

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

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### INTRODUCTION

Private antitrust litigation has always played a major role in the United States, making private litigants the primary enforcers of antitrust rules. Even when the antitrust agencies (i.e., the Antitrust Division of the Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”)) intervene, their decisions (in the case of the FTC) or the judgments that result from their intervention (in the case of the DOJ) often generate subsequent litigation where private plaintiffs seek to obtain damages from antitrust infringers.<sup>1</sup>

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

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<sup>1</sup> See, e.g., Douglas H. Ginsburg, *Comparing Antitrust Enforcement in the United States and Europe*, 1 J. COMPETITION L. & ECON. 427, 429 (2005) (quoting 15 U.S.C. § 15(a) (2000) (providing that persons injured by antitrust violations may recover treble damages in federal district courts)) (citing 15 U.S.C. § 26 (2000) (providing that persons so injured may seek injunctions in federal district courts and recover costs and attorneys’ fees)).

<sup>2</sup> Directive 2014/104, of the European Parliament and the Council of 26 November 2014 on Certain Rules Governing Actions for Damages Under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union, 2014 O.J. (L 349) 1 [hereinafter Damages Directive].

<sup>3</sup> Reena A. Gambhir, *Private Enforcement and Damages Directive: The Claimant’s Perspective*, PowerPoint Presentation Delivered at the George Mason Law Review’s 18th Annual Antitrust Symposium (Feb. 19, 2015) (on file with author).

Collective redress mechanisms are also being developed in the EU as a number of Member States have adopted statutes providing for such mechanisms. In 2013, the Commission adopted a Collective Redress Recommendation on common principles for injunctive and compensatory collective redress mechanisms concerning violations of rights granted under EU law (“Recommendation”).<sup>4</sup> This Recommendation not only covers breach of rights under EU competition law, but also covers EU legislation in the fields of consumer protection, environment protection, protection of personal data, financial services legislation, and investor protection. The Recommendation takes a conservative approach to collective redress, largely due to the fear that Member States may adopt mechanisms that trigger unmeritorious litigation. Many in the EU believe that the U.S. class action regime has led to excessive litigation by entrepreneurial lawyers that, in the end, produce limited benefits to victims while creating significant costs to society.<sup>5</sup> As will be seen, however, this view is questionable because U.S. district courts, which must certify class actions, have recently exercised a more rigorous analysis of the claims presented to them.<sup>6</sup> In addition, by opting for an “opt in” regime and the “loser pays” principle, while not authorizing contingency fees and punitive damages, the Recommendation may have made it harder for victims with small claims (i.e., individual consumers that have been overcharged for goods) to obtain compensation for the harm suffered.<sup>7</sup>

Against this background, this short essay discusses the Commission’s Recommendation along with the various national legislative measures that address collective redress mechanisms and contrasts these initiatives with the U.S. class action system. Part I briefly discusses the main features of the Damages Directive in order to set the framework under which private damages actions will develop in the EU. Part II then summarizes the main features of the U.S. class action regime and contrasts this regime with the approach proposed by the Commission in its Recommendation on collective redress. Part II argues that the Recommendation takes an excessively cautious attitude that, if followed by the Member States, will likely impede rather than enhance redress for small claims in the future. Part II concludes by discussing the recently adopted U.K. Consumer Act, which is the most ambitious collective regime adopted so far.

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<sup>4</sup> Commission Recommendation of 11 June 2013 on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted under Union Law, 2013 O.J. (L 201) 60 [hereinafter Redress Recommendation].

<sup>5</sup> See Samuel Issacharoff & Geoffrey P. Miller, *Will Aggregate Litigation Come to Europe?*, 62 VAND. L. REV. 179, 180 (2009).

<sup>6</sup> See *infra* Part II.A.

<sup>7</sup> See *infra* Part II.B.

## I. THE EU DIRECTIVE ON ACTIONS FOR DAMAGES FROM COMPETITION LAW INFRINGEMENTS

Europe's journey towards encouraging and facilitating private antitrust claims essentially started with the Court of Justice of the EU's ("CJEU") ruling in the *Crehan* case in 2001.<sup>8</sup> In *Crehan*, the CJEU held that private antitrust litigation contributes to effective competition law enforcement and that "victims" should have the right to seek compensation for harm suffered as a result of anti-competitive behavior.<sup>9</sup> The CJEU also stressed that, in the absence of EU legislation on the matter, each Member State should set up its own legal framework for antitrust damages claims and ensure that its national regime would not render damages claims excessively difficult or practically impossible.<sup>10</sup>

### A. *The Aftermath of Crehan*

In the aftermath of *Crehan*, the Commission started looking more closely into ways to bring more effective civil redress in the competition law field. First, it commissioned a study designed to identify existing obstacles to effective private enforcement in the EU.<sup>11</sup> Released in 2004, the study report concluded that national regimes on antitrust damages actions showed "astonishing diversity" and "total underdevelopment."<sup>12</sup> The Commission followed-up with a Green Paper in 2005, taking the view that the "underdevelopment" of antitrust damages litigation resulted primarily from procedural and other legal obstacles.<sup>13</sup> The Commission proposed a number of options to address these obstacles and facilitate damages claims, and invited comments from the public.

Building on these initial efforts, the Commission issued a White Paper in 2008, proposing policy choices and measures to facilitate antitrust dam-

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<sup>8</sup> Case C-453/99, *Courage Ltd. v. Crehan*, 2001 E.C.R. I-6297.

<sup>9</sup> *Id.* at I-6323 to -6324, ¶¶ 26-28; see also Assimakis P. Komninos, *New Prospects for Private Enforcement of EC Competition Law: Courage v. Crehan and the Community Right to Damages*, 39 COMMON MKT. L. REV. 447, 468-69 (2002) (discussing the *Crehan* court's recognition that allowing persons to seek redress for antitrust violations strengthens antitrust laws).

<sup>10</sup> *Crehan*, 2001 E.C.R. at I-6324, ¶ 29.

<sup>11</sup> DENIS WAELBROECK ET AL., STUDY ON THE CONDITIONS OF CLAIMS FOR DAMAGES IN CASE OF INFRINGEMENT OF EC COMPETITION RULES 26 (2004), [http://ec.europa.eu/competition/antitrust/actionsdamages/comparative\\_report\\_clean\\_en.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf).

<sup>12</sup> *Id.* at 1.

<sup>13</sup> See *Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules*, COM (2005) 672 final (Dec. 19, 2005); *Commission Staff Working Paper Annex to the Green Paper on Damages Actions for Breach of the EC Antitrust Rules*, at 12-16, SEC (2005) 1732 (Dec. 19, 2005).

ages claims.<sup>14</sup> The Commission advocated for mechanisms to make claims more effective, while respecting European legal systems and traditions. For instance, the Commission proposed to fully compensate victims via single damages, as opposed to multiple damages. Other proposed measures concerned, inter alia, collective redress, protection of corporate leniency statements, and improved access to evidence under judges' control. After proposing these measures, the Commission started preparing a directive on private antitrust litigation. However, some of the Commission's contemplated proposals raised concerns from other stakeholders, notably the European Parliament. In particular, the European Parliament pressed that it must be involved in any legislative activity touching upon collective redress.<sup>15</sup> The Commission ultimately renounced its presentation of the draft directive.

