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# COLLECTIVE REDRESS: BROADENING EU ENFORCEMENT THROUGH STATE LIABILITY?

James Marson\* and Katy Ferris\*\*

*ABSTRACT. This article advances an argument that private enforcement of European Union (EU) rights has largely been stunted due to a series of blocking tactics by Member States, enabled through a form of tacit subservience of the Court of Justice of the European Union. Currently, State Liability is neither an effective system of redress under tortious liability, nor a genuine enforcement mechanism in domestic law. By enabling collective redress in State Liability, we present an argument, missing explicitly in current literature, that both as a viable remedy through the (UK's modified) tort of breach of statutory duty, and through granting effective redress through action by the EU Commission, State Liability will become the mechanism for corrective justice the Court of Justice envisaged in 1991. In 2011, the EU Commission issued a non-binding Recommendation establishing collective redress for breach of competition law. Could this be seen as positive positioning by the EU to seize the initiative for greater access to individuals of justice and justiciable solutions?*

Keywords: State liability, collective redress, enforcement mechanisms, statutory duty, EU Commission, damages.

## I. INTRODUCTION

The purpose of this article is to critique the remedy of State Liability for individuals suffering loss as a result of a Member States' non-implementation or incorrect transposition of EU law. 'Enforcement mechanisms' is a topic which has been considered through a vast literature and from varying perspectives. Even a novice to the subject will be aware that as a consequence of membership of the EU, obligations have been imposed on individuals (and not confined to the signatory Member State) to follow laws derived from the EU. A corollary to this has been to ensure individuals have the full access to protective rights established at an EU level. Typically, the EU creates a directive (the most common source of EU legislation) which establishes harmonisation of the law through the 28 Member States. Directives are an oft used legislative instrument as they do not impose the rigidity and uniformity of EU Regulations, and whilst binding as to the result to be achieved, they grant to Member States discretion as to the choice of form and methods through which to give effect to (or, in the parlance, to transpose) the law.<sup>1</sup> The intention has always been that in using directives as a legislative source, the EU articulates the main aims and objectives of the necessary law, it provides the Member States a period of time within which to transpose the law into their legal systems, and thereafter, individuals access the law through the domestic transposing provision. Where access to the EU law in this manner is not possible (due to, for

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<sup>1</sup> Article 288 Treaty on the Functioning of the European Union (TFEU).

example, the Member State's non-implementation or incorrect transposition of the law), the EU Commission has the authority to compel a Member State's compliance. The Treaty on the Functioning of the European Union (TFEU) provides for enforcement through, first, a (pre-litigation) notification and secondly, a judicial procedure,<sup>2</sup> - the Commission fulfilling the role of 'guardian of the treaties.' The Commission has a substantial role of ensuring Member States conform to obligations and it possesses unlimited discretion<sup>3</sup> as to which cases are brought before the Court of Justice. Beyond investigations undertaken under its volition, other Member States,<sup>4</sup> individuals and organisations are also empowered to complain to the Commission regarding alleged infringements. The Commission has the power to fine Member States for late transposition of directives through a special penalty regime.<sup>5</sup> However, despite this power, late transposition notices are not uncommon – for instance they have previously been applied against more than two-thirds of Member States,<sup>6</sup> and even against 23<sup>7</sup> Member States in a further example.

Where the notification procedure of ensuring compliance fails, the Commission may launch infringement proceedings at the Court of Justice. In 2012, there were 1343 infringement cases open,<sup>8</sup> and although this number has fallen consistently since 2009,<sup>9</sup> and the explicit intentions of the Commission produce demonstrable improvements in the levels of Member State compliance,<sup>10</sup> there remain complaints from both academics<sup>11</sup> and the EU Parliament<sup>12</sup> regarding the

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<sup>2</sup> Articles 258-260 TFEU.

<sup>3</sup> The discretionary investigatory power is sometimes negatively viewed as enabling selective enforcement. See Richard Rawlings, *Engaged Elites Citizen Action and Institutional Attitudes in Commission Enforcement*, 6 *European Law Journal* 4, 10 (2000).

<sup>4</sup> Available in Article 259 TFEU, although, given the political ramifications for undertaking such an action, its use (and success) has been very limited (the following cases are where this mechanism has been used - Case 141/78 *France v United Kingdom* [1979] E.C.R. 2923; Case C-388/95 *Belgium v Spain* [2000] E.C.R. I-3123; Case C-145/05 *Spain v United Kingdom* [2006] E.C.R. I-7917; Case C-364/10 *Hungary v Slovakia*).

<sup>5</sup> Article 260(3) TFEU.

<sup>6</sup> Regarding Directive 2010/78/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 98/26/EC, 2002/87/EC, 2003/6/EC, 2003/41/EC, 2003/71/EC, 2004/39/EC, 2004/109/EC, 2005/60/EC, 2006/48/EC, 2006/49/EC and 2009/65/EC in respect of the powers of the European Supervisory Authority (European Banking Authority), the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority) (L 331/120).

<sup>7</sup> In respect of Directive 2010/78/EU of the European Parliament and of the Council of 24 November 2010 amending several Directives in respect of the powers of the European Supervisory Authority (European Banking Authority), the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority).

<sup>8</sup> Of these, 1062 were closed following compliance by the Member State, but 128 cases were still open as it could not be confirmed that the Member State had complied with the judgment of the Court of Justice.

<sup>9</sup> [http://ec.europa.eu/eu\\_law/docs/docs\\_infringements/annual\\_report\\_30/com\\_2013\\_726\\_en.pdf](http://ec.europa.eu/eu_law/docs/docs_infringements/annual_report_30/com_2013_726_en.pdf). p. 8

<sup>10</sup> See Robert Thompson, *Opposition Through the Back Door in the Transposition of EU Directives*, 11 *European Union Politics*, 577, 592 (2010) 'The... states'... deviat[ion] is effectively reduced to zero when the Commission explicitly supports a Directive's provision. Such support signals the Commission's intention to monitor compliance stringently in Member States that express incentives to deviate.'

<sup>11</sup> Melanie Smith, *Enforcement, Monitoring, Verification, Outsourcing: The Decline and Decline of the Infringement Process*, 14 *European Law Review* 777 (2008) and Carol Harlow & Richard Rawlings, *Accountability and Law Enforcement: The Centralised EU Infringement Procedure*, 12 *European Law Review* 447 (2006).

efficacy and transparency of the system of infringement proceedings. Enforcement actions by the Commission remain an important<sup>13</sup> and significant aspect of effective governance,<sup>14</sup> yet all too frequently, it has been reported that this system is not fit for purpose,<sup>15</sup> does not provide accessible justice for those individuals affected, does not deter Member States sufficiently from flagrant breaches of EU law, and has been restricted in its success<sup>16</sup> due to the expanding membership and competence of the EU. It is clear, even by the admission of the Commission itself, that EU law is frequently not being implemented and enforced in a satisfactory manner.<sup>17</sup>

The focus of enforcement by the Commission is to ensure Member States fulfil their obligations, and whilst a breach often results in individuals being denied access to rights conferred by the EU, the sanctions imposed on the recalcitrant State do not take into account the effects of such a breach or associated losses incurred by individuals. No private remedy is provided through enforcement at an EU level. This is the remit of the domestic level of enforcement.

Beginning with the direct effect of treaty articles (and later directives), affected individuals who were denied access to EU rights due to, for example, the non-transposition of a directive, could argue that the national court had to give effect to the directive directly in that court. This was a remedy only available against a State body or (latterly) an emanation of the State, and hence could not be used between private parties (such as an employee with a claim against an employer unless it involved an 'advance effect' or 'negative effect' of directives through a Mangold<sup>18</sup>-type application). Due to this constraint in the law, the Court of Justice developed the remedy of indirect effect and its requirement of a purposive method of statutory interpretation<sup>19</sup> (but which was of very limited use in the case of non-transposition of the directive and where no domestic law, capable of a purposive interpretation, existed). Finally, through *Francovich*<sup>20</sup> and the establishment of the State's non-contractual liability for losses, the Court created a system of compensatory redress for individuals to be provided through the national law, and enforceable through the

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<sup>12</sup> The lack of transparency in proceedings was raised by the European Parliament in 'Report on the 25th Annual Report from the Commission on Monitoring the Application of Community Law (2007)' A6-0245/2009, para 13.

<sup>13</sup> See Jonas Tallberg, *Paths to Compliance: Enforcement, Management, and the European Union*, 56 *International Organization* 609 (2002).

<sup>14</sup> And an increasingly important aspect of respect for the rule of law and the Commission's interests in strengthening its enforcement in this area – see European Commission 'Communication from the Commission to the European Parliament and the Council: A New EU Framework to Strengthen the Rule of Law' Brussels, 11.3.2014 COM(2014) 158 final.

<sup>15</sup> See Christian B. Jensen, *Implementing Europe: A Question of Oversight*, 8 *European Union Politics* 451, 453 (2007).

<sup>16</sup> See Tobias Lock *Is Private Enforcement of EU Law Through State Liability a Myth? An Assessment 20 Years After Francovich*, 49 *Common Market Law Review* 1675 (2012).

<sup>17</sup> Communication from the Commission on Implementing European Community Environmental Law, COM/2008/0773 final – <http://eur-lex.europa.eu/LexUriServ.do?uri=CELEX:52008DC0773:EN:NOT>

<sup>18</sup> Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] E.C.R. I-10013.

