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Forum shopping and the private enforcement of EU competition law: is forum shopping a dead letter?

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ABSTRACT

This thesis examines the relationship between the private enforcement of EU competition law and forum shopping with a particular focus on cross-border collective end-consumer redress. There is no coherent framework across the EU for these types of cases. This lack of uniformity has the potential to create recourse to different national courts. Lawyers may engage in forum shopping when filing lawsuits on behalf of the victims of mass torts. Such practices can provide Member States with incentives to amend their laws to attract collective proceedings and create competition between national judicial systems.

However, forum shopping is not the only concern. There appears to be a paucity of cross-border collective claims. This is coupled with an apparent lack of motivation for end-consumers to seek a remedy, particularly if the only choice is to litigate outside their own legal regime. Addressing this situation is vital given that end-consumers regularly suffer harm in the form of higher prices, lower output, reduced quality and limited innovation as a result of antitrust infringements but they are rarely compensated due to legal and practical obstacles. To each end-consumer the harm may indeed be *de minimis*. However, the aggregate harm can amount to a considerable sum. In the absence of effective redress procedures, infringing undertakings retain the spoils of their unlawful conduct.

Against this background, this thesis examines the extent to which the conflicts-of-laws rules encourage forum shopping and considers the appropriate forum and the appropriate procedural measures that need to be adopted in order to facilitate effective and equal access to justice for end-consumer victims of EU competition law violations.

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AUTHOR'S DECLARATION

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Signature: R. Telfer

Printed name: Robert Thomas Currie Telfer

ABBREVIATIONS

Alabama Law Review	Ala. L. Rev.
All England Law Reports	All ER
Alternative Dispute Resolution	ADR
American Arbitration Association	AAA
American Journal of International Law	A.J.I.L.
American Law Institute	ALI
Appeal Cases	A.C.
Brigham Young University Law & Management	BYU Int'l L. & Mgmt. R.
Butterworths Journal of International Banking & Financial Law	B.J.B.F.L
California Law Review	Cal. L. Rev.
Cambridge Law Journal	C.L.J.
Cartel Damages Claims	CDC
Civil Justice Law Quarterly	C.J.Q.
Collected Papers of Zagreb Law Faculty	Zbornik PFZ
Columbia Law Review	Colum. L. Rev.
Common Market Law Reports	C.M.L.R.
Common Market Law Review	C.M.L. Rev
Competition & Markets Authority	CMA
Competition Appeal Tribunal	CAT
Confederation of Business Industry	CBI
Consumer Financial Protection Bureau	CFPB
Cornell Law Review	Cornell L. Rev.
Court of Justice of the European Union	CJEU
Department of Justice	DOJ
Edinburgh Law Review	Edin. L.R.
ELTE Law Journal	ELTE L.J.
England and Wales Court of Appeal (Civil)	E.W.C.A. Civ.
England and Wales High Court	E.W.H.C.
EU Commission Competition Directorate-General	DG COMP
European Community	EC
European Consumer Organisation	BEUC
European Court Reports	E.C.R.
Emory International Law Review	Emory Int'l L. Rev.
European Competition Law Review	E.C.L.R.
European Intellectual Property Review	E.I.P.R.
European Journal of International Law	E.J.I.L.
European Law Review	E.L. Rev
European Lawyer	Euro. Law.
Federal Arbitration Act	FAA
Federal Rules of Civil Procedure	FRCP
Florida Law Review	Fla. L. Rev.
Forum non conveniens	FNC
George Washington Law Review	G.W.L. Rev.
Global Competition Litigation Review	G.C.L.R.
Harvard Law Review	Harvard L.R.
Harvard Negotiation Law Review	Harv. Neg. L. Rev.
Indiana Journal of Global Legal Studies	Ind. J. Global Legal Stud.
Industrial Law Journal	I.L.J.

Intellectual Property Quarterly	I.P.Q.
International & Comparative Law Quarterly	I.C.L.Q.
International Arbitration Law Review	I.A.L.R.
International Business Association	IBA
International Business Law Journal	I.B.L.J.
International Centre for Dispute Resolution	ICDR
International Chamber of Commerce	ICC
International Competition Network	ICN
International Company and Commercial Law Review	I.C.C.L.R.
International Insurance Law Review	Int. I.L.R.
International Journal of Conflict Management	Int'l J. Confl. Manage.
Intellectual Property & Technology Law Review	Intel. Prop. & Tech. L.J.
International Review of Intellectual Property and Competition Law	I.I.C.
Journal of Competition Law & Economics	J.C.L. & E.
Journal of International Law	Int'l Law
Journal of International Banking Law and Regulation	J.I.B.L.R.
Journal of International Banking Law	J.I.B.L.
Journal of International Maritime Law	J.I.M.L.
Journal of Private International Law	J. Priv. Int'l L.
Judicial Arbitration and Mediation Service	JAMS
Law Quarterly Review	L.Q.R.
Legal Studies	L.S.
Loyola of Los Angeles International and Comparative Law Review	Loy. L.A. Int'l & Comp. L. R.
Maastricht Journal	M.J.
Michigan Journal of International Law	Mich. J. Int'l L.
National Competition Authorities	NCAs
National Labour Relations Act	NLRA
National Labour Relations Board	NLRB
Nebraska Law Review	Neb. L. Rev
Netherlands Journal of private international law	NiPR
New Law Journal	N.L.J.
New York University Law Review	N.Y.U.L. Rev.
North Carolina Law Review	N.C.L. Rev
North Carolina Journal of International Law and Commercial Regulation	N.C.J. Int'l L. & Com. Reg.
Office of Fair Trading	OFT
Official Journal	OJ
Pacific Law Journal	Pac. L. J.
Praxis des internationalen Privat- und Verfahrensrechts	I.P.R.A.X.
Queen's Bench	Q.B.
Quinnipac Law Review	Quinnipac L. Rev.
Stanford Law Review	Stan. L.R.
Stanford Technology Law Review	Stan. Tech. L. Rev.
Treaty on European Union	TEU
Treaty on the Functioning of the European Union	TFEU
Tulane Law Review	Tul. L. Rev.
Tennessee Bar Journal	Tenn. B.J.
Trinity College Law Review	Trinity C.L. Rev.
Uniform Class Proceedings Act	UCPA
Uniform Law Conference of Canada	ULCC

Unitary Patent Court
University of Chicago Law Review
University of Michigan Journal of Law Reform
University of Pennsylvania Law Review
Utrecht Journal of International and European Law
Virginia Journal of Social Policy and the Law
World Competition

UPC
U. Chi. L. Rev
U. Mich. J.L.R.
U. Pa. L. Rev.
Utrecht J. Int'l & Eur. L.
Va. J. Soc. Pol'y & L.
W.C.

INTRODUCTION

0.1 Introduction

This thesis examines the relationship between the private enforcement of EU competition law and forum shopping with a particular focus on cross-border collective end-consumer redress. Forum shopping refers to the practice of litigants bringing their action to the court that is considered to be the most convenient for their action, i.e. where they will be most likely to obtain a favourable judgment.¹

This is a topic of importance because there is no coherent framework for cross-border collective redress cases in Europe. This has also been a major policy concern for the European Commission for some time. Currently, the EU comprises a mosaic of national legal systems. There are significant differences in the approaches of Member States towards collective redress. Such mechanisms exist in most, but not all, Member States. There has been much debate following the Commission's Recommendation on collective redress,² which invites Member States to legislate for collective redress. There is no obligation for the Member States to implement such a procedural tool. The soft nature of this instrument, and the fact that the issue of collective redress is not addressed by the new

¹ Directorate General for Internal Policies, Policy Department A, Economic and Scientific Policy, *Collective redress in antitrust*, 7, available at: [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/475120/IPOL-ECON_ET\(2012\)475120_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/475120/IPOL-ECON_ET(2012)475120_EN.pdf) (accessed 31.05.2016); See also Shearman & Sterling, *case comment: jurisdiction – forum shopping*, (2016) 31(5) J.I.B.L.R. N72; anon., *Shopping for justice*, (1999) 13(9) Lawyer 22; A. Waters, *Forum shopping in fraud actions following Owusu v Jackson*, (2010) 25(6) B.J.I.B. & F.L. 359; R. King and S. Colbran, *Forum shopping*, (2005) 149(18) S.J. 531; F. Ferrari, *Forum shopping despite international uniform contract law conventions*, (2002) 51(3) I.C.L.Q. 689; D. Sandy, *The importance of early forum shopping*, (2005) 125(Mar) Supp (Disputes 2005) I.H.L 46; J.F. Campsie, *Why shopping around for forum is a sensible move*, (2008) L.L.I.D. 8, 7; B. Barton, *England and Wales: effective tactics*, (1998) Jul/Aug Supp. I.C. Lit. 153.