While the Commission's plans for a Directive on antitrust damages claims were temporarily stalled, a growing number of damages claims started to be filed in the Member States, particularly in Germany, the Netherlands, and the United Kingdom given that these jurisdictions have a number of features that were attractive to claimants.<sup>16</sup> Among these jurisdictions, the United Kingdom has recently become the most active antitrust litigation center in Europe. As noted above, the number of claims, usually taking the form of follow-on actions, dramatically increased in the last few years, although the number still lags behind the United States.<sup>17</sup>

### B. *The Damages Directive*

In June 2013, the Commission released its long-awaited legislative "package" on antitrust damages claims. The Commission's objective with this package was clear: to strike a balance between (1) ensuring effective enforcement of the rights of those harmed by anti-competitive conduct across the EU and (2) preserving the effectiveness of the Commission's and national competition authorities' enforcement activities, their leniency programs in particular.<sup>18</sup>

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<sup>14</sup> *Commission White Paper on Damages Actions for Breach of the EC Antitrust Rules*, at 4, COM (2008) 165 final (Apr. 2, 2008).

<sup>15</sup> Report on the White Paper on Damages Actions for Breach of the EC Antitrust Rules, ¶ 23, at 8, EUR. PARL. DOC. A6-0123 (2009).

<sup>16</sup> See Damien Geradin & Laurie-Anne Grelier, *Cartel Damages Claims in the European Union: Have We Only Seen the Tip of the Iceberg?*, in 2 WILLIAM E. KOVACIC: AN ANTITRUST TRIBUTE *LIBER AMICORUM* 257, 257 (Nicolas Charbit et al. eds., 2014), <http://ssrn.com/abstract=2362386>.

<sup>17</sup> See Gambhir, *supra* note 3.

<sup>18</sup> See *Proposal for a Directive of the European Parliament and 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*, at 2-4, COM (2013) 404 final (June 11, 2013).

This package contained two main documents: the draft of the Damages Directive adopted in November 2014 and the Recommendation on collective redress that concerns all breaches of EU law, including violations of EU competition law.<sup>19</sup> This Section briefly discusses the Damages Directive while the next part of the essay examines the Collective Redress Recommendation with a greater degree of attention.

One of the reasons that led the Commission to propose the Damages Directive was that, while the CJEU had recognized the right for victims of antitrust infringements to be compensated for the harm suffered, very few victims had actually obtained compensation due to national procedural obstacles and legal uncertainty. For instance, access to evidence is a critical element when bringing an action for damages, but disclosure rules were inadequate in most Member States. Moreover, the procedural rules governing damages litigation were widely divergent across the EU, and as a result, the probability of victims obtaining compensation largely depended on the Member State where they happened to be located.<sup>20</sup> The Commission thus determined that a directive setting common principles, while leaving flexibility to the Member States to determine how to implement the principles, needed to be adopted for damages actions from competition law infringements in the EU.

The main features of this Directive are highlighted hereafter:

First, the Damages Directive provides that Member States must ensure that anyone who has suffered harm through an infringement of competition law has a right to full compensation.<sup>21</sup> The Directive defines “full compensation” expansively to cover not only actual loss, but also loss of profits and payment of interest from the time the harm occurred until compensation is paid.<sup>22</sup> Importantly, the Directive provides that compensation should not lead to “over-compensation,” including by means of punitive damages.<sup>23</sup> Thus, unlike U.S. antitrust law, the Directive does not conceive damages as a tool to punish and deter those who breach competition rules. As will be seen in Part II below, the lack of treble damages reduces the size of the damage awards that victims may obtain and thus may impact the incentives for lawyers or third-party funders to bring collective actions against companies that have breached EU competition laws.<sup>24</sup>

Second, upon request of a claimant, the national courts can order the defendant or a third-party to disclose relevant evidence which lies under

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<sup>19</sup> The package also contained a document on the quantification of harm in antitrust infringements. See *Commission Staff Practical Guide on Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union*, at 8-9, SWD (2013) 205 (June 11, 2013).

<sup>20</sup> See Damages Directive, *supra* note 2, recital 7, at 2.

<sup>21</sup> *Id.* art. 3(1), at 12.

<sup>22</sup> *Id.* art. 3(2), at 12.

<sup>23</sup> *Id.* art. 3(3), at 12.

<sup>24</sup> See *infra* Part II.C.

their control, subject to a series of conditions. Insufficient access to evidence is indeed one of the major barriers to damages claims in some Member States.<sup>25</sup> To obtain access, the claimant must provide a “reasoned justification” containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages.<sup>26</sup> The claimant must circumscribe the requested evidence or categories of evidence as precisely and as narrowly as possible in the reasoned justification, and the national courts must limit the disclosure of evidence to that which is proportionate, hence avoiding “fishing expeditions.”<sup>27</sup> Thus, the Directive seeks to prevent situations where parties unnecessarily exchange an extremely large number of documents. Member States must ensure that national courts ordering the disclosure of such information have at their disposal effective measures to protect against the disclosure of unnecessary information during the proceedings (e.g., the possibility of redacting some sensitive passages in documents, conducting in-camera sessions, etc.).<sup>28</sup> A similar regime applies to the disclosure of evidence requests made by the defendant.<sup>29</sup>

In addition to the above standard rules, special rules apply to the disclosure of evidence included in the file of a competition authority. Key to maintaining the incentives of infringers to voluntarily collaborate with the Commission,<sup>30</sup> the Directive provides that leniency statements and settlement submissions can never be disclosed.<sup>31</sup> To prevent harm to the Commission’s leniency program, which many consider the most effective tool in detecting cartel activities, the Commission needed to maintain certainty that these documents would never be disclosed.<sup>32</sup> In addition, three categories of evidence can only be disclosed once the investigation is closed: (1) information prepared by a person specifically for the proceedings of a competition authority (such as replies to questionnaires sent by the authority); (2) information drawn up by the authority and sent to the parties (such as a statement of objections); and (3) settlement submissions that have been withdrawn.<sup>33</sup> Finally, additional restrictions apply on the disclosure and subsequent use of evidence in the file of a competition authority.<sup>34</sup>

Third, the Directive provides that the finding of infringement in a final decision from a national competition authority constitutes irrefutable proof of infringement before national courts in the same Member State as the

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<sup>25</sup> See Damages Directive, *supra* note 2, recital 14, at 3.

<sup>26</sup> *Id.* art. 5(1), at 12.

<sup>27</sup> *Id.* recital 23, at 4, arts. 5(2)-(3), at 12.

<sup>28</sup> *Id.* art. 5(4), at 12.

<sup>29</sup> *Id.* art. 5(1), at 12.

<sup>30</sup> *Id.* recital 26, at 5.

<sup>31</sup> Damages Directive, *supra* note 2, art. 6(6), at 13.

<sup>32</sup> See Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, ¶ 6, 2006 O.J. (C 298) 17, 17.

