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**COLLECTIVE ACTIONS IN PRIVATE
ENFORCEMENT OF COMPETITION LAW**

Master's Degree Diploma Thesis

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Prohlášení

Prohlašuji, že předloženou diplomovou práci jsem vypracoval samostatně a že všechny použité zdroje byly řádně uvedeny. Dále prohlašuji, že tato práce nebyla využita k získání jiného nebo stejného titulu.

Declaration

I hereby declare that I compiled this master's thesis independently, using only the listed resources. I further declare that this thesis has not been used for obtaining any previous university degree.

V Praze, dne 27. června 2017 / In Prague, on 27 June 2017

Martin Jahn

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Glossary of Terms

The glossary of terms below contains definitions and explanations of capitalized terms and abbreviations used in this master's thesis. All capitalized terms and abbreviations used in this thesis shall have the meaning provided herein.

Term	Definition
Ashurst report	Study on the conditions of claims for damages in case of infringement of EC competition rules, Comparative and Economics Reports by Ashurst for the European Commission, DG Competition 2004
Art	Article
Commission	The European Commission
2013 Communication	European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Towards a European Horizontal Framework for Collective Redress' COM (2013)
2014 Directive	Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349/1, 5.12.2014
ECJ	European Court of Justice
EU	European Union
2005 Green Paper	Green Paper on Damages actions for breach of the EC antitrust rules COM (2005) 672 final, Brussels 19.12.2005 SEC (2005) 1732 (Green paper 2005)
Member State	A member state of the European Union
NCA	National Competition Authority
Office	Office for Protection of Competition Law
Regulation 1/2003	Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of

the rules on competition laid down in Articles 81 and 82 of the Treaty. OJ L 1, 4.1.2003

Regulation 17/62

EEC Council. Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty. OJ 13, 21.2.1962

TFEU

Treaty on the Functioning of the European Union

UK

United Kingdom

US

United States

2008 White Paper

White Paper on Damages actions for breach of the EC antitrust rules, COM (2008) 165 final, Brussels 2.4.2008 SEC (2008) 404-406 (White paper 2008)

1 Introduction, Research Question and Methodology

Private enforcement of competition law has been undergoing major changes in the recent past, especially in relation to the Directive on Antitrust Damages Actions adopted by the European Parliament and Council in 2014. One of the standing issues that has strongly been discussed within the EU is the question of the establishment of an effective collective redress mechanism, which would allow the pursuance of compensation for a breach of competition law rules by a multitude of individuals in one collective action. Collective redress has been defined by the Commission as a mechanism which enables many legal claims arising out of the same infringement to be integrated into a single legal action.¹

Recently, there have been attempts in the EU to search for a coherent approach towards collective actions. The EU successively published a series of documents aimed at promoting discussion and development of a collective redress mechanism at EU level. These documents include the 2005 Green Paper and the 2008 White Paper on Damages Actions, the 2011 Public Consultation “*towards a coherent European approach to collective redress*”, the 2013 Communication “*towards a European horizontal framework for collective redress*“, and the 2013 Recommendation on Collective Redress Mechanisms, which altogether influenced the EU to adopt a long awaited collective redress mechanism applicable in all Member States. However, the 2014 Damages Directive avoided the topic of collective actions and left collective redress regulated by the unbinding 2013 Recommendation.

The use of collective actions differs extensively in countries around the world. There are more than 100 countries that have established some kind of competition law regime², but only some of them allow enforcing damages caused by breaches of competition law through the means of collective actions. Probably the most advanced system

¹ EUROPEAN COMMISSION, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Towards a European Horizontal Framework for Collective Redress*. COM (2013), p. 4

² MA, T.-CH. *The Effect of Competition Law Enforcement on Economic Growth*. Oxford University Press. *Journal of Competition Law & Economics*, 7(2). 2011, p. 302

of collective redress has been developed in the US. On the other hand, there are only a few countries within the EU whose legal systems allow the use of collective actions.

That said, this thesis is concerned mainly with the enduring phenomenon of collective and representative actions as a form of collective redress from the competition law point of view. The main research question laid down by the author is whether appropriate legal basis for collective redress mechanisms was established by EU legislators so that further promotion of the enforcement of competition law is achieved in the EU. This master's thesis considers whether, and in which form, collective redress should play a role in private enforcement of EU competition law, and whether the Commission has taken a wise direction by inclining towards the *opt-in* approach in the 2013 Recommendation.

Throughout the research conducted in this master's thesis, conceptual and field-specific resources have been analyzed. The author further analyzed the gradual evolution of discussion on collective redress mechanisms in EU competition law. While doing so, different types of sources have been examined in the course of the legal research. Primary and, mainly, secondary sources of EU law play a big role in constituting legal framework for competition law enforcement. Nevertheless, attention has also been paid to *soft-law*, which forms an important part in the development of antitrust law by indicating the Commission's intentions in the development of the competition enforcement policy. For reasons of completeness, a variety of books and academic journals and articles have been used to get an overview of different approaches to private enforcement of EU competition law with respect to the collective redress instruments.

In writing this master's thesis, several methodologies have been used. First, in order to examine the development of private enforcement of competition law that led to the current regulatory framework, as well as the characterization of the concept of collective actions, descriptive and analytical methods has been used. Second, the comparative method has been used in assessing the response to the main research question of this thesis, when comparing different legal frameworks in which collective actions are used, and different types of collective redress instruments. Finally, each chapter is followed by a partial conclusion, which, using the synthetic method,

altogether form the overall conclusion of this thesis and try to answer the research question as a whole.

This master's thesis is divided into 5 parts. The current chapter provides the main background to the thesis and introduces the readers to the research question and to the sources and methodology used in writing the thesis. The next chapter follows with the description of different pillars of enforcement of EU competition law; it defines the legal and regulatory framework in which the potential collective redress instruments would be operating within, focusing mainly on private enforcement.

However, the main interest of this master's thesis lies in the subsequent chapters. The third chapter is predominantly concerned with collective and representative actions as different forms of collective redress mechanisms. After a short introduction to the topic, the readers are presented with the gradual evolution of the European discussion on collective redress mechanisms in private enforcement of competition law. Several binding and non-binding documents were published mainly by the Commission, which considered the state of private enforcement of competition law in the EU and the role of collective redress mechanisms within such a system. The meaning of collective redress and its different forms is further analyzed in the third chapter, followed by the description and mutual comparison of the *opt-in* and *opt-out* mechanisms. The choice between these mechanisms largely depends on the purpose a collective action system is supposed to serve. Both types of collective actions carry different characteristics, and the preference between them is dependent on the objectives sought by the specific instrument. Attention has also been paid to the US system of class actions, as it had a significant impact on the process of the formation of the European system of collective redress. Furthermore, the thesis provides an overview of main stumbling blocks in regards of collective actions in the fourth chapter. Issues such as barriers to file collective actions, the rational apathy problem, the free-riding problem or the principal agent problem are discussed. The final chapter of this thesis summarizes the findings in a conclusion, which provides the readers with a response to the research question laid down in the first chapter. Finally, a summary of the master's thesis in the Czech language finds its place at the end of the master's thesis.

For the purpose of clarity, the terms collective redress mechanisms, collective actions, representative actions and/or class actions as used in this master's thesis are, depending on the specific context, interchangeable.

2 Setting the Framework: Enforcement of Competition Law in the European Union

For the European Union to ensure that competition law rules are being followed, it is essential to create an effective system of enforcement. The Commission has been trying to figure out the most effective way to reduce anticompetitive behavior for decades. The Commission succeeded in developing a very effective system of public enforcement; however it seems that establishing a fully workable system of private enforcement that would provide compensation to victims of breaches of competition law applicable throughout the EU Member States is still an uphill struggle for the Commission.

The enforcement of competition law is built on three pillars³ that are being applied by the Member States with different intensity in respect to the Member states' legal systems:

1. **Public Enforcement.** The first pillar of enforcing competition law is through activities of public law authorities. Public authority intervention by the European Commission or national competition authorities has traditionally formed the predominant part of competition law enforcement,⁴ and its core task is to prevent and punish violations of rights granted under Union Law.⁵
2. **Private Enforcement.** Recent activities of the Commission have been trying to promote the second pillar of enforcement of competition law through private enforcement. Enforcing breaches of antitrust rules by using civil law actions brought before national courts by individuals that suffered harm as a result of anticompetitive behavior can complement public enforcement by its deterrent and compensatory effects.

³ Some authors, such as HÜSCHEL RATH, K. *Public and private enforcement of competition law – A differentiated approach*. SSRN Electronic Journal. (2013), p. 2, claim that the system is based on two pillars – public and private enforcement

⁴ MACCULLOCH, A, RODGER, B. *Competition law and policy in the EU and UK*. Routledge. 2014, p. 2

⁵ EUROPEAN COMMISSION. *Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law*. 2013/396/EU. Recital 6

3. **Criminal Enforcement.** The third pillar of enforcing competition law is through the means of criminal law. This way of enforcement has a very strong position in the US, however is generally considered as *ultima ratio* in the EU and it is upon the individual Member States to decide the level of criminalization of this area of law.

The different systems of enforcement, as described above, are established in order to ensure compliance with competition law rules. The choice of the preferred enforcement method depends largely on the goals sought by each way of enforcement. The key objective of public enforcement is usually seen in the creation of a deterrent effect.⁶ Effective deterrence is capable of constituting a credible threat of sanctions that can discourage potential competition law infringers from violating the law.⁷ Secretary-General Alexander Italianer stated that “*if we are to take antitrust rules and their enforcement seriously, there is a need for strong public enforcement, capable of detecting infringements (in particular cartels), of putting an end to illegal practices, and of ensuring deterrence through appropriate fines and other remedies.*”⁸ Nevertheless, some authors pointed out that the deterrence goal may sometimes require the imposition of extremely high fines that cannot be borne by all infringers. In such cases, they conclude that competition law enforcement should provide for alternative forms of sanctioning,⁹ so that the harm caused by the infringers is rectified and all victims obtain compensation caused to them by such a wrongdoing.

For these reasons, it is clear that the Commission should further focus on promoting and developing an effective system of enforcement of competition law. The remedies sought by public enforcement aim mainly at punishing the infringers themselves, leaving harmed individuals without compensation for the harm caused to them by the breach of competition law. The Commission has therefore been trying to create a functional

⁶ HÜSCHEL RATH, K. *Op. Cit.*, p. 4

⁷ ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT. *Relationship between Public and Private Antitrust Enforcement*. 2015, p. 2. Available at: [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3\(2015\)14&doclanguage=en](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2015)14&doclanguage=en)

⁸ ITALIANER, A. *Public and private enforcement of competition law*. 5th International Competition Conference. (2012), p. 3. Available at: http://ec.europa.eu/competition/speeches/text/sp2012_02_en.pdf

⁹ VAN DEN BERGH, R., CAMESASCA, P. *European Competition Law and Economics: A Comparative Perspective*. 2nd ed. London: Sweet and Maxwell. 2006, p. 311

system of private enforcement, which would allow these harmed individuals to claim damages at national courts.

It can be concluded that in the area of private enforcement, the deterrence objective is complemented by the compensation function¹⁰ due to the need of allowing victims of anticompetitive behavior to obtain compensation to which they are entitled to.¹¹

*“Damages actions for infringement of antitrust law serve several purposes, namely to compensate those who have suffered a loss as a consequence of anti-competitive behavior and to ensure the full effectiveness of the antitrust rules of the Treaty by discouraging anti-competitive behavior, thus contributing significantly to the maintenance of effective competition in the Community (deterrence).”*¹²

This chapter shortly summarizes each of the three pillars of enforcement of competition law, focusing mainly on private enforcement of competition law, as it forms the essential background for collective actions.

2.1 Public Enforcement of Competition Law

Public enforcement of competition law means that competition law rules are enforced by either the Commission or by a network of National Competition Authorities. The Commission described public enforcement in the 2005 Green Paper as *“indispensable for effective protection of the rights conferred and effective enforcement of the obligations imposed by the Treaty.”*¹³ The core task of public enforcement is to apply EU law in public interest and impose sanctions on infringers to both punish and deter them from committing future infringements.¹⁴

¹⁰ HÜSCHEL RATH, K. *Op. Cit.*, p. 6

¹¹ ITALIANER, A. *Op. Cit.*, p. 3

¹² EUROPEAN COMMISSION. *Green Paper on Damages actions for breach of the EC antitrust rules.* {SEC(2005) 1732}. COM/2005/0672 final. 2005, p. 4

¹³ *Ibid*, p. 3

¹⁴ EUROPEAN COMMISSION. *Commission Staff Working Paper. Public Consultation: Towards a Coherent European Approach to Collective Redress.* SEC(2011)173 final. 2011, p. 10

2.1.1 The Commission's Role in Public Enforcement

The main legislative piece regulating the Commission's tasks and powers within public enforcement is currently Regulation 1/2003. Prior Regulation 1/2003, the Commission's powers were governed by Regulation 17/62. Regulation 17/62 established fundamental procedural rules for the application of Articles 85 and 86 of the Treaty of Rome¹⁵ and set up a centralized scheme which hampered the application of competition law rules by NCAs and national courts, and prevented the Commission from concentrating its resources on curbing the most serious infringements.¹⁶ This was caused mainly by the fact that Regulation 17/62 established an *individual exemption regime*, under which *agreements, decisions and concerted practices* under Article 85 (1) of the Treaty of Rome must have been notified to the Commission¹⁷, with the Commission having sole powers to declare them compatible or incompatible with the exemption scheme set out in Article 85 (3) of the Treaty of Rome. The notification system caused the Commission to be swamped in handling the received notifications¹⁸, preventing it from being able to concentrate on the most serious infringements of anticompetitive conduct. Without filing these notifications, the companies were at risk of being fined if their practices did not fulfill the conditions of Article 85 (3) of the Treaty of Rome.¹⁹

The Commission's role in the enforcement system under the centralized scheme of Regulation 17/62 was described in a way that the Commission '*became a victim of its own success in securing such extensive powers, since particularly in the light of the extensive interpretation of the jurisdictional and substantive scope of EU competition*

¹⁵ MONTAG, Frank. *The Case for a Reform of Regulation 17/62: Problems and Possible Solutions from a Practitioner's Point of View*. Fordham International Law Journal. 1998, p. 819-820

¹⁶ COUNCIL OF THE EUROPEAN UNION. *Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty*. OJ L 1. 2003, Recital 3

¹⁷ COUNCIL OF THE EUROPEAN ECONOMIC COMMUNITY. *Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty*. Official Journal 013. 1962, para 4-5

¹⁸ The Commission received 33 700 notifications between November 1962 and March 1963. In: ŠMEJKAL, V. *Soutěžní politika a právo Evropské unie 1950-2015: vývoj, mezníky, tendence a komentované dokumenty*. Praha: Leges. 2015, p. 72

¹⁹ DIRECTORATE-GENERAL FOR INTERNAL POLICIES. Policy Department A – Economic and Scientific Policy. *An Academic view on the Role and Powers of National Competition Authorities*. IP/A/ECON/2016-06. 2016, p. 7

*rules at the time, the Commission received a flood of applications that caused an immense backlog in its docket.*²⁰

Regulation 1/2003 revised the Commission's monopolist powers and introduced a new framework for a decentralized system of enforcement of competition law rules involving NCAs complementing the Commission in its regulatory tasks. According to the Commission, the need for a more decentralized enforcement system of EU law was caused by the continuing enlargement of the EU members, taking into account that the number of cases requiring enforcement had increased substantially due to the larger territorial scope of application of EU law.²¹

The decentralization of the enforcement system aimed at enabling the Commission to focus on investigating the most serious infringements of competition law that affect European integration the most, leaving majority of minor infringements to NCAs.²² The Commission's role should further focus on coordinating and developing the enforcement policy, rather than on day-to-day enforcement.²³ Further, the decentralization revised the interpretation of Article 101 (3) TFEU. Under the new system, undertakings do not longer have to file notifications to the Commission, but they have to evaluate themselves whether the agreement in question benefits from the exemption system under Article 101 (3) TFEU.²⁴

2.1.2 The National Competition Authorities' Role in Public Enforcement

National Competition Authorities are public law bodies established by the Member States. The NCAs apply both national and EU competition law in parallel to infringements with an effect on trade between the Member States.²⁵ The NCAs have a comparative advantage before the Commission in a detailed knowledge of the market

²⁰ DIRECTORATE-GENERAL FOR INTERNAL POLICIES, *Op. Cit.* 19, p. 7

²¹ EUROPEAN COMMISSION. *Op. Cit.* 14, p. 2

²² WILS, W. *Discretion and Prioritization in Public Antitrust Enforcement, in particular EU antitrust enforcement.* World Competition: Law and Economics Review, Vol. 34, No. 3. 2011, p. 11

²³ MACCULLOCH, A., RODGER, B., *Op. Cit.*, p. 35

²⁴ DIRECTORATE-GENERAL FOR INTERNAL POLICIES, *Op. Cit.* 19, p. 8

²⁵ *Ibid*, p. 5

in the Member State in which the respective NCA operates.²⁶ The NCAs apply the same substantive provisions as the Commission - they are thus equally bound by Articles 101 and 102 TFEU and the exemption regulations.²⁷ However, neither the procedural rules governing antitrust enforcement activities, nor the rules on fines imposed by NCAs in public enforcement proceedings have been harmonized by EU law; these matters are therefore governed by the respective national laws of each of the EU Member State.²⁸

The NCAs' enforcement powers were strengthened by the 2004 modernization of the competition enforcement system brought by Regulation 1/2003. The Commission recognized that it cannot longer bear the sole responsibility for the enforcement of EU competition law (in particular its sole power to grant exemptions under Article 101 (3) TFEU), and that proceedings on the national level can provide a quicker and more efficient means of fighting anticompetitive conduct.²⁹

According to the Commission, the key objective of the modernization was to decentralize the enforcement of EU competition law and to strengthen the possibility for individuals to seek and obtain effective relief before national courts.³⁰ Centralization of the enforcement in the Commission's hands prior to the modernization was one of the key factors that contributed to the dearth of litigation in the EU. The Commission's exclusive right to grant exemptions under Article 101 (3) TFEU gave the Commission dominant powers over enforcement, which effectively excluded national courts from its participation on the whole range of Article 101 (the courts could apply only half of Article 101).³¹ By decentralizing the system of enforcement of competition law, the role of NCAs and national courts has been largely enhanced as they were both entrusted with the decentralized enforcement.³²

²⁶ MONTI, G. *EC Competition Law*. Cambridge: Cambridge University Press. 2007, p. 24

²⁷ WILS, W., *Op. Cit.* 22, p. 22

²⁸ *Ibid*, p. 23

²⁹ JONES, A., SUFRIN, B. *EU Competition Law: Text, Cases and Materials*. Oxford University Press, 4th edition. 2010, p. 1192

³⁰ *Ibid*, p. 1193

³¹ *Ibid*, p. 1188

³² ATHANASSIOU, L. *Collective Redress and Competition Policy*. In: NUYTS, A. *Cross-border Class Actions: The European Way*. Munich: Sellier European Law Publishers. 2014, p. 157

It was argued that NCAs' role in private enforcement of competition law should further be enhanced, in particular in relation to collective redress mechanisms. The NCAs may assume an additional role in the protection of consumers' interests, specifically when it comes to representative actions, which are discussed in more detail in Chapter 3.1.1. The NCAs could be granted the power to act before the national courts on behalf of victims of anticompetitive practices, certified in advance or *ad hoc*. As Athanassiou claims, "it does not seem to be any major difficulty to that end, as qualified entities may include any body entitled to bring collective actions on behalf of injured parties, without being necessary to establish a membership relationship between the entity and the represented victims."³³

In the Czech Republic, the national competition authority responsible for observing the compliance with competition law rules and their subsequent enforcement is the Office for the Protection of Competition (in Czech: *Úřad pro ochranu hospodářské soutěže*). Given the fact that the Office (and all NCAs for that matter) is funded from public resources³⁴, it is not capable of enforcing every single infringement of competition law that is discovered. It is therefore desirable that NCAs concentrate their powers against the most significant breaches of competition law that occur on the relevant market. By leaving some infringements unpunished, a situation called *enforcement gap* can occur, causing that some infringements of competition law remain, either intentionally or unintentionally, unpunished. In these cases, it is convenient to invoke private enforcement as an alternative or complement to public enforcement of competition law.³⁵

2.2 Private Enforcement of Competition Law

Historically, enforcement activities in the EU were undertaken almost entirely by public agencies rather than through private litigation. However, recently there has been a concerted effort to encourage greater use of private actions to enforce

³³ ATHANASSIOU, L. *Op. Cit.*, p. 159

³⁴ In 2015, the budget of the Czech Office for the Protection of Competition was CZK 244 million. In: DIRECTORATE-GENERAL FOR INTERNAL POLICIES, *Op. Cit.* 19, p. 21

³⁵ ÚŘAD PRO OCHRANU HOSPODÁŘSKÉ SOUTĚŽE. *Soukromé prosazování soutěžního práva*. 2008, p. 2. Available at: https://www.uohs.cz/download/Informacni_listy/2008/Infolist_2008_04_Private_enforcement.pdf

competition law.³⁶ Nonetheless, private enforcement has been the driving force of the US antitrust enforcement since the middle of the 20th century.³⁷ Private enforcement in the US exceeds public enforcement by a ratio of *nine to one* in antitrust cases.³⁸ Taking that into account, the EU policy makers realized that enhancing private enforcement at EU level could benefit the effectiveness of enforcement of European competition law rules, and therefore commenced with long-lasting discussions on how to best ensure the rights of individuals that are protected by competition law.