<sup>19</sup> Although see Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside – An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 *Stanford Law Review* 725 (2014) for an analysis and critique of the theories underpinning the textualist and purposivist approaches to statutory interpretation. The authors conclude that an alternative paradigm is required, adopting a pragmatic approach to interpretation.

<sup>20</sup> Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci and others v Italy* [1991] E.C.R. I-5357.

domestic courts, which, whilst being a damages action for losses, is frequently referred to in the body of law known as 'enforcement mechanisms'.<sup>21</sup>

Enforcement mechanisms has been a subject of importance since the inception of the Community, as a lack of enforcement (and a failure to secure access to rights) may be considered democratised theft.<sup>22</sup> Member States that do not adhere to EU obligations, particularly in relation to social policy and employment rights, may gain a political, economic, and financial benefit. Losses sustained by individuals for such transgressions may, financially at least, be relatively small although the impact on their lives and the relationship they have with (for example) their employer and the State is substantial. Member States that do adhere to EU obligations will incur costs either directly or through the competitiveness of the organisations that operate within the Member State, and a competitive disadvantage is evidently the consequence. The history of the Court of Justice's case law on this subject has been to ensure compliance amongst Member States, thereby creating fairness to all the individuals who work within the remit of that State's authority, and ensuring that Member States do not obtain an advantage from their breach of EU law. The time has come for the full effects of *Francovich* to be realised<sup>23</sup> and for a substantial mechanism to be established which compels adherence to the law.

## II. THE DEBILITATING EFFECT OF COSTS

A Member State's breach of EU law does not affect an individual in isolation, but rather there are multiple affected individuals all suffering an inability to avail themselves of (often) protective rights which are designed with the aim of, for

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<sup>21</sup> For a discussion of the EU utilizing rights, enforceable by individuals, to establish policy without the associated costs, see R. Daniel Kelemen, *Suing for Europe: Adversarial Legalism and European Governance*, Comparative Political Studies 39, 101 (2006).

<sup>22</sup> See David Vogel, *The Hare and the Tortoise Revisited: The New Politics of Consumer and Environmental Regulation in Europe*, 33 British Journal of Political Science 557 (2003).

<sup>23</sup> In the UK, for example, in the first 20 years of the availability of redress through State Liability, a mere 22 cases were heard before English courts - *R v Secretary of State for the Home Department ex p. Gallagher* [1996] 2 CMLR. 951; *Bowden v South West Water Services Ltd* [1998] 3 CMLR. 330; *R v Ministry of Agriculture, Fisheries and Food ex p. Lay and Gage* [1998] COD 387; *Boyd Line Management Services Ltd v Ministry of Agriculture, Fisheries and Food (No.1)* [1999] Eu. L.R. 44; *R v Department of Social Security Ex p. Scullion* [1999] 3 CMLR. 798; *R v Secretary of State for Transport ex p. Factortame Ltd (No.5)* [2000] 1 AC 524; *Evans v Secretary of State for the Environment, Transport and the Regions* [2001] EWCA Civ 32; *R v Secretary of State for Transport ex p. Factortame Ltd (No.6)* [2001] 1 WLR 942; *Three Rivers DC v Bank of England (No.3)* [2003] 2 AC 1; *Phonographic Performance Ltd v Department of Trade and Industry* [2004] EWHC 1795 (Ch); *Sayers v Cambridgeshire CC* [2006] EWHC 2029 (QB); *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners* [2007] UKHL 34; *Byrne v Motor Insurers' Bureau* [2008] EWCA Civ 574; *Moore v Secretary of State for Work and Transport* [2008] EWCA Civ 750; *Spencer v Secretary of State for Work and Pensions* [2008] EWCA Civ 750; *FJ Chalke Ltd v Revenue and Customs Commissioners* [2009] EWHC 952 (Ch); *Cooper v Attorney General* [2010] EWCA Civ 464; *R (on the application of MK (Iran)) v Secretary of State for the Home Department* [2010] EWCA Civ 115; *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2010] EWCA Civ 103; *R (on the application of Negassi) v Secretary of State for the Home Department* [2011] EWHC 386 (Admin); *Test Claimants in Thin Cap Group Litigation v Revenue and Customs Commissioners* [2011] EWCA Civ 127; *Harmon CFEM Facades (UK) Ltd v Corporate Officer of the House of Commons* 67 Con. L.R. 1. Of these, in 12 cases was the claimant an individual, and in total, 9 of the 22 cases were successful in obtaining a remedy. The more recent case of *Delaney v Secretary of State* [2014] EWHC 1785 (QB) and the judgment regarding the element of discretion (or lack thereof) for the State and its subsequent liability gives hope for future cases.

example, the betterment of their working lives. However, the existing system of liability redress is for each individual to claim against the State to obtain damages.<sup>24</sup> Issues of costs,<sup>25</sup> procedural difficulties,<sup>26</sup> quantum of damages, and the cost/benefit of the resources required to obtain redress through litigation compared with the monetary gains awarded, present problems to the current system which has resulted in its limited effectiveness in the 24 years since the *Francovich* ruling.

In realising the effects of the *Francovich* judgment, consideration of how a system of collective redress can help to remove a substantial barrier to the functionality of the enforcement of EU law and also help to deter non- and incorrect transposition of directives is paramount. The premise of this argument is from the Commission's recent non-binding Recommendation regarding collective redress for alleged breaches of EU antitrust / competition law. As part of the Commission's consultation process prior to enactment of the Recommendation, the European Coalition for Corporate Justice<sup>27</sup> commented:

Compensatory collective redress should have to cover all sectors where the mass damage due to the breaches of EU law is possible and not be limited to the areas of consumer law or competition. This would allow for example cases of loss of personal data or breaches of data protection, negligent financial advice to financial service users, environmental damage or breaches of employment rights to be tackled via collective claims.<sup>28</sup>

Parallels may be drawn between the Commission's non-binding Recommendation regarding collective redress for instances of anti-competitive behaviour by bodies within Member States, and an extension of the principle to State Liability. Here the Commission is primarily granting rights to individuals to access justice where, in many cases at least, it would be financially unviable to pursue such action through the courts. The expense of litigation, coupled with the very low remedy awarded under quantum, restricts the ability of individuals in such a situation to obtain redress. Similarly, social policy directives establishing protections from discrimination

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<sup>24</sup> The reality is that most do not enforce their rights. Specifically in relation to tortious liability, research presented by Richard E. Miller & Austin Sarat, *Grievances, Claims and Disputes: Assessing the Adversary Culture*, 15 *Law & Society Review* 525, 544–45 (1981) demonstrated that, in the US, merely 3.8% of those individuals with a tort grievance actually enforce their rights in court. That figure could be even lower in the UK.

<sup>25</sup> See, for way as an example of the Danish Consumer Ombudsman scheme – 'Report Paves the Way for Class Action Lawsuits on Behalf of Danish Consumers' <http://www.forbrug.dk>. Also, a system whereby claimants engaged in the same Member State, experiencing the same legal issue and, often, experiencing the same level of financial loss would be likely to benefit from a more efficient use of legal resources and would result in 'judicial economy' for the legal system in a reduction in the numbers of individual claims necessary to achieve the same result. In the UK, costs associated with access to courts and justice were proportioned accordingly - Court Fees: 3-5%; Bailiffs' Fees: 3-5 %; Lawyers' Fees: 70-90%; Experts' Fees: 5-10%; Witness Compensation: 2-5%; and Translation/Interpretation Fees: 5-7% (Jean Albert "Study on the Transparency of Costs of Civil Justice Proceedings in the European Union" (EC Commission, DG for Justice, Freedom and Security 2007), 9).

<sup>26</sup> Hans-W, Micklitz & Astrid Stadler, *The Development of Collective Legal Actions in Europe, Especially in German Civil Procedure*, 17 *European Business Law Review* 1481 (2006).

<sup>27</sup> 'Towards a Coherent European Approach to Collective Redress.' Available at [http://ec.europa.eu/dgs/health\\_consumer/dgs\\_consultations/ca/replies\\_collective\\_redress\\_consultation\\_en.htm](http://ec.europa.eu/dgs/health_consumer/dgs_consultations/ca/replies_collective_redress_consultation_en.htm).

<sup>28</sup> *ibid.* Answer to Q33 in the Commission consultation document.

experienced on the basis of (for example) sexual orientation,<sup>29</sup> beliefs and non-beliefs,<sup>30</sup> because the individual works under a fixed term contract<sup>31</sup> or is a part-time worker,<sup>32</sup> have been incorporated into domestic law on the basis of a parent EU Directive. Further, fundamental protections on the requirements to preserve the rights and conditions of work attributed to employees following the transfer of a business from one owner to the next,<sup>33</sup> and requirements to consult with employees and/or their representatives in the event of redundancies and/or transfers of an undertaking<sup>34</sup> are also subject to a parent EU law. In the instances identified above, the UK has been found (or an argument has been presented alleging it to be) in breach of its obligations, with the result that individuals have been denied protection to which they were entitled. The level of compensation available often makes it uneconomic to bring an individual claim, but the worker wishes to assert his or her rights or gain protection which is currently unavailable through domestic law. Direct effect is unavailable in cases where the individual is employed in the private sector (due to the horizontal / vertical distinction and application of directives), and indirect effect is a possible, albeit opaque remedy, where there exists domestic legislation capable of interpretation (although this is by no means a given state of affairs and frequently falls to the reference procedure<sup>35</sup> and consequent delay in accessing a remedy). State Liability is therefore not merely (or indeed nor should it be seen principally as) a mechanism to provide compensation for breach. Rather, we argue, its significance is in enabling an individual to force a Member State to take remedial action<sup>36</sup> and comply with EU law in order, albeit indirectly, to access a right which has been denied him or her and to act as the watchdog the Court of Justice had envisaged when developing the suite of enforcement mechanisms.