<sup>33</sup> Damages Directive, *supra* note 2, art. 6(5), at 13.

<sup>34</sup> *Id.* art. 7, at 14.

competition authority and at least prima facie evidence of the infringement before national courts in other Member States.<sup>35</sup> The Commission designed this provision to facilitate the task of claimants, who can thus piggyback on the decision of national competition authorities to establish that defendants have infringed competition law.

As to the limitation period for actions for damages, the period cannot begin to run before the infringement has ceased,<sup>36</sup> as well as before the claimant knows or can be expected to know of (1) the behavior and the fact that it constitutes an infringement; (2) the fact that the behavior caused the claimant harm; and (3) the identity of the infringer.<sup>37</sup> The limitation period should last five years and should be suspended (or interrupted) during the investigation by a competition authority.<sup>38</sup> As to the latter point, the suspension is to last at least one year after the infringement decision is final or proceedings are otherwise terminated.<sup>39</sup>

Fourth, undertakings that have infringed competition law through joint behavior are jointly and severally liable for the harm caused (i.e., each co-infringer is liable to compensate for the entire harm, and an injured party has the right to require full compensation from any of the co-infringers until the injured party is fully compensated).<sup>40</sup> Courts must determine the amount of contribution between the co-infringers based on their relative responsibility for the harm caused.<sup>41</sup> Further, special liability rules apply to immunity recipients, once again to avoid damages claims that interfere with the companies' incentives to collaborate with the Commission.<sup>42</sup>

Fifth, a defendant in an action for damages should be able to invoke as a defense the fact that the claimant passed-on the whole or part of the overcharge resulting from the competition law infringement to its customers (the so-called "pass-on" defense).<sup>43</sup> The burden of proving that the claimant passed-on the overcharge should, however, rest with the defendant, who may reasonably require disclosure from the claimant or from third parties.<sup>44</sup> When the claimant is an indirect purchaser, courts will regard the claimant as having proved that an overcharge paid by the direct purchaser has passed-on to its level when the claimant is able to make a prima facie case

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<sup>35</sup> *Id.* arts. 9(1)-(2), at 14-15.

<sup>36</sup> *Id.* art. 10(2), at 15.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* arts. 10(3)-(4), at 15.

<sup>39</sup> Damages Directive, *supra* note 2, art. 10(4), at 15.

<sup>40</sup> *Id.* art. 11(1), at 15.

<sup>41</sup> *Id.* art. 11(5), at 16.

<sup>42</sup> *Id.* art. 11(6), at 16.

<sup>43</sup> *Id.* art. 13, at 16.

<sup>44</sup> *Id.*

that such passing-on has occurred.<sup>45</sup> The infringer, however, can rebut the pass-on presumption.<sup>46</sup>

Finally, as to the quantification of the harm, the directive provides that neither the burden nor the standard of proof required for the quantification of harm should render the exercise of the right to damages practically impossible or excessively difficult.<sup>47</sup> The national courts should also have the power to estimate the amount of harm if a claimant can establish harm but cannot precisely quantify the harm based on the available evidence due to practical impossibility or excessive difficulty.<sup>48</sup> In order to remedy the information asymmetry and the difficulty of quantifying harm, the Directive provides that cartel infringements are presumed to cause harm, although the infringer should have the right to rebut that presumption.<sup>49</sup>

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

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

## II. THE COLLECTIVE REDRESS RECOMMENDATION

Collective redress mechanisms are necessary to ensure that consumers are able to obtain compensation for the harm they suffer as a result of competition law infringements.<sup>50</sup> The challenge when designing such mecha-

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<sup>45</sup> Damages Directive, *supra* note 2, art. 14(2), at 16-17.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* art. 17(1), at 17.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* art. 17(2), at 17.

<sup>50</sup> Collective redress is defined as a “procedural mechanism that allows, for reasons of procedural economy and/or efficiency of enforcement, many similar legal claims to be bundled into a single court action.” *Communication from the Commission to the European Parliament, the Council, the European*

nisms is to ensure that they will not trigger large amounts of unmeritorious litigation. As noted above, corporate and government stakeholders in the EU share a widely held belief that the U.S. class actions regime is not the right fit for Europe.<sup>51</sup> Whether this belief is well-founded or not, it has fundamentally influenced the design of the collective action regimes adopted at Member States level, as well as the Commission's Collective Redress Recommendation.

This Part is divided in three sections. First, Section A defines some concepts that are central to collective redress regimes by reference to the U.S. class action regime, the most developed collective redress scheme in the world. Section B then analyzes the Commission's Collective Redress Recommendation. Section C discusses the issue of whether the Recommendation's proposed regime creates sufficient financial incentives to launch collective actions. Finally, Section D examines the recently adopted U.K. Consumers Bill, which introduces a novel, more ambitious, approach to collective redress in the United Kingdom.

#### A. *Collective Redress—The Main Features of the U.S. Class Action Regime*

The U.S. class action regime provides a solution to the economic obstacle faced by individual claimants whose claims are too small to support the cost of litigation: aggregating a large number of individual claims into a single action.<sup>52</sup> The prospect of recovering the large damage awards that may result from these aggregated claims in turn attracts law firms willing to pay for all of the costs of litigation from their own pockets in return for a share of the class recovery when the action is successful.<sup>53</sup>

The U.S. class action regime has been a subject of controversy both within and outside the United States.<sup>54</sup> On the one hand, this regime pre-

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*Economic and Social Committee and the Committee of the Regions: Towards a European Horizontal Framework for Collective Redress*, at 4, COM (2013) 401 final (June 11, 2013).

<sup>51</sup> *Id.* at 3 (“For the Commission, any measures for judicial redress need to be appropriate and effective and bring balanced solutions supporting European growth, while ensuring effective access to justice. Therefore, they must not attract abusive litigation or have effects detrimental to respondents regardless of the results of the proceedings. Examples of such adverse effects can be seen in particular in ‘class actions’ as known in the United States.”); *id.* at 8 (“‘Class actions’ in the US legal system are the best known example of a form of collective redress but also an illustration of the vulnerability of a system to abusive litigation.”).

<sup>52</sup> For excellent, although slightly dated, discussion of the ins and outs of class actions in the United States, see Janet Cooper Alexander, *An Introduction to Class Action Procedure in the United States*, Presented at Debates Over Group Litigation in Comparative Perspective (July 21-22, 2000), <https://law.duke.edu/grouplit/papers/classactionalexander.pdf>.

<sup>53</sup> *Id.* at 2.

