is also true of any other form of collective action, be it representative or opt-in action. In fact, this loss of party autonomy is an inevitable consequence of the nature of collective actions. The Civil Justice Council consequently concludes that, instead of frustrating citizen's Article 6(1) ECHR rights, the opt-out collective action actually promotes them.[257]

But in cases where passive group members who are not aware that a collective action is being brought on their behalf would have to participate in the legal costs of the action, such as is the case in Denmark, the passive claimants right to a fair trial might be harmed if the collective action is unsuccessful. If the EU were to adopt an opt-out collective action for small claims, necessary safeguards should thus be put in place in order to ensure that unaware group members would not have to pay for these legal costs. One possibility would be to limit the obligation to pay legal costs to the group representative or, exceptionally, to give group members who can demonstrate that they had truly not been given notice of the action an opportunity to opt-out from the judgment and any related legal costs.

5.4. Other requirements

As is well known, the legal systems of the EU Member States are different. Most Member States are civil law jurisdictions, whereas the United Kingdom and Ireland are common law jurisdictions. Member States have their own legal traditions and national procedural rules also govern antitrust damages actions based on an infringement of Article 101 or 102 TFEU. Since national procedural rules are very divergent, it is difficult to find a consensus about how to design common procedural rules.

Moreover, the EU differs from the United States in that it does not have a litigation culture to the same extent as the U.S.A. does, but the barrier to initiate legal proceedings is much higher. In fact, it is a common fear in Europe that class actions lead to abuses, with lawyers making huge fees at the cost of class members.[258] Consequently, a possible introduction of a

[257] *Cf.* CIVIL JUSTICE COUNCIL, "Improving Access to Justice through Collective Actions", Developing a More Efficient and Effective Procedure for Collective Actions, A Series of Recommendations to the Lord Chancellor, July 2008, at p. 133-134.
[258] *Cf.* SCHNELL, G., "Class Action Madness in Europe – a Call for a More Balanced Debate", *E.C.L.R.*, Volume 28, Issue 11, 2007, p. 617-619, at p. 617.

(modified) class action in the EU legal system is met with skepticism. Thus, Neelie Kroes, the former Commissioner for Competition Policy, has affirmed that the Commission will intend to design solutions compatible with European cultures and traditions.[259] This may be seen as attempt to soothe the fears that the U.S. litigation model would be adopted in the field of antitrust enforcement.

The feasibility of introducing an opt-out collective action naturally also requires the existence of a political will among the Member States to adopt such a measure. Since various Member States have introduced or are thinking of introducing more efficient collective actions,[260] it is understood that a sufficient political will exists to at least consider the introduction of an opt-out collective action device if it is possible to eliminate possible constitutional problems. Consequently, the opt-out model would merely be thinkable for cases involving small individual claims that would not be economically viable to be enforced individually.

Furthermore, in order to limit the risks of possible abuses, necessary safeguards should be put in place in the form of adequate criteria for certifying the group, guarantees that group members are given notice of any pending action in the best possible way and sufficient control by courts of group representatives and counsels to assure that they represent the interests of all group members in an adequate manner and that possible settlements are fair to all group members.

Finally, taking into consideration the divergent legal systems and traditions, it seems that any collective action should be introduced by adopting a directive, since it would be a more flexible tool in that it would only establish the framework and the objectives that are to be attained, but would leave to the Member States to concretely design the procedural devices. This would enable them to adopt mechanisms that would be in compliance with their legal system and traditions, thus increasing the likelihood of effective application. Nevertheless, sufficient political will for the reform would again be indispensable.

6. Conclusions

Today, the existing collective actions for antitrust damages in the EU are, in general, fairly unsatisfactory. Only the United Kingdom expressly provides for representative actions for damages based on a breach of the UK or the EU competition rules. Nevertheless, these representative actions can only be brought as follow-on actions, after a decision by the European Commission or the OFT establishing that the infringement in question exists.

[259] *Cf*. KROES, N., "Making consumers' right to damages a reality: the case for collective redress mechanisms in the antitrust claims", speech at the Conference on Collective redress, Lisbon, November 9, 2007, at p. 4.