### III. STATE LIABILITY AND THE AWARD OF DAMAGES

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<sup>29</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, Art 1, and transposed in the UK through the Disability Discrimination Act 1995 and the Equality Act 2010.

<sup>30</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, Art 1.

<sup>31</sup> Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP OJ L 175/43, and transposed in the UK through The Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002.

<sup>32</sup> Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC OJ L 14 and transposed in the UK through The Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000.

<sup>33</sup> Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, OJ L 061, and Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, OJ L 82.

<sup>34</sup> Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, and transposed in the UK through The Trade Union and Labour Relations (Consolidation) Act 1992, amended by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995 and The Transfer of Undertakings (Protection of Employment) Regulations 1981, amended by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995 and 1999.

<sup>35</sup> Article 267 TFEU.

<sup>36</sup> Although others have already discussed the concept of extending *Francovich*-type damages actions beyond the mere award of monetary compensation – see in particular Michael Dougan, *The Francovich Right to Reparation: Reshaping the Contours of Community Remedial Competence*, 6(1) European Public Law 103 (2000).

A little over twenty years ago, the Court of Justice famously held:<sup>37</sup>

... the effectiveness of [EU] rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain compensation when their rights are infringed by a breach of law for which a Member State can be held responsible.<sup>38</sup>

The ruling provided for the effectiveness of EU law to be reaffirmed,<sup>39</sup> and a new (hybrid) form of liability in public law<sup>40</sup> (despite the fact that many disputes arising from the breach of EU law affect private parties), to be established and made enforceable before national courts. English law did not provide a neat form<sup>41</sup> of tortious liability into which the principles established through State Liability would fit. It did not align neatly with the rules to establish misfeasance in public office (as the test of bad faith and deliberate<sup>42</sup> abuse of power is more onerous than the tests for State Liability), nor negligence, as liability here is usually linked with fault<sup>43</sup> leading to some form of injury or harm connected with the award of damages. Liability for pure economic loss is particularly difficult to establish and from which to gain redress, and whilst State Liability provides damages for economic losses incurred by the claimant, it does not give the claimant direct access to the EU rights conferred through the law,<sup>44</sup> nor does it require the claimant to link the damages claimed with actual proof of harm. State Liability in the UK adopts a bastardised<sup>45</sup> form of breach of statutory duty,<sup>46</sup> albeit with fundamental distinctions. Whereas the basis of a State Liability action is to recover damages from the State (by its nature a public body and therefore involving a public tort),<sup>47</sup> the tort of breach of statutory duty avoids the imposition of liability and “distinguishes clearly between private and public law

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<sup>37</sup> The Court of Justice, had, in Case 6/60 *Humblet v Belgium* [1960] E.C.R. 559, 569 established the duty on Member States to make good damage incurred due to national laws conflicting with EU law.

<sup>38</sup> Fn 20 at [33].

<sup>39</sup> Despite arguments as to its success (see e.g. Roberto Caranta, *Judicial Protection Against Member States: A New Jus Commune Takes Shape*, 32 *Common Market Law Review* 703, 725 (1995); Fernand Schockweiler, *La responsabilité de l'autorité nationale en cas de violation du droit communautaire*, 28 *Revue trimestrielle de droit européen* 27, 42 (1992), it is arguable that such effectiveness has never been realised.

<sup>40</sup> Although a second set of legal proceedings outside of the normal 'private' sphere may 'hardly be compatible with the requirement of an effective legal remedy' Case C-316/93 *Vaneetveld v SA Le Foyer* [1994] E.C.R. I-763, at [775], per Jacobs AG.

<sup>41</sup> In *Application des Gaz SA v Falks Veritas Ltd* [1974] 1 Ch 381, Lord Denning had suggested (*obiter* [395-6]) the creation of a new form of tort law to provide an effective remedy for such breaches.

<sup>42</sup> *Three Rivers District Council v Bank of England (No.3)* [2000] UKHL 33; [2003] 2 AC 1.

<sup>43</sup> The requirement of a finding of fault was rejected by the Court of Justice in *Brasserie du Pêcheur v Germany* [1996] at [56].

<sup>44</sup> It does grant such access indirectly as the Member State, having been found in breach of its EU law obligations and ordered to compensate the affected claimant, will change / amend / 'clarify' the law to avoid any further claims (and exposure to damages actions). Hence, following the finding of State Liability, the State invariably grants access to individuals through remedial action.

<sup>45</sup> See comments by Judge Toulmin QC, *R v The Secretary of State for Transport ex parte Factortame Ltd. (No.7)* [2000] EWHC (Tech) 179 at [176].

<sup>46</sup> Breach of statutory duty was used by Lord Diplock in *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] AC 130 [141] when identifying potential liability for breach of Art. 86 EEC Treaty (now Art. 102 TFEU) as applicable to individuals who suffered loss.

<sup>47</sup> *X v Bedfordshire CC* [1995] 2 AC 633.



actions such as judicial review.”<sup>48</sup> Breach of statutory duty includes a remoteness element whereby the statute must include an objective requirement that the breach and damage suffered is actionable in private law, and thereby the statute intended for the conferment of a remedy for the claimant. Statutes often do not expressly identify such an intention and the courts are left in the position of ‘hunting’ for intention, incorporating presumptions and weightings, through textual and purposive examination. This led to the creation<sup>49</sup> of a State Liability remedy model based on non-contractual / tortious liability.<sup>50</sup> For English law, a new hybrid fusion of English and EU law was created and to be applied by the domestic courts.

Despite *Francovich* and the resultant necessity for the domestic judicial activism and creation leading to a suitable tortious liability remedy, Member States continued to be required to fulfil their obligations for the correct and timely implementation of directives. Failure in this regard may lead to the award of damages as the Member State was obliged to make good any loss / damage<sup>51</sup> sustained by the claimant, and justified on the principles of equivalence<sup>52</sup> and effectiveness.<sup>53</sup>

Victims of infringement / transgression of EU law thus have routes by which to claim damages where they have suffered loss or harm. This was established in relation to competition law generally in *Courage and Crehan*<sup>54</sup> and *Manfredi*,<sup>55</sup> having already been established in *Francovich* in relation to State Liability. Beyond the general principles of law which allow redress as identified in these cases, however, various practical limitations apply to affect the reality of the ability for the individual victims to successfully recover damages. In the UK, for example, the prospect of an individual personally funding a public law action or, without retaining legal representation, presenting such a case is a practical impossibility. Trades unions and some public bodies do fund State Liability claims, but these are relatively rare and, in 2012, in the UK, only 2.6 million workers were union members engaged in the private sector. Such private sector workers lack the protection of availing themselves of a (vertical) direct effect claim against their employer, they may face the problems of enforcing the law through indirect effect, and whilst these workers may have the financial and legal support of their union to pursue a remedy of State Liability, clearly the overwhelming majority of workers in both public and private

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<sup>48</sup> Paula Giliker, *English Tort Law and the Challenge of Francovich Liability: 20 Years On*, 128 *The Law Quarterly Review* 541, 546 (2012).

<sup>49</sup> A national system establishing and facilitating the award of a remedy was required, however, given the unique nature of the effects of *Francovich*, and its adoption by Member States to be lukewarm at best, by 1997, no Member State had introduced any legislative measures to give effect to this development in EU law (SOU ‘Det Allmannas Skadestandsansvar vid Overtradelse av EG-regler’ 1997, 194).

<sup>50</sup> Although not every breach / infringement of EU law by a Member State constitutes a tort - *Borgouin S. A. and Others v Ministry of Agriculture, Fisheries and Food* [1986] QB 716.

<sup>51</sup> *Francovich* Fn 20 at [36].

<sup>52</sup> In relation to anti-trust / competition law, the principle requires Member States to sanction breaches of the EU law in the same way, and thereby equivalent to, the application of domestic law.

<sup>53</sup> A national court must not make it impossible or excessively difficult for a party to exercise his or her EU rights – see *Francovich* [1991] Fn 2 at [33] and [39]. Further, In *Autologic Holdings Plc v Inland Revenue Commissioners* [2004] EWCA Civ 690 [2004] 2 All ER 957 Gibson LJ stated: ‘The importance of the principle of effectiveness in Community law cannot be overstated. Any provision of national law which makes the exercise of a right conferred by Community law practically impossible or extremely difficult cannot prevail.’ 25.

<sup>54</sup> Case 453-99 *Courage Ltd. v Crehan* [2001] E.C.R. I-6297.

<sup>55</sup> Joined Cases C-295-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] E.C.R. I-6619.

sectors are not trade union members. Further, 27% of permanent employees were trade union members compared with 15% of temporary employees.<sup>56</sup> The statistics demonstrate greater vulnerability for workers who are not in trades unions and who are less likely to possess the funds to bring their own, individual action for State Liability.