<sup>54</sup> See Issacharoff & Miller, *supra* note 5, at 180.

sents a series of advantages. First, it allows individual consumers who may have small claims to obtain some monetary compensation for the damages caused by the defendants. Second, by aggregating a large number of claims into a single action, class actions are generally efficient by allowing defendants to save the time, energy, and resources required to litigate hundreds or thousands of individual claims.<sup>55</sup> Finally, class actions may have a deterrent effect as infringers will often have to pay stiff damages to claimants, notably due to the treble damages allowed in antitrust actions.<sup>56</sup>

On the other hand, critics of the U.S. class actions regime argue that plaintiff law firms leverage the significant risks class actions create to defendants to extract large settlements from them, regardless of whether or not their claims are meritorious.<sup>57</sup> This practice may in turn incentivize lawyers to file unmeritorious claims in the expectation that risk-averse defendants will prefer to settle for a reasonable amount of money rather than face the minor, but catastrophic, risk of paying extremely large damages if these actions go to trial and succeed.<sup>58</sup> In addition, some observe that individual claimants may only obtain minimal rewards, generally a few dollars, or even in some case a coupon for a good or service that they will not necessarily be able or willing to use.<sup>59</sup> Class actions would thus essentially benefit plaintiff lawyers rather than the victims of the illegal conduct.

Although these criticisms are not entirely unfounded, an important observation is that Rule 23 of the U.S. Federal Rules of Civil Procedure disciplines class actions, allowing only reasonable, well-grounded actions to proceed.

First, Rule 23(a) requires that actions meet the requirements of “numerosity” (i.e., the class must be “so numerous that joinder of all members is impracticable”), “commonality” (i.e., the action must raise “questions of law or fact common to the class”), “typicality” (i.e., one or more persons who are members of the class may sue on its behalf if their claims are “typical of the claims . . . of the class”), and “adequacy of representation” (i.e., these persons “will fairly and adequately protect the interests of the class”).<sup>60</sup>

Second, if the action meets the Rule 23(a) requirements, it must fall under one of the categories of actions listed in Rule 23(b). Most actions for monetary damages fall under Rule 23(b)(3), which requires that the actions

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<sup>55</sup> *Id.* at 182-83.

<sup>56</sup> See 15 U.S.C. § 15(a) (2012); Alexander, *supra* note 52, at 1.

<sup>57</sup> Ian Simmons & Alexander Okuliar, *Private Enforcement of the U.S. Antitrust Laws Through Class Actions*, in THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO: COMPETITION LITIGATION 2009, at 10, 10 (Arundel McDougall & James Levy eds. 2009), <http://www.omm.com/files/upload/simmonsokuliar.pdf>.

<sup>58</sup> *Id.*

<sup>59</sup> Christopher R. Leslie, *The Need to Study Coupon Settlements in Class Action Litigation*, 18 GEO. J. LEGAL ETHICS 1395, 1395 (2005).

<sup>60</sup> FED. R. CIV. P. 23(a).

meet two additional requirements. First, the questions of law and fact that are common to the class must “predominate” over individual questions.<sup>61</sup> In addition, class treatment must be “superior to other available methods for fairly and efficiently adjudicating the controversy.”<sup>62</sup> In this respect, courts will have to take into account the “manageability” of the class action.

Third, Rule 23(c) provides that “[a]t an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.”<sup>63</sup> Class certification is typically the defining moment in a class action. If the court certifies the class, the action can proceed to discovery and resolution on the merits. Thus, class certification will typically incentivize defendants to settle the action rather than litigate the case. If the court does not certify the class, the action will typically collapse, as the individual claims are too small to justify the cost of litigation. While historically most courts favored class certification, in more recent years, appellate level courts have required that district courts perform a more rigorous analysis of the class certification factors.<sup>64</sup> For instance, in *In re Hydrogen Peroxide Antitrust Litigation*,<sup>65</sup> the 3rd Circuit established that the evidence and arguments a district court considers in the class certification decision call for “rigorous analysis,”<sup>66</sup> and that “[a]n overlap between a class certification requirement and the merits of a claim is no reason to decline to resolve relevant disputes when necessary to determine whether a class certification requirement is met.”<sup>67</sup> Similarly, in *Comcast Corp. v. Behrend*,<sup>68</sup> the Supreme Court found that:

By refusing to entertain arguments against respondents’ damages model that bore on the propriety of class certification, simply because those arguments would also be pertinent to the merits determination, the Court of Appeals ran afoul of our precedents requiring precisely that inquiry. And it is clear that, under the proper standard for evaluating certification, respondents’ model falls far short of establishing that damages are capable of measurement on a classwide basis.<sup>69</sup>

Thus, district courts must act as true gatekeepers of the certification process to ensure that, in practice, actions meet the requirements contained in Rule 23 of the U.S. Federal Rules of Civil Procedure.

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<sup>61</sup> See FED. R. CIV. P. 23(b)(3).

<sup>62</sup> *Id.*

<sup>63</sup> FED. R. CIV. P. 23(c)(1)(A).

<sup>64</sup> See, e.g., *Comcast Corp. v. Behrend*, 135 S. Ct. 1426, 1428-29 (2013) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011)); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 318 (3d Cir. 2008).

<sup>65</sup> 552 F.3d 305 (3d Cir. 2008).

<sup>66</sup> *Id.* at 318.

<sup>67</sup> *Id.* at 316.

<sup>68</sup> 133 S. Ct. 1426 (2013).

<sup>69</sup> *Id.* at 1432-33.

Fourth, in Rule 23(b) cases, courts must direct notice to the members of the class that the court has certified a class action on their behalf. The notice must inform class members of their rights to “opt out” of the class action. If they do not want to be part of the class, they can either decide to file their own suit or let their claims expire. When claims are small, however, individual actions are illusory and only a few members of the class will typically opt-out. This opt-out regime differs from the “opt-in” regime that other nations have adopted, where claimants must voluntarily elect to be part of the class. The opt-out regime facilitates the creation of large classes and thus the funding of the class action litigation.

Finally, pursuant to Rule 23(e), parties may not dismiss or settle a class action without notice to the class and the approval of the court. This requirement protects class members against inadequate settlements that arise when representative lawyers pursue their own economic interests rather than those of the class. Class action lawyers may, for instance, face temptation to agree to an early settlement, which will generate a large fee for the amount of work done on the case. As one commentator has noted, the “class counsel’s economic interest is in maximizing their effective hourly fee.”<sup>70</sup> In that case, the district court may simply refuse to approve the settlement and force class counsel to return to the Court with a more attractive deal for the claimants.<sup>71</sup>

Finally, one should note that two important features of U.S. class actions do not have any equivalent in Europe. First, with respect to antitrust actions, the Clayton Act permits plaintiffs to recover treble damages (i.e., three times the amount of the actual/compensatory damages).<sup>72</sup> This remedy, of course, attracts class actions lawyers as it significantly increases the amount that they may recover. Thus, an important difference between the private actions for antitrust damages in the U.S. and EU systems is that the former’s damages actions maintain both compensatory and deterrent functions, while the latter’s actions only focus on ensuring compensation for the damage actually incurred. Second, in U.S. actions, each side typically bears its own costs, regardless of who wins. This practice differs from the “loser pays” principle that generally applies in Europe. The “loser pays” rule increases the difficulty of bringing class actions, as plaintiff lawyers would need to factor in the risks of having to pay the defendant’s costs. Part II.C

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<sup>70</sup> See Alexander, *supra* note 52, at 17.