[260] *Cf.*, for example, Office of Fair Trading, "Private actions in competition law: effective redress for consumers and business", Recommendations from the Office of Fair Trading, OFT916resp, November 2007, at p. 23, and SÉNAT, "La commission des lois du Sénat crée un groupe de travail destiné à examiner l'opportunité et les conditions de l'introduction de l'action de groupe en droit français", communication of October 21, 2009, available at http://www.senat.fr/presse/cp20091021c.html.

Furthermore, it is limited to consumers. Similarly, the only collective action brought in France so far has demonstrated that the existing collective action procedure has limitations. The administration of multiple mandates is too heavy and costly and the prohibition of solicitation makes it difficult to efficiently bring such claims.

In Spain, the problem with the collective action is, first, that any award is made with respect to each individual claimant, and not the whole group, so each claimant must apply to the court in order to be recognized as a member of the group and for individual damages to be quantified.[261] If the claim is very small, the claimant might not bother to take the steps necessary to join the action because it is often difficult to calculate the exact amount of the damage that he has suffered. Second, the collective action is only available to consumers, which makes it difficult especially for small and medium-sized companies to enforce their rights if they have been victims of an antitrust violation. In Germany, collective actions are limited to applying for injunctions and, thus, damages claims may not be brought under such actions. In Sweden, no opt-in collective action for antitrust damages has been brought to date.

However, it would be important to enhance private enforcement of the antitrust rules by providing efficient collective redress mechanisms because private enforcement is the only way for victims to obtain compensation for the loss that they have suffered, as public enforcement of the antitrust rules can only put an end to the infringement and impose sanctions on the infringers. Private enforcement serves also to ease the burden on competition authorities since they have limited resources. Its role is thus complementary to public enforcement and it makes it possible for private individuals to act when competition authorities cannot or will not.[262]

As the OFT is currently envisaging ways of extending the possibility of bringing representative actions for damages to companies and also allowing stand-alone representative actions, and France is contemplating the introduction of some form of improved collective action, it would nonetheless appear that there would be a political will to enhance the redress mechanisms of victims of antitrust violations. Germany is the only Member State of those reviewed in this paper that expressly excluded the possibility of bringing collective damages actions when it recently amended its Competition Act, probably because it feared that this would result in excessive litigation. But, for instance, the Swedish experience has shown that these fears are not necessarily justified.

In the White Paper on Damages actions for breach of the EC antitrust rules, the Commission is proposing two forms of collective actions to enhance private enforcement: victims of antitrust violations should be entitled to bring an opt-in collective action for damages or be represented in a representative action for damages by qualified entities. Qualified entities would include entities designated in advance by the Member States according to national procedures, representing legitimate and defined interests. Alternatively, other existing entities

[261] *Cf*. National Report on Spain prepared for the Ashurst Study on the conditions of claims for damages in case of infringement of EC competition rules, at p. 7.
[262] *Cf*. BÖGE, U., "Up and Running, or is it? Private enforcement – the Situation in Germany and Policy Perspectives", *E.C.L.R.*, Volume 27, Issue 4, 2006, p. 197-205, at p. 198.

could be certified in order to bring a representative action in relation to a particular infringement on an *ad hoc* basis. This second option would be limited to entities whose primary task is to protect the defined interests of their members, such as trade associations defending the interests of their members active in a given industry. Both forms of qualified entities that have standing in one Member State should also automatically be granted standing in all other Member States.[263]

These forms of collective actions are to ensure a minimum level of protection, but Member States could decide to go beyond these types of actions conforming to their legal traditions.[264] Further, if the interests of those represented in a representative action for damages coincide with those victims, who have decided to bring a distinct claim either through a collective opt-in action or individually, the individual must have the right to decide which claim he wants to pursue. Moreover, the Commission believes that safeguards are necessary in order to ensure that the same harm is not being compensated several times through various actions.[265]

The model proposed by the Commission is balanced in that it appears to respect the national legal traditions and may well find the political support needed to adopt it. It is particularly welcome that the Commission clearly states that the suggested model would provide for a minimum level of protection, since it seems that representative actions and opt-in collective actions are alone not sufficient to enhance private enforcement significantly but, in certain situations, opt-out collective actions would be required. This is the case when there are numerous small individual claims, representing a large aggregate damage, that are not economically viable to be brought individually. But if representative bodies were able to seek damages for victims at large, even if it were not possible to locate all of them, and were given the required financial resources and incentives to actually bring such claims, this would improve access to justice in situations involving small claims. However, it is not clear if the Commission would be willing to go this far since it is only proposing that representative actions could, in restricted cases, be brought on behalf of *identifiable* victims but does not expressly state that representative actions on behalf of victims at large would be possible.