It was first confirmed by the ECJ in 2001 that any individual harmed by anticompetitive conduct is entitled to claim damages at a national court. The ECJ ruled in *Courage Ltd v Crehan* that “*the full effectiveness of Article 85 of the Treaty and, in particular, the practical effect of the prohibition laid down in Article 85 (1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.*”³⁹ The ECJ also concluded that there should be no absolute bar to a damages claim, even to one brought by a party to a contract violating competition rules.⁴⁰

This case was further followed by a 2006 ECJ ruling in *Manfredi v Lloyd Adriatico Assicurazioni SpA*, where the ECJ stated that the practical effect of Article 81 of the EC Treaty prohibition would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.⁴¹ The ECJ stated that “*any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 81 EC.*”⁴²

³⁶ GRAHAM, C. *EU and UK competition law*. Harlow: Pearson Education. 2010, p. 237

³⁷ HÜSCHEL RATH, K. *Op. Cit.*, p. 2

³⁸ HODGES, CH. *The Reform of Class and Representative Actions in European Legal Systems. A New Framework for Collective Redress in Europe*. Hart Publishing. 2008, p. 196

³⁹ Judgement of 20 September 2001, *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*, C-453/99, ECLI:EU:C:2001:465, para 26

⁴⁰ JONES, A., SUFRIN, B. *Op. Cit.*, p. 1204

⁴¹ *Ibid*, p. 1205

⁴² Judgment of 13 July 2006, *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA (C-295/04)*, *Antonio Cannito v Fondiaria Sai SpA (C-296/04)* and *Nicolò Tricarico (C-297/04)* and *Pasqualina*

2.2.1 Modernization of Private Enforcement of Competition Law

After the *Crehan* judgment was issued, the Commission started looking more closely into ways to bring more effective civil redress in the competition law field.⁴³ The process of modernization of private enforcement in the EU began with the adoption of Regulation 1/2003. More than 10 years after the modernization of private enforcement began, it was still not possible for most victims of competition law infringements to effectively exercise the right to compensation, mainly due to a lack of appropriate rules governing actions for damages.⁴⁴ In November 2014, after almost a decade of preparatory works and three different commissioners overseeing the process⁴⁵, the Commission published the 2014 Directive on Antitrust Damages Actions, with the aim of enhancing the system of private enforcement of competition law that would contribute to fostering growth and innovation throughout the EU.⁴⁶

The area of private enforcement has traditionally been seen as uneven due to the Member States' different legal traditions and provisions. The 2014 Directive facilitates the use of private enforcement of competition law mainly by making damages proceedings at national courts more accessible to the claimants. Nevertheless, it was possible to claim damages at national courts even before the 2014 Directive was signed into law, by virtue of the fact that Articles 101 and 102 TFEU have direct effect. It means that Articles 101 and 102 TFEU have precedence over conflicting principles of national law.⁴⁷ However, considerable obstacles hindered their efficient use by harmed parties, thus discouraging the harmed individuals from filing the claims.⁴⁸

Murgolo (C-298/04) v Assitalia SpA, Joined cases C-295/04 to C-298/04, ECLI:EU:C:2006:461, para 61

⁴³ GERADIN, D. *Collective Redress For Antitrust Damages In The European Union: Is This a Reality Now?* GEO. MASON L. REV., Vol. 22:5. 2015, p. 1081

⁴⁴ EUROPEAN COMMISSION. Commission Staff Working Document. Impact Assessment Report – Damages actions for breach of the EU antitrust rules. {COM(2013) 404 final}. p. 5

⁴⁵ Mario Monti (1999-2004), Neelie Kroes (2004-2009), Joaquín Almunia (2010-2014)

⁴⁶ EUROPEAN COMMISSION. *Op. Cit.* 44, p. 5

⁴⁷ JONES, A., SUFRIN, B. *Op. Cit.*, p. 1185

⁴⁸ EUROPEAN PARLIAMENT AND COUNCIL. Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. OJ L 349. 2014, Article 3

The Directive obliges Member States to harmonize national procedural provisions with the rules contained in the Directive. The Member States must ensure that any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim damages and obtain full compensation for that harm. The main changes brought by the Directive include, among others, the disclosure of evidence, the effect of decisions issued by the Member States' competition authorities in court proceedings, limitation period in damages actions, joint and several liability of undertakings which have infringed competition law, or the passing-on⁴⁹ defense.

The view that private enforcement should be further encouraged is not held universally. Wouter Wils has argued that “*public antitrust enforcement is inherently superior to private enforcement, because of more effective investigative and sanctioning powers, because private antitrust enforcement is driven by private profit motives which fundamentally diverge from the general interest in this area, and because of the high cost of private antitrust enforcement*”.⁵⁰ On the other hand, private enforcement may relieve enforcement pressure on public enforcement agencies by freeing their resources for complex cases, promote deterrence of violations of competition law, and achieve corrective justice by allowing compensation of victims of these breaches.⁵¹

Despite the lengthy discussions and different kinds of proposals, the Directive does not provide for any collective redress mechanism. The Directive explicitly states that it should not require Member States to introduce collective redress mechanisms for the enforcement of Articles 101 and 102 TFEU.⁵² This means that the Directive leaves it to the Member States to decide whether to introduce the option of collective redress in the area of private enforcement of competition law. This step has been criticized heavily

⁴⁹ Passing-on is one of the central issues of private enforcement of competition law. The Commission has recently published a *Study on the Passing-on of Overcharges* in 2016 (available at: <http://ec.europa.eu/competition/publications/reports/KD0216916ENN.pdf>). In this study, the Commission defines passing-on as a situation in which a claimant passes on some or all of overcharge brought about by the infringer to its customers.

⁵⁰ WILS, W. *Should Private Antitrust Enforcement Be Encouraged In Europe?* World Competition: Law and Economics Review, Vol. 26, No. 3. 2003, p. 1

⁵¹ JONES, A., SUFRIN, B. *Op. Cit.*, p. 1184-1189

⁵² EUROPEAN PARLIAMENT AND COUNCIL. *Op. Cit.*, Recital 13

by practitioners who argue that a regulatory approach would be a significant step towards effective antitrust enforcement.⁵³

2.3 Criminal Enforcement of Competition Law

Criminal enforcement forms the third pillar of enforcement of competition law. Enforcement of competition law is criminalized only on the Member States level. The EU law does not contain any criminal provisions, as there does not seem to be any political appetite to introduce criminal sanctions.⁵⁴ The EU enforcement system is an administrative one, built on imposing financial sanctions against undertakings, but not individuals.⁵⁵

Criminal law is generally not considered to be the best way of punishing infringements of competition rules.⁵⁶ Nevertheless, the Member States have put a greater focus on the criminalization of competition law. Almost all Member States enforce competition law through a combination of civil law, public law, criminal law and out-of-court dispute resolution, but the difference in emphasis on the preferable systems of enforcement of competition law in the respective Member States is great. Since the Member States impose criminal sanctions upon undertakings for breaches of competition law by themselves, it is redundant to create criminal sanctions at EU level.

Even though most Member States have established a system of criminal sanctions, they are quite reluctant to use them. It is caused mainly due to the fact that violating competition law ultimately benefits the company itself, not the individuals. Therefore, it seems more reasonable to rather punish the companies by heavy financial penalties imposed by the Commission or NCAs under public enforcement, which, by their nature,

⁵³ VITZILAIYOU, L., ZOHIOS, G. *Op. Cit.*

⁵⁴ JONES, K., HARRISON, F. *Criminal Sanctions: An overview of EU and national case law*. National Competition Laws Bulletin, N° 64713. 2014, p. 1. Available at: <http://awa2015.concurrences.com/articles-awards/business-articles-awards/article/criminal-sanctions-an-overview-of-eu-and-national-case-law>

⁵⁵ ITALINIER, A. *Fighting cartels in Europe and the US: different systems, common goals*. Annual Conference of the International Bar Association (IBA) Boston. 2013, p. 2

⁵⁶ MACCULLOCH, A., RODGER, B., *Op. Cit.*, p. 21

are substantively similar to criminal penalties.⁵⁷ This has also been confirmed by the European Court of Human Rights in *Menarini Diagnostics*⁵⁸ case, in which a €6 million fine was imposed by the Italian Competition Authority in 2013 on Menarini for fixing prices and allocating the market of certain diagnostic tests for diabetes. The Court agreed with Menarini that the fine imposed on it by the Italian competition authority amounted to a criminal sanction within the meaning of Art. 6 of the European Convention on Human Rights.⁵⁹

The majority of Member States currently have the ability to impose penalties for some type of competition law violations.⁶⁰ Enforcing competition law through the means of criminal law can be a successful deterrent, considering that criminal law has a monopoly on the use of imprisonment. “*The main driving force behind criminalization is recognition that the threat of sanctions against an individual could be a more effective deterrent than the threat of corporate sanctions.*”⁶¹ The fear of criminal sanctions could encourage individuals to resist entering into unlawful activities.⁶² In addition, criminal sanctions carry a stigma effect that can put convicted individuals in a bad light. It is therefore in their best personal interest not to be criminally punished.⁶³

2.4 Partial Conclusion

It is mainly public enforcement that has the most significant role in the enforcement of competition law at EU level. Private enforcement has been in use in several Member States, such as the UK, the Netherlands or Germany; however the overall level of utilization of private enforcement tools amongst all Member State, as recently introduced by the 2014 Directive, is still low. Further, criminal law enforcement only

⁵⁷ JONES, A., SUFRIN, B. *Op. Cit.*, p. 3-5

⁵⁸ Judgement of 27 September 2011, A. Menarini Diagnostics S.R.L. v. Italy, no. 43509/08

⁵⁹ BRONCKERS, M. VALLERY, A. *Judicial Review of European Competition Law Decision After Menarini*. In: RAFFAELLI, E. *Antitrust Between EU law and National Law*. Éditions Bruylant, Bruxelles. 2012, p.

⁶⁰ JONES, A., SUFRIN, B. *Op. Cit.*, p. 1

⁶¹ *Ibid*, p. 3

⁶² *Ibid*, p. 3

⁶³ WILS, W. *Is criminalization of EU Competition Law the Answer?* World Competition, Volume 28, No. 2. 2005, p. 5

plays a marginal role, as there are no criminal law provisions at EU level, leaving the criminalization of this area of law on the individual Member States.

Public enforcement by administrative authorities and private enforcement by damages actions filed at national courts are complementary tools that both enhance effective enforcement of EU competition rules,⁶⁴ with the ability to promote competitive economy.⁶⁵ The continuing modernization of the system of enforcement in the EU is essential in shaping the state of the enforcement policy towards a better functioning system.

The newly modernized system is one of parallel competences, where the enforcement competences are shared between the Commission and the Member States' NCAs. The Commission is the central enforcer of EU competition rules, with the NCAs complementing its functions. In a case the Commission is investigating a potential infringement, the NCAs cannot begin to investigate the same infringement. The NCAs are required to alert the Commission when they open an investigation under EU competition rules, and further, when they are about to take a decision that an infringement cannot be determined.⁶⁶

However, the relationship between the Commission and national courts seems to be more problematic. That is why the Commission has issued a notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC⁶⁷, which sets out certain rules on mutual behavior between the Commission and national courts, outlining certain obligations of national courts in respect to the application of EU competition law rules. Most importantly, “*where a national court comes to a decision before the Commission does, it must avoid adopting a decision that would conflict with a decision contemplated by the Commission*”, and further, “*where the Commission reaches a decision*

⁶⁴ EUROPEAN COMMISSION. *Op. Cit.* 44, p. 12

⁶⁵ EUROPEAN COMMISSION. *White Paper on Damages actions for breach of the EC antitrust rules.* COM(2008) 165 final. 2005, p. 3

⁶⁶ DIRECTORATE-GENERAL FOR INTERNAL POLICIES, *Op. Cit.*, p. 4-5

⁶⁷ EUROPEAN COMMISSION. Communication from the Commission — Amendments to the Commission Notice on the cooperation between the Commission and courts of the EU Member States in the application of Articles 81 and 82 EC. OJ C 256, 2015

*in a particular case before the national court, the latter cannot take a decision running counter to that of the Commission”.*⁶⁸

Further, pursuant to Article 15 (3) of Regulation 1/2003, the Commission may intervene in the proceedings in the position of *amicus curiae*, which means that it may, acting on its own initiative, submit written or oral observations to courts of the Member States where the coherent application of Article 101 or 102 TFEU so requires.⁶⁹

Taking into account the expected future growth of use of antitrust damages actions, the interaction between public and private enforcement ought to be further increased. Antitrust damages actions are often triggered by a decision issued by the Commission or NCAs, and can be brought to a court either while the investigation by the administrative authority is still pending or, more typically, after an infringement decision had been adopted, in the form of a follow-on action.⁷⁰

It is important to promote private litigation in the area of competition law. Further development of damages actions has the capacity to ensure that competition enforcement policy goals are satisfied. According to the Commission, the losses that individuals suffer in the EU due to anticompetitive behavior amount to several billion Euros every year.⁷¹ The Commission has therefore put a lot of effort and time to establishing a workable system of private enforcement, which resulted in adopting the 2014 Directive on Damages Actions. It is too early after the adoption of the 2014 Directive to be able to conclude whether the system of private enforcement is sufficiently effective. However, it seems that the Commission has taken a wise approach by further enhancing damages actions, thus making it easier for the victims of anticompetitive behavior to obtain compensation for the harm caused to them.

⁶⁸ *Ibid.*, para 12-13

⁶⁹ COUNCIL OF THE EUROPEAN UNION. *Op. Cit.* 16, Art 15 (3)

⁷⁰ EUROPEAN COMMISSION. *Op. Cit.* 44, p. 12

⁷¹ EUROPEAN COMMISSION. Commission staff working document accompanying document to the White paper on damages actions for breach of the EC antitrust rules - Impact assessment {COM(2008) 165 final} {SEC(2008) 404} {SEC(2008) 406}. 2008, p. 45

3 Collective Actions as an Enforcement Tool

It was established in the previous chapter that public and private enforcement are complementary tools that both follow slightly different goals, however their parallel use is capable of enhancing the orderly functioning of enforcement of competition law in the EU. In public enforcement, it is the administrative bodies that enforce infringements of competition law. However, in private enforcement it is the harmed individuals that are entitled by EU law to raise claims at national courts. There are two ways for these individuals to do so:

- Firstly, private enforcement can be pursued by way of *individual redress*. That means that harmed individuals can initiate legal proceedings individually to enforce their rights protected by EU law. The main legal framework for these individual damages actions can be found in the 2014 Directive on Antitrust Damages Actions.
- Secondly, there are situations in which a large group of individuals (either natural or legal persons) is harmed by the same anticompetitive conduct that infringed their subjective rights protected under EU law. In this case, individual lawsuits are often not an effective tool to stop unlawful practices or to obtain compensation, considering that the individual losses often tend to be too small in comparison to the expected costs of litigation.⁷² This is why a system of *collective redress* comes in handy. Without such a system, multiple claimants suffer only small individual losses, but infringers may escape with large illicit gains and thus undermine economic performance and confidence in the rule of law.⁷³

Cases involving a large number of potential claimants have presented difficulties to different legal systems for a long time in the area of competition law. The most obvious problem of collective actions is that there is neither a generic model which could be used as an example, nor a scholarly consensus on what their main function is.