<sup>71</sup> *E.g.*, Opinion and Order Denying Without Prejudice Motion for Final Approval of Proposed Settlement at 17-18, *Allen v. Dairy Farmers of Am., Inc.*, No. 5:09-cv-230 (D. Vt. Mar. 31, 2015) (“Analyzing the *Grinnell* factors collectively, the court cannot find that the Proposed Settlement’s monetary relief of \$50 million is on its face inadequate or unreasonable. However, when this amount is considered from the class’s perspective, in light of the broad Proposed Release, and the absence of what the remaining Subclass Representatives contend is meaningful injunctive relief, the receipt of approximately \$4,000 per dairy farm could reasonably be perceived as a modest recovery.”).

<sup>72</sup> 15 U.S.C. § 15(a) (2012).

provides an example equation that plaintiff lawyers may use when deciding to bring a lawsuit.

B. *The Collective Redress Recommendation*

“Collective redress” is not a new issue in the European Union. First, prior to the Recommendation, some Member States had developed collective redress mechanisms with various degrees of sophistication. Collective redress actions remained, however, marginal in the Member States due to the features of these systems (essentially based on the “opt-in” approach). Second, the Commission’s Green and White papers on antitrust damages action, respectively adopted in 2005 and 2008, included policy suggestions on antitrust-specific collective redress.<sup>73</sup> In addition, in 2008, the Commission published a Green Paper on consumer collective redress,<sup>74</sup> and in 2011, it carried out a public consultation entitled “Towards a Coherent European Approach to Collective Redress.”<sup>75</sup> Finally, the European Parliament adopted a resolution bearing the same title in February 2012.<sup>76</sup>

These various documents expressed a clear hostility towards the U.S. class action regime, which many Europeans perceive as a source of excessive litigation and unmeritorious claims. Whether or not this hostility is justified is a difficult question as class actions are controversial even within the United States. Part II.A, however, has shown that U.S. courts now carry out a more rigorous analysis of the evidence at the certification stage than they did in the past, filtering out claims that have little or no chance of success or for which other forms of litigation may be more appropriate.<sup>77</sup> Some aspects of the U.S. litigation regime, such as parties paying their own costs or treble damages in antitrust cases, are also alien to the European system, making class actions an unlikely source of inspiration for the development of collective redress in the European Union.

Against this background, this section summarizes the main features of the Commission’s Recommendation.

First, the Recommendation is not a binding act on the Member States. As its name indicates, it merely *recommends* a series of principles regarding collective redress that should apply commonly across the EU. Unlike the Damages Directive, the Commission cannot condemn Member States for failing to implement these principles, although the Commission expects that

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<sup>73</sup> See *supra* Part I.B.

<sup>74</sup> *Commission Green Paper on Consumer Collective Redress*, COM (2008) 794 final (Nov. 27, 2008).

<sup>75</sup> *Commission Staff Working Document, Public Consultation: Towards a Coherent European Approach to Collective Redress*, SEC (2011) 173 final (Feb. 4, 2011).

<sup>76</sup> Resolution of 2 February 2012 on “Towards a Coherent European Approach to Collective Redress,” EUR. PARL. DOC. P7\_TA(2012)0021 (2012).

<sup>77</sup> See *supra* Part II.A.

the Member States will generally follow the principles as they largely reflect the legal traditions of the Member States. In addition, the Recommendation takes the form of a horizontal framework whose principles apply to claims regarding rights granted under EU law in a variety of areas, such as consumer protection, competition, data protection, environmental protection, etc.<sup>78</sup> Thus, although these principles apply to collective redress for antitrust claims, they are not specific to the competition law field.

Second, in terms of standing to bring collective actions, the Recommendation provides that Member States should designate “representative entities” to bring “representative actions” on the basis of clearly defined conditions of eligibility.<sup>79</sup> According to the Recommendation, the conditions should at least require that (1) the entity have a “non-profit making character”; (2) a “direct relationship” between the main aims of the entity and the rights granted under EU law that are deemed to have been violated; and (3) the entity should have sufficient expertise and resources to “represent multiple claimants acting in their best interests.”<sup>80</sup> The Recommendation does not, however, prevent Member States from maintaining other forms of collective actions, such as group actions, where the action can be brought jointly by those who have suffered the harm. The Recommendation, however, leaves it to the Member States to address issues of standing in such cases, as these issues are generally more straightforward.<sup>81</sup>

Third, in terms of admissibility, the Recommendation provides that Member States “should provide for verification at the earliest possible stages of litigation that cases in which conditions for collective actions are not met, and manifestly unfounded cases, are not continued.”<sup>82</sup> Because of the restrictive features of collective redress mechanisms recommended by the Commission, the number of unmeritorious claims is likely to more be limited than it is in the United States. In any event, however, weeding out such claims as early as possible in the litigation process remains an important goal in both systems.

Fourth, in terms of funding collective actions, the Recommendation provides that, subject to some exceptions,<sup>83</sup> Member States should not permit contingency fees, which risk creating an incentive in favor of litigation that is “unnecessary from the point of view of the interest of any of the parties.”<sup>84</sup> The Recommendation thus proposes a litigation-funding model that vastly differs from the model based on contingency fees used in U.S. class actions. The Recommendation nevertheless allows third-party funding for

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<sup>78</sup> See Redress Recommendation, *supra* note 4, recital 7, at 60.

<sup>79</sup> *Id.* ¶ 4, at 62.

<sup>80</sup> *Id.* ¶¶ 4(a)-(c), at 62-63.

<sup>81</sup> *Id.* recital 17, at 61.

<sup>82</sup> *Id.* ¶ 8, at 63.

<sup>83</sup> See *id.* ¶ 30, at 64.

<sup>84</sup> Redress Recommendation, *supra* note 4, ¶ 29, at 64.

representative actions under strict conditions. There can be no conflict of interest between the third-party funder and the claiming party and its members, and the third-party must have sufficient resources to meet its financial commitments to the claimant party initiating the procedure, as well as to cover any adverse costs should the collective redress procedure fail.<sup>85</sup>

Private third-party funding is developing in Europe with a variety of firms, such as IMF Bentham,<sup>86</sup> Claims Funding International,<sup>87</sup> Caprica,<sup>88</sup> and Harbour Litigation Funding,<sup>89</sup> who now offer funding for litigation in the U.K. and in Europe. The Recommendation, however, provides for the imposition of additional rules when a private third-party funds an action for collective redress. For instance, a private third-party funder may not “seek to influence procedural decisions of the claimant party, including on settlements.”<sup>90</sup> Moreover, its remuneration or the interest it charges cannot vary based on the amount of the settlement reached or the compensation awarded “unless the funding arrangement is regulated by a public authority to ensure the interests of the parties.”<sup>91</sup>

Fifth, the Recommendation provides that Member States should follow the “loser pays” principle, whereby “the party that loses a collective redress action reimburses necessary legal costs borne by the winning party.”<sup>92</sup> This recommendation can represent an insurmountable problem for insufficiently-funded third-parties initiating collective actions on behalf of victims of infringement. For instance, in December 2013, the Düsseldorf District Court dismissed follow-on damage claims by a special purpose vehicle, Cartel Damage Claims (“CDC”).<sup>93</sup> CDC had brought damages claims

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<sup>85</sup> *Id.* ¶¶ 14-15, at 63.