² Commission Recommendation on common principles for injunctive and compensatory collective redress mechanism in the Member States concerning violations of rights granted under Union Law OJ L 201 26.7.2013, 60.

Directive on Actions for Damages,³ must be regarded as a strong indication that the EU legislator believes that Member States are better placed to devise their own cross-collective redress mechanisms.⁴ Despite the attempt at establishing common principles, the European legislature thus seems to accept a heterogeneous landscape of collective redress in Europe. Some argue that the Commission has missed the opportunity to provide rules on international jurisdiction, recognition and the applicable law particularly designed for cross-border mass litigation and that, as a consequence, forum shopping has the potential to become even more important for claimants in mass damages claims.⁵

This diversity has the potential to engage multiple judicial forums in cases arising out of common facts and legal questions. The lack of uniformity of a legal solution causes uncertainty in the choice-of-law and jurisdictional rules, and has the potential to create a rush to different national courts.⁶ The opportunity to file lawsuits in different fora makes the choice of venue a matter of business tactics.⁷ Lawyers may engage in forum shopping when filing lawsuits or entering into settlements on behalf of the victims of mass torts.⁸ This, in turn can provide Member States with incentives to amend their laws to attract collective proceedings and create competition between national judicial systems. For example, it is stated that the Amsterdam Court of Appeal has been performing the role of the most favourable forum for the enforcement of foreign collective action judgments in

³ Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of competition law provisions of the Member States and of the European Union OJ 349 5.12.2014 1.

⁴ M. Danov, *Cross-border competition cases: level playing for undertakings and redress for consumers*, (2014) 35(10) E.C.L.R. 487, 494.

⁵ A. Stadler, *The Commission's Recommendation on common principles of collective redress and private international law issues*, NiPR 2013 Afl. 4. 483.

⁶ D-G for Internal Policies (supra n.1), 43.

⁷ L. Gorywoda, *The emerging EU legal regime for collective redress*, in A. Nuyts, N.E. Hatzimihail, W. de Gruyter, *Cross-border class actions: The European Way* (2013), 188.

⁸ A. Stadler, *Mass damages in Europe – allocation of jurisdiction – cross-border multidistrict litigation*, in W.H. van Boom, G. Wagner, W. de Gruyter GmbH & Co KG, *Mass torts in Europe: Cases and reflections* (2014), 200.

the EU.⁹ Contrast the situation with Germany which has faced political resistance to the implementation of new instruments.¹⁰

There are also other factors which make this an important topic. There are growing concerns that the diversity of collective redress procedures across the EU contributes to a paucity of claims. Moreover, there appears to be a lack of motivation for end-consumers to seek a remedy, particularly if they have to seek redress outside of their own legal regime. Addressing this situation is vital given that end-consumers regularly suffer harm in the form of higher prices, lower output, reduced quality and limited innovation as a result of antitrust infringements but they are rarely compensated due to legal and practical obstacles.¹¹ Collective redress is a mechanism that may accomplish the termination or prevention of unlawful business practices which affect a multitude of claimants or the compensation for the harm caused by such illegal practices.¹² Efficient and effective schemes for collective actions are considered as a vital component of a well-functioning judicial system. In the area of antitrust where illegal conduct may cause scattered and low-value damage to a multitude of individuals, and where the individual cost for redress might not be proportionate to the damage suffered, this holds true all the more.¹³

⁹ See J. Kortmann and M. Bredenoord-Spoek, *The Netherlands: a 'hotspot for class actions?'* (2011) 4(1) G.C.L.R. 13; See also Court of Appeal Amsterdam 1.6.2006, LJN: AX 6440 (*DES*); 25.01.2007, LJN: AZ 7033, NIPR 2007, 208 (*Dexia*); 29.4.2009, LJN: BI 2717 (*Vie d'Or*); 29.5.2009, LJN: BI 5744, NIPR 2010, 71 (*Shell*); 15.7.2009, LJN: BJ 2691, NIPR 2010, 458 (*Vedior*); 12.11.2010, LJN: BO3908, NIPR 2011, 85 and 17.1.2012, LJN: BV1026 (*Converium*).

¹⁰ Although see A. Stadler, *Developments in collective redress: What's new in the 'new German KapMuG,'* (2013) 24(6) E.B.L.R. 731.

¹¹ D-G for Internal Policies (supra n.1), 1.

¹² Ibid.

¹³ Ibid., 11.

0.2 Research Questions

Two main research questions have been identified. First, to what extent do the conflicts-of-laws encourage forum shopping; second, what is the appropriate forum and what are the procedural measures that need to be adopted in order to facilitate effective and equal access to justice for victims of EU competition law violations?

0.3 Methodology

This thesis provides a critical analysis of the EU rules on jurisdiction and the applicable law. In undertaking this research, a mixture of primary and secondary sources has been considered. This thesis includes reference to statutory materials, case law, standard textbook and reference books, legal periodicals, parliamentary debates and government reports. Moreover, this thesis compares the EU with the jurisprudence and legal doctrines of the EU Member States and US. The US in particular has a well-recognised private enforcement regime and collective redress mechanism. This type of approach is beneficial where modification and amendment to EU cross-border end-consumer redress is required.

0.4 Structure

This thesis answers the research questions over six chapters (excluding the introduction and conclusion). The first chapter provides an overview of the current system of end-consumer cross-border redress in EU competition law. It provides definitions of the relevant terminology. It describes the potential for forum shopping given the diversity of EU Member States' collective procedures. This chapter also considers the US as the pioneer of collective redress and its culture of private antitrust enforcement, emphasising

the EU's rejection of the US' invasive and far-reaching punitive measures. The second chapter addresses the first research question. It assesses the current private international law rules on jurisdiction and the applicable law relevant to cross-border collective redress (with particular reference to EU competition law). Their relationship with forum shopping shall be analysed. The following chapters address the second research question. This begins by considering the role of alternative dispute resolution, namely class arbitration, to resolve cross-border collective claims flowing from a breach of competition law. The experience in the US shall be drawn upon to assess whether such an approach is suitable for a European setting. The analysis then embarks upon an evaluation of the attitudes of end-consumers towards competition law violations. This is followed by a discussion of what can be learned from this information in order to make cross-border collective redress more effective from an end-consumer perspective. The penultimate chapter evaluates the interface between public and private enforcement. This chapter discusses whether methods of public enforcement (such as fines, settlements and commitment decisions) should play a role in facilitating the redress of victims who have suffered from wide-spread anticompetitive harm. The final chapter considers the ultimate remedy to the problems faced by the current heterogeneous system of collective redress by concentrating proceedings in a centralised EU competition court.