⁷² EUROPEAN COMMISSION. *Op. Cit.* 14, p. 2-3

⁷³ HODGES, CH. *Op. Cit.*, p. 1

Collective redress is a type of procedural mechanism that allows a group of individuals (i.e. a ‘class’ of individuals) with a common interest on a particular issue on one side to bundle and file their claim against another party on their own behalf and on behalf of others who are similarly situated but have not brought a claim. The Commission refers to the situation in which a large number of persons are harmed by the same illegal practice as a ‘*mass harm situation*’.⁷⁴

Collective redress is capable of facilitating access to justice in cases where the individual damage is so low that potential claimants would not consider it worthy to pursue their individual claims,⁷⁵ but where the total claimed amount in issue is significant.⁷⁶ The whole group of claimants is in principle bound by the *res iudicata* of the relevant judgment, even if all individuals forming the class do not actively participate in the actual proceedings. It is necessary that the harm suffered is common to all members of the class and that the individuals affected by such harm are so numerous it makes it impracticable to bring every person before the court individually.⁷⁷

The OECD described collective actions as “*an important element in a competition regime that seeks to effectively deter anticompetitive conduct. They can be a useful form of deterrence in particular with respect to hard core cartels, class/collective actions could be the only effective mechanism to ensure that consumers with small claims can be compensated as well. Without such a system, recovery of damages would be limited to plaintiffs that are wealthy and have sufficiently large claims to justify litigation for damages.*”⁷⁸

However, collective actions do not play an important role only in the area of the enforcement of competition law. The use of collective actions is also encountered in

⁷⁴ “Mass harm situation means a situation where two or more natural or legal persons claim to have suffered harm causing damage resulting from the same illegal activity of one or more natural or legal persons”. In: EUROPEAN COMMISSION. *Op. Cit.* 5, p. 1

⁷⁵ EUROPEAN COMMISSION. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Towards a European Horizontal Framework for Collective Redress"*. COM/2013/0401 final. 2013, p. 4

⁷⁶ WRBKA, S., UYTSEL, S., SIEMS, M. *Collective Actions. Enhancing access to justice and reconciling multilayer interests?* Cambridge University Press. 2012, p. 57

⁷⁷ VITZILAIU, L., ZOHIOS, G. *Op. Cit.*

⁷⁸ ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT. *Op. Cit.*, p. 19.

areas such as consumer protection, labor law, unfair competition law or protection of the environment. In these areas, special associations or other representative bodies play an important role, as they have the right to bring cases either in the interest of persons which they represent or in the public interest, thus promoting private enforcement of rules adopted in the public interest and supporting individual claimant, who are often in a weaker position to face well organized and financially stronger opponents.⁷⁹

3.1 Different Forms of Collective Redress Mechanisms

Collective redress mechanisms exist in several different forms. Different states around the world use diverse forms of collective actions. The most evolved system of collective redress has been developing in the US, where the opt-out class actions have been in use for decades. In the EU, the Commission has recommended to the Member States in the 2013 Recommendation the establishment of a complementary system of *collective actions* and *representative actions*. The following subchapters therefore present this complementary system, outline the gradual evolution of discussion which graduated in it, and further explain the opt-in and opt-out models of collective redress.

3.1.1 Collective Actions and Representative Actions

The Commission in its soft-law documents distinguishes between two main types of collective redress mechanisms: *collective actions* and *representative actions*. The term *collective redress* works as an umbrella encompassing all methods in which compensation can be obtained for a claimed infringement of competition law. Both collective and representative actions have the ability to improve the efficiency of the litigation process by consolidating claims of a large number of harmed persons, who would otherwise have to file individual claims for damages. Therefore, this group of claimants can file a single damages action against the infringer by bundling their individual claims. Bundling of the individual claims can result in saving costs that

⁷⁹ See AG Jacobs in his opinion in judgment of 13 July 2006, *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* (C-295/04), *Antonio Cannito v Fondiaria Sai SpA* (C-296/04) and *Nicolò Tricarico* (C-297/04) and *Pasqualina Murgolo* (C-298/04) v *Assitalia SpA*, Joined cases C-295/04 to C-298/04, ECLI:EU:C:2006:461, para 47

would have to be spent on the proceedings by the individual claimants, time spent on filing these claims, and it can further help to ensure access to justice.

A **collective action** is a claim, in which individual claims of harmed individuals or businesses are bundled into one single action.⁸⁰ The potential *res iudicata* and awarding of damages is binding to the group as a whole.⁸¹ In collective actions it is the claimants themselves who have suffered the harm in question, and who also file the action with the relevant court.

It has been argued that the opt-in collective actions may sometimes not be very effective in stimulating participation in these collective actions, citing the *Consumers' Association v JJB Sports plc* case as an example. In this case, a local NCA found a price-fixing agreement in the supply of certain football kits replicas. Subsequently, the Consumers' Association brought a claim on behalf of a few hundred consumers against JJB Sports. In this case, only a small number of the consumers who purchased the football kit during the cartel period benefited from the action, resulting in the costs spent of filing the claim being disproportionate to the compensation actually obtained in the proceedings. As a consequence, the Consumers' Association stated that they would not bring a similar opt-in action in the future.⁸²

Conversely, the Commission considers a **representative action** to be an action which is brought by a representative entity, such as a consumer organization or association, on behalf of a group of identified individuals or legal persons, who claim that they have been harmed by the same infringement.⁸³ These qualified entities can either be designated in advance or certified on an *ad hoc* basis. The represented members are however not part of the proceedings.⁸⁴ *“Representative actions are characterized by the fact that the claimant himself is not the one who has suffered harm. The claimant is*

⁸⁰ TZAKAS, D. *Effective Collective Redress in Antitrust and Consumer Protection Matters: A Panacea or a Chimera?* Common Market Law Review 48: 1125-1174. 2011, p. 1126

⁸¹ VITZILAIYOU, L., ZOHIOS, G. *Op. Cit.*

⁸² DIRECTORATE-GENERAL FOR INTERNAL POLICIES. Policy Department A – Economic and Scientific Policy. *Collective Redress in Antitrust*. 2012, p. 40. Available at: <http://www.europarl.europa.eu/document/activities/cont/201206/20120613ATT46782/20120613ATT46782EN.pdf>

⁸³ EUROPEAN COMMISSION, *Op. Cit.* 71, p. 10

⁸⁴ *Ibid*, p. 11

a consumer association that has been bestowed with the right to bring an action in court or report to the enforcement authorities.”⁸⁵ The *res iudicata* as well as the eventual award of damages is binding each member of the group individually.⁸⁶

In the 2013 Recommendation, the Commission suggested that the Member States should designate representative entities capable of bringing representative actions based on the following requirements:

1. The representative entities should have a “*non-profit making character*”;
2. A direct relationship should exist between the main objectives of the entity and the rights granted under Union law; and
3. The entity should have sufficient capacity in terms of financial resources, human resources and legal expertise.⁸⁷

In order for a representative entity to be able to represent a group of victims harmed by anticompetitive conduct, a two-level examination is required regarding the standing of the representative entities. The first level asks whether the consumer association in question is lawfully constituted and designated (addressed by the law of incorporation). The second level is whether such an entity has the right to sue before a foreign civil court (procedural law question).⁸⁸

In regards to representative actions, several scholars have opined that legislators should be extremely careful in introducing this kind of collective redress mechanisms, because representative actions should be limited to cases where there is no other action being brought by any natural or legal person.⁸⁹ This could result in a situation in which the same damages claim would be filed twice by the same person. It is therefore important to set out safeguards that would ensure that such situation does not occur. Further, it can be concluded from the UK and French trial experience that representative associations gain from the litigation only indirectly, which limits their incentive

⁸⁵ WRBKA, S., UYTSEL, S., SIEMS, M. *Op. Cit.*, p. 76

⁸⁶ VITZILAIU, L., ZOHIOS, G. *Op. Cit.*

⁸⁷ EUROPEAN COMMISSION. *Op. Cit.* 5, para 4

⁸⁸ ATHANASSIOU, L. *Op. Cit.*, p. 169

⁸⁹ WRBKA, S., UYTSEL, S., SIEMS, M. *Op. Cit.*, p. 74

to pursue a claim. It was concluded that “*collecting claims from individual consumers can be extremely onerous and costly, and consumer associations may not find it worthwhile.*”⁹⁰

The fact that the Commission makes differences between different types of collective redress mechanisms does not mean that these types are mutually exclusive; collective actions and representative actions can act as complementary tools of collective redress.⁹¹ Representative actions in the EU can be considered as the European answer to the US class actions system.

3.2 The European Discussion on Collective Redress Mechanisms

Competition law is a complex phenomenon which does not consist only of legislative texts and judicial decision, but political and economic factors have also given directions to competition policy.⁹² It is therefore important to present the evolution of the European discussion on collective redress mechanisms. The Commission has put a lot of their resources into researching the competition market, with the aim of promoting the successful enforcement of competition law infringements.

The long-lasting discussions and different kinds of proposals on how to regulate collective actions in the EU made an impression that European legislators are having a difficult time in reaching a general consensus. A variety of entities have entered this process, including Member States’ governments, consumer organizations or law firms. Each of these entities is trying to defend slightly different interests, but generally it was concluded throughout the differing opinions that collective actions are perceived as tools capable of increasing access to justice.⁹³

Further, it was concluded in the previous chapter that the Commission is trying to reduce the possible *enforcement gap*, which is caused by the fact that some infringements of competition law remain unpunished. This gap is caused by a situation in which consumers or businesses with small-value claims are either reluctant to bring

⁹⁰ DIRECTORATE-GENERAL FOR INTERNAL POLICIES. *Op. Cit.* 138, p. 40

⁹¹ EUROPEAN COMMISSION. *Op. Cit.* 67, p. 20

⁹² MONTI, G. *op. cit.*, p. 3-5

⁹³ HODGES, CH. *Op. Cit.*, p. 196

these claims to a court due to some barriers or may not even know that they have suffered loss, which results in the losses being uncompensated.⁹⁴ Collective actions are an enforcement tool which may help to overcome the enforcement gap and ensure that any person harmed by anticompetitive conduct obtains the compensation they are entitled to. The following subchapters therefore describe the gradual evolution of the Commission's stance towards collective redress, which graduated in issuing the 2013 Recommendation.

3.2.1 The 2005 Green Paper on Damages Actions

The 2005 Green Paper on Damages Actions was the first piece of legislature issued by the Commission after the adoption of Regulation 1/2003 in regards to private enforcement of competition law. It considered the conditions for bringing damages claims for infringements of competition law of the EU by identifying obstacles⁹⁵ that hindered the use of a more efficient system of damages claims, and set out different options for further reflection and possible action to improve both follow-on actions and stand-alone actions.⁹⁶ The Commission (following the Ashurst report⁹⁷) found the system for damages claims for infringements of antitrust rules in Member States as one of *total underdevelopment*.⁹⁸ It is obvious from the Commission's point of view that further action to stimulate private action was required at EU level.⁹⁹

The 2005 Green Paper tackled many issues relating to private enforcement, such as access to evidence, scope of the damages claims, the passing-on defense and indirect purchaser's standing, or costs of actions. Besides that, the Commission made some very

⁹⁴ HODGES, CH. *Op. Cit.*, p. 196

⁹⁵ "The obstacles to private redress have led to the introduction of simplified court procedures in several jurisdictions across Europe." In: EUROPEAN COMMISSION. *Commission Staff Working Paper, Annex to the GREEN PAPER, Damages actions for breach of the EC antitrust rules*. SEC(2005) 1732, {COM(2005) 672 final}. 2005, p. 52

⁹⁶ JONES, A., SUFRIN, B. *Op. Cit.*, p. 1193

⁹⁷ The 2004 Ashurst Study commented the state of damages actions as follows: "The picture that emerges from the present study on damages actions for breach of competition law in the enlarged EU is one of astonishing diversity and total underdevelopment." In: ASHURST. *Study on the conditions of claims for damages in case of infringement of EC competition rules. Comparative report*. 2004, p. 1. Available at: http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf

⁹⁸ EUROPEAN COMMISSION. *Op. Cit.* 79, p. 12

⁹⁹ JONES, A., SUFRIN, B. *Op. Cit.*, p. 1193

interesting remarks on collective actions. The Commission said that it is very unlikely for consumers and purchasers with small claims to bring actions for damages for breach of competition law, and therefore concluded that creating a system of collective actions should be considered, thus raising a chance to better protect interests of these individuals.¹⁰⁰ The Commission also called for proposals with the aim of addressing significant obstacles at Member States' level in order to find an effective system of damages actions for infringements of antitrust law.

The 2005 Green Paper was complemented by a Commission Staff Working Paper on Damages Actions for Breach of the EC antitrust rules.¹⁰¹ The working paper considered the state of collective actions in the Member States to be an obstacle to actions for damages, in particular due to the overall rarity of use of collective and representative actions.¹⁰² Furthermore, the study concluded that a specific collective action system might be an efficient form of redress, given the very low level of individual damage suffered in many of the cases.¹⁰³

3.2.2 The 2008 White Paper on Damages Actions

Following the proposals received by the Commission as a reaction to the 2005 Green Paper, the 2008 White Paper considered policy choices and specific measures that would ensure that all victims of infringements of competition law would have access to effective redress mechanisms, so that they can be fully compensated for the suffered harm. The 2008 White Paper follows the *Manfredi* ruling that *any individual* who has suffered harm caused by an antitrust infringement must be allowed to claim damages before national courts.¹⁰⁴

¹⁰⁰ EUROPEAN COMMISSION. *Op. Cit.* 12, p. 8

¹⁰¹ EUROPEAN COMMISSION. *Op. Cit.* 79

¹⁰² The study defines **collective actions** are those by which a single claim is brought on behalf of a group of affected persons, whereas **representative actions** mean actions brought by representative organizations, such as consumer organizations. In: EUROPEAN COMMISSION. *Op. Cit.* 79, p. 12

¹⁰³ EUROPEAN COMMISSION. *Op. Cit.* 79, p. 50

¹⁰⁴ MANFREDI, *op. cit.*, at para. 61 (“*any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 81 EC*”).

It was once again stated that there is a clear need for a mechanism that allows aggregation of individual claims of victims of antitrust infringements, because individuals with small claims are often deterred from bringing individual actions for damages by the costs, delays, uncertainties, risks and burdens involved.¹⁰⁵

The 2008 White Paper contains specific proposals to facilitate damages actions throughout the EU as a complement to public enforcement.¹⁰⁶ Even though there were some signs of improvement in certain Member States by 2008, victims of antitrust infringements in the EU in practice only rarely obtained compensation of the harm suffered.¹⁰⁷ The Commission further stated that it is important to preserve strong public enforcement by the Commission and NCAs, and that the measures put forward by the 2008 White Paper should only complement public enforcement, but not replace or jeopardize it.¹⁰⁸

Finally, the Commission suggested a combination of two complementary mechanisms of collective redress to address these issues:

- **Representative actions** brought by qualified entities, such as consumer associations, state bodies or trade associations, on behalf of the victims. These entities are supposed to be either officially designated in advance or certified on an *ad hoc* basis by a Member State for a particular antitrust infringement. The representative actions ought to be used more for follow-on actions¹⁰⁹;
- **Opt-in collective actions**, in which victims expressly decide to combine their individual claims for harm they suffered into single action with other victims of the same infringement of competition law.¹¹⁰ This type of action would permit stand-alone actions.¹¹¹

¹⁰⁵ EUROPEAN COMMISSION. *Op. Cit.* 64, p. 3

¹⁰⁶ JONES, A., SUFRIN, B. *Op. Cit.*, p. 1184

¹⁰⁷ EUROPEAN COMMISSION. *Op. Cit.* 64, p. 2

¹⁰⁸ *Ibid*, p. 3

¹⁰⁹ HODGES, CH. *Op. Cit.*, p. 174

¹¹⁰ EUROPEAN COMMISSION. *Op. Cit.* 64, p. 4

¹¹¹ HODGES, CH. *Op. Cit.*, p. 174

The reasoning behind this complementary model introduced by the Commission is that in representative actions, the qualified entities entitled to file the action are often not willing to pursue every claim, due to several reasons. It is therefore necessary to create a system in which all cases of antitrust rules infringement are covered by a possible damages action, and no victims are deprived of their right to bring an individual action for damages.¹¹² Further, the Commission rejected the opt-out model of US class actions (which is in more depth discussed in Chapter 3.3.2), and accepted that this kind of actions have in other jurisdictions been perceived to lead to excesses.¹¹³

For the reasons of completeness, it is not only the 2008 White Paper that suggested this complementary model. As a follow-up on the 2008 White Paper, the Commission introduced a draft directive on antitrust damages actions in 2009. In this draft directive, the Commission proposed, in contrary to the principles set out in the 2008 White Paper, to implement collective actions using the opt-out mechanism. Due to general disagreement with the draft directive, the Commission decided to withdraw it.¹¹⁴

3.2.3 The 2011 Commission consultation “Towards a Coherent European Approach to Collective Redress”

In 2011, the Commission held a public consultation on a coherent approach to collective redress in different areas of EU law. The purpose of this consultation was to identify common legal principles on collective redress and to examine how such common principles could fit into the EU legal system and into the legal orders of the Member States.¹¹⁵

In this consultation, the Commission further focused its interests on defining the ideal system of collective redress. It stated that any initiative on collective redress in the EU should ensure that this system operates effectively and efficiently,¹¹⁶ because such system would be capable of delivering legally certain and fair outcomes within

¹¹² EUROPEAN COMMISSION. *Op. Cit.* 64, p. 4

¹¹³ HODGES, CH. *Op. Cit.*, p. 173

¹¹⁴ ATHANASSIOU, L. *Op. Cit.*, p. 161

¹¹⁵ EUROPEAN COMMISSION. *Op. Cit.* 14, p. 5

¹¹⁶ *Ibid*, p. 7

a reasonable timeframe.¹¹⁷ “*A system of collective redress that results in lengthy and costly litigation is neither in the interests of consumers nor business and should be avoided.*”

A particular issue of information of victims was raised in the consultation. The Commission concluded that in order for the victims to be able to bundle their claims into a single collective action, they first need to be aware that they become victims of the same illegal practice, and that the possibility of bringing a collective claim or joining an existing lawsuit exists.¹¹⁸

Moreover, the Commission once again warned that no matter in which form the potential system of collective redress at EU level is established, the possibility of creating a system which would allow abusive litigation should be avoided. Concerns have been raised during the consultation that the US class actions system contains strong economic incentives¹¹⁹ for parties to bring a case to court even if it is unmeritorious. “*Any European approach to collective redress should not give any economic incentive to bring abusive claims.*”¹²⁰

Following the 2011 Communication, the Commission received over 300 replies from different stakeholders. 15 Member States governments replied, out of which 10 favored adopting a binding instrument on collective redress at EU level, while 5 preferred a non-binding approach. 6 Member States supported policy-specific legislation, while 4 preferred horizontal initiatives.¹²¹ In addition, over 19 000 replies were received in the form of mass mailing from EU citizens.¹²² After all the responses were analyzed, the Commission found out that considerable differences in opinions regarding a new collective redress mechanism exist between consumers and businesses.