The Commission's hesitation to recommend opt-out collective actions because of constitutionality concerns is also not completely justified. Opt-in collective actions do not always guarantee a constitutional right of access to justice, even though they have the advantage of ensuring that an individual will not participate in litigation against his will as he must choose to join the action in order to be bound by the judgment. In situations where the individual claim would be too small to be individually enforced, all victims of an antitrust violation would not be able to enforce their rights[266] because too few claimants might decide to opt-in and, consequently, the action would not pay off. In fact, in these situations their

[263] *Cf.* Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, at p. 18-20.
[264] *Cf.* Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, at p. 18.
[265] *Cf.* Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, at p. 21-22.
[266] *Cf.* TARUFFO, M., "Some Remarks on Group Litigation in Comparative Perspective", *Duke Journal of Comparative and International Law*, 11, Spring/Summer 2001, p. 405-421, at p. 413.

constitutional right of access to justice would be better guaranteed in the opt-out model. In the worst-case scenario, the claimant would not receive any compensation, which would also have been the case if the action had not been brought on his behalf, because his individual claim would have been too small to be enforced, whereas, in the best-case scenario, he would receive at least some compensation for the loss that he has suffered. Moreover, thanks to technological progress, the increased possibilities of reaching potential claimants would often guarantee also in these cases that the claimant would have a possibility to opt out.

Consequently, in order to assure effective access to justice, an opt-out collective action should be possible at least for claims involving small amounts that could not be enforced individually. Courts could be given the discretion to decide on case-by-case basis whether to certify a collective action as an opt-in or opt-out action. This is the model chosen in Norway and the OFT has also proposed that the judge should be able to decide whether claims should be brought as representative actions on behalf of consumers or businesses at large or on behalf of named consumers or businesses or as individual actions. The case-by-case assessment would be made on the basis of appropriately defined criteria and filters.[267]

By giving courts the choice of which model of collective action to adopt, they could verify that opt-out collective actions are not being used to bring frivolous suits and that they would only be allowed if it were possible to assure that no group member would have to bear legal costs of actions that they were not aware of. It would be possible to envisage a limitation of the obligation to pay legal costs to the group representative or, exceptionally, to give group members who can demonstrate that they had truly not been given notice of the action an opportunity to opt-out from the judgment and any related legal costs. With these safeguards put in place, the opt-out collective action should not pose any constitutional problems. Ultimately, as it would be for national courts to decide whether a collective action could be brought as an opt-out action, national legal traditions would also be respected.

In case it was not possible to reach all group members, damages that have not been claimed could be used to the benefit of all group members, for example, to protect consumer interests in general, if the claimants are consumers. The so-called *cy pres* award, *i.e.* the use of the damages awards to achieve a result that is as near as possible to a compensation of individual injuries,[268] could also be an appropriate alternative if the damages awards were too small for the distribution to each claimant to pay off.

In short, in addition to the representative action and the opt-in collective action envisaged by the Commission, opt-out collective actions should also be available, at the courts' discretion. This would increase access to justice while, at the same time, allowing Member States to provide for collective actions that are compatible with their legal traditions. In this manner, consumers who are victims of antitrust violations would finally have a more effective redress mechanism to enforce their European Union law right to damages, whereas companies would

[267] *Cf*. Office of Fair Trading, "Private actions in competition law: effective redress for consumers and business", Recommendations from the Office of Fair Trading, OFT916resp, November 2007, at p. 29.
[268] *Cf.* Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, at p. 18.

have to think twice before engaging in an infringement of the EU antitrust rules and facing a real risk of having to compensate for the harm that the antitrust violation has caused.

In addition, by also advocating for the possibility of national courts deciding on a case-by-case basis whether to certify opt-out collective actions, the Commission would also give a clearer signal that it is serious about improving redress for victims of antitrust violations than by simply providing for a minimum level of protection in the form of representative actions and opt-in collective actions.

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