CHAPTER 1 BACKGROUND

1.0 The definition of forum shopping

The concept of forum shopping comes from the notion that the '[t]he plaintiff usually shops in the forum where he is most familiar or in which he gains the greatest procedural advantage or puts the defendant to the greatest procedural disadvantage.'¹

It has developed from the lack of uniformity throughout the world's legal systems, in terms of internal laws, choice-of-law and procedural rules developed by different countries to facilitate the enforcement of those laws.² Lack of uniformity in any one of these three areas may vary the legal result in any given situation according to the forum in which litigation takes place. Difference in forum and legal approach may convert an unpromising case into an eminently winnable one³ or at least one wherein the certainty of an opponent's victory is considerably diminished, paving the way for settlement where one was either not feasible prior to the jurisdictional battle or on far better terms for the jurisdictional victor. Once a state or a nation produces a law, people and firms connected with the polity must obey the law or suffer the consequences. But individuals and undertakings are increasingly given another choice, i.e. to move beyond the law's reach. This has become more common with the dawn of transnational litigation.⁴ Litigation over where to litigate has increased dramatically in recent decades.⁵ One commentator has observed that 'in a world where daily transactions routinely involve multiple countries, litigants are increasingly likely to

¹ L. Collins, *Contractual obligations: The EEC Preliminary Draft Convention on Private International Law*, (1976) 25 I.C.L.Q. 35, 36.

² A.S. Bell, *Forum shopping and venue in transnational litigation*, (2003, (OUP)), 25.

³ *Ibid.*, 47.

⁴ L.E Ribstein and E. O'Hara., *The law market*, (Oxford Scholarship Online, (2009)), 3.

⁵ A.S. Bell (*supra* n.2), vii.

find themselves embroiled in simultaneous contests in several theatres.’⁶ Lord Goff has rather pertinently remarked in *Airbus Industrie GIE v Patel*⁷ that the world ‘is a jungle of separate, broadly-based jurisdictions’.⁸

Forum shopping is a controversial issue.⁹ Some embrace the concept. Others strongly condemn it. ‘Like cholesterol and trolls, forum shopping can be good, and forum shopping can be bad.’¹⁰ Debra Lyn Bassett¹¹ states that:

‘One of the more interesting contradictions in law is the common description of litigation as a ‘game’ while simultaneously decrying ‘game playing’ in the litigation process.

Litigation involves strategic choice, as game theory illustrates. One of those strategic choices includes the plaintiff’s initial selection of the forum, which the defendant may attempt to counter through transfer strategies of its own. Criticising and trivialising forum selection through the label of forum shopping misapprehends the forum game by treating forum selection as a parlor trick – as unfair and abusive – rather than as a lawful, authorised strategy. Forum shopping is not a form of ‘cheating’ by those who refuse to play by the rules. Playing by the rules includes the ability of plaintiff’s counsel to select – and the ability of defendant’s counsel to attempt to counter – the set of rules by which the litigation ‘game’ will be played.’¹²

⁶ L.E. Teitz, *Taking multiple bites of the apple: A proposal to resolve conflicts of jurisdiction and multiple proceedings*, (1992) 26 Int’l Law 21, 22.

⁷ *Airbus Industrie G.I.E. v Patel and Others* [1999] 1 A.C. 119.

⁸ *Ibid.*, at 132.

⁹ A.G. Slater, *Forum non conveniens: A view from the shop floor*, (1988) 104 L.Q.R. 554, 561.

¹⁰ R. Maloy, *Forum shopping? What’s wrong with that?* (2005) 24(1) Quinipiac L. Rev 25.

¹¹ Professor of Law at Southwestern Law School.

¹² D.L. Bassett, *The forum game*, (2006) 84 N.C.L. Rev. 333, 344; In 1973, Lord Denning MR refused to disapprove of forum shopping in England since ‘it is a good place to shop in, both for quality of goods and the speed of service.’ See *The Atlantic Star* [1973] Q.B. 364, 382; R. Schuz, *Controlling forum-shopping: The impact of MacShannon v Rockware Glass Ltd*, (1986) 35 I.C.L.Q. 374, 375.

Bassett continues by arguing that: ‘The ethical rules require lawyers to represent clients to the best of their ability, and selecting the forum most favourable to the client’s claim is an integral part of vigorous and effective representation. Indeed, the failure to forum shop would, in most cases, constitute malpractice.’¹³

Others are of the opinion that forum shopping is fundamentally malevolent and that it is solely concerned with the unfair exploitation of different legal systems. It describes the scenario of ‘a plaintiff by-passing his natural forum and bringing his action in some alien forum which would give him relief or benefits which would not be available to him in his natural forum.’¹⁴ As a rule, counsel, judges and academics employ the term ‘forum shopping’ to reproach a litigant who, in their opinion, unfairly exploits jurisdictional or venue rules to affect the outcome of a lawsuit.¹⁵ The UK House of Lords has on several occasions expressed the need to combat forum shopping.¹⁶

1.1 The relationship between forum shopping and the private enforcement of EU competition law

An area where forum shopping has the potential to arise is within the private enforcement of EU competition law. Central to the objective of EU competition policy is that anyone within the EU who has suffered loss as a result of anticompetitive conduct has the right to

¹³ D.L. Bassett (supra n.12), 344.

¹⁴ *Boys v Chaplin* [1971] A.C. 356 at 401 per Lord Pearson; See also J. Fawcett, *Forum shopping? Some questions answered*, (1984) 35 Northern Ireland Law Quarterly 141.

¹⁵ F. K. Juenger, *Forum shopping, domestic and international*, (1989) 63 Tul. L. Rev. 553, 553.

¹⁶ *Boys v. Chaplin* (supra n.14); *The Atlantic Star* [1974] A.C 436, 454; *Hesperides Hotels Ltd. v Muftizade* [1979] A.C. 508.

take action in the national courts.¹⁷ This shall be in accordance with national rules.¹⁸ This evokes questions of forum shopping before the national courts given the existence of different national laws governing causes of actions, different procedural rules (e.g. relating to disclosure of documents, admission of evidence/pre-trial discovery, statute of limitation, allocation of costs, sources of funding for legal expenses etc.) and different remedies (interim relief, restorative-compensatory and/or punitive damages).¹⁹ If the victims of an antitrust infringement cannot gain an effective remedy in their home Member State, they will have an incentive to shop around for the best forum in which they are perceived to be the most favourably treated and take their case to a different, ‘better equipped’ jurisdiction.²⁰ Note that the new Damages Directive²¹ has started to pave the way for antitrust damages actions by removing barriers which formerly prevented victims from seeking redress, and harmonizing procedures across the EU for claimants seeking to bring damages actions for harm caused by businesses which have been found to have infringed competition law. This uniformity should contribute to the reduction (or even elimination) of ‘forum shopping’ in which claimants bring actions in jurisdictions with the most favourable laws.²² However, there are still areas of private enforcement of competition law which remain open to the possibility of forum shopping. One is collective redress.

¹⁷ EU courts do not have jurisdiction to hear private antitrust claims for the infringement of EU or national competition law although the courts of the Member States can bring the issue before the CJEU through a referral for a preliminary ruling. Those references lead to the landmark rulings in Case 453/99 *Courage Ltd v Bernard Crehan* [2001] E.C.R. I-6297 and Case 295/04 to 298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni* Joined Case [2006] E.C.R. I-6619; see S. Peyer, *Myths and untold stories: Private antitrust enforcement in Germany* (2010) U.E.A. C.C.P. Working Paper available at <https://ira.le.ac.uk/bitstream/2381/28243/6/Peyer-Private%20Antitrust%20Enforcement%20in%20Germany2011-11-29final.pdf> (accessed 09.08.2016).

¹⁸ Commission staff working document accompanying the White Paper on damages actions for breach of the EC antitrust rules, SEC (2008) 404.

¹⁹ P.L. Krauskopf and A. Tkacikova, *Competition law violations and private enforcement: forum shopping strategies*, (2011) 4(1) G.C.L.R. 26, 26.

²⁰ *Ibid.*, 38.

²¹ Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of competition law provisions of the Member States and of the European Union OJ L 349 5.12.2014, 1.