¹¹⁷ Ibid, p. 7

¹¹⁸ EUROPEAN COMMISSION. *Op. Cit.* 14, p. 8

¹¹⁹ “*These incentives are the result of a combination of several factors, in particular, the availability of punitive damages, the absence of limitations as regards standing (virtually anybody can bring an action on behalf of an open class of injured parties), the possibility of contingency fees for attorney and the wide-ranging discovery procedure for procuring evidence.*” In: EUROPEAN COMMISSION. *Op. Cit.* 14, p. 10

¹²⁰ EUROPEAN COMMISSION. *Op. Cit.* 14, p. 9

¹²¹ EUROPEAN COMMISSION. *Op. Cit.* 44, p. 9

¹²² EUROPEAN COMMISSION, *Op. Cit.* 71, p. 5

The Commission concluded that “consumers are generally in favor of introducing new mechanisms, while businesses are generally against. Academics are generally in favor. Lawyers are divided on this issue, although those who are skeptical or opposed outnumber those in favor”.¹²³

3.2.4 The 2013 Communication “Towards a European Horizontal Framework for Collective Redress”

The long-lasting discussions initiated by the Commission culminated in 2013 by introducing the 2013 Communication and the 2013 Recommendation. These two documents are the outcome of the Commission’s attempts to come up with a suitable solution for regulating collective actions in the EU. According to the Commission, procedural law solutions are required on the basis of EU law in order to ensure that both citizens and businesses are able to obtain effective redress.¹²⁴

Further, an important conclusion was made by the Commission in the 2013 Communication regarding the goals of enforcement of competition law. The Commission stated that “there is no need for EU initiatives on collective redress to go beyond the goal of compensation: punitive damages should not be part of a European collective redress system.”

3.2.5 The 2013 Recommendation on Collective Redress Mechanisms

Given the diversity of legal systems of the Member States, a lack of consistent approach to collective redress at EU level may undermine the Commission’s continuous effort in securing the enforceability of statutory rights of the EU citizens and businesses.¹²⁵ Therefore, on 11 June 2013 the Commission published a non-binding Recommendation for collective redress mechanisms with the aim of facilitating access to justice in relation to violations of rights under EU law.

Unlike the 2014 Damages Directive, the Commission cannot punish Member States for failing to implement the principles brought by the 2013 Recommendation.¹²⁶

¹²³ EUROPEAN COMMISSION. *Op. Cit.* 1, p.6

¹²⁴ *Ibid.*, p. 2

¹²⁵ EUROPEAN COMMISSION. *Op. Cit.* 14, p. 4

¹²⁶ GERADIN, D. *Op. Cit.*, p. 1092

The non-binding nature of the 2013 Recommendation therefore limits its efficiency, and was chosen by the Commission due to conflicts between consumer unions and company representatives, which led many Member States to urge the EU to issue a Recommendation of a non-binding nature.¹²⁷

It was recommended that all Member States should have a collective redress system at national levels that would follow the same basic principles set out by the Recommendation, taking into account legal traditions of the Member States.¹²⁸ Nevertheless, the Commission has taken a rather conservative approach to collective redress, largely due to the fear that mechanisms that could trigger unmeritorious litigation may be implemented by the Member States.¹²⁹

The 2013 Recommendation intends to provide a consistent method of collective redress across different policy areas “*in order to avoid the risk of uncoordinated sectorial EU initiatives and to ensure the smoothest interface with national procedural rules, in the interest of the functioning of the internal market.*”¹³⁰ The EU has chosen to shift from a fragmented and mainly vertical approach to a horizontal one. Horizontal approach towards collective redress, as adopted in the Recommendation, makes the redress mechanisms applicable not only in the area of competition law, but also areas such as consumer protection, environmental protection, data protection, etc.¹³¹

The proposed system is expected to complement public enforcement of competition law. The 2013 Recommendation indicated that collective actions should in principle be used once the competent public authority has found an infringement. Conversely, if the collective redress action is filed before the commencement of the public authority proceedings, national courts should avoid issuing decisions which would conflict with a decision contemplated by the public authority (basically requiring the courts to stay

¹²⁷ MIKROULEA, A. “*Collective Redress*” in *European Competition Law*. Journal of Competition Law, ZWer 4/2006, p. 391

¹²⁸ EUROPEAN COMMISSION. *Op. Cit.* 5, p. 2

¹²⁹ GERADIN, D. *Op. Cit.*, p. 1080

¹³⁰ EUROPEAN COMMISSION, *Op. Cit.* 71, p. 4

¹³¹ EUROPEAN COMMISSION. *Op. Cit.* 5, recital 7

the collective action judicial proceedings until the public authority proceedings have been concluded).¹³²

Taking into account the results of the Commission's previous consultations, the 2013 Recommendation finally recommended adopting an opt-in system of compensatory collective redress. This means that the claimants harmed by a breach of competition law have to actively decide to join the action of the group. The opposite to this system of collective redress is the US class actions system based on the opt-out approach, in which the group is determined *ex ante* and the persons belonging thereto automatically participate in the action, unless they actively opt out. The proposed system of collective redress further alienates itself from the US class actions by avoiding punitive damages and contingency fees, which are claimed to create incentives to unnecessary litigation.¹³³

Moreover, an interesting point was risen in the Commission's approach towards the regulation of collective redress at EU level. The Commission stressed out the importance of maintaining legal traditions of each Member State in relation to the reluctance of the US class actions system. The Commission recommended that "*elements such as punitive damages, intrusive pre-trial discovery procedures and jury awards, most of which are foreign to the legal traditions of most Member States, should be avoided as a general rule*".¹³⁴ However, Rafael Amaro said that the legal tradition argument is overrated, because it the Commission mainly put it forward to dismiss collective redress devices inspired by the US model of private antitrust litigation. He claims that the 100 years of US experience with private enforcement of competition law cannot be ignored when addressing the crucial question of its spreading across Europe.¹³⁵

¹³² *Ibid*, p. 6

¹³³ DOWNIE, G., CHARRIER, M. *UK and EU developments in collective action regimes for competition law breaches*. European Competition Law Review. 2014, p. 376

¹³⁴ EUROPEAN COMMISSION. *Op. Cit.* 5, p. 2

¹³⁵ AMARO, R. *Plurality is the Key: Collective Redress, Consensual Settlements and Other Incentive Devices*. In: DERRENE, J., RIVERY, M., PETIT, N. *Antitrust damages in EU law and policy*. GCLC Annual Conferences Series. 2014, p. 82

The Commission invited Member States to implement the principles set out in the 2013 Recommendation in national collective redress systems by 26 July 2015 at the latest, and also to submit annual reports about the operation of the recommended mechanisms to the Commission. Moreover, the Commission should assess whether further legislative measures to consolidate and strengthen the horizontal approach reflected in the Communication and the Recommendation should be proposed by 26 July 2017.¹³⁶¹³⁷

3.2.6 Directive on Antitrust Damages Actions

One of the reasons that led the Commission to issue the 2014 Damages Directive is that very few victims of antitrust infringements had actually been able to obtain compensation for the harm suffered, mainly due to national procedural obstacles and legal uncertainty. Creating an effective system of redress is rather important, because it can complement and reinforce public enforcement, and enable the aggrieved parties to obtain redress for the harm caused by an infringement of competition law.¹³⁸

The development of private enforcement after Regulation 1/2003 graduated in the adoption of Directive 2014/104/EU on Antitrust Damages Actions on 26 November 2014, which should have been transposed into the Member States' national laws by 27 December 2016. The 2014 Directive has an important impact in the area of collective redress. In spite of the fact that it does not contain any special provisions on collective redress, it also applies to collective actions in those Member States where they are available.¹³⁹

Private parties in certain Member States may have encountered difficulties, such as national procedural obstacles or legal uncertainty, when claiming damages for infringements of EU competition law. By adopting the 2014 Directive, the EU created

¹³⁶ EUROPEAN COMMISSION. *Op. Cit.* 5, paras 38-41

¹³⁷ VITZILAIYOU, L., ZOHIOS, G. *Op. Cit.*

¹³⁸ COMPETITION & MARKETS AUTHORITY. *Competition law redress. A guide to taking action for breaches of competition law.* CMA 55. 2016, p. 2. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/520423/competition-law-redress-a-guide-to-taking-action-cma55.pdf

¹³⁹ EUROPEAN COMMISSION. Press release. Antitrust: Commission welcomes Council adoption of Directive on antitrust damages actions. Brussels, 10 November 2014. Available at: http://europa.eu/rapid/press-release_IP-14-1580_en.htm

a minimum standard for actions for damages for infringements of competition law.¹⁴⁰ The 2014 Directive seeks to codify case law and guide Member States towards the establishment of a legal framework that provides procedural and legal certainty and a minimum standard that will allow cartel victims to seek compensation more effectively.¹⁴¹ It is in the public interest that the use of damages actions in the EU is promoted. Nevertheless, it follows that the use of damages actions keeps on growing. “For instance, while there were only 18 ongoing damages claims in 2009, the number had increased to 59 by 2015.”¹⁴²

The Directive’s goal is to ensure that anyone who has suffered harm caused by an infringement of competition law by an undertaking can effectively exercise the right to claim full compensation for that harm from that undertaking. It also seeks to coordinate the enforcement of the competition rules by competition authorities.¹⁴³ Its purpose is to enhance both public and private enforcement by punishing the guilty parties that benefited from engaging in anticompetitive behaviour through their illegal behaviour and remunerating the aggrieved parties.¹⁴⁴ These goals are to be achieved by, among others, providing easier access to evidence through minimum disclosure rules¹⁴⁵, effectively limiting access to leniency documentation¹⁴⁶, providing for decisions of all NCAs to constitute proof of infringement before their own Member State civil courts¹⁴⁷, establishing clear limitation periods¹⁴⁸, giving protection to successful leniency immunity applicants, with limitation of their joint and several liability to compensate infringement¹⁴⁹ and introducing a rule on presumption of harm¹⁵⁰.

¹⁴⁰ FUNKE, T. *The EU Damages Actions Directive*. Getting the Deal Through – Private Antitrust Litigation 2016. P. 1. Available at: http://www.osborneclarke.com/media/filer_public/28/2a/282a0ac7-4563-4b77-aff-83c283d357cf/the_eu_damages_actions_directive.pdf

¹⁴¹ FUNKE, T. *Op. Cit.*, p. 1

¹⁴² GERADIN, D. *Op. Cit.*, p. 1079

¹⁴³ EUROPEAN PARLIAMENT AND COUNCIL. *Op. Cit.*, Article 1

¹⁴⁴ BOVIS, CH., CLARKE, CH. *Private Enforcement of EU Competition Law*. *Liverpool Law Rev* (2015) 36:49–71, p. 6

¹⁴⁵ EUROPEAN PARLIAMENT AND COUNCIL. *Op. Cit.*, Article 5

¹⁴⁶ *Ibid*, Article 6-7

¹⁴⁷ *Ibid*, Article 9

¹⁴⁸ *Ibid*, Article 10

¹⁴⁹ *Ibid*, Article 11

3.3 To Opt-in or To Opt-out?

As it was described above, there are several different types of collective redress mechanisms. Their choice depends largely on the purpose sought by the respective collective action. One more crucial difference needs to be explained in order to present the general overview of collective actions – the difference between the opt-in and opt-out mechanisms.

The long-lasting discussion on collective redress in the EU has been considering this question heavily, and putting it in contrast to the US class actions system. Both models have their advantages and disadvantages, and the choice of a preferred model should be considered carefully. *“The difference between the opt-in and opt-out mechanisms is straightforward to understand, but selection between them is far more difficult, since the consequences that flow from both are complex and require a difficult balancing exercise to be undertaken.”*¹⁵¹

An important point relating to both mechanisms is that bundling of the claims of numerous claimants can ease the administrative burden for national courts, allowing them to only deal with one case instead of dealing with each case from scratch.¹⁵² Further differences between the two models of collective actions are to be explained in the following subchapters.

3.3.1 The Opt-In Mechanism

The difference between opt-in and opt-out mechanisms is connected to the very nature of collective actions. In collective actions, damages claims of individuals or businesses are bundled into one single action. The question that needs to be answered is how these harmed persons become parties to this single action.

*“The opt-in collective action system [...] is a system where the victims have to express their intention to be included in the action.”*¹⁵³ That means that in order for a person

¹⁵⁰ *Ibid*, Article 17

¹⁵¹ HODGES, CH. *Op. Cit.*, p. 119

¹⁵² WRBKA, S., UYTSEL, S., SIEMS, M. *Op. Cit.*, p. 50

¹⁵³ EUROPEAN COMMISSION. *Op. Cit.* 67, p. 19-20

to become legally bounded by the result of an opt-in collective action, he or she must actively express their intention to be bound by it. The opt-in system respects the right of a person to decide whether to participate in the collective option or not, unlike the opt-in system in which all victims of a certain anticompetitive behavior form a part of the action automatically, unless they decide to opt-out.

The opt-in model has an advantage of limiting the risk of unmeritorious actions, which is one of the often-expressed concerns of the EU legislators in regards to the US class action system. In the US, a claimant can bring a damages action on behalf of an unspecified number of harmed persons, hoping to obtain compensation for the whole group, thus raising the potential amount of compensation obtained. It is claimed that this set up creates a high incentive for attorneys to file class actions, given the fact that their remuneration for legal representation of the class is based on contingency fees.¹⁵⁴ Further, the opt-in mechanism is more similar to traditional rules of European litigation. It would therefore be easier to implement such mechanism into national laws of Member States.¹⁵⁵

On the other hand, opt-in collective actions often entail low participation rates, which may render the collective redress system ineffective, especially in cases of infringements of competition law. Such infringements often cause low value individual harm, but to a multitude of individual consumers.¹⁵⁶ The low participation rate is caused mainly by the need of the harmed individuals to spend time and money on joining or establishing the action. Spending their resources may be detrimental especially in cases where the individual value at stake is low, so the potential gains from the action might not even cover the costs for the victims to take part in it. However, it was argued that “*victims who suffered a relatively large damage are likely to opt-in, when the expected damage award is equal to or larger than the net damage award they could receive in an individual litigation.*”¹⁵⁷

¹⁵⁴ DIRECTORATE-GENERAL FOR INTERNAL POLICIES. *Op. Cit.* 138, p. p. 64

¹⁵⁵ EUROPEAN COMMISSION. *Op. Cit.* 67, p. 19-20

¹⁵⁶ DIRECTORATE-GENERAL FOR INTERNAL POLICIES. *Op. Cit.* 138, p. p. 64

¹⁵⁷ BERGH, R. *Private Enforcement of Competition Law and the Persisting Collective Action Problem.* Maastricht Journal of European and Comparative Law. (2013), p. 21

The increased costs are not only incurred by the harmed individuals themselves, but also by the claimants, especially in the case of representative actions. These costs are related to the fact that the claimant must approach each victim individually, inquiring whether they are interested in joining the action or not, and further informing them about the status of the concurrent proceedings. Reducing the number of potential claimants may thereby limit corrective justice and would as a consequence cause that illicit gain may be retained by the infringers, thus further limiting the deterrent effect of the redress mechanism.¹⁵⁸ This problem may also discourage a potential representative claimant to file a representative action, as they may be afraid to spend their resources on an action which will not attract the attention of enough harmed persons to be profitable.¹⁵⁹

Opt-in based collective redress mechanisms are currently the most widely used compensatory collective redress mechanism in Europe.¹⁶⁰ The Commission has also inclined towards the opt-in mechanism in the 2013 Recommendation, due to the reluctance of using the US class actions system. *“Despite the fact that many EU Member States implemented opt-in group actions in the last ten years, no sudden rises of actions for damages has been observed.”*¹⁶¹

3.3.2 The Opt-Out Mechanism

Conversely, collective actions under the opt-out mechanism include every person harmed by an anticompetitive conduct unless they actively decide to opt-out of the action. A failure to act means that the person is automatically included in the action.¹⁶²

Opt-out actions have certain positive impacts on the collective redress proceedings. They usually tend to cover larger number of harmed individuals who are bound by the result of the action, thus having larger detrimental effects on the infringers than

¹⁵⁸ EUROPEAN COMMISSION. *Op. Cit.* 67, p. 19-20

¹⁵⁹ DIRECTORATE-GENERAL FOR INTERNAL POLICIES. *Op. Cit.* 138, p. 66

¹⁶⁰ WRBKA, S., UYTSEL, S., SIEMS, M. *Op. Cit.*, p. 50

¹⁶¹ AMARO, R. *Op. Cit.*, p. 85

¹⁶² GARCIA, C. *The Role of Consumer Associations in the Enforcement of Article 82 EC*. In: MACKENRODT, GALLEGGO AND ENCHELMAIER (eds.). *Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?* Springer-Verlag Berlin Heidelberg. 2008, p. 196

the opt-in mechanism, which benefits the efficiency of private enforcement.¹⁶³ A successful opt-out action is therefore likely to obtain higher award of damages, thus causing major losses to the infringer. Opt-out actions are also more successful than opt-in actions in overcoming the *rational apathy* phenomenon of victims related to social, psychological, financial or transparency reasons.¹⁶⁴

However, as results from the US system of class actions where the opt-out model uses contingency fees, a higher number of unmeritorious claims is generally filed at a court due to the attorneys' expected high financial gains. Further, the size of the opt-out actions often motivates defendants to settle with the claimants, given the fact that the expected damages awarded by the court may be much higher than what the defendant would pay if the case got settled. For these reasons, it is important to establish control mechanisms that prevent potential abuses of the opt-out actions, such as strong initial certification stage which would not allow proceedings with unmeritorious claims.¹⁶⁵ In opt-out actions, another problem often tends to arise. Considering the high number of parties involved in the class, it may be difficult to identify each one of them and their corresponding compensation, if awarded by the court. This increases the costs the claimants need to incur in relation to the class action.¹⁶⁶

As previously discussed, the best known system of opt-out class actions have been developed in the US. However, certain states have developed their own system of collective redress in the European Union, amongst which Portugal, Denmark, Norway and the Netherlands have inclined towards using the opt-out mechanism of collective actions. Considerable differences exist in between the chosen models; however, the most important finding is that in these states, "*there is no requirement for anyone to opt-in at the start of the class representative proceedings, but instead notice must be given to all class members so that each is entitled to opt-out of the class, and have the opportunity either not to assert his or her claim or to bring it individually.*"¹⁶⁷

¹⁶³ AMARO, R. *Op. Cit.*, p. 87

¹⁶⁴ ATHANASSIOU, L. *Op. Cit.*, p. 164

¹⁶⁵ HODGES, CH. *Op. Cit.*, p. 119

¹⁶⁶ ATHANASSIOU, L. *Op. Cit.*, p. 166

¹⁶⁷ HODGES, CH. *Op. Cit.*, p. 119

Rafael Amaro suggested that a dual system using both out-in and opt-out mechanisms should be adopted, in which it would be up to the judge to choose the most appropriate system of enforcement, taking into account the type of damages and the number of victims. This *hybrid* system of collective actions has already been adopted in several EU Member States.¹⁶⁸

- In Belgium, both opt-in and opt-out models are in use, depending on the type of collective damages sought by the action. “*For physical or moral damages, consumers must opt-in to the class action. This is likely because physical and moral damages are more personal damages, so the government felt that consumers must opt-in to such a claim. For other types of damages, the court will decide whether the proceeding will be opt-in or opt-out.*”¹⁶⁹ It is interesting to point out that the choice between the two methods is available only for Belgian residents. “*For non-residents, only the opt-in system is applicable.*”¹⁷⁰
- In Denmark, the general rule is that opt-in group actions can be brought either by individual claimants, representative organizations or by the Consumer Ombudsman. However, the judge may be granted, on a case-by-case basis, the discretion as to whether the opt-out model is necessary to guarantee that a significant proportion of injured parties are compensated for the damages suffered.¹⁷¹
- In the UK, the Competition Act 1998 has recently been amended by Schedule 8 of the Consumers Rights Act 2015 in relation to private actions. Section 5 of Schedule 8 of the Consumers Rights Act 2015 states that proceedings combining two or more claims may be brought before the Competition Appeal Tribunal. For the collective proceedings to begin, the Tribunal must make a collective proceedings order, in which it includes a specification of

¹⁶⁸ AMARO, R. *Op. Cit.*, p. 89

¹⁶⁹ EIZENGA, M., BELL, P. *Class actions now available in Belgium*. 2014, available at: <http://www.lexology.com/library/detail.aspx?g=ca5ec16d-50d4-44b8-ac51-c956b1cb8dd9>

¹⁷⁰ BONTINCK, T., GOFFINET, P. *Belgium – Competition Litigation 2017*. 2016, available at: <https://iclg.com/practice-areas/competition-litigation/competition-litigation-2017/belgium>

¹⁷¹ JUSKA, Z. *Obstacles in European Competition Law Enforcement. A Potential Solution from Collective Redress*. European Journal of Legal Studies, Volume Issue (2014) 7(1) EJLS 125. Available at: <http://www.ejls.eu/15/184UK.htm>

the proceedings as opt-in collective proceedings or opt-out collective proceedings.¹⁷²

It can be observed from the previous explanations that clear consensus on which mechanism can better achieve access to justice to victims of antitrust law infringements does not yet exist. There are considerable advantages and disadvantages on both sides of the table. “*For example, while for serial low-value damages, opt-out will probably be more appropriate, for damages of higher value but with fewer harmed victims, it will be the opt-in.*”¹⁷³ In light of these statements, it is reasonable that the Commission does not exclusively choose between opt-in or opt-out mechanisms, but rather opts for a hybrid model combining the advantages of both systems. Nevertheless, the Commission has already expressed multiple times its intention to lean towards the opt-in mechanism, because it is afraid that negative attributes of the opt-out mechanism could be drawn into the Member States’ legal systems.