#### IV. CLASS ACTIONS / COLLECTIVE REDRESS

There exists a catalogue of complexity and barriers which an individual must overcome to avail him/herself of, first, compensation through State Liability and secondly, a means of enforcing EU rights. Beyond the domestic procedural rules regarding tortious liability of a public body, one of the most debilitating factors of any public law action is the financial cost involved. This has been recognised at an EU level, and the response of the Commission has seen it institute mechanisms, first by encouraging Member States through its non-binding Recommendation to establish a system of collective redress, and secondly (albeit a separate measure) by compelling them through a (proposed) directive relating to compensation, connected to breaches of EU anti-competition laws.<sup>57</sup> This has initially been established on the basis of, and restricted to, anti-trust / competition law, but the principle of enabling collective redress to access/enforce EU rights is a compelling move.<sup>58</sup> The EU evidently recognised a major barrier to justiciable problems and action needed to be taken at an EU level to ensure individuals can access justice, along with the broader positive effects that derive therefrom.

It is important to recognise from the outset that incentivising private individuals<sup>59</sup> to enforce their rights and to act as a watchdog in assisting the Commission in its role as guardian of the treaties has not simply been the exclusive want or remit of the EU. Increasingly, Member States<sup>60</sup> in the EU have been establishing systems whereby individuals are in a position, through private claims, to seek damages on the basis of corporate wrongdoing and malfeasance<sup>61</sup> (although this does not mean that such systems are particularly widespread or have universal agreement).<sup>62</sup> The positive positioning of some Member States has been mirrored by

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<sup>56</sup> Department of Business Innovation & Skills (2012) 'Trade Union Membership 2012 Statistical Bulletin May 2013, p. 6.

<sup>57</sup> Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. COM(2013) 404, 11.6.2013.

<sup>58</sup> For a comparative study of the effectiveness of collective redress in competition law see Clifford A. Jones, *Private Enforcement of Antitrust Law in the EU, UK and USA* (Oxford University Press 1999).

<sup>59</sup> See Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 *University of Pennsylvania Law Review* 2119, 2144-6 (2000) where 'By the 1960s, lawyers, judges, academics and legislators began to conceive of civil justice as having characteristics readily associated with criminal justice and administrative systems... Creating incentives for entrepreneurial private actors to use the civil justice system to partake in the work of public norm enforcement offered an alternative to centralizing power exclusively within the government.'

<sup>60</sup> France, for example, has recently established a system of collective redress into its Consumer Code – albeit restricted to State authorised consumer associations.

<sup>61</sup> Hans-W. Micklitz & Astrid Stadler, *The Development of Collective Legal Actions in Europe, Especially in German Civil Procedure*, 17 *European Business Law Review* 1473 (2006).

<sup>62</sup> For example, the German (conservative / social democrat) coalition government elected in 2013 have opposite views on the issue of collective redress in competition laws, with the negative position being such a development would be unnecessary, be subject to abuse and require substantial

the EU, albeit the extent of, and the best mechanism by which to facilitate, such access has been in consideration for some time. Approximately 19 Member States including the UK have existing, or are proposing, collective redress mechanisms, using opt-in and opt-out models, which in many ways follow the collective redress procedures in the US. The existing use of collective redress has largely been limited to consumer rights, securities litigation and anti-competition law violations. This sectoral approach is instructive in that any further expansion of collective redress would need to adopt a similar pattern. Employment protection / social policy appears to be an area of EU competence that would benefit from the application of a system of collective redress.

#### A. COLLECTIVE REDRESS - TO OPT-IN OR OPT-OUT?

Under a system of collective redress, two mechanisms are available as viable options. The first is a system whereby the affected individual has to make an informed decision to pursue an action against the defendant and be part of the 'class' of litigants in a particular case. This is the 'opt-in' procedure which ensures that a definable, genuine group of affected individuals who have been impacted by the breach and have sustained some form of monetary loss can be identified, and associated remedies through compensation can be distributed. Individuals declare that they intend to participate in the legal action which assists the court in establishing with certainty a group of claimants. As this group exists in advance, distribution of any award is easier, as is the calculation of risk by the defendant of the potential damages,<sup>63</sup> and it aligns itself with the legal systems of many Member States. The opt-in system is often championed as enabling a legal freedom not offered through opt-out. With opt-in, each individual has the option to form part of the collective group seeking redress, whilst enabling those who wish to pursue an individual claim to proceed without any restraints. However, as demonstrated in case studies presented in 2007, the BEUC (the European Consumers' Bureau) found:

the freedom not to have one's claim is often overstated in opt-in regimes. Commencing proceedings without the explicit consent of those affected is not necessarily a limitation on the claimant's freedom of choice, since people are able to withdraw from the group and pursue individual actions or decline to litigate altogether.<sup>64</sup>

Further, the opt-in system has been criticised as not removing the problem of potential-claimant inertia<sup>65</sup> and where lawyers are not motivated (presumably

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amendment to the Code of Civil Procedure; and the UK coalition government has stated its misgivings regarding the extent of the reach to establishing a system of collective redress.

<sup>63</sup> Many defendants value collective redress due to the finality of the action with no fear of subsequent claims from affected individuals or a requirement to maintain a damages fund beyond the life of the collective claim and appeals – see Francis E. McGovern, *Distribution of Funds in Class Actions—Claims Administration*, 35 *Journal of Corporation Law* 123 (2009).

<sup>64</sup> BEUC (2007) *Private Group Actions - Taking Europe Forward. BEUC Reflections on a Future European Collective Redress Scheme for Individual Damage Claims* p. 15. Available at [http://ec.europa.eu/dgs/health\\_consumer/dgs\\_consultations/ca/replies\\_collective\\_redress\\_consultation\\_en.htm](http://ec.europa.eu/dgs/health_consumer/dgs_consultations/ca/replies_collective_redress_consultation_en.htm).

<sup>65</sup> See Albert A. Foer & Jonathan W. Cuneo, *Toward an Effective System of Private Enforcement* in Albert A. Foer & Jonathan W. Cuneo (eds) *The International Handbook on Private Enforcement of Competition Law* 605 (Edward Elgar Publishing 2010).

financially rather than through other altruistic and value-based factors), litigation will simply be an ineffective means of accessing rights.<sup>66</sup> As way of an example, the Enterprise Act 2002 s.19 inserted into the Competition Act 1998 a new section (s.47B) which provided for representative actions to be brought on behalf of consumers. Under this legislation, the Consumer Association, on behalf of a few hundred named individuals, brought proceedings against the retailer JJB Sports in a follow-on<sup>67</sup> action by the Office for Fair Trading regarding price-fixing on the supply of replica football shirts. The defendant settled, but the proportion of consumers who joined the case compared to the number of consumers affected was very small, and the value of the claim, compared to the costs of pursuing it, led to the Consumer Association remarking that it would not bring a similar opt-in action again.<sup>68</sup>

The alternative mechanism available is where the affected individuals will automatically form part of the collective action unless they declare and thereby affirm that they wish to be excluded. This is the 'opt-out' procedure. Each mechanism has its benefits and drawbacks, and in the consultation process undertaken by the Commission, and the feedback provided, the majority of respondents identified that the opt-in mechanism was their preferred choice. The opt-out mechanism is widely considered to be the more aggressive form of collective redress and may not be particularly apt for situations of consumer protection / antitrust violations. Hence, the overwhelming response in this respect by the respondents to the Commission's consultation exercise, and the resultant Recommendation, selected the 'opt-in' model. Of course, State Liability is a different proposition and given that individuals denied access to rights provided by the EU affects a clearly identifiable class (who by their nature share a commonality) – such as workers when the situation involves certain social policy laws – and the damages sustained will in many situations be similar / identical to all the members of that class, the opt-out model should be adopted (similar to that used in Denmark). It is ultimately more suitable for low value claims and where individuals are unlikely to be aware that their rights have been infringed or breached. This mechanism provides the most inclusive and appropriate approach to enable access to justice and promoting accountability, transparency and to incentivize compliance with EU obligations. Many citizens in the EU affected by the breach of the Member State are poorly placed to opt-in to a class action claim, they may have limited access to information, be socially isolated, or suffer health problems that can be exacerbated by the stress of individually pursuing a claim through the courts. Collective redress through a system of opt-out can reduce these problems.

## B. COLLECTIVE REDRESS – WHY NOT?

Criticisms of a system of collective redress, despite the existence of advantages to both individuals and the Commission in ensuring access to EU rights and holding to

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<sup>66</sup> *ibid* at 607-8.

<sup>67</sup> A follow-on action occurs where an infringement of competition law has been found by a competition authority (for example the European Commission and/or an industry-sector regulator). The claimant must, however, demonstrate how the claim relates to his/her own case. For further developments on this, and the boundaries for such claims, see Case C- 557/12 *Kone AG and others v ÖBB-Infrastruktur AG* 5<sup>th</sup> June 2014.

<sup>68</sup> As reported in The Law Society response to the EU Commission consultation document *Towards a Coherent European Approach to Collective Redress* (2011), 9-10. Available at [http://ec.europa.eu/dgs/health\\_consumer/dgs\\_consultations/ca/replies\\_collective\\_redress\\_consultation\\_en.htm](http://ec.europa.eu/dgs/health_consumer/dgs_consultations/ca/replies_collective_redress_consultation_en.htm).

account those responsible for breaches, are numerous. The main criticisms to its adoption in the EU, and particularly articulated in relation to anti-competition laws – but in some instances could be applied to State Liability generally, include the following.