²² M. de Sousa e Alvim, *Legislative comment: The new EU Directive on antitrust damages – a giant step forward?* (2015) 36(6) E.C.L.R. 245, 248; However, note the concerns of the European Justice Forum about Article 5(8) of the Damages Directive: ‘Article 5 will already revolutionise disclosure in most Member States, creating a process that is almost entirely unknown, and which is likely to create significant cost. There

1.2 The relationship between forum shopping and collective redress flowing from a breach of the EU competition rules

There is no overarching EU regime for collective redress and the new Damages Directive gives little attention to this area. In spite of the EU legislator's objective to 'improve the conditions for consumers to exercise their rights,'²³ the Damages Directive states that '[it] should not require Member States to introduce collective redress mechanisms for the enforcement of Articles 101 and 102 of the Treaty.'²⁴

Without any overarching rules, there exists a patchwork of different Member State regimes. A small number of Member States do not have such procedures.²⁵ This has the potential to engage forum shoppers. With a mosaic of legal systems and no coherent legal framework, this means that potentially multiple judicial forums can be engaged in cases arising out of common facts and common legal questions. The possibility to file lawsuits in different fora with different applicable laws makes the choice of venue a matter of business tactics. This in turn can provide the Member States with incentives to amend their laws to attract collective proceedings. For example, the Amsterdam Court of Appeal is considered

is a real risk that disclosure may be abused by claimants as a means of forcing defendants to settle even unmeritorious claims. Article 5, as it currently reads, offers only minimal protection against such potential abuses. Article 5(8) would render such minimal protection wholly ineffective since it would allow Member States to maintain and develop unfettered disclosure procedures. Further, it would cause a misalignment among Member States, which would trigger forum shopping and would create barriers to effective redress.' European Justice Forum, *5 key changes to the Commission's proposed Directive on antitrust damages actions*, available at <http://static1.1.sqspcdn.com/static/f/333255/24425576/1393335180850/EJF+5+Key+Changes+to+the+Commission's+proposed+Directive+on+antitrust+damages+actions.pdf?token=zZLap4R2fiMbVMiHw4NXRYdPgA%3D> (accessed 09.05.16).

²³ Directive 2014/104/EU (supra n.21), Recital 9.

²⁴ Ibid., Recital 12.

²⁵ For example, in Luxembourg, see L.V. Steinmetz, *Focus on collective redress*, British Institute of International and Comparative Law, <http://www.collectiveredress.org/collective-redress/reports/luxembourg/overview> (accessed 24.5.2016).

one of the most favourable forums for the enforcement of foreign collective redress judgments in the EU.²⁶

Before further considering the relationship between forum shopping and collective redress, a word should be said on terminology. Collective redress is a 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. It facilitates access to justice in particular in cases where the individual damage is so low that potential claimants would not think it worth pursuing an individual claim. It also strengthens the negotiating power of potential claimants and contributes to the efficient administration of justice, by avoiding numerous proceedings concerning claims resulting from the same infringement of law.²⁷ As a result, actions for damages under competition law are facilitated due to the reduction of the necessary economic resources and technical expertise.²⁸

One category of claimant who benefits from collective redress is the end-consumer. An end-consumer is an end-purchaser acting out-with their trade or profession.²⁹ End-consumers regularly suffer harm in the form of higher prices, lower output, reduced quality and limited innovation as a result of antitrust infringement.³⁰ In all probability each individual end-consumer claim is likely to be very small - too small to make it worth the

²⁶ L. Gorywoda, *The emerging EU legal regime for collective redress*, in A. Nuyts, N.E. Hatzimihail, W. de Gruyter, *Cross-border class actions: The European Way* (2013), 188.

²⁷ Commission Communication, *Towards a European horizontal framework for collective redress*, COM (2013) 401, para 1.2.

²⁸ P. Eckel, *A common approach to collective redress in antitrust and unfair competition: A comparison of the EU, Germany and the United Kingdom*, (2015) 46(8) I.I.C. 920, 920.

²⁹ See for example, the notion of 'consumer' in EU law, Library Briefing, Library of the European Parliament, 06.05.2013, [http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130477/LDM_BRI\(2013\)130477_REV1_EN.pdf](http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130477/LDM_BRI(2013)130477_REV1_EN.pdf), (accessed 09.05.16).

³⁰ Directorate General for Internal Policies, Policy Department A Economic and Scientific Policy, *Collective redress in antitrust*, available at <http://www.europarl.europa.eu/document/activities/cont/201206/20120613ATT46782/20120613ATT46782EN.pdf> (accessed 09.09.2016), 1.

time, effort and expense of bringing an individual damages claim. Using the US *Bank of Boston*³¹ case as an example, no one claimant would initiate a lawsuit with the hope of receiving an \$8.76 award. As Judge Posner stated, 'the realistic alternative to a class action [this is the US name for a collective redress mechanism and shall be discussed in greater depth below] is not 17 million individual suits, but zero individual suits, as only one lunatic or fanatic sues for £30.'³² What is small fry to the end-consumer may of course be big fish indeed so far as the infringer is concerned: if thousands or millions of consumers have been affected, the infringer may well escape paying a very considerable sum in damages if no effective mechanism exists for providing collective redress. In these circumstances, there is a concern not only that victims suffer an injustice, but also the fear of fines alone may prove insufficient to deter would-be infringers who stand to make large profits.³³

This kind of mass harm situation often includes a cross-border element. Products, goods and services of all kinds are distributed all over Europe. Damages arising from a breach of competition law may thus entitle victims domiciled in different Member States to claim compensation from the infringing undertaking(s). Cross-border collective redress proceedings offer the chance of pooling all or at least a large number of claims arising from the same violation.³⁴ This raises the issue of forum shopping. Member States which offer the facility to pool together similar claims from victims domiciled in different parts of the EU will be perceived as more attractive to claimants. This generates some complex issues for private international law.

³¹ *Carnegie v Household International*, 376 F.3d 656, 991 (2004).

³² *Ibid.*

³³ G. Barling, *Collective redress for breach of competition law: A case for reform?* (2011) *Comp. Law* 5, 10 available at http://ec.europa.eu/competition/consultations/2011_collective_redress/sir_gerald_barling_en.pdf (accessed 02.08.2016); The fine is limited to 10% of the overall annual turnover of the company. The profits of a cartel could outweigh this, especially if there is no effective private enforcement mechanism.

³⁴ British Institute of International and Comparative Law, *Focus on collective redress*, available at <http://www.collectiveredress.org/collective-redress/eu-cross-border> (accessed 02.08.2016).

1.3 Failure to establish a coherent framework of EU collective redress and forum shopping

The European Commission has worked for many years to develop an EU cross-border collective redress mechanism in the field of competition and consumer law. Last decade, the Commission issued a series of publications in which the issues relating to private enforcement of European competition law were analysed with the aim of integrating collective actions for damages. Those initiatives have resulted in the following publications:

- Green Paper on antitrust damages actions;³⁵
- White Paper on damages actions for breach of EU antitrust rules;³⁶ and
- Green Paper on consumer collective redress.³⁷

Having failed in these attempts to propose legislation on collective redress, the Commission deepened its analysis by carrying out a public consultation entitled, ‘Towards a Coherent Approach to Collective Redress.’³⁸ The Commission tried to set out core principles which could pave the way for future initiatives in the area of collective redress.³⁹ Such principles must cover, *inter alia*, the following points:

- The creation of strong safeguards to avoid the risk of abusive litigation (including the availability of the ‘loser pays’ rule, a ban on contingency fees and punitive damages);

³⁵ Green Paper, *Damages actions for breach of the EC antitrust rules*, COM (2005) 672.

³⁶ White Paper, *Damages actions for breach of the EC antitrust rules*, COM (2008) 165.

³⁷ Green Paper, *Consumer collective redress*, COM (2008) 794.