3.4 Relief Sought by Collective Actions

Different types of collective redress mechanisms have been introduced by Member States with the intention to prevent and stop unlawful practices, and to ensure that compensation can be obtained for an infringement of competition law by filing a damages action.¹⁷⁴ The Commission in the 2013 Recommendation distinguishes between *injunctive collective redress* and *compensatory collective redress*, which altogether create the system of collective redress.

According to the Commission, injunctive collective redress is “*a legal mechanism that ensures a possibility to claim cessation of illegal behavior collectively by two or more natural or legal persons or by an entity entitled to bring a representative action*”¹⁷⁵. Conversely, compensatory collective redress is “*a legal mechanism that ensures the possibility to claim compensation collectively by two or more natural or legal*

¹⁷² Section 5 of Schedule 8 of the Consumer Rights Act 2015

¹⁷³ AMARO, R. *Op. Cit.*, p. 89

¹⁷⁴ EUROPEAN COMMISSION. *Op. Cit.* 5, recital 9

¹⁷⁵ *Ibid*, p. 3

persons claiming to have been harmed in a mass harm situation or by an entity entitled to bring a representative action”.¹⁷⁶

From these definitions, two different reliefs sought by any collective redress mechanism can therefore be distinguished:

a. *Injunctive relief*

By way of injunctive relief, claimants seek to stop the continuation of illegal behavior.¹⁷⁷ The EU has previously adopted Directive 2009/22/EC on injunctions for the protection of consumers’ interests. However, the directive does not enable to obtain compensation to those who claim they have suffered detriment as a result of an illicit practice.¹⁷⁸ Collective actions do not always aim at obtaining compensation for the harm suffered. Injunction actions can sometimes work as a helpful tool to discontinue illegal activities. *“In several Member States, the power of representative organizations, consumer associations and other bodies to bring actions for injunctions is broader than the power of such entities to bring claims for damages.”*¹⁷⁹ The Commission further requires expedient procedures for claims for injunctive relief. It is necessary that these claims are treated with all due expediency by the courts or competent public authorities, in order to prevent any further harm causing damage or such violation.¹⁸⁰

b. *Compensatory relief*

The second form of relief sought by collective actions is compensatory relief, by which the claimants seek compensation as a group for damage they suffered individually.¹⁸¹ Such a procedure has been introduced in the majority of Member States. However, the existing mechanisms vary widely throughout the EU. Most of the national legal

¹⁷⁶ *Ibid*, p. 3

¹⁷⁷ EUROPEAN COMMISSION. *Op. Cit.* 14, p. 3

¹⁷⁸ EUROPEAN COMMISSION. *Op. Cit.* 5, p. 11

¹⁷⁹ ASHURST. *Op. Cit.*, p. 42

¹⁸⁰ EUROPEAN COMMISSION. *Op. Cit.* 5, p. 6

¹⁸¹ EUROPEAN COMMISSION. *Op. Cit.* 14, p. 3

systems allow for compensatory relief for consumers, whereas only a few also allow for compensatory redress also for other victims, such as small businesses.¹⁸²

3.5 The US Class Actions

Considering the importance of the US system in the European discussion on collective actions, the system of class actions will now shortly be presented, as it is often considered as a starting point which has often been contrasted with the EU collective redress system. It was suggested repeatedly that the US class actions system is avoided in the EU, mainly due to its likeliness of causing abuses and the prevailing image of an attorney acting as an entrepreneur maximizing personal profits without sufficiently taking care of the interests of the members of the class.¹⁸³

The US class action system is probably the most advanced system of collective redress, as it has been developing since the second half of the 20th century. The vast majority of antitrust cases in the US are brought by private parties, contrary to the EU, where it is mainly the public authorities (the Commission, NCAs) who initiate proceedings against persons involved in anticompetitive behavior.¹⁸⁴

The system of class actions is built on the premise that a claim for damages is brought on behalf of a class of persons against the same defendant. “*A class sought to be represented should all have a common interest and a common grievance and the relief sought should in its nature be beneficial to all of them.*”¹⁸⁵ The US class action system is built on the opt-out principle, which means that the judgment is binding for all persons who chose to be bound by it, i.e. who did not actively opt out from the action upon receiving notification.¹⁸⁶

The legal framework for class actions in the US varies from state to state. In addition to this diversity, class actions are regulated at the federal law level, in particular by the Federal Rules of Civil Procedure and their Rule 23, according to which the plaintiffs

¹⁸² *Ibid*, p. 4

¹⁸³ BERGH, R. *Op. Cit.*, p. 13

¹⁸⁴ *Ibid*, p. 13

¹⁸⁵ ATHANASSIOU, L. *Op. Cit.*, p. 153

¹⁸⁶ WRBKA, S., UYTSEL, S., SIEMS, M. *Op. Cit.*, p. 74-75

must first make a motion to certify a class before the actual class action proceedings even begin. The Rule 23 therefore allows only reasonable, well-grounded actions to proceed to trial.¹⁸⁷

A class can be certified by the court under Rule 23(a) Fed. R. Civ. P. if the plaintiffs can establish each of the following requirements:

1. **Requirement of numerosity.** The class is so numerous that joinder of all members is impracticable;
2. **Requirement of commonality.** There are questions of law or fact common to the class;
3. **Requirement of typicality.** The claims or defenses of the representative parties are typical of the claims or defenses of the class; and
4. **Requirement of adequacy of representation.** The representative parties will fairly and adequately protect the interests of the class.

If the action meets the Rule 23(a) requirements, it must further fall under one of the categories of actions listed in Rule 23(b).¹⁸⁸ Rule 23(b) of the Fed. R. Civ. P. states that if the plaintiffs seek damages on behalf of the class member, they must show the **predominance** of class issues over individual issues, and the **superiority** of the class procedure for resolving plaintiffs' claims.¹⁸⁹ Finally, after each class is certified, the court must send notice to the members of such class, informing them that the class has been certified and that they have the right to opt-out of the class actions.¹⁹⁰

The system of collective redress at EU level, as established by the 2013 Recommendation, does not contain similar requirements. The Recommendation rather

¹⁸⁷ GERADIN, D. *Op. Cit.*, p. 1088

¹⁸⁸ *Ibid*, p. 1088

¹⁸⁹ MAHONEY, STACEY ANNE: *Got Class?: A Comparison of US and EU Collective Actions*. American Bar Association Section of International Law, 2016 European Forum. 2016, p. 1. Available at: <https://shop.americanbar.org/PersonifyImages/ProductFiles/237345198/Session%206.pdf>

¹⁹⁰ GERADIN, D. *Op. Cit.*, p. 1090

sets out ‘*common principles which should apply to all instances of collective redress, and also those specific either to injunctive or to compensatory collective redress.*’¹⁹¹

There are also other considerable differences between the EU and the US systems of collective redress. Firstly, the US class actions system allows the courts to grant *treble damages*¹⁹² to the plaintiffs, which have the tendency to attract the attention of class actions lawyers, as it significantly increases the total amount to be possibly recovered in the class action proceedings. Treble damages also tend to further promote both functions of collective redress mechanisms, i.e. compensatory and deterrent functions. In the EU, the Commission decided not to incorporate treble damages; therefore claimants can only recover compensation for the damage actually incurred by the antitrust law infringement. Lower compensation in stake thus lowers the deterrence level placed upon the infringers. Secondly, it is typical in the US that both sides of the dispute bear their own costs of the proceedings. Conversely, the Commission has introduced the *loser pays* principle, in which “*the party that loses a collective redress action reimburses necessary legal costs borne by the winning party*”.¹⁹³ This principle follows the traditional legal principle of legal systems in continental Europe. However, it has the potential to discourage victims of anticompetitive behavior to file damages actions. Using collective actions as the means of obtaining compensation may nevertheless help to reduce the gravity of this issue, because the potential losses would be borne by a multitude of individuals included in the respective collective action.

3.5.1 Perception of the US Class Actions in the EU

The skepticism towards the US class actions system is obvious in majority of the European policy documents, as discussed in Chapter 3.2 of this thesis in more detail. The US class action system is believed to have the potential of creating the culture of abusive litigation. It has also been criticized for awarding excessive

¹⁹¹ EUROPEAN COMMISSION. *Op. Cit.* 5, p. 3

¹⁹² i.e. damages amounting to three times the amount of the actual/compensatory damages. In: GERADIN, D. *Op. Cit.*, p. 1090

¹⁹³ EUROPEAN COMMISSION. *Op. Cit.* 5, p. 63

contingency fees¹⁹⁴ to attorneys representing class actions before courts, as their remuneration is calculated from percentage of damages granted by the court.¹⁹⁵

The Commission stated in the 2013 Recommendation that the Member States should create a system remuneration which does not create any incentives to unnecessary litigation, and does not permit contingency fees which carry the risk of creating such an incentive.¹⁹⁶ The system also allows seeking punitive damages¹⁹⁷, which increase the economic interests of the concerned parties.¹⁹⁸ In addition, it has been observed in the US that in some cases members of the class only obtained minimum rewards for the harm suffered, “*generally a few dollars, or even in some cases a coupon for a good or service that they will not necessarily be able or willing to use.*”¹⁹⁹ This problem often emerges when attorneys decide to settle with the wrongdoer without waiting for the case to be decided by a jury.

However, the US legislators are aware of the negative attributes of the US class action system. That is why on March 9, 2017, the Fairness in Class Action Litigation Act of 2017²⁰⁰ was passed by the House of Representatives. Its purpose has been described as “*keeping baseless class action suits away from innocent parties, while still keeping the doors to justice open for parties with real and legitimate claims.*” The Act addresses, among others, the issue of attorney fees, which was subjected to severe scrutiny by the Commission. The proposed provisions address both timing and amount of fee payments, which could make class actions less profitable for plaintiffs’ attorneys,

¹⁹⁴ “*A contingent fee is a charge made by an attorney dependent upon a successful outcome in the case and is often agreed to be a percentage of the party’s recovery. Such fee arrangements are often used in negligence cases and other civil actions but it is unethical for an attorney to charge a criminal defendant a fee substantially contingent upon the result.*” In: GIFIS, S. *Law Dictionary*. 6th edition. Barron’s Educational Series. 2010, p. 42

¹⁹⁵ AMARO, R. *Op. Cit.*, p. 87

¹⁹⁶ EUROPEAN COMMISSION. *Op. Cit.* 5, p. 29-30

¹⁹⁷ “*Exemplary [punitive] damages – compensation in excess of actual damages; a form of punishment to the wrongdoer and excess enhancement to the injured; nominal or actual damages must exist before exemplary damages will be found and then they will be awarded only in instances of malicious and willful misconduct.*” In: GIFIS, S. *Op. Cit.*, p. 135

¹⁹⁸ EUROPEAN COMMISSION. *Op. Cit.* 14, p. 8

¹⁹⁹ LESLIE, CH. *The Need to Study Coupon Settlements in Class Action Litigation*, 18 GEO. J. LEGAL ETHICS 1395, 1395 (2005). In: GERADIN, D. *Op. Cit.*, p. 1088

²⁰⁰ H.R. 985 — *115th Congress: Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017*

due to the fact that the fees would be limited to “*a reasonable percentage of any payments directly distributed to and received by class members never to exceed the total amount of money directly distributed to and received by all class members.*”²⁰¹

Further, the EU Competition Commissioner has criticized the US system as having excessive and undesirable consequences, and said that she wished to produce a competition culture and not a litigation culture, and therefore expressly was not proposing to introduce class actions or contingency fees.²⁰² The negative stance of the EU towards the US class actions can further be observed in the reluctance of using the term “*class actions*”. The EU legislators prefer to refer to the collective redress mechanisms as “*collective actions*” or “*representative actions*”.

According to Athanassiou, the expressed fears relating to the US class action system are exaggerated in the EU. The alleged risks of abuses may be reduced or eliminated by setting safeguards that could limit their possible negative impacts. Further, European systems of civil procedure are founded on different grounds, thus some of the fears, such as the existence of juries or extensive discovery powers, eliminate themselves.²⁰³

3.6 Partial Conclusion

This Chapter 3 focuses on presenting different forms of collective redress mechanisms. Two main systems of collective redress need to be put in contrast: the US system of opt-out class actions and the EU complementary system of collective actions and representative actions, as introduced by the Commission in the 2013 Recommendation. It needs to be pointed out that a flawless system of collective redress has not yet been developed in the world. The US class action system has been in use for a long time, and it seems to have good detrimental and compensatory effects in the US antitrust law. In search of an efficient system of collective redress in the EU, the Commission has carefully considered both positive and negative effects of the US class actions and

²⁰¹ ZOROGASTUA, G., SMITH, P. *Proposed Fairness in Class Action Litigation Act of 2017*. American Bar Association. Available at: <https://www.americanbar.org/publications/litigation-committees/commercial-business/articles/2017/proposed-fairness-class-action-litigation-act-of-2017.html>

²⁰² HODGES, CH. *Op. Cit.*, p. 131

²⁰³ ATHANASSIOU, L. *Op. Cit.*, p. 163

decided to incline towards a new European system by creating a complementary opt-in system of collective actions and representative actions.

Creating a new European system of collective redress has presented a tremendous challenge for the Commission. Given the diversity of the Member States' legal systems and traditions, *“each legislative measure at the substantive law level has to be scrutinized from the standpoint of its implications for cross-border litigation and its effects on the European internal market.”*²⁰⁴

It is not possible to establish at the time of writing this master's thesis whether the Commission has made a smart move by opting for this kind of European system and refusing the US class actions as a whole. As presented in this Chapter, many scholars have expressed both affirmative and dissenting opinions on the Commission's preferred choice. A unified consensus towards a specific system of collective redress that should be adopted in the EU has not been found in the European discussion. Nevertheless, it was agreed that there is a strong *“need to ensure a well-balanced system for collective proceedings as well as the aim of granting effective compensation for every victim of illegal business practices.”*²⁰⁵

²⁰⁴ TZAKAS, D. *Op. Cit.*, p. 1174

²⁰⁵ *Ibid*, p. 1174

4 Main Stumbling Blocks in Collective Actions

It has been argued repeatedly in this thesis that collective redress mechanisms are capable of contributing to the enhancement of litigation culture in the EU Member States. Regardless its obvious positive aspects, it is important to confront these collective redress instruments with several issues legislators have to face when implementing such mechanisms into their legal systems. Now that the basic framework of collective redress in the EU and the US has been explained, this Chapter 4 concentrates on the most widely discussed issues, which are frequently scrutinized by the Commission and scholars.

Collective actions are a complicated and complex legal instrument. It is obvious from the above that reaching a consensus on the preferred form of a collective redress mechanism among legislators, governments, scholars, or consumer organizations has presented quite a struggle. However, it is generally believed that collective actions have both positive and negative effects on the enforcement system. Collective actions are capable of overcoming the *rational apathy* problem by allowing to a multitude of harmed individuals to claim damages that they would have not otherwise claimed individually, because the potentially awarded damages are disproportionate to the resources spent on the collective redress proceeding. Collective actions can further promote *free-riding*, in which harmed individuals file damages actions after other damages action related to the same competition law infringement has been decided. There is also a problem of funding of collective actions, considering that all harmed individuals that enter the collective actions have to share the costs and risks related to the proceedings.

4.1 Barriers to file collective actions

Individuals harmed by anticompetitive conduct are often reluctant to initiate private lawsuits against these unlawful practices.²⁰⁶ It is therefore very important that the long-lasting discussion has been taking place in the EU, proving that

²⁰⁶ ATHANASSIOU, L. *Op. Cit.*, p. 145. According to Athanassiou, “*such claimants (consumers being the characteristic example) would very rarely initiate individual actions as they face “significant barriers in terms of accessibility, effectiveness and affordability” mainly related to high litigation and psychological costs, complex and lengthy procedures and lack of information.*”

“the enforcement has become a strategic priority of the EU internal policy”.²⁰⁷ Identifying the barriers that deter individuals from filing collective actions is the first step towards their possible elimination by adjusting the system of collective actions so that it is accessible to most victims of anticompetitive conduct. The barriers that have been identified include, among others, costs of the proceedings, procedural impediments, dispersed interests, information asymmetries or differences in opinion on the common strategy.²⁰⁸

Costs of collective action proceedings are considered to be one of the main barrier that deter harmed individuals from claiming damages,²⁰⁹ mainly due to the fact that individual losses are small in comparison to the expected costs of collective redress litigation. Filing a collective action instead of an individual one could therefore overcome the costs of the proceedings by spreading them among numerous litigants and provide them with the means to consolidate a large number of smaller claims into one action.²¹⁰ Establishing a system of collective actions could therefore benefit claims that are subject to disproportionate costs compared to the individual claims sought by the collective action²¹¹ and contribute to enhancing access to justice.²¹²

Collective actions also have the ability to foster equality between litigating parties.²¹³ Defendants in damages action cases are most often companies with adequate means to fight the suits. These means include either monetary funds that ensure proper legal representation at the proceedings before the court or internal legal teams. On the other hand, harmed individuals are in most cases consumers (either natural or legal persons) that are usually in a weaker position than the infringer. Collective actions can therefore facilitate access to justice to the individuals that would otherwise not file the claim themselves.