<sup>86</sup> Bentham Europe “provides funding to plaintiffs for large scale commercial disputes in the UK and Europe. It offers law firms and their clients the benefits of strong financial backing and risk mitigation, extensive experience in litigation funding and a proven record of success unmatched globally by any other commercial litigation funder.” *About Bentham Europe*, BENTHAM IMF, <http://www.benthamimf.com/about-us/bentham-europe> (last visited Aug. 6, 2015).

<sup>87</sup> Claims Funding International (CFI) is an Irish litigation company that “provide[s] individuals and companies with easy access to justice. . . . [when] the cost of litigation would otherwise be too onerous.” *Claims Funding International*, CLAIMS FUNDING EUR., <http://www.claimsfundingeurope.eu/about-us/partners/claims-funding-international/> (last visited Aug. 6, 2015).

<sup>88</sup> Caprica Litigation Funding provides “a cost effective third party litigation funding solution for lawyers’ fees and disbursements on a non-recourse basis.” *What We Do*, CAPRICA, <http://www.caprica.co.uk/> (last visited June 8, 2015).

<sup>89</sup> Harbour provides litigation funding “to finance part, or all, of the costs of any type of commercial litigation or arbitration. In return Harbour receives a share of the proceeds of the case but only if there is a successful outcome.” *Welcome to Harbour Litigation Funding*, HARBOUR LITIG. FUNDING, <http://www.harbourlitigationfunding.com/> (last visited Aug. 6, 2015).

<sup>90</sup> Redress Recommendation, *supra* note 4, ¶ 16(a), at 63.

<sup>91</sup> *Id.* ¶ 32, at 65.

<sup>92</sup> *Id.* ¶ 13, at 63.

<sup>93</sup> *Düsseldorf Court Dismisses CDC Damage Claims in Antitrust Follow-on Action*, ALERT MEMORANDUM (Cleary Gottlieb Steen & Hamilton LLP, Frankfurt, Ger.), Jan. 8, 2014, at 1,

against various German cement producers following an infringement decision by the German Federal Cartel Office.<sup>94</sup> The District Court dismissed the claims on two main grounds. First, the assignments of damage claims to CDC were in violation of German law to the extent they were made at a time (i.e., prior to June 2008) when such assignments were not allowed. Second and more importantly, the District Court determined that these assignments violated public policy as, under the German loser pays provisions of the Civil Procedure Code, the losing party is required to pay the court fees and reimburse the winning side for its costs, and CDC was insufficiently funded to cover such costs.

Sixth, in terms of compensatory damages, the “opt-in” principle should guide the formation of the claimant party (i.e., the natural or legal persons claiming harm must provide express consent to join the claimant party).<sup>95</sup> Exceptions to this principle, by law or court order, “should be duly justified by reasons of sound administration of justice.”<sup>96</sup> Although Member States have traditionally utilized the opt-in system to develop collective redress regimes, some Member States utilize regimes that allow for some form of opting-out.<sup>97</sup> Yet, the Recommendation provides that the opt-in principle should be the rule, subject to exceptions.

The opt-in should cause the claimant party to be smaller than it would be under an “opt-out” system since individual victims with small claims may lack sufficient incentives to take “positive” steps to join the claiming party.<sup>98</sup> It may also make the funding of collective actions more difficult.<sup>99</sup> The general lack of responsiveness of the victims of mass harm is illustrated by the fact that, in the United States, consumer class actions rarely see more than a small percentage (less than 10%) of the class members to file a claim after a settlement is approved, even though they are entitled to an award.<sup>100</sup>

Moreover, anecdotal evidence suggests that when individual claims are small, creating a sufficiently large group of claimants to make the action

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<http://www.cgsh.com/files/News/45e15064-1e93-4c43-bbb2-4c70560d4958/Presentation/NewsAttachment/6399233c-20d3-42b1-8021-4cd96542fe14/D%e3%bc3%bcsseldorf%20Court%20Dismisses%20CDC%20Damage%20Claims%20in%20Antitrust%20Follow-on%20Action.pdf>

<sup>94</sup> See *id.*

<sup>95</sup> Redress Recommendation, *supra* note 4, ¶ 21, at 64.

<sup>96</sup> *Id.*

<sup>97</sup> Robert Gaudet, Jr., *Turning a Blind Eye: The Commission's Rejection of Opt-out Class Actions Overlooks Swedish, Norwegian, Danish and Dutch Experience*, 30 EUR. COMPETITION L. REV. 107, 107 (2009).

<sup>98</sup> On the downsides of the opt-in system, see Charlotte Leskinen, *Collective Actions: Rethinking Funding and National Cost Rules*, 8 THE COMPETITION L. REV. 87 (2011).

<sup>99</sup> See *infra* Part II.C.

<sup>100</sup> Douglas H. Ginsburg, *Collective Actions in Europe: The View from the United States*, Power-Point Presentation Delivered at the AECLJ Annual Conference (June 13, 2014) (on file with the author).

worthwhile may be difficult. For instance, in 2006, the French consumers' association UFC Que Choisir brought a damages claim against three mobile communication operators following on a cartel decision from the French Competition Authority.<sup>101</sup> Despite considerable efforts, UFC Que Choisir only managed to aggregate claims for 12,350 consumers although the infringement potentially affected 20 million consumers. The association spent nearly 2,000 hours preparing the action and incurred €500,000 of legal expenses for a claim amounting overall to €750,000. In the end, French courts rejected the action.<sup>102</sup> Similarly, in 2007, the U.K. consumers' association Which?, which was the only association entitled to bring collective actions on behalf of consumers, brought proceedings against JJB Sports for overcharging consumers for replica football shirts as a result of a price-fixing cartel.<sup>103</sup> Despite a major media campaign, Which? only managed to collect claims for 600 consumers. In the end, it negotiated a settlement where consumers who had bought the shirts received £20 in compensation for each shirt.<sup>104</sup> Given the difficulty experienced in collecting claims, Which? never brought a collective action on behalf of overcharged consumers again.

Finally, the Recommendation provides that the compensation awarded to the victims "should not exceed the compensation that would have been awarded, if the claim had been pursued by means of individual actions."<sup>105</sup> In addition, "punitive damages" leading to overcompensation of the claimants should be prohibited.<sup>106</sup> Once again, the approach taken in the Recommendation differs from U.S. litigation where in a number of fields, such as antitrust, defendants can face treble damages.

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

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<sup>101</sup> Study by the Directorate-General for Internal Policies: Collective Redress in Antitrust, PARL. EUR. DOC. 475.120 (2012), at 36 [hereinafter Study: Collective Redress].

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> Redress Recommendation, *supra* note 4, ¶ 31, at 64-65.

<sup>106</sup> *Id.*

C. *Does the Recommendation Create Sufficient Financial Incentives for Collective Actions?*<sup>107</sup>

While the Recommendation seeks to stimulate collective redress by urging Member States to adopt legal regimes that make redress possible and practicable, the question still remains whether the recommended approach will offer sufficient financial incentives to launch these actions. This essay addresses this question by using simple numerical examples, contrasting the economics of U.S. class actions with the economics of the approach that the Commission recommends.