*(I) THE US MODEL WILL BE MIRRORED IN THE EU*

The US is frequently presented as embodying the worst effects of a litigation culture<sup>69</sup> where lawyers provoke abusive claims<sup>70</sup> (unlikely to be successful at trial) and are the only ‘beneficiaries’ of class actions.<sup>71</sup> Lazy generalisations critiquing alternative methods of enforcement of rights are quite unhelpful when formulating a new paradigm of access to justice and it would be unwise to consider that claims that are unsuccessful or their outcome is uncertain are by their nature abusive. It is even more so when individuals affected by the current system are those often least able to protect themselves or to fund representation. It is without doubt that, in using the model of the US as a comparator, some cases will have been heard in the US courts which are without merit, which are abusive, and will be brought with the intent of a settlement to be reached to avoid the litigation costs/judgment and costs of discovery<sup>72</sup> and award of damages or due to the exposure to risk through multiple claimants / treble damages awards and associated legal fees.<sup>73</sup>

However, in reality there are few if any meaningful, empirical bases on which these arguments have been sustained. It is possible that meritless claims might be initiated by the inexperienced (lawyer or claimants) or those who wish for a public ‘day in court’. But this, along with abusive claims, can be effectively controlled through judicial examination of the case and subsequent management. Damages awards, in cases involving State Liability in the UK, based as they are on the hybrid tort of breach of statutory duty, are hence not subject to the award of punitive damages. The defendant in the case of State Liability actions will, naturally, be the State and therefore will not suffer the damage of adverse competition or cases being brought by a competitor seeking advantage through pursuing ‘nuisance’ claims. Fears that lawyers will merely take cases, which for individuals would be

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<sup>69</sup> See Deborah R. Hensler, Nicholas M. Pace, Bonnie Dombey-Moore, Elizabeth Giddens, Jennifer Gross & Erik Moller, *Class Action Dilemmas: Pursuing Public Goals for Private Gains* (RAND Institute for Civil Justice 2000) at 15-18, available at [http://www.rand.org/pubs/monograph\\_reports/MR969/index.html](http://www.rand.org/pubs/monograph_reports/MR969/index.html).

<sup>70</sup> For example, in the US, Rule 11 of the Federal Rules of Civil Procedure was established to ensure that claims presented in federal courts have merit (are not frivolous) and are not brought for an improper purpose - although see Julia K. Cowles, *Rule 11 of the Federal Rules of Civil Procedure and the Duty to Withdraw a Baseless Pleading*, 56 Fordham Law Review 697, 700 (1988) for a demonstration of the general lack of effectiveness of the Rule in deterring such claims and how US class action claims fails to lead to benefits to the claimants (consumers and citizens).

<sup>71</sup> Whilst it is frequently noted that private individuals to class action claims rarely obtain a meaningful remedy whilst lawyers representing the group obtain very large payments for their services, see Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and their Fee Awards*, 7 Journal of Empirical Legal Studies 811 (2010) and Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993-2008*, 7 Journal of Empirical Legal Studies 248, 262, 265 (2010) which demonstrated that lawyers’ fees were 12% for cases where recovery of damages exceeded \$175.5 million (and 23% for claims involving significant smaller awards).

<sup>72</sup> Referred to ‘nuisance settlements theory’, see Brief of the American Bar Association as Amicus Curiae in Support of Neither Petitioners Nor Respondents at 10-11, *Bell Atl. Corp. v Twombly*, 550 US 544 (2007) (No. 05-1126).

<sup>73</sup> Referred to as ‘hydraulic pressure theory’, see Charles B. Casper, *The Class Action Fairness Act’s Impact on Settlements*, 20 Antitrust 26 (2005).

uneconomic to pursue, and will lead to an opening of the floodgates, have not materialised in jurisdictions where collective redress is available. Further, to prevent some form of unjust enrichment or unethical practice being pursued, the UK could adopt a 'cy pres' system where residual money from the award of damages can be used in specified mechanisms to assist in achieving the aims of the claim (i.e. the basis of the action), as opposed to being returned to the defendant or being retained by the lawyers.

The legal systems of the US compared with those within the EU are different and the procedural rules in which they operate are sufficiently distinct to prevent any potential for reflected negative consequences. Juries do not assess the quantum of damages, members of the judiciary are not elected, contingency fee arrangements limit the fees recoverable by lawyers and damages are based on losses incurred in prescribed areas. As such, concerns that the Member States in the EU will find their legal systems inundated with spurious and speculative claims appear unfounded.

The Commission recognised the potential problem of directly following the US model (or attracting unfavourable comparisons) and as such suggested use of an opt-in model in its Recommendation which necessitates a deliberate action to become a party to the class of litigants in the case. The UK's Consumer Rights Act 2015,<sup>74</sup> however, despite the arguments presented above, enables collective redress in anti-competitive / anti-trust cases<sup>75</sup> following a more 'radical' opt-out model.<sup>76</sup> Not only does the UK appear to be leading the way in this regard, fears of developing a US-style litigation culture seem to be ill-founded.

## *(II) THE AGGREGATION AND AMPLIFICATION EFFECT*

Opponents to the use of collective redress often point to the existence of the aggregation effect<sup>77</sup> and the resultant possibility of abuse. Collective redress enables individuals who would otherwise be unable to seek access to their rights due to the limitations of high costs and low financial 'rewards' to challenge wrongdoing. However, it is argued, this aggregation (including possibly tens / hundreds of thousands of weak claims) may in effect change substantive rights due to defendants settling claims where the mere possibility of an adverse ruling could result in potentially significant compensation payments (regardless of the merits of the claim); and, it is argued from a consumer / antitrust perspective, that such aggregation may result in a disincentive for firms to operate businesses in a Member State where they could be exposed to collective redress claims and be subject to expensive litigation. This would be to the detriment of the citizens of the Member State who benefit from the legitimate activities of businesses but which may choose not to operate in the Member State due to this fear.

However, collective redress, despite the aggregation effect, does have the ability to persuade the defendant to seek the use of alternative forms of dispute resolution and/or the settlement of the claims prior to court action on the basis of the improved bargaining position achieved by the claimants.

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<sup>74</sup> Which gives effect to the provisions of the Recommendation regarding collective redress in relation to breach of anti-trust / competition laws.

<sup>75</sup> See Schedule 8, Part 1.

<sup>76</sup> A limited right for representative groups / trade associations to take action on behalf of consumers, on an opt-out basis, through an amended Competition Act 1998 (s.47B).

<sup>77</sup> See Richard A. Epstein, *Class Actions: Aggregation, Amplification and Distortion*, University of Chicago Legal Forum, 475 (2003).

Through the aggregation of claimants' loss, individuals may have suffered greater or lesser loss but are still part of the same collective action. This is true in relation to anti-competitive laws, but the disparity in redress through damages becomes more apparent when considered in the wider context of EU law generally, and particularly in social policy laws where, for example, protective awards are made in relation to the lack of effective consultation prior to redundancies,<sup>78</sup> potential breaches of an individual's right to enforce a maximum working week,<sup>79</sup> and, of much greater significance in this regard, an individual who may have suffered some form of discrimination at work.<sup>80</sup> Where these breaches are effective due to inaction or incorrect transposition of EU law by a Member State, aggregating losses sustained through adherence to strict quantification criteria could prove to be problematic, and further, where there are potentially many thousands of individuals affected, the prospective claim for damages against the State could be so prohibitively expensive, that a court would not feel capable of imposing such a judgment. Indeed, potential losses sustained through the breach of EU law and where the Member State is considered liable under torts law, could dwarf any fine or imposition of sanctions available to the EU. A safeguard, which would by necessity have to be incorporated into any such enforcement mechanism, would be the discretion of the courts to reject legal actions or to limit the maximum compensation awarded. That of course leads to the unenviable situation whereby the greater the damage sustained by individuals and the more flagrant abuse by a recalcitrant Member State, the less likely that full damages would be available.

Under the existing system of individual actions, such claims will, by necessity, be heard in different courts with the possible and likely result that different conclusions (judgments) will be drawn between the various court cases. This leads to a reduction in any (rolled-up) awards being made against the defendant. With collective redress, the individual claims are collated into a single action with the 'gamble' for the defendant that an adverse ruling could have financially devastating results (the amplification effect). The UK Competition Law Association cite the US case *Rhone-Poulenc* where Judge Posner remarked on the situation where perhaps as few as 8% of the claimants in this class action would likely satisfy the tests to establish the liability of the defendant and there was 'great likelihood that the plaintiffs' claims... lack(ed) legal merit.'<sup>81</sup> However, the US Supreme Court acknowledged the significance of class actions as a mechanism to facilitate claimants to pool resources, they are 'peculiarly appropriate' where the 'issues involved are common to the class as a whole'<sup>82</sup> and they enable an 'opportunity to save the enormous transaction costs of piecemeal litigation.'<sup>83</sup>

### (III) DETERRENCE DOES NOT WORK

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<sup>78</sup> *USDAW v Ethel Austin Ltd (In Administration)* [2013] UKEAT/0547/12/KN, and *USDAW and Wilson v Unite the Union, WW Realisation 1 Ltd and Secretary of State for Business, Innovation & Skills* [2013] UKEAT/0548/12/KN.

<sup>79</sup> Case C-484/04 *Commission v United Kingdom* [2006] IRLR 888.

<sup>80</sup> Compare the approaches taken in *Rowstock Ltd v Jesseme* [2013] ICR 807 and *Onu v Akwivu & Anor* [2013] ICR 1039 and the necessity of judicial acrobatics to comply with EU law.

<sup>81</sup> UK Competition Law Association (2011) *Response to European Commission's Consultation on Collective Redress* [www.competitionlawassociation.com](http://www.competitionlawassociation.com) (ukmatters: 18238974.3) April, 2.3(b).

<sup>82</sup> *Califano v Yamasaki*, 442 US 682, 701 (1979).

<sup>83</sup> *Ortiz v Fibreboard Corp.*, 527 US 815, 860 (1999).