²⁰⁷ ATHANASSIOU, L. *Op. Cit.*, p. 145

²⁰⁸ WRBKA, S., UYTSEL, S., SIEMS, M. *Op. Cit.*, p. 59

²⁰⁹ EUROPEAN COMMISSION. *Op. Cit.* 5, p. 2

²¹⁰ EUROPEAN COMMISSION. *Op. Cit.* 12, p. 8

²¹¹ WRBKA, S., UYTSEL, S., SIEMS, M. *Op. Cit.*, p. 11

²¹² EUROPEAN COMMISSION, *Op. Cit.* 71, p. 7

²¹³ WRBKA, S., UYTSEL, S., SIEMS, M. *Op. Cit.*, p. 11

4.2 The Rational Apathy Problem

It is generally believed that all losses caused by competition law infringements should be compensated to their victims. It is desirable to force infringers of competition law to internalize the full negative welfare effects caused by their behavior.²¹⁴ In collective actions, however, it may sometimes seem unreasonable for harmed individuals to bring their damages claims to courts. This is called *the rational apathy problem*, which frequently occurs in mass harm situations.

The rational apathy problem is built on the following premise: it would be highly irrational for victims of competition law infringements to bring a small-value claim in court, because costs of the proceedings would most likely be higher than the expected benefits that the victims who file the damages action could gain if compensation is awarded by the court.²¹⁵ Therefore, private parties tend to initiate proceedings only if the expected benefits of doing so are higher than costs that need to be incurred for bringing the action.²¹⁶

According to the Commission, “*one out of five European consumers will not go to court for less than EUR 1000. Half say they will not go to court for less than EUR 200.*”²¹⁷ This reluctance of harmed individuals to file damages actions leads to the infringers not being sanctioned for their illegal activities. Collective actions have the potential to overcome the rational apathy problem. In competition law, individuals harmed by anticompetitive behavior are most often consumers who purchased a product whose price was increased due to some kind of behavior prohibited by competition law. The overcharge which is caused by such an infringement may not amount to the costs of individual damages proceedings. In collective actions, costs of the proceedings are spread out between a multitude of harmed individuals, which decreases each individual’s fear that in case the collective action is not successful, they do not have to carry the costs incurred on the proceedings themselves.

²¹⁴ BERGH, R. *Op. Cit.*, p. 20

²¹⁵ *Ibid*, p. 14

²¹⁶ *Ibid*, p. 20

²¹⁷ EUROPEAN COMMISSION. *Green Paper on Consumer Collective Redress*. COM(2008) 794 final. Para 9

It has been further argued that consumer associations can help to overcome the rational apathy problem. As discussed in Chapter 3.1.1, the Commission in the 2013 Recommendation recommended that Member States should designate certain representative entities, which would be entitled to bring representative actions in court. Therefore, two different situations regarding standing of these representative entities in the proceedings need to be distinguished:

1. **Representative actions are filed by approved consumer associations entitled to represent their members.** By joining these associations, individuals want to actively participate in a potential representative action, which generally causes the opt-in rates to be high. In this situation, however, only members of such a consumer association are represented in the representative action proceedings. Other victims of that competition law infringement are left without compensation due to the fact that they did not join the association. The expected sanctions faced by the infringer are therefore not equal to the total loss caused by the infringement, thus leading to under deterrence.²¹⁸
2. **Consumer associations are established on *ad hoc* basis after an infringement of competition law occurred.** In this case, the number of participating consumers is not necessarily larger than in the first case described above, because consumers who suffered low-value damage may still refrain from joining the group. In order to increase the participation rate, it is essential to limit the financial risk by transferring the litigation costs to the consumer association.²¹⁹

4.3 The Free-Riding Problem

The free-riding problem emerges in situations where individual parties harmed by anticompetitive behavior decide to leave the initiative to file a damages action to other victims, hoping to take a free-ride on their efforts, thus potentially obtaining compensation without having to spend their own resources.²²⁰

²¹⁸ BERGH, R. *Op. Cit.*, p. 22-23

²¹⁹ *Ibid*, p. 22-23

²²⁰ *Ibid*, p. 24

It is important to distinguish that in finding the solution to the free-riding problem, opt-in and opt-out mechanisms score differently in this regard. It is believed that *“free-riding may be more severe in opt-in procedures than in opt-out procedures.”*²²¹ In opt-in collective actions, harmed individuals have to actively declare their interest in being bound by outcome of the collective action. If some of the victims stay passive and wait for the result of the collective action they previously decided not to join, it is convenient for them to wait for the judgment, and if damages are awarded, file an individual damages action for the same infringement of competition law. By doing so, they can avoid the risk of failure, which is borne by the primary collective action.²²² It is generally believed that less people decide to opt-in than opt-out. From this perspective, it is obvious that in the opt-in mechanism, there are more victims that can free-ride, i.e. decide that they will file individual damages actions based on the primary decision.

However, the free-rider problem may also occur if individual victims are allowed to opt-out from collective actions. By opting-out, the victims can simply delay the start of their potential individual proceedings after the primary proceedings have ended and take the possibility to free-ride on that decision without having to carry the costs or risks of the collective action.²²³ *“By staying in the group, the victim may be required to bear a part of the costs of the lawsuit, but also has a higher chance of receiving compensation. By opting out, the victim does not bear any costs, but given that his or her losses are only small, an individual suit is not worthwhile. Therefore, the possibility of free-riding seems to be a less severe problem in cases of widespread losses.”*²²⁴

Free-riding can also occur in follow-on actions, where there is a primary decision issued by the Commission or NCA that confirms that competition law has been infringed. Victims of such an antitrust violation did not have to bear the costs of the case, and they

²²¹ *Ibid*, p. 24

²²² DIRECTORATE-GENERAL FOR INTERNAL POLICIES. *Op. Cit.* 138, p. 66

²²³ CENTRE FOR EUROPEAN POLICY STUDIES (CEPS). Report for the European Commission. *Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios*. DG COMP/2006/A3/012. 2007, p. 287

²²⁴ BERGH, R. *Op. Cit.*, p. 24-25

can therefore free-ride easily, using the primary decision as a legal basis for their damages claim.

Consumer associations involved in representative actions also experience difficulties with the free-riding problem. It is not only the lack of interest of the victims and the financial risks associated with the litigation, but also the risk of free-riding that provides an explanation for the lack of enforcement efforts of consumer associations. Victims who have decided not to become members of such associations can benefit from the associations' efforts and claim compensation in individual proceedings. *"Consumer associations may mitigate the free-riding problem if they are able to charge their members a fee for the costs incurred. This way, the members are forced to contribute to the funds that are necessary to file the collective lawsuit and they cannot behave as a free-rider. However, non-members can still behave as free-riders, because they do not contribute and continue to benefit from the efforts of the association."*²²⁵

4.4 The Principal-Agent Problem

Another issue that was discussed in the European discussion on collective redress mechanisms is related to the so-called principal-agent problem. *"A principal-agent problem arises when a person (the agent), who is required to carry out an activity in the interest of another (the principal), places his own interests before those he should protect."*²²⁶ This problem causes concerns in the US class actions system, due to the fact that attorneys are highly motivated to pursue antitrust infringements by the means of class actions, because of the vision of high financial gains through contingency fees. Therefore, a situation in which *"the interests of the agent (attorney) do not coincide with the interests of the principal (victims)"*²²⁷ may occur, resulting in the limited ability of the principal to control the agent's conduct throughout the proceedings.

The principal-agent problem is generally more likely to have negative impact on collective actions under the opt-out mechanism. In opt-out collective actions, the represented class is usually larger than in opt-in collective actions, and many victims

²²⁵ BERGH, R. *Op. Cit.*, p. 25

²²⁶ LÍANOS, I., GERADIN, D. *Handbook on European Competition Law. Substantive Aspect*. Edward Elgar. 2013, p. 179

²²⁷ BERGH, R. *Op. Cit.*, p. 26

included in the action may even not be aware of the ongoing damages proceedings. Further, the opt-out class action proceedings are heavily controlled by attorneys representing the class. Sometimes, the attorneys' goal can slide from trying to obtain the highest compensation possible for the victims, to increasing their own remuneration. In the US, attorneys often try to settle cases even before they get to be decided by the jury, which is "*attractive for the attorney but harms the interests of the represented group members.*"²²⁸ The attorneys may even "*conspire with the corporate wrongdoer to deprive the victims of their full remedy and to share the proceeds among themselves through a collusive settlement.*"²²⁹ In these cases, higher level of judicial review of the merits of the case or the terms of the settlement may constitute safeguards aimed at protecting the victims of the anticompetitive behavior. Further, the US, it is standard practice in the US that class actions are certified and settled at the same time. "*In approximately one-third of all cases where certification is granted, it is for settlement only.*"²³⁰

The Commission seems to have justified fears of the principal-agent problem that arose in the US. However, it seems that consumer associations, which are entitled to bring representative actions to the court, may help to reduce the principal-agent problem. They are less motivated by monetary profits as these can generally be used only for achieving the purpose of the association and not for private purposes.²³¹

4.5 The Problem of Funding

European legislators have been trying to find the best way to enhance the use of private enforcement with the goal of ensuring that every person harmed by anticompetitive behavior is compensated for the harm caused. It has been established that every individual has the right to file a damages action at a national court, however one of the standing issues is one of funding of collective actions. Bringing collective actions to courts can be a rather expensive experience. It was noted by Bergh that

²²⁸ BERGH, R. *Op. Cit.*, p. 27

²²⁹ *Ibid*, p. 27

²³⁰ SILVER, CH. *Class Actions – Representative Proceedings*. In: B. Bouckaert & De Geest, Eds., *Encyclopedia of Law and Economics*, Volume V, Page 194 (Edward Elgar Publishing. 2000, p. 222

²³¹ BERGH, R. *Op. Cit.*, p. 29

*“irrespective of the type of collective or representative action that is preferred by policy makers, adequate pecuniary incentives must be provided for individuals or organizations to initiate damages actions for infringements of competition law.”*²³²

It follows that it is essential to ensure that victims of competition law infringements are not excluded from access to justice only because of their limited financial resources. Therefore, an adequate system of funding of collective actions needs to be established.²³³ *“Mechanisms of financing collective redress should allow for the funding of meritorious claims but avoid any incentives for pursuing unmeritorious claims.”*²³⁴

The 2013 Recommendation, being the last piece of legislature issued by the Commission in regards to collective redress mechanisms, rejected the funding system established by the US-style class actions by stating that the Member States should ensure that it is prohibited to base remuneration of the attorneys or consumer associations on the amount of the settlement reached or the compensation awarded.²³⁵

As previously discussed, the US class actions are built on the opt-out approach, and it is the lead plaintiffs who bring class actions to courts and who are also responsible for the costs and risks of the proceedings. Class actions bundle a high number of individual claims, which involves high initial input of resources. Under the US class actions system, remuneration of attorneys filing class actions on behalf of a represented class is calculated on the contingency fees basis. *“Contingency fee arrangements thus permit attorneys to overcome liquidity problems that make it impossible for individual consumers to pursue their rights.”*²³⁶ However, these fees are paid to the attorneys from the total compensation obtained for the class. The attorneys therefore need to obtain funding for the actual initiation of the proceedings themselves. *“Attorneys can use their legal expertise for assessing the value of claims and invest efforts in cases which offer the largest expected benefits for the victims of law infringements. They can also achieve risk-spreading by handling numerous lawsuits of unequal value.”*²³⁷

²³² BERGH, R. *Op. Cit.*, p. 30

²³³ EUROPEAN COMMISSION. *Op. Cit.* 14, p. 11

²³⁴ *Ibid*, p. 11

²³⁵ EUROPEAN COMMISSION. *Op. Cit.* 5, p. 6

²³⁶ BERGH, R. *Op. Cit.*, p. 31

²³⁷ *Ibid*, p. 31

The Recommendation proposed a funding model that vastly differs from the model based on contingency fees used in the US class actions.²³⁸ At the beginning of the proceedings, the claimant party should declare to the court the origin of the funds that it is going to use to support the legal action.²³⁹ Third-party funding is allowed under the Recommendation. However, strict conditions are set out for the court to allow such funding of the proceedings:

- a. there can be no conflict of interest between the third party and the claimant party and its members;
- b. the third party must have sufficient resources in order to meet its financial commitments to the claimant party initiating the collective redress procedure; and
- c. the claimant party must have sufficient resources to meet any adverse costs should the collective redress procedure fail.²⁴⁰

Further, reimbursement of legal costs of the winning party is based on a so-called '*loser pays principle*'. Under the 2013 Recommendation, the Member States should ensure that the party that loses a collective redress action reimburses necessary legal costs borne by the winning party.²⁴¹ This principle has one obvious goal – to deter unmeritorious claims from being brought to courts. In other words, the claimants should carefully consider whether their claims have merit before they decide to file the collective action due to the inherent financial risk of losing the case.

The costs of collective redress proceedings are not connected only to the actual funds related to the question of losing or winning such an action. Further costs must be incurred in order to satisfy the requirements of notification, information, control and avoidance of conflicts. Notification of victims of a certain competition law infringement can be achieved through mass media communications, such as newspapers, radio, television, email and internet. This can lead to reducing expenses that would have to be

²³⁸ GERADIN, D. *Op. Cit.*, p. 1093

²³⁹ EUROPEAN COMMISSION. *Op. Cit.* 5, p. 4

²⁴⁰ *Ibid.*, p. 4

²⁴¹ *Ibid.*, p. 4

incurred on notifying each victim by post, and can be especially convenient to use where the identity of the individual victims is not known.²⁴²

In representative actions, it is the consumer associations that bring damages claims to the court on behalf of a group of victims. Such consumer associations need to find both its own costs of the litigation and adverse costs award against it, should it lose the representative action.²⁴³ Nevertheless, if consumer associations lack adequate funding they will refrain from bringing representative actions for damages in cases of competition law infringements.

4.6 Partial Conclusion

There are no doubts about the positive effects of collective redress mechanisms on enforcement of competition law. The use of collective actions and representative actions is capable of reducing the enforcement gap, which emerges in situations in which small-value claims victims are reluctant to bring their claims to courts due to certain barriers, which make it disadvantageous for them.²⁴⁴ These barriers include, among others, costs of the proceedings, procedural impediments, dispersed interests, information asymmetries or differences in opinion on the common strategy.²⁴⁵

Collective actions have the ability to provide a remedy for low-value claims, which otherwise would not have been brought to courts. The possibility of bundling the individual victims' claims should incentivize these harmed individuals to go to court.²⁴⁶ By filing a collective action, the costs of the proceedings spread out across the represented class, which allows the harmed individuals to afford the generally expensive and long-lasting proceedings. Nevertheless, it has been argued that collective

²⁴² HODGES, CH. *Op. Cit.*, p. 126

²⁴³ MULHERON, R. *Costs and Funding of Collective Actions: Realities and Possibilities*. A Research Paper for the submission to the European Consumers' Organization (BEUC). (2011), p. 56. Available at: <http://www.law.qmul.ac.uk/media/law/docs/staff/department/71112.pdf>

²⁴⁴ HODGES, CH. *Op. Cit.*, p. 196

²⁴⁵ WRBKA, S., UYTSEL, S., SIEMS, M. *Op. Cit.*, p. 59

²⁴⁶ *Ibid*, p. 91

redress mechanisms under the opt-out scheme achieve better deterrence, due to the fact that a sufficiently large group of consumers will participate in the proceedings.²⁴⁷

Overcoming the free-riding problem seems to be one of the hardest tasks for the enforcement policy makers. As long as harmed individuals can benefit from being passive members of a class and put the risk of suffering losses on the acting claimant or consumer organization or association, free-riding will remain pervasive.²⁴⁸ A possible way to overcome free-riding is tying the victims of anticompetitive behavior to the collective or representative action by membership fees. In such a case, the individuals would already have invested in being a part of the class, and this could therefore potentially lower their incentive to free-ride.

Further, it seems that representative actions are more likely to succeed in overcoming the principal-agent problem than collective actions. Representative actions are filed by consumer organizations or associations, which are established under strict rules. Their members' remuneration is not calculated on contingency fees basis, which lowers the incentive to reach a settlement with the defendant.

The Commission has clearly expressed its negative stance against the use of contingency fees. The rationale behind it is that contingency fees are supposed to attract the attention of entrepreneur attorneys who tend to pursue every possible infringement of competition law with the expectation of high profit gains. However, it has been argued that *“no evidence supports the conclusion that contingency fees necessarily lead to unmeritorious claims as they force plaintiff law firms or third-party funders to carefully analyze the likelihood of success of the actions they contemplate launching. That is not necessarily the case under an hourly fees system as it gives law firms an incentive to generate as much more billable work as possible.”*²⁴⁹

The current state of collective redress mechanisms in the EU does not yet allow for a thorough evaluation of its effects on the system of enforcement of competition law. Given that experiences with the complementary system of collective redress

²⁴⁷ BERGH, R. *Op. Cit.*, p. 22-23

²⁴⁸ *Ibid*, p. 24

²⁴⁹ GERADIN, D. *Op. Cit.*, p. 1101

mechanisms as proposed by the Commission are minimal, it is difficult to assume whether the Commission's assumption made throughout the process were correct or not. The Commission itself has not made any statements towards appropriate ways of addressing these issues, but rather monitors the state of collective redress so that it can later decide if adjustments of the collective redress system, as set up by the 2013 Recommendation, are necessary.

5 Conclusion

*“We have a different history in the US and Europe, and we don't always do things the same way. But I think our goals are very similar: We want to protect competition and consumers.”*²⁵⁰

The previous statement by Margrethe Vestager, the current European Commissioner for Competition, defines the differences between the US and the EU collective redress mechanisms systems perfectly. In almost every step made by EU legislators throughout the process of establishing the European system of collective redress, it was obvious that they purposely kept distant from the US class-actions system. One of the main differences between the US and the EU enforcement system is the fact that while the US competition policy encourages the highest possible effectiveness of private enforcement, the EU aims at ensuring access to justice and full compensation of the victims of competition law infringements. Nevertheless, both systems have been developed in order to enhance the enforcement of competition law and promote a well-functioning internal market and undistorted competition.