In very simple terms, under the U.S. system, a plaintiff law firm will likely bring an action when the

$$[Probability\ of\ winning] \times [Number\ of\ claimants] \times [Damages\ from\ each\ claim] \times [3\ (treble\ damages)] \times [25\% \ (average\ fee)]$$

*exceeds the*

$$[Total\ costs\ incurred\ in\ bringing\ the\ claim\ (costs\ of\ providing\ notice\ to\ claimants,\ opportunity\ costs\ of\ time\ spent\ on\ the\ case,\ costs\ of\ hiring\ experts,\ etc.)]$$

To numerically illustrate the above, this essay makes the following assumptions: (1) the probability of winning the action is 80%; (2) there are 100,000 claimants; (3) the damage from each claim is \$50; (4) the law firm would collect 25% of the amount recovered; and (5) the costs incurred in bringing the claims are expected to be \$2,000,000. Because  $80\% \times 100,000 \times \$50 \times 3 \times 25\% = \$3,000,000 > \$2,000,000$ , the firm will likely bring this action.

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

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<sup>107</sup> What follows draws on Ginsburg, *supra* note 100.

*[Probability of winning] x [Number of claimants] x [Damages from each claim] x [25% (average fee)]*

*exceeds the*

*[Costs incurred in bringing the claim + Costs of defendants] x [1 – Probability of winning]*

Based on the above observations, this essay makes the following assumptions: (1) the number of claimants is lower due to the opt-in system, decreasing to 10,000; (2) the costs of bringing the action are estimated at \$2,000,000; and (3) the costs of defending the claims are estimated at \$3,000,000. Because  $80\% \times 10,000 \times \$50 \times 25\% = \$100,000 < \$1,000,000 = [1 - 80\%] \times [\$2,000,000 + \$3,000,000]$ , the firm will not bring the action.

In practice, this calculation shows that the approach preconized by the Recommendation will generally lead to fewer actions being brought than under the U.S. class action regime. The actions that claimants will bring should typically involve scenarios where (1) the claimants have a significant chance of winning (e.g., a follow-on action); (2) the private law firm can easily identify potential claimants; (3) the individual claims are reasonably significant; and (4) the private law firm can bring the action at a reasonable cost (e.g., because the action is not excessively complex and may not require the hiring of economic experts, etc.). The “loser pays” principle should also encourage firms to bring cases that can settle relatively easily, and thus reduce the risks of losing in court, given the financial risks that defendants face.

For example, assume that a national competition authority has adopted a decision condemning cement producers for price fixing and market sharing. Law Firm A contemplates the idea of bringing a collective action on behalf of the construction companies who purchased overpriced cement from cartelists during the infringement period. There are 1,000 affected construction companies and assume that 50% will opt-in. On average these companies suffered a \$20,000 prejudice. The chance of winning stands at 90% and the costs of bringing the action amount to \$2,000,000, whereas the costs of defending against the action are estimated at \$3,000,000. In this scenario, because  $90\% \times 500 \times \$20,000 \times 25\% = \$2,250,000 > \$500,000 = [1 - 90\%] \times [\$2,000,000 + \$3,000,000]$ , Law Firm A will likely bring the action.

In the above scenario, Law Firm A will likely initiate the action because the claimants are easy to identify and each of them has a significant claim, and thus the incentive to “opt in” even if this requires handling some paperwork.

In contrast, in scenarios involving a large number of players, each having small claims, law firms will likely not bring actions. To demonstrate,

assume that a national competition authority has adopted a decision condemning consumer care companies for fixing the price of certain types of soap. Law Firm A is contemplating the prospect of bringing a collective action on behalf of the consumers who have purchased overpriced soap during the infringement period. There are 500,000 overcharged customers and on average they have suffered a \$20 prejudice. Because of the smallness of their individual claim, Law Firm A expects that only 10% of them will opt-in, thus totaling 50,000 overcharged customers. The chance of winning stands at 90% and the cost of bringing the action amounts to \$2,000,000, whereas Law Firm A estimates the cost of defending against the action at \$3,000,000. In this scenario, because  $90\% \times 50,000 \times \$20 \times 25\% = \$225,000 < \$500,000 = [1 - 90\%] \times [\$2,000,000 + \$3,000,000]$ , Law Firm A will not bring the action.

One can, of course, ask whether or not one should be concerned that these actions may not be brought. The answer depends on the perspective that one takes. On the one hand, one could find it regrettable that individual consumers will often be unable to recover the overcharge they have paid to unscrupulous sellers. At the end of the day, individual consumers deserve compensation as much as larger actors. Even if the amount they obtain is small, any amount of compensation may help those with modest means. On the other hand, the U.S. class action regime suggests that, even when the class action is successful in recovering a sizeable sum from the defendants, most users do not bother collecting their awards given the smallness of their individual claims. In such cases, the main beneficiary of the action is the plaintiff law firm or the private third-party funder. In this type of case, consumer organizations should probably step in through representative actions, although this essay has shown, with the actions brought by *Que Choisir* in France and *Which?* in the U.K., that these organizations may find it unattractive to pursue such claims under an opt-in regime.<sup>108</sup> Although consumer organizations may be able to bring actions at a lower cost than private law firms and pursue them even if the planned return is not significant, their resources are limited and must be managed carefully.

Thus, the question still remains, is the Recommendation's approach unduly restrictive? As this essay has shown, federal district courts must now rigorously analyze the compatibility of the claims under Rule 23 of the U.S. Federal Rules of Civil Procedure, acting as gatekeepers against unmeritorious claims.<sup>109</sup> They can also reject settlements that are not in the interest of the class members, hence ensuring that plaintiff law firms act in the interests of class members. From that standpoint, there is no reason why European judges could not also act as gatekeepers if proper procedures are put into place.

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<sup>108</sup> See Study: Collective Redress, *supra* note 101.

<sup>109</sup> See Arianna Andreangeli, *Collective Redress in EU Competition Law: An Open Question with Many Possible Solutions*, 35 *WORLD COMPETITION* 529, 545-46 (2012).

Another question that remains is whether some of the assumptions that guided the Commission in its Recommendation are truly realistic. For instance, the Recommendation's general hostility toward contingency fees on the ground that the use of such fee arrangements might lead to "abusive litigation"<sup>110</sup> fails to recognize that contingency fees are the most effective means to fund collective actions.<sup>111</sup> In addition, research has revealed that contingency fees better align the interests of lawyers with their clients,<sup>112</sup> and that contingency fees reduce the amount of wasteful proceedings.<sup>113</sup> Further, a broad trend in the legal industry is arising where clients wish for law firms to abandon hourly fees for other forms of value-based compensation.<sup>114</sup> One should finally note that a number of EU Member States have relaxed their restrictions against contingency fees.<sup>115</sup>

#### D. *The U.K. Consumer Rights Act 2015*

Since the adoption of the Recommendation, some Member States have adopted new collective redress regimes. For instance, the French parliament adopted a Consumer Act in 2014.<sup>116</sup> It allows actions for follow-on damages, but consumers can only file actions through government-approved consumer groups. The French regime also employs the opt-in system.