One of the main arguments for collective redress being applied to cases of State Liability is the ability of individuals to access their rights, and to deter Member States from breaching their EU obligations. A cautionary note regarding the efficacy of the deterrence effect of collective redress can be seen when considered from the perspective of the developments in consumer protection and anti-trust actions. Hodges remarks that:

most of the UK cases have involved industries that are already heavily regulated.<sup>84</sup> There is no evidence in those cases that regulation was inappropriate or ineffective or that the corporations would have acted any differently at the relevant times. If that is so, the argument for indirect regulation by threat of litigation, as a complementary mechanism to direct regulation... looks weak, unnecessarily duplicative, and wasteful of resources. If litigation does produce change, it seems to be a very costly way of doing so.<sup>85</sup>

This argument has been challenged in the US courts,<sup>86</sup> but it is also true that deterrence may 'remain far from optimal due to three remaining problems: the rational apathy on the side of individual victims (in particular, those who suffered trifle damage), problems to finance the claim and the risk of free-riding, which may equally reduce the number of claims brought below the efficient level.'<sup>87</sup> Further, whilst industries may be regulated, transposition of directives remains the duty of the State and inaction or misapplication in this area negatively impacts on an individual who is dependent on an accessible legal system through which to seek redress. The distinct nature of State Liability in this respect negates the arguments relating to the ineffectiveness of deterrence in collective actions.

### C. COLLECTIVE REDRESS AND DETERRENCE

A significant argument for the adoption of a form of collective redress against Member States, and not simply limited to cases of anti-trust / competition laws, is that Member States are charged with the responsibility of transposing correctly and on time EU laws in the form of directives. There are mechanisms in place to protect a Member State that innocently fails in the correct transposition, and the EU provides Member States with sufficient time in order to comply with the judicious transposition of the law. Given the safeguards, Member States that fail in their duty should be subject to sanctions and these have traditionally been through complaints

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<sup>84</sup> This is true, but it is also quite evident that public methods of fining companies for breaches of the law have, often, been largely ineffective in controlling bad behavior, have not led to a deterrence to many large companies, and there is certainly not an over-deterrence that some commentators have suggested could be the ultimate result of regulation through collective redress. See Centre for European Policy Studies et al., *Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios*, at 28, Contract DG Comp/2006/A3/012 final (Dec. 21, 2007).

<sup>85</sup> Christopher Hodges, *Multi-Party Actions: A European Approach*, *Duke Journal of Comparative and International Law* 321, 341 (2001).

<sup>86</sup> To counteract the potential problems of the deterrence effect of collective redress, the US Supreme Court identified that 'the purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws' *Zenith Radio Corp. v Hazeltine Research, Inc.* 395 US 100, 130-31 (1969).

<sup>87</sup> Centre for European Policy Studies et al., *Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios*, at 28, Contract DG Comp/2006/A3/012 final (Dec. 21, 2007), 301.



procedures initiated by or through the Commission. Member States will be aware that sanctions for breach of EU law have traditionally been limited, the Commission lacks in many cases the ability and resources to effectively monitor 28 Member States and the plethora of laws and legal areas in which the EU has competence, and enforcement by individuals through State Liability has been established since 1991, but relatively few cases have been brought before the courts and even fewer have been successful.<sup>88</sup> Indeed it is well remembered that Mr Francovich failed in his own seminal case of establishing State Liability.<sup>89</sup> Given these few examples provided to illustrate the limitations of the effectiveness of State Liability as a means of ensuring compliance with EU law, is it any wonder that Member States may take a rational view that where compliance with EU law may be ideologically, politically or financially repugnant, the sanctions for breach (if and when such a breach is discovered and actioned) would not dissuade them from such activity? Collective redress enables a mechanism of cost-internalisation for the wrong-doer to exist which is necessary as currently, there is little in the way of practical deterrence<sup>90</sup> that would compel a Member State to comply with its EU obligations against its will or judgement. This follows the optimal deterrence model established by Gary Becker who identified the cost that deterrence requires from both public and private resources, but such costs have to be addressed in relation to the seriousness of the breach and its effects on society.<sup>91</sup> This is by the very nature of the model, the optimal aspect. 100% compliance with the law by a Member State is unlikely, if at all possible (or indeed desirable - it may prove to be inefficient to devote the necessary resources to provide compliance at this level). What is required is enforcement that provides an equilibrium between the costs and benefits to the individuals, society, the Member States and the EU as a collective body. The consensus<sup>92</sup> appears to be, however, that whilst deterrence is an important aspect of collective redress,<sup>93</sup> this should not extend to the award of punitive damages.<sup>94</sup> It has been remarked that

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<sup>88</sup> See fn. 23.

<sup>89</sup> Here, Francovich used a domestic industrial relations, rather than a more appropriate civil claims, procedure – although the Italian legal system appeared not to know which was the designated procedure to use in such a case.

<sup>90</sup> Deterrence can be exhibited in many ways, including negative publicity and the effects on reputation, whilst also encompassing financial penalties which may have a broader effect on private organisations involved in wrongdoing. As a way of an example of the effectiveness of this second example of the deterrent effect of collective interests, Lande and Davis, citing results of an empirical research project involving 40 private anti-trust class-action claims in the US, found that the amounts recovered in damages by private individuals exceeded the aggregate amount of fines imposed by public bodies in the same period of time. Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 University of San Francisco Law Review 879, 906 (2008).

<sup>91</sup> See Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 Yale Law Journal 347 (2003).

<sup>92</sup> However – see Francis E. McGovern, *Punitive Damages and Class Actions*, 70 Louisiana Law Review 435, 462 (2010) for an opposite view ‘Whether called “economic,” “extra compensatory,” “exemplary,” or “punitive,” these global damages would result in tortious defendants being held responsible for all the harm they cause rather than only the subset of harm calculated from the damages won by opportunistic plaintiffs.’

<sup>93</sup> It is seen as a mechanism not so concerned with the compensation of claimants’ losses but principally aimed at retribution and deterring wrongful / harmful conduct – *Exxon Shipping Co. v Baker*, 128 Ct. 2605, 2621 (2008).

<sup>94</sup> Punitive damages should only be awarded in cases where the defendant’s actions have been so reprehensible as to warrant ‘advanced’ sanction and punishment - *State Farm Mut. Auto Ins. Co. v Campbell*, 538 U.S. 408, 427 (2003).

punitive damages is analogous with the fines imposed following conviction of a criminal offence.<sup>95</sup>

It is also feasible that without appropriate redress and sanctioning of the wrong-doer, the wrong-doing activities are continued and a state of underdeterrence is established. Examples of continued incorrect transposition of directives by the UK are numerous and the inability of redress through State Liability has perpetuated this state of affairs. McGovern<sup>96</sup> provides an overview of this problem and demonstrates the various difficulties that belie the availability of State Liability in its use and effect:

A problem of underdeterrence can arise in the context of mass tortious activity... From the perspective of society as a whole, if a defendant faces litigation from only ten to twenty percent of the plaintiffs who are tortiously harmed—a normal range of lawsuit filings—then that defendant will underinvest... because it is not fully benefitting from the avoidance of liability resulting from an optimal investment. If only twenty percent of injured plaintiffs sue, then the defendants will be responsible for only twenty percent of the damages and will, therefore, invest less... to correspond with the lower benefit of the avoided [incident].<sup>97</sup>

There have been relatively few cases of State Liability actions in the UK since 1991, and even where cases have been successfully argued, awards of damages are applied to the individual claimant. If one takes social policy law as an example, EU social policy directives often affect many millions of workers in the UK, the UK government may not be particularly concerned over potential legal action for its breach of the law under the current structure of procedural limitations, court fees and requirement that each claimant brings his or her claim individually. Collective redress, particularly one adopting an opt-out model, may redress this imbalance by facilitating cases more readily through the courts and any subsequent award of damages against the defaulting State could be multiplied many thousands of times to the class of claimants to the action. Collective redress could prove to be a substantial weapon in defending individual workers' rights.

## V. GIVING EFFECT TO COLLECTIVE REDRESS IN STATE LIABILITY

To begin, a significant issue to overcome in adopting a system of collective redress in State Liability is of ensuring adherence to the principles of primacy and national procedural autonomy. EU law is supreme over inconsistent domestic law (EU law has primacy) although the application of EU law has been decentralised to the Member States. Individuals enjoy the right to claim compensation for breaches of EU law but the details of facilitating such claims are subject to national procedural law. The concern occurs where there is friction between the requirement to adhere to EU law and any existing national procedure which may prevent its effective application. In an attempt to avoid obvious tensions that may exist, the Court of Justice has conditioned the use of national procedural rules to comply with EU law on the basis of the principles of equivalence and effectiveness. Equivalence requires that national procedural rules governing a dispute with an EU law dimension may not be less favourable than those governing domestic disputes. As effectiveness necessitates

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<sup>95</sup> *Browning- Ferris Indus. of Vt., Inc. v Kelco Disposal*, 492 U.S. 257, 275 (1989).

<sup>96</sup> Fn 92.

<sup>97</sup> *ibid* at 452-453.

the right to effective judicial protection,<sup>98</sup> individuals must have access to the application of EU law, and appropriate systems of judicial review and supervision. The principle of effectiveness has led to issues relating to access to courts and judicial proceedings,<sup>99</sup> legal aid,<sup>100</sup> national rules on standing,<sup>101</sup> and the use of mandatory out-of-court dispute resolution procedures<sup>102</sup> (to name but a few). It is clear that effectiveness enjoys a broad approach in interpretation by the Court of Justice, and this may extend to effective access where individual litigation may prove practically inaccessible.