Collective redress is seen primarily as an instrument which is capable of providing those affected by infringements of competition law with access to justice and the possibility to claim compensation for the harm suffered.²⁵¹ *“Collective actions are a useful enforcement tool that enable to bring cases, which otherwise would not have been brought to a court, due to the small size of the claims.”*²⁵²

It can be concluded that the Commission has successfully developed an effective system of public enforcement of competition law. The Commission holds a strong position in the competition enforcement policy. It monitors the behavior of the European market and in case an infringement of competition law occurs, it has strong powers to investigate and punish the infringer. However, public enforcement of competition law aims mainly at punishing the infringers with further goals, such as the deterrence

²⁵⁰ VESTAGER, M. *Competition Enforcement in the EU and US*. Press Event, Washington DC, 2016. Available at: https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-enforcement-eu-and-us_en

²⁵¹ EUROPEAN COMMISSION. *Op. Cit.* 14, p. 10

²⁵² BERGH, R. *Op. Cit.*, p. 20

of other potential infringers. It needs to be emphasized that any infringement of competition law brings negative monetary effects on the consumers. “*Cartels raise prices by an average of 10 or even 20%, so there's a lot at stake for consumers.*”²⁵³

Public enforcement by itself does not ensure that the harmed individuals obtain compensation for the harm suffered. That is why the Commission has put a lot of effort into creating and promoting an effective system of private enforcement of competition law, which would provide compensation to the victims of competition law infringements. Under private enforcement, the victims can claim compensation either individually by the use of damages actions, which are regulated by the 2014 Directive, or through a complementary system of collective and representative actions, as recommended by the Commission in the 2013 Recommendation.

It is in the Commission’s best interest to promote discussion in this regard. In the documents discussed in Chapter 3.2 of this master’s thesis, the Commission made findings towards the growing interests in the use of collective redress instruments in Europe. Actions brought by certain entities or individuals on behalf of wider groups, classes or the public at large that resulted in damages being awarded were, by the beginning of the discussion, quite rare.²⁵⁴

The 2005 Green Paper concluded that collective actions can serve to consolidate a large number of smaller claims into one action, thereby saving time and money.²⁵⁵ The 2008 White Paper subsequently stated that there is a clear need for a mechanism allowing aggregation of individual claims of victims of antitrust infringements, because individual consumers are often deterred from bringing an individual action for damages by the costs, delays, uncertainties and risks involved, resulting in many of them remaining uncompensated. For these reasons, the 2008 White Paper suggested introducing two complementary mechanisms of collective redress. First, a mechanism based on *opt-in collective actions*, in which the victims of anticompetitive behavior

²⁵³ VESTAGER, M. *Op. Cit.*

²⁵⁴ ASHURST. *Op. Cit.*, p. 105

²⁵⁵ EUROPEAN COMMISSION. *Op. Cit.* 12, p. 8

expressly decide to join in a single damages action; second, a system of *representative actions* brought by qualified entities, such as consumer associations.²⁵⁶

This scheme set out by the Commission was incorporated in the non-binding 2013 Recommendation, which further sums up general principles on collective redress in the area of enforcement of EU competition law, and requires the Member States to adjust their legal systems accordingly within a set timeframe. The Commission decided to avoid the system of US class actions, mainly due to the fear of abusive litigation, unmeritorious claims and contingency fees. However, the risk of over-litigation is what makes the US class actions such an effective mechanism.²⁵⁷

It is clear that collective redress mechanisms are able to reduce the enforcement gap by enhancing the coverage of damage caused by competition law infringements. Private enforcement of competition law has formed a predominant form of enforcement in the US and that should not be overlooked. Both the US and the EU systems of collective redress have numerous advantages and disadvantages, and the Commission has carefully considered all of them prior it issued the 2013 Recommendation.

Opt-out collective actions tend to include a higher number of harmed individuals in the action due to the fact that there is a need to actively opt-out from the class in order not to be bound by its result. This scheme has the potential of obtaining higher compensation as a whole. However, it can be potentially more difficult and expensive to identify each person in the class. On the other side, in opt-in collective actions the victims of anticompetitive behavior must opt-in to the class in order to be bound by the result of the action. The opt-in system respects the right of a person to decide whether to participate in the collective option or not more than the out-out system. However, fewer persons tend to participate in these actions due to several phenomena, such as the rational apathy problem or free-riding.

From the author's point of view, it can be concluded that the opt-in mechanism is generally a better fit for the European litigation culture. It follows main procedural law principles that are being applied in the Member States' legal systems, and it seems

²⁵⁶ EUROPEAN COMMISSION. *Op. Cit.* 64, p. 4

²⁵⁷ GERADIN, D. *Op. Cit.*, p. 1095

unlikely that the opt-out scheme is to be established in the EU. Furthermore, the opt-out scheme is not in line with the European Convention on Human Rights, mainly with the principle of freedom to take legal proceedings, since these persons become members of the group automatically, without having to expressly declare their interest in being part of the class.²⁵⁸

However, some scholars have pointed out that it might be reasonable not to choose between the opt-in or opt-out models of collective actions exclusively, but rather to create a hybrid system that would allow to apply either of the two models, depending on the number of victims or the type of damages sought by the respective collective action. Several Member States, such as Belgium, Denmark or the UK have already adapted this hybrid system, and generally it is up to the judges to consider which system better suits each action.

Given everything that was concluded in this master's thesis, the author is convinced that the EU has made a wise choice by opting for a specific, European system of collective redress mechanism. Nevertheless, if the complementary system of collective and representative actions proves to be successful in achieving its anticipated goals, it seems to be reasonable to incorporate it into a binding document, such as a directive. In such a case, the EU would be in a stronger position to enforce its implementation from Member States, thus potentially improving the state of consumer welfare throughout the EU.

The EU should further compare and take into consideration the already operating systems of collective redress in several Member States, and potentially adjust the EU collective redress system accordingly, so that the highest possible level of enforcement of competition law is achieved, and the harm caused to the victims of anticompetitive behavior is rectified.

The fact that the Commission has exclusively opted for the opt-in model is one of high controversy. Despite its obvious positive effects, it may not be in line with the victims' best interests. The fear that opt-in collective actions result in fewer persons being compensated for the harm caused should not be overlooked. The Commission should try

²⁵⁸ MIKROULEA, A. *Op. Cit.*, p. 391

to set up the enforcement system in a way that compensation is awarded to as many persons as possible. That is why the best solution seems to lie in a hybrid system, which combines elements from both the opt-in and opt-out mechanisms.²⁵⁹

²⁵⁹ MIKROULEA, A. *Op. Cit.*, p. 408

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7 Abstracts

7.1 Abstract in English

This master's thesis is concerned with collective redress mechanisms in the area of competition law of the European Union. Taking into account the ongoing modernization of private enforcement of competition law, the European Commission had decided to create a complementary system of collective and representative actions. Implementation of such instruments was recommended by the European Commission in Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law.

The main research question of this thesis is whether the European Commission has taken a wise approach towards collective redress mechanisms by creating the complementary system of collective redress, using the opt-in mechanism.

This master's thesis is divided into 5 main chapters. In the first chapter, the readers are introduced to the topic of enforcement of competition law in the European Union. Further, the main research question is laid down, followed by the sources and methodology used in this thesis. The second chapter shortly describes each way of enforcement of competition law in the European Union. It aims mainly at describing private enforcement of competition law, as it forms the essential legal basis for collective redress. However, the main interest of the thesis lies in the third chapter, which is concerned with the topic of collective actions. After a short introduction to the topic, evolution of the European discussion on collective redress mechanisms is presented. Different forms of collective actions are further discussed in this chapter, and attention is also paid to *opt-in* and *opt-out* mechanisms. The fourth chapter discusses main issues in damages actions and collective actions, which are often found in collective redress mechanisms and concludes whether the introduction of a collective redress mechanisms is capable of overcoming such issues. The master's thesis ends with a conclusion in the fifth chapter, which presents partial conclusions of each chapter and answers the main research question.

7.2 Abstract in Czech

Tato diplomová práce se zabývá problematikou kolektivní právní ochrany v soutěžním právu Evropské Unie. V rámci probíhající modernizace soukromoprávního vymáhání soutěžního práva se Evropská Komise rozhodla pro vytvoření komplementárního systému hromadných a reprezentativních žalob, jejichž zakotvení v právních řádech členských států Evropské Unie navrhla v Doporučení Komise ze dne 11. června 2013 o společných zásadách pro prostředky kolektivní právní ochrany týkající se zdržení se jednání a náhrady škody v členských státech v souvislosti s porušením práv přiznaných právem Unie.

Hlavní výzkumnou otázkou této diplomové práce je, zda Evropská Komise učinila správně, když se rozhodla pro vytvoření komplementárního systému kolektivní právní ochrany využívajícího tzv. *opt-in* metody.

Po obsahové stránce je tato diplomová práce rozdělena do 5 hlavních kapitol. V první kapitole je čtenář krátce uvozen do problematiky vymáhání soutěžního práva v Evropské Unii, a zároveň je vytyčena výzkumná otázka, zdroje a metodologie. Druhá kapitola stručně popisuje jednotlivé formy vymáhání soutěžního práva v Evropské Unii. Zaměřuje se zejména na soukromoprávní formu vymáhání soutěžního práva, která tvoří esenciální právní základ pro kolektivní právní ochranu. Pro tuto diplomovou práci je ovšem nejdůležitější třetí kapitola, která se jako celek věnuje kolektivním žalobám. Po krátkém úvodu do tématu je představen vývoj evropské diskuze na téma kolektivní právní ochrany. V této kapitole jsou dále představeny různé formy právních prostředků kolektivní právní ochrany a pozornost je také věnována rozlišení *opt-in* a *opt-out* systémů. Ve čtvrté kapitole jsou rozebrány hlavní problémy, které se v systému náhrady škody a kolektivních žalob vyskytují. V této kapitole je dále vysvětleno, zda zavedení systému kolektivního právní ochrany je schopno tyto problémy omezit nebo vyloučit. Celá práce je zakončena pátou kapitolou, ve které jsou shrnuty jednotlivé dílčí závěry diplomové práce, a kde je také zodpovězena výzkumná otázka.

8 Thesis in Czech

1. Úvod

Soukromoprávní vymáhání soutěžního práva v Evropské Unii prošlo v nedávné době významnými změnami v souvislosti se směrnicí o žalobách na náhradu škody, která byla přijata v roce 2014. Jednou z otázek, která je již po delší dobu na úrovni Evropské Unie diskutována, je otázka vytvoření efektivního mechanismu hromadných žalob, který by umožnil požadovat kompenzaci za porušení pravidel soutěžního práva většimu množství poškozených prostřednictvím jediné žaloby. Kolektivní náhrada škody byla Evropskou Komisí (dále jen „Komise“) definována jako mechanismus, který umožňuje spojit větší množství právních nároků vzniklých na základě jediného porušení práva do jedné žaloby.

Evropská Unie se v poslední době snaží vytvořit jednotný přístup k těmto hromadným žalobám. Z tohoto důvodu Komise vydala řadu na sebe navazujících dokumentů, mezi které se řadí Zelená kniha z roku 2005 a Bílá kniha z roku 2008 o žalobách o náhradu škody způsobenou porušením antimonopolních pravidel Evropského Společenství, veřejná konzultace *„Směrem k soudržnému evropskému přístupu ke kolektivnímu odškodnění“* z roku 2011, sdělení Komise *„Směrem k evropskému horizontálnímu rámci pro kolektivní právní ochranu“* z roku 2013 a doporučení Komise o společných zásadách pro prostředky kolektivní právní ochrany, ze kterých se usuzovalo, že Komise vydá dokument upravující hromadné žaloby závazný pro všechny členské státy Evropské Unie. Nicméně Komise v roce 2014 vydala směrnici o žalobách na náhradu škody, ve které otázku hromadných žalob záměrně vynechala, a tyto tak nadále zůstaly upraveny pouze nezávazným doporučením z roku 2013.

Tato diplomová práce se tedy věnuje trvající otázce hromadných a reprezentativních žalob jako prostředkům kolektivní právní ochrany v Evropské Unii. Výzkumnou otázkou této diplomové práce je otázka, zda evropští zákonodárci zvolili vhodnou právní úpravu kolektivních žalob, která má předpoklady k posílení systému vymáhání soutěžního práva v Evropské Unii. Tato diplomová práce se věnuje otázce, zda a v jaké formě by kolektivní právní ochrana měla najít svou formu, a zda Komise učinila správně, když se v Doporučení přiklonila k tzv. „opt-in“ přístupu.

2. Vymáhání soutěžního práva v Evropské Unii

Aby bylo v Evropské Unii zajištěno důsledné dodržování soutěžního práva, je důležité vytvořit funkční systém jeho vynucování. Komise se již po několik desetiletí usilovně věnuje otázce, jak co nejefektivněji snížit protisoutěžní jednání. Vynucování soutěžního práva v Evropské Unii je postaveno na třech pilířích, které jsou jednotlivými členskými státy užívány s různou intenzitou:

1. **Veřejnoprávní vynucování.** První pilíř vynucování soutěžního práva probíhá prostřednictvím orgánů veřejného práva, tedy skrze Komisi a vnitrostátní orgány pro hospodářskou soutěž. Tato forma vynucování soutěžního práva tradičně převládá nad ostatními formami vynucování, a jejím hlavním úkolem je zabránit a potrestat porušení práv zaručeným evropským právem.

2. **Soukromoprávní vynucování.** Tato forma vynucování se v poslední době díky velké aktivitě Komise dostává na výsluní. Soukromoprávním vynucováním se jednotlivá porušení soutěžního práva zažalují u národních soudů osobami, které těmito porušeními utrpěli škodu. Hlavním cílem soukromoprávního vynucování je tedy kompenzace poškozených osob, a tato forma vynucování může zároveň doplňovat veřejnoprávní vymáhání díky svým odrazujícím účinkům.

3. **Trestněprávní vynucování.** Na rozdíl od Spojených států Amerických, kde se trestněprávní vynucování těší poměrně silné oblibě, se v jednotlivých členských státech Evropské Unie tato forma vymáhání považuje jako *ultima ratio*, a úroveň kriminalizace protisoutěžního jednání je na posouzení jednotlivých států.

Důraz na preferenci jednotlivých systémů vymáhání soutěžního práva záleží především na cílech, kterých jsou jednotlivé způsoby vynucování schopny dosáhnout. Hlavním cílem veřejnoprávního vymáhání je vytvoření odrazujícího efektu, jelikož tento je schopný efektivně odradit potencionální narušitele soutěžního práva před jeho porušením. Někteří autoři poukazují na fakt, že prostředky k dosažení odrazujícího efektu někdy vyžadují uložení extrémně vysokých pokut, které všichni narušitelé soutěžního práva nejsou schopni zaplatit. Z tohoto důvodu by soutěžní právo mělo vytvořit systém alternativních sankcí, kterými by byla zajištěna náprava způsobené škody a poškozeným osobám by byla poskytnuta kompenzace za způsobenou škodu.

Nápravná opatření veřejnoprávního vymáhání směřují pouze na potrestání samotných narušitelů, což nechává poškozené osoby bez kompenzace. Z tohoto důvodu se Komise zaměřila na vytvoření funkčního systému soukromoprávního vymáhání, které by umožnilo jednotlivým poškozeným žádat náhradu škody před národními soudy. Tímto by byl odrazující efekt veřejnoprávního vymáhání doplněn kompenzační funkcí soukromoprávního vymáhání, čímž by byla zaručena kompenzace osob poškozených protisoutěžním jednáním.

Je možné shrnout, že veřejnoprávní a soukromoprávní vymáhání soutěžního práva jsou komplementární prostředky sledující různé cíle, jejichž paralelní použití je schopné zlepšit řádné fungování vymáhání soutěžního práva v Evropské unii. Ve veřejnoprávním vymáhání na dodržování pravidel soutěžního práva dohlíží orgány veřejného práva, tedy Komise a vnitrostátní orgány pro hospodářskou soutěž (v České republice se jedná o Úřad pro ochranu hospodářské soutěže). V soukromoprávním vymáhání jsou to samotné poškozené osoby, které se svých subjektivních práv zaručených evropským právem domáhají přímo před národními soudy, a to dvojnásobným způsobem:

- V první řadě se jedná o vymáhání cestou individuálních žalob na náhradu škody. To znamená, že jednotlivé poškozené osoby mohou zahájit řízení o náhradu škody přímo u národních soudů. Právní rámec pro tyto žaloby byl vytvořen směrnicí o žalobách na náhradu škody z roku 2014.
- Za druhé, někdy mohou nastat situace, ve kterých je velká skupina osob (fyzických nebo právnických) poškozena stejným protisoutěžním jednáním, které porušilo jejich subjektivní práva chráněna evropským právem. V těchto případech se individuální žaloby nejeví jako ideální prostředek ochrany proti nelegálním praktikám či nárokování kompenzace za způsobenou škodu. Proto byl vyvinut systém kolektivní právní ochrany, který se uplatní v situacích, kdy jednotlivým poškozeným osobám byla způsobena pouze malá škoda, která ovšem ve svém součtu představuje obohacení narušitele soutěžního práva potencionálně dosahujícího vysokých částek.

3. Kolektivní žaloby jako prostředek vymáhání

Kolektivní právní ochrana je typ procesního prostředku, který umožňuje skupině osob se společným zájmem (někdy nazývané jako „třída“) sloučit jejich jednotlivé nároky v jednu žalobu, která se podá vůči narušiteli jménem celé této skupiny. Komise tuto situaci, kdy je jedním protisoutěžním jednáním poškozeno velké množství osob nazývá termínem „*událost hromadné škody*“²⁶⁰. Kolektivní právní ochrana je schopná usnadnit přístup ke spravedlnosti v případech, kdy jednotlivé nároky individuálních poškozených osob jsou tak nízké, že jejich uplatnění žalobami by nebylo rozumné, jelikož finanční prostředky a čas vynaložený na tuto žalobu by mnohonásobně převyšovaly samotnou škodu, který byla předmětným protisoutěžním jednáním způsobena.

V situaci, kdy by národní soud vynesl rozsudek týkající se hromadné žaloby, by byl tento rozsudek závazný pro všechny osoby, které by byly zastoupeny touto hromadnou žalobou. Je ovšem nezbytné, aby škoda způsobená protisoutěžním jednáním byla společná všem poškozeným osobám jedné „třídy“, a aby těchto jednotlivců byl dostatečný počet proto, aby podání jednotlivých žalob na náhradu škodu pozbývalo smyslu.

Hromadné žaloby nezastávají důležitou roli pouze v oblasti soutěžního práva, ale mimo to se dále uplatňují v dalších oblastech evropského práva, jako je ochrana spotřebitelů, pracovní právo, nekalá soutěž či právo životního prostředí. Pro tyto oblasti je typická aktivita zvláštních asociací či zastupitelských orgánů, které jsou oprávněny podat žalobu buď v zájmu osob, které zastupují, anebo ve veřejném zájmu.