³⁸ Commission Communication (supra n.27).

³⁹ Z. Juska, *The future of collective antitrust redress: is something new under the sun?* (2015) 8(1) G.C.L.R. 14, 15.

- The importance of ensuring availability of appropriate financing mechanisms; and
- The importance of the role of representative bodies.

Parallel to the work being carried out by the Commission, the European Parliament decided to provide its input to the European debate on collective redress by adopting a Resolution entitled, ‘Towards a Coherent Approach to Collective Redress.’⁴⁰This Resolution welcomed the main views expressed in the public consultation of the European Commission, stressing that:

‘victims of unlawful practices – citizens and companies alike – must be able to claim compensation for their individual loss or damage suffered, in particular in the case of scattered and dispersed damages, where the cost risk might not be proportionate to the damages suffered.’⁴¹

It suggested that any proposal in the field of collective redress take the form of a horizontal framework so as to avoid the fragmentation of national laws applying to different areas of law.⁴²The European Parliament also stressed the need for procedural measures to avoid frivolous claims if a horizontal measure is adopted, including:

- The ‘opt-in’ principle should be the only appropriate European approach to collective redress;
- Damages should be compensatory and punitive damages should be clearly prohibited; and,

⁴⁰ European Parliament Resolution of 2 February 2012 on *Towards a coherent European approach to collective redress* (2011/2089 (INI)).

⁴¹ *Ibid.*, para. 1.

⁴² *Ibid.*, paras. 15-20.

- The ‘loser pays’ principle should be used as a means of avoiding unmeritorious claims.

Subsequently, the European Commission revealed its latest and long-awaited contribution to collective redress. The EU legislator decided to adopt a Commission Recommendation on common principles for injunctive and collective redress in the Member States concerning violation of rights granted under Union law.⁴³ The Recommendation invites, rather than instructs, Member States to adopt collective redress mechanisms for injunctive and compensatory relief. These principles are supposed to represent ‘minimum standards’ that Member States are encouraged to apply in their regulation of collective redress. They are not bound to do so. The non-binding nature by no means guarantees that all Member States will participate to form a coherent body of collective redress across the EU. This has the potential to create an uneven playing field and thus produces the potential for forum shopping.

Moreover, a major issue is that some Member States have already gone beyond these minimum standards. For example, reforms in recent years have sent a signal that individual Member States may comply broadly with the Commission but, on key issues, such as the opt-in procedure and funding mechanism, each will feel free to chart its own course.⁴⁴ For instance, the UK, the Netherlands and Portugal have implemented opt-out mechanisms. In Denmark, if the number of individual claims is high enough to make it burdensome to pursue them individually, the competent court may decide that the collective mechanism will encompass all group members which will have not opted-out within a deadline set by

⁴³ Commission Recommendation on common principles for injunctive and compensatory collective relief mechanisms in the Member State concerning violations of rights granted under Union Law OJ L 201 26.7.2013 60.

⁴⁴R. Gamble, *Not a class (yet): Europe moves softly towards collective redress*, (2016) 37(1) E.C.L.R 14, 21.

the court.⁴⁵ In Bulgaria the decision of the court is binding for those who have submitted a claim as well as for the potential victims who did not opt-in, but did not bring separate actions on their own either.⁴⁶ Belgium was the first country to pass a broader collective redress procedure after the Recommendation's release.⁴⁷

The soft nature of the EU legislative instrument, and the fact that the issue of collective redress is not addressed by the Directive, must be regarded as a strong indication that the EU legislator believes that Member States are better placed to devise their cross-collective redress mechanisms.⁴⁸ Moreover, despite the attempt at establishing common principles, the European legislature thus seems to accept a heterogeneous landscape of collective redress in Europe and has missed the opportunity to provide rules on international jurisdiction, recognition and the applicable law particularly designed for cross-border mass litigation. As a consequence, forum shopping becomes even more important for claimants in mass damages cases.⁴⁹

⁴⁵ D-G for Internal Policy (supra n.30), 20.

⁴⁶ Ibid.

⁴⁷ In 2014, the Belgium enacted a law adding a new section on 'collective compensation action' to the Code of Economic Law (Title 2 'On Collective Compensation Action' in Book XVII 'Special Jurisdictional Procedures' of the Code of Economic Law, 28.3.2014, Official Gazette of Belgium). Contrary to the Recommendation, there is no default opt-in rule. In its certification decision, the Belgian court can choose between an opt-in or an opt-out system, based on the underlying facts and claims of the case. For instance, in small-claim consumer damages, an opt-out system will be most feasible. (CEL Article XVII.43.1).

⁴⁸ M. Danov, *Cross-border competition cases: level playing for undertakings and redress for consumers*, (2014) 35(10) E.C.L.R. 487, 494.

⁴⁹ A. Stadler, *The Commission's Recommendation on common principles of collective redress and private international law issues*, NiPR 2013 Afl. 4. 483; See also C. Hodges, *Collective redress: A breakthrough or a damp squib?* (2014) J.C.P. 37, 67.

1.4 The current lack of cross-border provisions in the Recommendation and the potential for forum shopping

The Recommendation only has one cross-border provision. This concerns legal standing.⁵⁰

It is recommended that group claimants and representative entities with legal standing in one Member State should not be prevented from bringing claims in other Member States. Foreign groups and representative entities may have legal standing in the Member States where the claim is issued, based simply on their status in their home jurisdiction, whereas identical or similar domestic groups and entities may not because of more restrictive group standing and representative entity designation criteria in the jurisdiction where proceedings are issued. This has the potential for discrimination and inconsistency. There is the prospect that this cross-border provision could subvert established conflicts-of-laws principles. Legal standing is a procedural issue. Ordinarily, procedure is a matter for the *lex fori*. However, designation and regulation of representative entities could, depending on the manner of implementation in Member States, be subject to substantive public and administrative law, opening the prospect of some foreign claimants on public policy grounds. Even if this is not the case, there are no European treaties or regulations on conflicts-of-laws that would require the domestic courts to apply, on the basis of this non-binding Recommendation, foreign procedural laws on legal standing. This then opens up the question of which law the court seised of jurisdiction should apply. The Recommendation essentially anticipates that national courts will voluntarily recognise procedural standing defined according to foreign laws in cross-border claims, whereas national courts, which enjoy procedural autonomy, will most likely be under a legal duty to apply the domestic procedural law. Disregarding the Recommendation's principles on cross-border standing will stultify the Recommendation's impact on cross-border mass

⁵⁰ Recommendation (supra n.43), para. 17.

harm cases. On the other hand, following the non-binding Recommendation might contradict established conflicts-of-laws principles on civil procedure, undermine European principles of non-discrimination, subsidiarity, mutual respect and sovereignty, and be contradictory to the legal tradition in that national system, contrary to Article 67 TFEU. Thus the legal standing provisions could have the adverse unintended consequence of exacerbating cross-border ‘forum shopping,’ a risk that is already present due to the absence of substantive harmonising standards applicable to collective actions.⁵¹

1.5 The main reason for the lack of an EU-wide collective redress procedure: the US experience

Fragmentation and the lack of consensus in Europe over a harmonized collective procedure is largely due to a hostility towards the type of experience in the US. Collective redress was pioneered in the US. Many in the EU believe that the US collective regime has led to excessive litigation by entrepreneurial lawyers that, in the end, produce limited benefits to victims while creating significant costs to society.⁵² Before proceeding, the terminology should be clarified. In the view of Fairgrieve and Howells⁵³ it is preferable to reserve the term ‘class action’ for the US procedure. Whilst class action procedures can take a variety of forms, the kernel of the concept is an opt-out procedure whereby consumers can be represented by default if given adequate notice of the action. The US version also has a formal certification stage, and the judge has the power to award a flexible range of remedies, including but not restricted to the award of damages to identified individuals.