Therefore, it is reasonable to conclude that the current system of access to EU law and to domestic remedies exists. Primacy of EU law in this regard is not in question, it is the application of national rules, along with national procedural autonomy, that is being examined. There is no denying that an individual with sufficient resources, be that personal or through association with a supporting body, has the ability to seek damages against a Member State for breach of EU law. What has been presented so far is a brief overview of the potential problems that exist for individuals seeking access to courts and access to awards of damages. This is not the same as what has been termed a direct collision between EU law and national procedural rules. Rather, this exemplifies the indirect collision whereby national procedural rules can essentially hinder the effect of access to EU law. Primacy<sup>103</sup> does not provide an adequate solution as there is no incompatibility of national law which can be set aside to give greater access and effectiveness to the EU law sought. Therefore the argument being presented requires the assistance and cooperation of Member States to give greater effectiveness to EU law through national courts. This has been achieved through the Commission Recommendation in relation to collective redress for anti-competitive behaviour, and it is possible that Member States, in good faith, could realise the effectiveness of damages for individuals affected by the breach of EU law through its own action or inaction, and given the strict and literal approach to future transposition to be taken, as promised by the government, it would by necessity only be the most flagrant breaches of EU law which would satisfy the 'sufficiently serious breach' to establish the culpability of the State and the award of damages.

If a system of collective redress can overcome a major barrier to the accessibility of State Liability, with its power to compel action on the part of Member States whilst deterring malpractice or intransigence, what form should it take? Three bodies that could take the necessary action are the Commission, the Member States themselves, or the Court of Justice. Using a legislative or case law approach, each would have benefits and drawbacks, and whilst it is beyond the scope of this article

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<sup>98</sup> Sacha Prechal & Rob J.G.M. Widdershoven, *Effectiveness or Effective Judicial Protection: A Poorly Articulated Relationship*, in: Tristan Baumé et al. (eds.), *Today's Multi-layered Legal Order: Current Issues and Perspectives*, 283 (Zutphen: Paris 2011).

<sup>99</sup> Case C-268/06 *Impact v Minister for Agriculture and Food and others* [2008] E.C.R. I-2483.

<sup>100</sup> Case C-279/09 *DEB v Germany* [2010] E.C.R. I-13849.

<sup>101</sup> Case C-12/08 *Mono Car Styling SA (in liquidation) v Odemis and others* [2009] E.C.R. I-6653.

<sup>102</sup> Joined Cases C-317/08 to C-320/08 *Alassini and Others v Telecom Italia* [2010] E.C.R. I-2213, and Case C-418/11 *Texdata Software GmbH* [2013] ECR I-0000.

<sup>103</sup> For a broader discussion of primacy and procedural autonomy see René Barents, *The Precedence of EU Law from the Perspective of Constitutional Pluralism*, 5 *European Constitutional Law Review*, 5, 421 (2009), and Koen Lenaerts & Tim Cortbaut, *Of Birds and Hedges: the Role of Primacy in Invoking Norms of EU Law*, 31 *European Law Review*, 287 (2006).

to critique each in the depth necessary to do justice to such discussion,<sup>104</sup> it is sufficient at this point to outline the most significant aspects.

The most likely form collective redress would take is through legislative action from the Commission (supported by subsequent judicial action through the Court of Justice and national courts). As has been seen, in respect of competition law and the protection of consumers, the Commission had identified problems in the availability of damages and enforcement generally:

despite the requirement to establish an effective legal framework turning exercising the right to damages into a realistic possibility, and although there have recently been some signs of improvement in certain Member States, to date in practice victims of EC anti-trust infringements only rarely obtain reparation for the harm suffered.<sup>105</sup>

The Commission called<sup>106</sup> for Member States to introduce a system of injunctive and compensatory collective redress mechanisms in domestic law with a deadline of July 26, 2015. Being a Recommendation, and requesting implementation, did not establish any compulsion on Member States to transpose this initiative into domestic law. However, the Commission stated that it would evaluate the status of collective redress laws in the Member States after a four-year period. Even at this stage, given the details provided by the Commission and the request for Member States to adopt this Recommendation, it is considered to be a mere intermediate step<sup>107</sup> and that certainly within the four-year period, the Commission will be establishing a directive to ensure collective redress is part of the legal systems of Member States when protecting consumers generally and anti-trust / competition laws in particular. Many Member States already had collective redress mechanisms in place in their legal systems prior to the Recommendation and, unsurprisingly, there has been a quiet acceptance to the aims of the Commission in this regard. On 12 June 2013, following the Recommendation, the UK began consultation on its draft Consumer Rights Bill which, among others, sought to establish a system of enforcement of consumer and competition laws utilising, in part, collective redress (and collective settlement) as a vehicle for access to justice.

This form of collective redress was realised in England and Wales in 2015 through the Consumer Rights Act. This is a very positive first step, and through utilising an opt-out model, it demonstrates a movement towards seeing the value of collective redress in combating wrong-doing, providing access to justice, and deterring actions which seek to provide a competitive advantage deriving from malfeasance or abuse. The government was not obliged to follow the Recommendation, and the fact that both the EU and the UK have voluntarily entered into the spirit of access to rights and access to justice through a mechanism of collective redress, albeit in relation to competition laws, must be viewed as a potential willingness to progress this to other areas. The opt-out model chosen by the UK in Schedule 8 of the Consumer Rights Act to transpose the

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<sup>104</sup> Such detailed discussion will be provided in the second part to this article.

<sup>105</sup> White Paper on Damages Actions for Breach of the EC Antitrust Rules COM (2008) 165 final (2 April 2008) 1.1, at [2].

<sup>106</sup> Draft Commission Recommendation on common principles for injunction and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, C (2013) 3539/3, 11 June 2013.

<sup>107</sup> As the Recommendation procedure is not binding, but is of politically persuasive force.

Recommendation, offers potentially greater benefits for individuals (and competitors) than may have been achieved through an opt-in model. Deterrence will likely be greater, as will facilitating the functioning of the internal market.

#### A. ESTABLISHING THE RULES OF COLLECTIVE ACTIONS IN STATE LIABILITY

Extending the argument for collective redress to State Liability will necessitate legislative action by the EU rather than relying on the Member States or indeed the Court of Justice to take up such an initiative. Member States would and have demonstrated differing approaches to such access, and whilst they may be willing to accede to the necessity for collective redress when preventing the worst examples of anti-competitive behavior, whether Member States would willingly establish a system which makes it easier for claims against them due to their own transgression of EU law is unlikely at best. A Regulation or directive would be required to compel adherence and 'acceptance' of a system of collective redress in this area.

Further, collective redress would likely be subject to limitations and restrictions on the bodies empowered to bring such claims; be subject to strict deadlines;<sup>108</sup> rules of quantification and limitations to the awards of damages would be essential for the efficacy of a system of collective redress in areas of competence such as social policy; and it would have to require Member States to provide access to documents and evidence regarding consultations and discussion<sup>109</sup> culminating in the transposition of a directive – subject to a balancing of the rights and legitimate interests of the State and the claimants (possibly exercised by the Court of Justice).<sup>110</sup> Despite the discovery rules in England and Wales which are broad, especially when compared to the requirements established by the Commission in relation to anti-competition enforcement, it may also necessitate the adoption of an exception to the general rules on burden of proof by adopting legal presumption. This situation would benefit the claimants who may not have access to materials and evidence<sup>111</sup> through which to substantiate a prima facie assertion – although the presumption is defeated through (even weak) evidence. Finally, collective redress would be governed through the application of strict procedural rules to ensure control of the activities of claimants and their representatives.<sup>112</sup>

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<sup>108</sup> Such as an EU-based, not less than five-year, limitation period in which claims may be lodged, given the disparity in limitation periods for damages actions between the Member States.

<sup>109</sup> Although, given the often long periods between enactment of a national implementing law and a subsequent analysis of judicial enquiry in a related claim, gathering sufficient information to demonstrate the State's deliberate non-compliance can be problematic – see *Delaney v Secretary of State* [2014] EWHC 1785 (QB) paras 94-101.

<sup>110</sup> Per Case C-536-11 *Bundeswettbewerbshorde v Donau Chemie AG and others* (2013) E.C.R. I-0000, paras 46 and 47.

<sup>111</sup> In an opinion delivered on 7 February 2013 in *Donau Chemie* (n 89) A-G Jääskinen stated: '... the principle of effective judicial protection laid down in Article 47 of the Charter comprises various elements; in particular, the rights of the defence, the principle of equality of arms, the right of access to a tribunal and the right to be advised, defended and represented... Hence, limiting availability of critical evidential material undermines the right of litigants to a judicial determination of their dispute. It also impacts on their rights to bring cases effectively.' (paras 52 and 53).

<sup>112</sup> As in the US, for example, with the US Federal Rules of Civil Procedure which at Rule 23(a) provides for the satisfaction of four criteria applicable to all class action claims (see *Amchem Prods. v Windsor*, 521 US 591, 613 (1997): 1) the numerosity of the class; a commonality of the class in relation to questions of law or fact; 3) a typicality of the class members' claim; and 4) adequacy of the legal representation afforded the members of the class in relation to their interests.