Also in 2014, the Belgian parliament adopted a Collective Redress Act, which provides for a system where consumer organizations meeting

<sup>110</sup> See Redress Recommendation, *supra* note 4, recital 15, at 61, ¶ 30, at 64.

<sup>111</sup> See Issacharoff & Miller, *supra* note 5, at 198-99 ("The contingency fee permits the attorney to fund the litigation and thus overcomes problems of liquidity that may make it impossible for an individual to pursue his rights. Attorneys are good litigation funders. As legal specialists, they have the ability to assess the value of suits. They will thus tend to direct valuable resources (their time and energy) to cases that offer the largest expected benefit for class members and society as a whole. Because attorneys handle numerous lawsuits, moreover, they can achieve portfolio diversification in ways not possible for ordinary clients, who are usually involved in only one. And attorneys tend to have better liquidity than consumers. They finance cases through their own efforts. If bank financing is required, they are probably better than their clients at obtaining loans at favorable rates. Accordingly, the contingent fee can generate effective funding of class action litigation. Essentially all U.S. class actions are funded with contingent fees.")

<sup>112</sup> See, e.g., A. Mitchell Polinsky & Daniel L. Rubinfeld, *A Note on Settlements Under the Contingent Fee Method of Compensating Lawyers*, 22 INT'L REV. L. & ECON. 217, 217-25 (2002), <http://ssrn.com/abstract=286055>.

<sup>113</sup> See, e.g., Eric Helland & Alexander Tabarrok, *Contingency Fees, Settlements Delay, and Low-Quality Litigation: Empirical Evidence from Two Datasets*, 19 J. L. ECON. & ORG. 517, 540 (2003).

<sup>114</sup> See Catherine Ho, *Is This the Death of Hourly Rates at Law Firms?*, WASH. POST, Apr. 13, 2014, available at [http://www.washingtonpost.com/business/capitalbusiness/is-this-the-death-of-hourly-rates-at-law-firms/2014/04/11/a5697018-be97-11e3-b195-dd0c1174052c\\_story.html](http://www.washingtonpost.com/business/capitalbusiness/is-this-the-death-of-hourly-rates-at-law-firms/2014/04/11/a5697018-be97-11e3-b195-dd0c1174052c_story.html).

<sup>115</sup> See Leskinen, *supra* note 98, at 98 (discussing England and Wales).

<sup>116</sup> Loi 2014-344 du 17 mars 2014 relative à la consommation [Law 2014-344 of Mar. 17, 2014 on the Consumption], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.][OFFICIAL GAZETTE OF FRANCE], Mar. 18, 2014, p. 5400.

certain criteria can initiate collective actions.<sup>117</sup> The Belgian system does not allow for punitive damages or contingency fees, and before filing an action, parties must attempt a mandatory dispute settlement process. Because judges decide whether the action will utilize an opt-in or opt-out approach, the Belgian regime goes beyond the approach recommended by the Commission.

The most important development, however, is the adoption of the U.K. Consumer Rights Act 2015, which obtained royal assent on March 26, 2015 and is expected to enter into force on October 1, 2015.<sup>118</sup> For the purposes of this essay, the relevant part of the Act is Schedule 8, which brings significant changes to the Competition Act 1998 with regard to private actions in competition law. Section 47B provides that claimants may bring proceedings before the Competition Appeals Tribunal (“CAT”) combining two or more claims for damages. Collective proceedings must be initiated by “a person who proposes to be the representative in those proceedings”<sup>119</sup> and can only be pursued if the CAT makes a “collective proceedings order.”<sup>120</sup> The CAT may authorize any person to act as the representative of the proposed class, regardless of whether that person falls within the class of persons to be represented. However, the CAT must determine that “it is just and reasonable for that person to act as a representative in those proceedings.”<sup>121</sup> In order to be eligible for inclusion in collective proceedings, the CAT must determine that “they raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings.”<sup>122</sup>

Further, the CAT must state in the collective proceedings order whether the collective proceeding follow either the opt- in or opt- out regime. Similar to the Belgian regime, the CAT must decide thus which of these two approaches applies to the collective action at hand. The Act nevertheless contains a number of safeguards designed to prevent abusive litigation. For instance, the CAT may not award “exemplary damages” in collective proceedings.<sup>123</sup> Moreover, a “damages-based” agreement (i.e., a contingency

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<sup>117</sup> Loi portant insertion d'un titre 2 “De l'action en réparation collective” au livre XVII “Procédures juridictionnelles particulières” du Code de droit économique et portant insertion des définitions propres au livre XVII dans le livre 1er du Code de droit économique [An Act to Insert a Title 2 “From the Collective Redress Action” in Book XVII “Special Court Proceedings” of the Code of Economic Integration of Duty and Definitions Specific to the Seventeenth Book in the Code Book 1 Economic Law] of Mar. 28 2014, MONITEUR BELGE [M.B.][Official Gazette of Belgium], Apr. 29, 2014, 35201.

<sup>118</sup> Consumer Rights Act, 2015, c. 15 (U.K.).

<sup>119</sup> Consumer Rights Act, 2015, c. 15, sch. 8, ¶ 5(1) (U.K.) (substituting a replacement § 47B(2) into the Competition Act 1998).

<sup>120</sup> *Id.* (substituting a replacement § 47B(4) into the Competition Act 1998).

<sup>121</sup> *Id.* (substituting a replacement § 47B(8)(b) into the Competition Act 1998).

<sup>122</sup> *Id.* (substituting a replacement § 47B(6) into the Competition Act 1998).

<sup>123</sup> Consumer Rights Act, 2015, c. 15, sch. 8, ¶ 6 (U.K.) (inserting a new § 47C(1) into the Competition Act 1998).

fee) is unenforceable if it relates to opt-out collective proceedings, although the CAT will permit this type of agreement for damages actions brought by individual businesses or other claimants.

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

## CONCLUSION

Private actions for antitrust damages have clearly become a reality in the EU, and the implementation of the Damages Directive by the Member States will further stimulate such actions. The Collective Redress Recommendation also urges the Member States to adopt regimes facilitating collective actions. The Commission's anxiety to avoid the alleged excesses of U.S. class actions has translated into a set of principles that fail to recognize that collective actions will not proceed in the absence of financial incentives. The Recommendation's aversion toward the opt-out system raises significant obstacles to the funding of collective actions when a large number of consumers hold small individual claims. From this viewpoint, the approach adopted by the U.K. Consumer Rights Act, which gives the CAT discretion in determining whether to allow for a collective action to proceed on an opt-out basis, is preferable because, in some cases, no action will be economically viable under an opt-in regime.

Contingency fees, or at least some form of third-party funding, are also often necessary to fund collective actions. No evidence supports the conclusion that contingency fees necessarily lead to unmeritorious claims as they force plaintiff law firms or third-party funders to carefully analyze the likelihood of success of the actions they contemplate launching. That is not necessarily the case under an hourly fees system as it gives law firms an incentive to generate as much more billable work as possible.