⁵¹ R. Money-Kyrle, *Legal standing in collective redress actions for breach of EU rights: Facilitating or frustrating common standards and access to justice?* in B. Hes, M. Bergström, E. Storskrubb, *EU civil justice: Current issues and future outlook* (Bloomsbury Publishing, (2016)), 66.

⁵² D. Geradin, *Collective redress for antitrust damages in the European Union: Is this a reality now?* (2014) 22. *Geo. Mason L. Rev* 1079, 1080.

⁵³ D. Fairgrieve and G. Howells, *Collective redress procedures: European debates*, (2009) 59 *I.C.L.Q* 379, 382.

There is also the possibility for the award of treble (punitive) damages. At present, there is no European equivalent to the US class action model.

The class action plays a special role in the US legal regime, particularly in the field of antitrust law.⁵⁴In the US, the antitrust laws are considered as important to protecting individual rights as the Magna Carta and the Bill of Rights.⁵⁵ As the Supreme Court has repeatedly stressed, every antitrust violation strikes at the very heart of the US economy – the free enterprise system.⁵⁶For these reasons, the antitrust laws are treated with special solicitude in the US and their enforcement is highly encouraged. Congress recognised early on that the government would not have the resources to handle adequately this task alone.⁵⁷ Therefore, it enlisted the support of the public to serve as ‘private attorneys general’ to assist in the enforcement.⁵⁸ The policy is that every individual is able, and is incentivised, to seek out and pursue infringements by others. The number of private antitrust actions for any given year dwarfs the number of government actions, in some years by as much as a factor of 20.⁵⁹ Information on 34 collective redress cases collected by US scholars Lande and Davis reveal that collective redress returned almost \$30 billion to victims.⁶⁰

Many fear that Europe might eventually adopt the litigation culture prevalent in the US.⁶¹

US-style collective redress mechanisms are rejected on the ground that, as a punitive

⁵⁴ Collective redress for infringements of competition law in the US is jointly ruled by: The Federal Rules of Civil Procedure which govern the conduct of all civil actions brought in Federal District Courts and the Clayton Antitrust Act which is a civil statute that prohibits mergers or acquisitions that are likely to lessen competition and also prohibits other business practices that may harm competition.

⁵⁵ *US v Topco Assoc.*, 405 US 596, 610 (1972).

⁵⁶ *Hawaii v Standard Oil*, 405 US 251, 262 (1972).

⁵⁷ G. Schnell, *Class action madness in Europe: a call for a more balanced debate*, (2007) 28(11), E.C.L.R. 617, 617.

⁵⁸ *Cargill v Monfort of Colorado*, 479 US 104, 129 (1986).

⁵⁹ G. Schnell (supra n.57), 617.

⁶⁰ See D-G for Internal Policies (supra n.30), 35: Some of them resulted in very high monetary awards, such as *In re Visa Check/MasterMoney Antitrust Litigation* 192 F.R.D. 68 No. 96-CV-5238 (2000) and *Wal-Mart, Inc v. Visa USA Inc. & MasterCard Int’l Inc.* 396 F.3d 96 (2005) that returned awards of \$3,383 million.

⁶¹ ‘The rise of the compensation culture in the US was fostered by a civil justice system that adopted several ‘access to justice’ features such as class actions (primarily on an opt-out basis), contingency-fee financing of litigation, extensive reliance on juries as fact finders, costly pre-trial discovery, and the availability of

tool,⁶² they create an unacceptable risk of ‘over-deterrence’ encouraging ‘groundless’ claims, and a ‘blackmail effect’ on defendants.⁶³ The US mechanism, at least in the Commission’s belief, contains the ‘toxic cocktail’ that could open the door to abusive litigation.⁶⁴ As such, the goal of the Recommendation is to ensure effective access to justice and economic growth, while avoiding the excesses perceived to derive from US class actions.⁶⁵

In its Communication, the Commission made a veiled reference to the US, affirming that any collective redress policy should be seen as complementing public enforcement but would be seen:

‘primarily as an instrument to provide those affected by infringements with access to justice and (*sic*) possibility to claim compensation for harm suffered...there is no need for EU initiatives on collective redress to go beyond the goal of compensation.’⁶⁶

To this end, the Recommendation includes procedural safeguards: it adopts the ‘loser pays’ costs rule and the opt-in mechanism, places severe restrictions on the use of contingency

punitive damages in the area of civil litigation such as torts. The implication drawn is that the foregoing features generate a considerable and undesirable drag in the US economy. In the US, litigation costs total 2.1 per cent of GDP, four times that of other OECD countries. Four reports [2009 at time of writing] last year on the competitiveness of US capital markets found that the ability to bring broad securities class actions in the US was a factor in a foreign company’s decision whether to list or trade in the US. In fact, a 2007 Financial Services Forum study found nine out of every ten companies who delisted from a US exchange in the last four years said the litigation environment played a role in that decision.’ G.L. Fowler, M. Shelley and S. Kim, *Emerging trends in international litigation: Class actions, litigation funding and punitive damages*, (2009) 3 *Disp. Resol. Int’l* 101, 105.

⁶² Commission Communication (supra n.27), paras. 7-9.

⁶³ P. Eckel, *A common approach to collective redress in antitrust and unfair competition: a comparison of the EU, Germany and the United Kingdom*, I.L.C. 2015, 46(8) 920, 923; See also D. Hass and N. Fagan, *US class action: will the EU follow suit?* (2005) *Euro. Law.* 53, 31.

⁶⁴ The definition of class actions as ‘toxic cocktails’ refers to a deadly combination of dangerous measures, such as punitive damages, contingency fees, opt-out schemes and pre-trial discovery procedures comes from a press release accompanying the Green Paper on consumer collective redress. See European Commission, *Green Paper on Consumer Collective Redress – Questions and Answers*, MEMO/08/741, para 9, available at http://europa.eu/rapid/press-release_MEMO-08-741_en.htm, (accessed 23.05.2016).

⁶⁵ Z. Juska, (supra n.39), 16.

⁶⁶ Commission Communication (supra 27), para 3.1.

fees, bans punitive damages and imposes stricter disclosure rules.⁶⁷ Further, and again in contrast to the US, where private enforcement is regarded as a substitute for the work of the public regulator, private enforcement in Europe plays second fiddle.⁶⁸ A private enforcement tool, such as collective redress, is primarily an instrument to provide victims with access to justice: punishment and deterrence is the responsibility of the public regulators.⁶⁹ This supplementary role is assured because collective redress actions are primarily follow-on actions that generally only commence after any proceedings brought by the public regulator have been concluded.⁷⁰

1.6 Forum shopping only one part of the picture

The fragmentation of EU collective redress procedures and forum shopping is not the only concern. Another major issue is that by trying to avoid the type of perceived litigation abuse in the US, the Commission's efforts are inadvertently stifling the development of effective EU collective redress measures. Some argue that the Commission's regime is inconclusive, unconvincing and nothing more than a political compromise which is influenced by the European Parliament and by (industrial) lobbying pressure.⁷¹

There also appears to be a lack of motivation for end-consumers to seek a remedy, particularly if they have to seek redress in another Member State. For example, it may be argued that the recommended opt-in mechanism is a major hindrance. Under this mechanism the claimant party includes only those who actively choose to be a part of the

⁶⁷ C. Hodges, *Collective redress in Europe: The new model*, (2010) 29 C.J.Q. 370, 373.

⁶⁸ Recommendation (supra n.43), para. 6.

⁶⁹ Ibid., para. 3.1.

⁷⁰ R. Gamble (supra n.44), 16.

⁷¹ Z. Juska, (supra n.39), 24.

represented group. The judgment is binding on those who opted-in while all others who have been harmed remain free to pursue compensation individually.