In relation to those rules necessary to substantiate claims, it is likely that rules similar to those established for anti-competition law,<sup>113</sup> based as they are on a breach of statutory duty, would be followed. This has been particularly successful in areas such as enforcement and obtaining damages in workplace health and safety.<sup>114</sup> Having breached the statutory duty (due to non- or (sufficiently serious) incorrect transposition) which has caused the claimants damage/loss (through denial of protective employment rights for example), the first two tests are satisfied. The remaining tests require the claimant to establish that the legislator intended to create a private right of action and fourthly, that the statute sought to protect the victim against the damage suffered.

Despite the objection of using breach of statutory duty to facilitate the award of a civil remedy for a failing on the part of a legislator, which may for example cause 'an undesirable potential for conflict between governmental discretion and the private right of enforcement',<sup>115</sup> a Member State has the capacity to safeguard its position and limit exposure to unreasonable and unsustainable damages actions by multiple claimants. It may choose to explicitly avoid the award of damages (unless unequivocally provided for in the relevant EU parent law) by placing into the transposing legislation, and making available, a system of compensation or other remedies which are 'no less accessible'. This would thus avoid the requirement for State Liability claims from the outset by making an alternative form of remedy available to all (multiple) claimants. Protection in this area has also been provided to Member States where, for example, broad discretion as to the requirements of transposition of EU law is present.<sup>116</sup> In *Dillenkofer v Federal Republic of Germany*,<sup>117</sup> as there was little doubt what the directive required, the fact that Germany failed in its transposition duties resulted in a finding of liability on the part of the State due to the lack of discretion. Further, where the State has made a genuine, albeit mistaken attempt at transposition, liability will not be established unless the misunderstanding was cynical or egregious.<sup>118</sup>

A successful claim of breach of statutory duty requires satisfaction of the test that the relevant statute intended to protect victims against the kind of damage suffered. Claimants seeking redress under laws established through the EU's social policy competence, for example, are likely to be well placed to demonstrate they fall under the specific class of persons to whom legislation sought to protect. Further, establishing that claimants possessed the standing for the purposes of satisfying the requirement of being in a class who are protected from the kind of damage suffered is not subject to a maximum, hence multiple claimants seeking collective redress in one legal action would not be a bar to a claim,<sup>119</sup> insofar as they are an ascertainable

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<sup>113</sup> J. S. Davidson 'Actions for Damages in the English Courts for Breach of EEC Competition Law' (1985) 34(1) *International and Comparative Law Quarterly* 183.

<sup>114</sup> Margaret Fordham, *Breach of Statutory Duty: A Diminishing Tort*, Singapore Journal of Legal Studies 370 (1996).

<sup>115</sup> Barry J. Rodger & Angus MacCulloch, *Community Competition Law Enforcement, Deregulation and Re-regulation: The Commission, National Authorities and Private Enforcement*, 4(3) Columbia Journal of European Law 610 (1998).

<sup>116</sup> See Case C-392/93 *R v HM Treasury, ex parte BT* [1996] QB 615) and the commentary of the Court of Justice in *Brasserie du Pêcheur* (see paras 43 and 44).

<sup>117</sup> Joined Cases C-178, 179 and 188-190/94 *Dillenkofer v Federal Republic of Germany* [1996] E.C.R. I-4845.

<sup>118</sup> See *R (on the application of Negassi) v Secretary of State for the Home Department* [2013] EWCA Civ 15.

<sup>119</sup> *Roe v Sheffield City Council* [2004] QB 653.

class. The final issue, and most problematic, is of the specific head of damages. This will likely prove to be the most significant issue for collective redress through breach of statutory duty. Awards of damages as compensation for physical injury are not uncommon, whereas awards for economic losses have generally been much more restrictive,<sup>120</sup> and will likely be the only remedy sought for the State's Liability in transposing EU law. Foreseeability and remoteness have effectively limited the extension of economic losses as being recoverable in isolation of physical loss (which is deemed foreseeable) for many reasons, the floodgates argument being central to limiting the number of claimants and the defendant's exposure to risk (which would be significant in cases involving social policy laws and workers) and that economic loss involves an unreasonable level of speculation. To remove any uncertainty, and the associated 'speculative' dimension to economic loss, legislative action would remove doubt and establish clear rules regarding its application throughout the Member States. *Crehan*<sup>121</sup> established the English courts approach to bending the rules regarding the requirement of foreseeability to facilitate a successful claim for economic loss. Similarly, the Commission could also legislate to enable discretion for national courts to find recovery for economic loss and to enable their calculation of any subsequent awards to be based on factual circumstances.

As has been demonstrated in this article, there are several examples of the limited effectiveness of State Liability in its current form. This is despite the judicial activism of the Court of Justice. The Commission, by assessing the impact of the Recommendation, and in subsequently developing the expected directive on collective redress for breaches of competition law, has demonstrated a willingness to legislate. This is despite the potential constitutional problems this may present. More broadly than the UK, there are potential problems for some Member States<sup>122</sup> in the nature of a general system of collective redress which binds individuals to a legal action and subsequent judgment to which they did not take part, make any outward step in which to be involved, and in which the individual did not have the possibility to intervene. The opt-out model is certainly a welcome movement by the UK and would be a necessity when introducing collective redress for State Liability. The traditional *inter partes* method of litigation needs to be reassessed when considering an effective means of holding the State to account for breaches of EU law and whilst constitutional rights may be impinged, and associated complexity would be introduced through opt-out claims, the benefits for individuals, largely denied any meaningful access to State Liability and reliant as they currently are on action through the Commission to hold a Member State to account, outweigh these potential problems. This point is not made flippantly, but a new paradigm for effective rights management and enforcement is required if the new legal order of the EU,<sup>123</sup> first enshrined in 1963, is to be effected across the Member States.

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<sup>120</sup> In torts if not contract, as famously seen in *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] 1 QB 27 which demonstrates the requirement for economic losses as recoverable when associated with physical loss. However, *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 stands as the exception here.

<sup>121</sup> *Crehan v Inntreprenneur Pub Co* [2004] EWCA Civ 637.

<sup>122</sup> For example the German Constitution where no general collective redress mechanism exists. The German Code of Civil Procedure is focused on two party claims although an opt-out settlement system was inserted into the Capital Market Model Claims Act (*Kapitalanleger - Musterverfahrensgesetz* (KapMuG)).

<sup>123</sup> Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] E.C.R. 1, [1963] CMLR 105.

With the Commission's Recommendation, and the subsequent UK response through the Consumer Rights Act 2015, it appears a definite move towards collective protection and enabling greater access to justice is taking place. The UK has gone further than necessary to hold wrong-doers in the field of competition law to account and facilitate a class of affected individuals' access to their rights. It can only be hoped that in applying these strict standards of behaviour to such entities operating in the UK, and establishing an ease of access to available enforcement mechanisms, the government is equally willing to accede to future calls for collective redress in State Liability, potentially against itself.

## VI. CONCLUSIONS

This article has sought to identify a path to justice for individuals affected by a breach of EU obligations of a Member State. To facilitate State Liability's use and evolution from a damages-only action through tortious liability, to becoming a viable enforcement mechanism, the need for a system of collective redress to be made available is crucial. Using the collective redress model established in the Commission's Recommendation in 2011 as the basis for extending the argument that political will may be present from the actions of the Commission and the Member States to facilitate access to justice through collective redress, it has been argued that extending this principle to State Liability as a genus, but on a sectoral basis, would provide both benefits of redress and access, whilst fulfilling the EU's requirement that Member States adhere to their obligations. There are no legal or political bars to prevent the extension of collective redress to State Liability, the fears that collective redress will lead to the establishing of a litigation culture and abusive legal system across the EU are ill-founded, and Member States appear to be amenable to the concept and exercise of collective redress as a system of facilitating private enforcement of EU law.

Individuals who are denied rights granted through the membership of the EU must have an appropriately accessible and transparent system of redress available. Many individuals lack the social and economic power to secure their EU rights, and were this not the case, the system of EU law reporting and education, in the UK at least, makes awareness of laws and existing sources of help limited, disjointed and prohibitory. Individuals are also affected in their daily lives by EU rights (perhaps most visible to them through social policy initiatives) which, when denied through inadequate action on behalf of the State, profoundly and adversely affect their lives, but may be difficult to quantify financially. This makes the system of redress through State Liability as a mere damages action restrictive, largely inappropriate, but presently necessary. The consequential deterrence effect of many, albeit individually financially insignificant joined cases, may be witnessed when awards are provided to a class of claimants such as workers. The collective effect of such damages payments may serve as the necessary incentive for a State to correctly, and on-time, transpose EU directives.

The cost/benefit ratio of the necessary changes to the Member States' legal systems requires close examination, but it appears, *prima facie*, to be worth the resource investment by the Commission to remedy the current limited effectiveness of State Liability. Data is needed as relatively little research has been conducted that conclusively substantiates the economic benefit for the introduction of collective



actions in State Liability.<sup>124</sup> However, the advantages of making EU rights accessible, creating a transparent system of redress and limiting the opportunities for a wrong-doing State from benefiting therefrom, certainly provides substantial advantages in ensuring EU law is followed and made available to those who are often the most vulnerable in society.

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<sup>124</sup> Although such a methodology has been established and applied to collective redress in consumer protection – see European Commission – DG SANCO ‘Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union’ Final Report. *Part I: Main Report Submitted by: Civic Consulting (Lead) and Oxford Economics* (available at [http://ec.europa.eu/consumers/redress\\_cons/finalreportevaluationstudypart1-final2008-11-26.pdf](http://ec.europa.eu/consumers/redress_cons/finalreportevaluationstudypart1-final2008-11-26.pdf)) at [136].