3.1 Evropská diskuze na téma kolektivní právní ochrany

Soutěžní právo je komplexní fenomén, který se nesestává pouze z legislativních textů a soudních rozhodnutí. Významnou roli hrají také politické či ekonomické faktory, které jsou schopny určovat směřování politiky hospodářské soutěže v Evropské Unii. Z tohoto důvodu je důležité nastínit základní průběh diskuze o hromadných žalobách, která se vedla na úrovni Evropské Unie. V obecné rovině bylo jedním z hlavních cílů

²⁶⁰ EVROPSKÁ KOMISE. Doporučení komise ze dne 11. června 2013 o společných zásadách pro prostředky kolektivní právní ochrany týkající se zdržení se jednání a náhrady škody v členských státech v souvislosti s porušením práv přiznaných právem Unie (2013/396/EU), s. 1

Komise zajistit zmenšení mezery ve vynuucování soutěžního práva, která je způsobená tím, že některá protisoutěžní jednání zůstanou z různých důvodů nepotrestána.

V roce 2005 vydala Komise Zelenou knihu o žalobách na náhradu škody způsobené porušením antimonopolních pravidel Evropských společenství. Komise v Zelené knize posoudila tehdejší podmínky pro uplatňování žalob pro porušení soutěžního práva mj. stanovením právních a procesních překážek, které znemožňovaly efektivní používání těchto žalob o náhradu škody. Na základě zprávy Ashurst z roku 2004 Komise došla k závěru, že stav hromadných žalob v členských státech Evropské Unie je velmi zaostalý, a že je třeba podniknout další kroky ke zvýšení úrovně soukromoprávního vymáhání na úrovni Evropské Unie. Komise dále došla k závěru, že osoby s nízkými individuálními nároky způsobenými protisoutěžním jednáním pouze zřídka podávají žaloby o náhradu škody, a uzavřela, že je třeba vytvořit systém hromadné právní ochrany, která by zvýšila úroveň ochrany zájmů těchto osob. Komise tedy vyzvala k předkládání návrhů s cílem identifikování hlavních překážek na úrovni právních řádů členských států, které by napomohly ke snadnějšímu nalezení systému žalob na náhradu škod pro porušení soutěžního práva.

V návaznosti na návrhy, které Komise obdržela po vydání Zelené knihy, Komise dále zveřejnila Bílou knihu o žalobách na náhradu škody v roce 2008. V tomto dokumentu Komise zvážila jednotlivé alternativy vývoje politiky hospodářské soutěže v oblasti hromadných žalob, a konstatovala, že každému jednotlivci, který utrpěl škodu způsobenou protisoutěžním jednáním, musí být umožněno žádat náhradu škody u národního soudu. Komise znovu konstatovala, že je nutné vytvořit mechanismy kolektivního vymáhání, které by umožnily spojit jednotlivé žaloby osob poškozených porušením antimonopolních pravidel. Bylo zjištěno, že *„přestože v některých členských státech byly v poslední době zaznamenány určité známky zlepšení, zatím osoby, které byly poškozeny porušením antimonopolních pravidel ES, v praxi jen málokdy obdrží náhradu za utrpěnou škodu.“*²⁶¹

Komise tedy navrhla zavedení kombinace dvou vzájemně se doplňujících mechanismů kolektivního vymáhání, které by mohly tyto problémy účinně vyřešit:

²⁶¹ EVROPSKÁ KOMISE. Bílá kniha ze dne 2. dubna 2008 o žalobách o náhradu škody způsobené porušením antimonopolních pravidel EU. KOM(2008)165

- **žaloby podané v zastoupení**, které předkládají kvalifikované subjekty, jako jsou sdružení spotřebitelů, státní orgány nebo oborová sdružení, jménem poškozených osob. Tyto subjekty jsou buď oficiálně určeny předem, nebo pověřeny členským státem *ad hoc*, aby jménem svých členů podaly žalobu v souvislosti s konkrétním případem porušení antimonopolních pravidel; a
- **kolektivní žaloby s výslovným předchozím souhlasem všech žalobců**, v nichž se poškození výslovně rozhodnou spojit své jednotlivé nároky na odškodnění za utrpěnou škodu do jedné žaloby.²⁶²

Tento komplementární systém byl Komisí navržen z důvodu, že kvalifikované subjekty nejsou schopny nebo ochotny se zabývat každým nárokem, který z každého jednotlivého porušení soutěžního práva vznikne. Je tedy zapotřebí vytvořit mechanismus, který pokryje co největší množství nároků, a kde žádný poškozený nebude ochuzen o své právo žalovat o náhradu škody způsobenou porušením soutěžního práva. V návaznosti na Zelenou knihu vydala Komise v roce 2009 návrh směrnice o žalobách na náhradu škody, která se ovšem nesečkala s úspěchem, a byla Komisí stažena.

V roce 2013 vydala Komise Doporučení o společných zásadách pro prostředky kolektivní právní ochrany s cílem „*usnadnit přístup ke spravedlnosti v souvislosti s porušením práv přiznaných právem Unie a doporučit všem členským státům, aby na vnitrostátní úrovni zavedly systém kolektivní právní ochrany, který by v celé Unii vycházel ze stejných zásad a současně by zohledňoval právní tradice členských států a obsahoval pojistky proti jeho zneužívání.*“²⁶³ Komise v doporučení stanovila, že členské státy by měly přijmout nezbytná opatření k provedení zásad obsažených v Doporučení nejpozději do 11. června 2015. Jelikož má tento dokument formu doporučení, promítnutí zásad v něm obsažených do právních řádů členských států není ze strany Evropské Unie vynutitelné.

V Doporučení Komise převzala komplementární systém kolektivní právní ochrany tak, jak byl navržen v Bílé knize, který nadto rozvedla do většího detailu. Komise navíc

²⁶² *ibid*, s. 4

²⁶³ EVROPSKÁ KOMISE. *op.cit.* 260, s. 2

rozlišila mezi (i) prostředkem kolektivní právní ochrany týkající se **zdržení se jednání**, kterým se rozumí „*právní prostředek, který umožňuje, aby se dvě a více fyzických či právnických osob nebo zastupující subjekt oprávněný podat reprezentativní žalobu mohly kolektivně domáhat zastavení protiprávního jednání*“, a (ii) prostředkem kolektivní právní ochrany týkající se **náhrady škody**, kterým je „*právní prostředek, který umožňuje, aby se dvě a více fyzických či právnických osob, jež tvrdí, že jim vznikla škoda v události hromadné škody, nebo zastupující subjekt oprávněný podat reprezentativní žalobu, mohly kolektivně domáhat náhrady škody.*“²⁶⁴

Kolektivní žaloby na základě Doporučení mají využívat tzv. „*opt-in*“ zásady, což znamená, že žalující strana „*by se měla vytvářet na základě výslovného souhlasu fyzických nebo právnických osob, které tvrdí, že jim vznikla škoda.*“²⁶⁵ Opakem této zásady je tzv. „*opt-out*“ zásada, která je využívána hromadnými žalobami ve Spojených státech amerických (tzv. „*class-actions*“). Do žaloby typu *opt-out* jsou zahrnuty všechny poškozené osoby, které aktivně nevyjádřily, že se této žaloby nechtějí účastnit. Otázka, zda evropský systém hromadných žalob přizpůsobit *opt-in* nebo *opt-out* systému, byla po dlouhou dobu jednou z nejvíce diskutovaných. Komise se ve svých dokumentech stavěla poměrně negativně k *opt-out* systému využívanému ve Spojených státech amerických, a to z několika důvodů. Dle mnohých názorů používání tohoto systému zvyšuje pravděpodobnost neodůvodněných žalob, a to zejména v souvislosti s tím, jak je ve Spojených státech amerických nastavený systém odměňování advokátů zastupujících hromadné žaloby. Advokáti zastupující hromadnou žalobu pracují na základě honoráře odvíjejícího se od úspěchu dosaženého ve sporu (tzv. „*contingency fees*“), což v případě hromadných žalob může přitahovat pozornost advokátů. Na druhou stranu, žaloby využívající systému *opt-in* často vykazují nízkou míru účasti. Nároky jednotlivých poškozených osob u hromadných žalob jsou totiž většinou příliš nízké na to, aby byly tyto poškozené osoby ochotné věnovat svůj čas a prostředky na obranu proti protisoutěžnímu jednání, které jim způsobilo škodu.

²⁶⁴ *ibid*, s. 3

²⁶⁵ *ibid*, s. 3

4. Hlavní problémy v systému kolektivních žalob

Vytváření nového evropského systému kolektivní právní ochrany pro Komisi představovalo nesmírně náročný úkol. Vzhledem k různorodosti právních řádů jednotlivých členských států a jejich tradic musely být Komisí prozkoumány jednotlivé možnosti nastavení hromadných žalob, a to jak na úrovni hmotněprávní, tak i procesněprávní. Jak evropští zákonodárci, tak i akademici se shodují na tom, že systém kolektivní právní ochrany je schopný přispět ke zlepšení úrovně vymáhání soutěžního práva v Evropské Unii. I přes veškeré pozitivní efekty, které tento systém může přinést, je potřeba se zaměřit i na negativní stránky tohoto systému.

Uplatňování kolektivních žalob může být ztíženo určitými bariérami, které odrazují poškozené osoby od jejich uplatnění u národních soudů. Včasná identifikace těchto bariér je prvním krokem k jejich možnému zamezení, a to správným nastavením systému hromadných žalob, který se tímto stane přístupným pro co největší spektrum osob poškozených protisoutěžním jednáním. Mezi jednu z těchto bariér se řadí náklady spojené s řízeními o hromadných žalobách, a to hlavně z důvodu, že individuální ztráty způsobené protisoutěžním jednáním jsou minimální oproti tomu, kolik času a prostředků je třeba na taková řízení vynaložit. Vytvořením systému hromadných žalob by se ovšem tato bariéra mohla eliminovat, a to z důvodu, že náklady, které je potřeba na toto řízení vynaložit se rozprostřou mezi velký počet poškozených osob. Hromadné žaloby mají dále také schopnost vyrovnat nerovnováhu mezi protistranami, jelikož žalované strany jsou ve většině případů společnosti, které mají k dispozici dostatečné prostředky k obraně před žalobou. Tyto prostředky mohou zahrnovat jak finanční, tak i právní zázemí žalované společnosti. Na druhou stranu, osoby poškozené protisoutěžním jednáním jsou ve většině případů spotřebitelé, kteří takovými prostředky nedisponují.

Je všeobecně uznávaným faktem, že veškeré škody způsobené porušením soutěžního práva by měly být poškozeným z tohoto protiprávního jednání nahrazeny. Někdy ovšem mohou nastat situace, kdy podání žaloby na náhradu škody se poškozeným zdá nerozumné (tzv. „*rational apathy problem*“). Tento problém je založen na premise, že by bylo iracionální pro poškozené podat žalobu pro náhradu škody způsobenou protisoutěžním jednáním v situacích, kdy by jejich nárok byl nízký, protože náklady,

kteře by tito poškození museli za soudní řízení vynaložit, by pravděpodobně byly vyšší než samotná potencionální kompenzace přiznaná soudem. Z tohoto důvodu je vhodné zavedení systému kolektivní právní ochrany, která je schopna tento problém zmírnit, jelikož náklady vynaložené na soudní řízení se rozprostřou mezi větší množství poškozených, což má za následek snížení individuální obavy ze ztráty, která by mohla nastat v případě, kdyby byl soudní spor o náhradu škody neúspěšný.

Dalším problémem, který je spojován se systémy kolektivní právní ochrany, je tzv. parazitování („*free-riding problem*“). Parazitování se nejčastěji vyskytuje v situacích, kdy jednotliví poškození protisoutěžním jednáním se rozhodnou ponechat iniciativu podání žaloby na náhradu škody na ostatních poškozených s vidinou toho, že pokud jejich žaloba u soudu uspěje, zvýší se šance toho, že by uspěla i jejich žaloba, a to za současné minimalizace rizik spojených s podáním žaloby jako první. Zde je potřeba upozornit na to, že parazitování se častěji objevuje u hromadných žalob využívajících *opt-in* systém. U tohoto systému se totiž musí poškození do hromadné žaloby aktivně zapojit, což znamená, že je jim dána větší míra diskrece, než u *opt-out* systému. V tomto případě je tedy pravděpodobnější očekávat, že někteří z poškozených záměrně do hromadné žaloby nevstoupí, a v případě, že tato uspěje, následně uplatní svůj nárok individuální žalobou na náhradu škody.

Dalším argumentem pro zavedení hromadných žalob využívajících *opt-in* systému je, že u tohoto systému je menší pravděpodobnost, že dojde k rozporu mezi zájmy zastoupené osoby a zástupcem (tzv. „*principal-agent problem*“). Tento problém může nastat v situacích kdy zástupce, od kterého se vyžaduje, aby zastupoval zájmy jiných, upřednostní své vlastní zájmy na úkor zájmů takovéto skupiny osob. Možnost výskytu tohoto problému je vyšší u žalob spadajících pod *opt-out* systém, které se těší oblibě především ve Spojených státech. Advokáti zastupující hromadné žaloby zde mají větší možnost kontroly nad řízením, a mohou být tedy motivováni vidinou vlastního zisku. To může způsobit, že tito zástupci upřednostní smírné urovnání sporu před vyčkáním, jak by o sporu rozhodla porota. Předčasné ukončení žaloby totiž právním zástupcům zaručuje alespoň nějakou odměnu za její zastupování, ale v případě, kdyby případ byl rozhodnut porotou a prohrál, jejich odměna by byla mizivá. I z těchto důvodů se zdá

rozumné zavedení reprezentativních žalob na úrovni členských států Evropské Unie, jelikož tyto jsou méně motivovány finančními zisky.

Dále je potřeba zmínit, že uplatňování hromadných žalob u národních soudů je obecně velmi nákladnou záležitostí. I přesto je ale třeba zajistit, aby osoby poškozené protisoutěžním jednáním nebyly připraveny o možnost uplatnění svých nároků u soudů. Komise se k zajištění financování hromadných žalob vyjádřila tak, že *„dostupnost financování soudních sporů v rámci kolektivní právní ochrany by měla být zajištěna způsobem, který nevede ke zneužívání systému nebo ke střetu zájmů.“*²⁶⁶ Komise v Doporučení nastavila model financování, který se výrazně odlišuje od modelu, který je používán ve Spojených státech, a pro financování byla stanovena poměrně striktní pravidla. Komise doporučila, že na počátku řízení o hromadné žalobě by žalující strana měla mít povinnost sdělit soudu, odkud pochází finanční prostředky, které bude využívat na podporu svých právních kroků. Komise ale zároveň dovoluje, aby financování bylo poskytnuto třetí osobou. Soud by měl mít možnost přerušit řízení, pokud finanční zdroje poskytuje třetí osoba a:

- a. existuje střet zájmů mezi třetí osobou a žalující stranou a jejími členy;
- b. třetí strana nemá dostatek zdrojů, aby splnila své finanční závazky vůči žalující straně zahajující kolektivní řízení; a
- c. žalující strana nemá dostatek zdrojů na krytí výloh protistrany, pokud nebude mít v kolektivním řízení úspěch.

Řízení o hromadných žalobách je rovněž založeno na zásadě, že kdo prohrál, platí. Tato zásada znamená, že kdo prohraje řízení o kolektivní žalobě, nahradí za podmínek platných v příslušných vnitrostátních právních předpisech nezbytné náklady řízení, které vynaložila vítězná strana. Tato zásada má jednoznačný cíl, a to, aby nebyly uplatňovány žaloby, které nemají dostatečný právní základ.

5. Závěr

Evropská komisařka Margrethe Vestager na konferenci „Vymáhání soutěžního práva v EU a USA“ v roce 2016 prohlásila: „Spojené státy americké a Evropská Unie mají

²⁶⁶ *ibid*, s. 2

rozdílnou historii a ne vždy dělají věci stejným způsobem. Ale myslím si, že naše cíle jsou velmi podobné: snažíme se ochránit soutěž a spotřebitele.“²⁶⁷ Její vyjádření se zdá být naprosto přesným. V téměř každém kroku v rámci postupného vývoje evropského systému hromadných žalob se evropští zákonodárci záměrně vyhýbali použití prvků z amerického class action systému, ale i přesto byly oba systémy vyvinuty s cílem zlepšit vynutitelnost soutěžního práva, fungující vnitřní trh a nerušenou soutěž prospívající spotřebitelům.

Lze dospět k závěru, že Komisi se podařilo vytvořit funkční systém veřejnoprávního vymáhání soutěžního práva. Komise má v rámci veřejnoprávního vynuocování velmi silnou pozici, v rámci které monitoruje chování na evropském trhu, a v případě porušení má k dispozici široké pravomoci pro vyšetření a následné potrestání protisoutěžního jednání. I přesto veřejnoprávní vymáhání míří hlavně na potrestání vzniklých porušení soutěžního práva s cílem zajištění prevence dalšího nežádoucího jednání, ovšem nezajišťuje jakoukoliv kompenzaci osob poškozených takovýmto protisoutěžním jednáním. Komise tedy vyvíjí značné úsilí na vytvoření efektivního systému soukromoprávního vymáhání, které by zaručilo, že poškozeným osobám bude poskytnuta kompenzace za porušení jejich subjektivních práv.

Přijetím směrnice o žalobách na náhradu škody v roce 2014 bylo zlepšeno procesní postavení jednotlivých osob poškozených protisoutěžním jednáním při soudních sporech o náhradu škody. Směrnice se ovšem nevěnuje problematice kolektivní právní ochrany, tudíž nejvíce relevantním dokumentem v této oblasti je stále nezávazné Doporučení Komise z roku 2013.

Autor této diplomové práce je přesvědčen, že opt-in mechanismus je vhodnější pro instrumenty procesního práva užívané v právních řádech členských států Evropské Unie. Navíc, charakteristika opt-out mechanismu není slučitelná s principy Evropské úmluvy o lidských právech, a to především s principem svobody předložit věc soudu, protože osoby se automaticky stávají členy skupiny, aniž by přitom projevíly výslovný souhlas s žalobou. Zdá se tedy rozumné, aby Evropská Komise nepoužívala *opt-in* a *opt-out* mechanismy vzájemně vylučně, ale spíše aby vytvořila hybridní systém

²⁶⁷ VESTAGER, M. *Competition Enforcement in the EU and US*. Tisková konference, Washington DC, 2016. Dostupné na: https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-enforcement-eu-and-us_en

umožňující použití obou modelů. Některé členské státy jako např. Belgie, Dánsko či Spojené království takovýto hybridní systém již vytvořily, a jejich národní soudci rozhodují o použití toho kterého modelu hromadných žalob při každé žalobě individuálně. Evropská Komise by tedy měla nadále sledovat a porovnávat funkčnost systémů hromadných žalob v jednotlivých členských státech a potencionálně upravit evropský systém kolektivní právní ochrany tak, aby bylo dosaženo co největší ochrany práv chráněných soutěžním právem.

Keywords: competition law, enforcement, collective actions, representative actions, class-actions

Klíčová slova: soutěžní právo, vymáhání, hromadné žaloby, reprezentativní žaloby, class-actions