The Commission advocates the use of the opt-in regime for a number of reasons.⁷²First, the procedure is compatible with the normative principle that a party should not be bound by acts of agents who have not been authorised to act on their behalf.⁷³Secondly, consistent with the Commission's aversion to US-style entrepreneurial litigation, the opt-out option is seen as prone to abuse. Finally, it is more compatible with the legal traditions that exist in many Member States that currently have some form of collective redress.⁷⁴

However, the opt-in mechanism can be criticised for a number of reasons. First, it discourages participation and access to justice, particularly where claimants are not able to make informed decisions on whether they wish to sue for compensation.⁷⁵They may not know the existence of the claim. The UK's Response to the Consultation⁷⁶(specifically on private actions in competition law) stated:

'It is very clear that the current system of collective redress does not work. Consumers are not currently getting redress for breaches of competition law. It appears unlikely that simply tinkering with the opt-in system would deliver the desired access to justice...and bodies such as the Law Society of England and Wales have said that an opt-out regime is essential if consumer cases are to be brought successfully.'⁷⁷

⁷² Commission Communication (supra n.27), para 3.4.

⁷³ Recommendation (supra n.43), para. 23.

⁷⁴ R. Gamble, (supra n.44), 19.

⁷⁵ Ibid.

⁷⁶ Department for Business Innovation & Skills, *Private actions in competition law: A consultation for reform – government response*, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/70185/13-501-private-actions-in-competition-law-a-consultation-on-options-for-reform-government-response1.pdf (accessed 02.08.2016).

⁷⁷ Ibid., 30.

Secondly, in an opt-in system, the ‘loser pays’ rule discourages anyone from volunteering as a representative plaintiff, because passive claimants may share in the gains but are not required to share in the losses.⁷⁸

Thirdly, it erodes the elements of finality and diminishes the attractiveness of a settlement because those who have not been part of the proceedings are free to initiate actions or join another collective action later. In this sense a defendant has much less to gain from settlement.

Fourthly, it is said that the opt-in provision lacks logic:

‘As to logic, how can it be thought that many thousands of consumers, each suffering the same loss or damage, can obtain access to justice and proper redress through an action in which each case has to opt-in?’⁷⁹

The logic is particularly difficult to sustain where those who opt-in may suffer badly in the event the action is unsuccessful as a result of the loser pays rule. Professor Issacharoff has embellished Judge Posner’s remark that ‘only a lunatic or a fanatic sues for \$30,’⁸⁰ by stating that: ‘it would take a particularly fanatical lunatic to do so and assume the risk of millions of dollars in adverse costs judgment to boot.’⁸¹

In very simple terms, under the US system, a claimant will bring an action where the:

⁷⁸ R. Gamble (supra n.44), 17.

⁷⁹ G. Jones, *Collective redress in the European Union: Reflections from a national judge*, (2014) 41(3) *Legal Issues of Economic Integration* 289, 301.

⁸⁰ Supra n.31.

⁸¹ S. Issacharoff, *Litigation funding and the problems of agency cost in representative actions*, (2014) 63 *De Paul Law Review* 561, 568.

[Probability of winning] x [number of claimants] x [damages from each claim] x [treble damages] x [25% (average fee)]

exceeds the total costs incurred in bringing the claim (costs of providing notice to claimants, costs of time spent on the case, costs of hiring experts, etc.).

This is based on research performed by Damien Geradin.⁸² In order to illustrate this numerically, he makes 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 claimant will likely bring this action.

The collective redress approach promoted in the Recommendation, however, dramatically impacts on the above equation, and thus incentives to bring actions, because the ‘opt-in’ mechanism will drastically reduce the amount of the possible award. In addition, because the ‘loser pays’ principle applies in the EU, the entity funding the action will have to factor into its calculations the risk of paying the costs of the defendants if the action goes to trial

⁸² D. Geradin, (supra n.52).

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, an entity will bring an action if the:

[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]

With the following assumptions made:

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.

Due to $80\% \times 10,000 \times \$50 \times 25\% = \$10,000 < \$1,000,000 = [1-80\%] \times [\$2,000,000 + \$3,000,000]$, there will be a great disincentive to bring an action.⁸³

The Recommendation also fails to take into account any analysis of behavioural economics. Assuming that the maximum participation by the alleged victims is a desirable social aim, opt-out provides the easiest access to court, ‘as parties need not do anything to join the proceedings and benefit from the group membership.’⁸⁴ The question is, however,

⁸³ Ibid., 1097.

⁸⁴ A. Higgins and A.A.S Zuckerman, *Class action in England? Efficacy, autonomy and proportionality in Collective redress*, (2013), Oxford Legal Studies Research Paper No. 93/2013, 20.

why this is so: why are people reluctant to opt-in to an opt-in class action, and reluctant to opt-out of an opt-out collective action. The answer derives, Alma M. Mozetic⁸⁵ suggests, from behavioural economics, viz. the importance in the collective redress context of introducing default options into the choice set.⁸⁶The empirical experience in the US confirms the analysis from behavioural economics. Opt-in will fail to attract widespread participation whereas in opt-out actions, Americans usually do nothing. Thus, in the US, less than 0.2 per cent in thousands of consumer cases from 1993 to 2003 opt-out.⁸⁷

The relationship between the opt-in method and behavioural economics is further complicated in pan-European cases. This is based on the current geographical restriction. Whilst there is only one EU economic market, the legal traditions of different states vary widely. In other words, there is no pan-European *legal* market. This is problematic for the following reason. The effectiveness and utility of an opt-in mechanism rest on a fair notice being given, usually through advertisement by counsel in the national media: newspapers, TV and so on. Yet, civil legal systems adopt a conservative attitude towards advertising legal service, which is an inevitable by-product of opting-in to a class action it represents.⁸⁸

1.7 Concluding remarks

This chapter has underlined the current status of EU-wide collective redress. It started with the premise that the fragmentation and diversity of national legal systems opens up the

⁸⁵ A.M. Mozetic, *Collective Redress: a case for opt-out class actions in England and Wales*, (2016) 35(1) C.J.Q. 29.

⁸⁶ *Ibid.*

⁸⁷ T. Eisenberg and G.P. Miller, *The role of opt-outs and objectors in class action litigation: Theoretical and empirical issues*, (2004) Cornell Law School Research Paper No.04-019, 1532.

⁸⁸ In Slovenia, for instance, two legal instruments: The Attorney Act 1993, s.21 and Code of Professional Conduct of the Bar Association of Slovenia, ss. 22 and 23 restrict, albeit, not prohibit, an attorney from self-advertisement.

potential for forum shopping. The latest legislative move by the Recommendation does not do much to address this.

The other issue that has been identified is that the Commission's conservative approach to EU collective redress has the potential to raise significant obstacles to the effective vindication of consumer rights. This is even more possible when a cross-border element is added.

The background provides the foundations upon which to consider the research questions. First, to what extent do the conflicts-of-laws encourage forum shopping; second, what is the appropriate forum and what are the procedural measures that need to be adopted in order to facilitate effective and equal access to justice for victims of EU competition law violations?

CHAPTER 2 THE CONFLICTS-OF-LAWS, FORUM SHOPPING AND END-CONSUMER CROSS-BORDER COLLECTIVE REDRESS IN COMPETITION LAW

2.0 Introduction

This chapter analyses the relationship between forum shopping and cross-border end-consumer collective redress in EU competition law cases from a conflicts-of-laws perspective. This chapter is primarily focussed on the first research question: namely the extent to which the conflicts-of-laws encourage forum shopping in this area of law. However, it also touches on the second research question by considering where, under the current regime, the appropriate forum should be for this type of action.

2.1 Background to Jurisdiction

Collective redress mechanisms are fairly novel in Europe when compared with legal systems such as the US. Nevertheless, the EU and its Member States have been considering this issue for some time.¹ Most EU Member States have collective mechanisms² in some shape or form but there are many differences between them and they have proved to be 'limited in scope and effectiveness'³(for instance, most of the national mechanisms are generally restricted to national claims). The specific cross-border

¹ For example: Green Paper on antitrust actions, COM (2005) 672; White Paper on damages actions for breach of the EC antitrust rules, COM (2008) 165; Green Paper on consumer collective redress, COM (2008) 794.

² See F. Cafaggi and H.W. Micklitz, *Collective enforcement of consumer law: A framework for comparative assessment* (2008) 16 E.R.P.L. 391.

³ S. Tang, *Consumer collective redress in European private international law*, (2011) 7 J. Priv. Int'l L. 101, 102.

dimension of collective redress (and the avoidance of forum shopping) has long concerned the EU Commission⁴ In the Commission Communication it was stated that:

'The general principles of European international private law require that a collective dispute with cross-border implications should be heard by a competent court on the basis of European rules on jurisdiction, including those providing for a choice of court, in order to avoid forum shopping. The rules on European civil procedural law and the applicable law should work efficiently in practice to ensure proper coordination of national collective redress procedures.'⁵

It went on to state that:

'with regards to jurisdictional rules, many stakeholders asked for collective proceedings to be specifically addressed at European level. Views differ, however, as to the desirable connecting factors between the court and the cases. A first group of stakeholders advocate a new rule giving jurisdiction in mass claim situations to the court where the majority of parties who claim to have been injured are domiciled and/or an extension of the jurisdiction for consumer contracts to representative entities bringing a claim. A second category argues that jurisdiction at the place of the defendant's domicile is best suited since it is easily identifiable and ensures legal certainty. A third category suggests creating a special judicial panel for cross-border collective actions with the Court of Justice of the European Union.'⁶

Further, it stated that:

⁴ Commission Communication, *Towards a coherent European approach to collective redress*, COM (2013) 401, 9.

⁵ *Ibid.*, 13.

⁶ *Ibid.*

‘in this respect the Commission considers that the existing rules of [Regulation 1215/2012]⁷ on jurisdiction, recognition and enforcement of judgments in civil and commercial matters (the Brussels I [Recast] Regulation), should be fully exploited.’⁸

The subsequent Commission Recommendation⁹ is silent on jurisdictional rules. What can be gathered from the Communication and the Recommendation is that the Commission believes that the Brussels I Recast Regulation remains best placed to allocate jurisdiction, contrary to the views expressed and proposals made by some writers.¹⁰ However, in doing so the Commission relies on a Regulation which was created for and guided by the leitmotiv of two party proceedings. Litigation is generally regarded as taking place between *one* specific claimant and *one* specific defendant. Some are concerned that the jurisdictional aspects of both 'traditional' two-party cross-border proceedings and collective cross-border litigation cannot be treated with a 'one-size-fits-all' approach.¹¹ Cross-border collective redress may in many cases have very specific needs which are different from traditional two-party litigation.

There are not many provisions in the Brussels I Recast Regulation which would appear to be relevant to cross-border end-consumer redress in competition cases. Only two heads of

⁷ Regulation 1215/2012 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters OJ L 351, 20.12.2012, 1 (Brussels I Recast Regulation).

⁸ Commission Communication (supra n.4).

⁹ Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law OJ L 201 26.7.2013 60.

¹⁰ C. Gonzalez Beilfuss and B. Añoveros Terradas, *Compensatory consumer collective redress and the recast Brussels I Regulation*, in A. Nuyts, N.E. Hatzimihail, W. de Gruyter, *Cross-border class actions: The European way* (2013), 241; B. Añoveros Terradas, *Consumer collective redress under the Brussels I Regulation Recast in the light of the Commission's Common Principles*, (2015) 11(1) J. Priv. Int'l L. 143, 147.

¹¹ See H. Muir Watt, *Brussels I and aggregate litigation or the case for redesigning the common judicial area in order to respond to changing dynamics, functions and structures in contemporary adjudication and litigation*, (2010) 2 I.P.R.A.X. 111.

jurisdiction would immediately stand out to serve this purpose: Articles 4 and 7(2). The former underpins the general rule (the court of the domicile of the defendant) and the latter refers to matters relating to tort/delict at the courts for the place where the harmful event occurred or may occur. A major difficulty faced by cross-border collective redress and the Brussels I Recast Regulation in terms of Article 7(2) will arise when there is a plurality of end-consumer claimants who have each suffered from similar harm but in different Member States.

On closer inspection of the Regulation, it is noted that Article 8(1) may be of relevance. This allows for the potential consolidation of claims against members of a cartel provided that one of the members is domiciled in the jurisdiction in question (and so is subject to the jurisdiction of that court under Article 4(1)). The English courts refer to this member as the ‘anchor defendant.’¹²

Article 7(5) of the Regulation may also be relevant. A person domiciled in a Member State may be sued in another Member State: ‘as regards a dispute arising out of the operation of a branch, agency or other establishment, in the courts for the place where the branch, agency or other establishment is situated.’

¹² C. Stothers, M. Gardner, S. Hinchliffe, *Forum shopping and ‘Italian torpedoes’ in competition law in the English courts*, (2011) 4(2) G.C.L.R 67, 68; See also C. Balmain and V. Coughlan, *More haste less speed: the evolving practice in competition damages actions in the UK*, (2011) 4(4) G.C.L.R. 147.

2.2 Domicile of the Defendant

The general rule in the Regulation is found in Article 4. The Article provides that a defendant domiciled in an EU Member State should be sued in the courts of that Member State. If the national provisions of that State include a collective action mechanism, the action can, in principle, proceed. In a collective redress case, this head of jurisdiction allows for relatively easy bundling of claims of several parties from various States, as it focuses on the Member State in which the *defendant* is domiciled.

With regards to forum shopping, Article 4 is a provision which clearly favours a defendant.¹³ This was intentional in the structuring of the Brussels Regime, having taken the *actor sequitur forum rei* as its foundation. The Regulation operates on the basis that the defendant should have a reasonable expectation of where they are likely to be sued.¹⁴ Special jurisdictions (i.e. derogations from the general rule) are provided for only as an exception. If this is the sole ground for clothing a court with jurisdiction in a collective action, then the claimants would appear to be left with a tactical disadvantage. The defendant will generally be left in an economically strong position and would benefit from the practicability of their home jurisdiction. Meanwhile foreign collective members potentially suffer from high costs and the many risks associated with litigation abroad. This would seem particularly inappropriate where a vast majority of victims are domiciled elsewhere.¹⁵ Given that many representative authorities working on behalf of the claimants have finite financial resources; this could result in a huge disincentive to litigate. Referring back to Chapter 1, it was mentioned that the opt-in and ‘loser-pays’ rules already

¹³ E. Lein, *Cross-border collective redress and jurisdiction under Brussels I: A mismatch*, in D. Fairgrieve and E. Lein, *Extraterritoriality and collective redress* (OUP, (2012)), 8.11.

¹⁴ Brussels I Recast Regulation (supra n.7), Recital 15.

¹⁵ E. Lein, (supra n.13).

discourage collective actions on the basis of the reduction of the possible award and the risks of having to pay the defendant's costs if the action is unsuccessful.¹⁶

Moreover, jurisdiction at the domicile of the defendant may give the wrong incentives. Even though it might seem practically unlikely, undertakings may deliberately choose to incorporate and take their seat in countries which do not provide for any collective redress mechanisms.¹⁷ Companies domiciled, for instance, in France, where there is currently some hostility towards the most effective forms of collective redress (e.g. opt-out mechanisms), would never be subject to such procedures. By contrast, companies domiciled in Member States such as Sweden and Portugal, which have adopted quite wide ranging mechanisms of collective redress, would be subject to such mechanisms on a local basis; this is hardly in agreement with the idea of a common judicial area, or with the goal to avoid distortions of competition in the internal market.¹⁸

There are, however, some benefits for the claimant under Article 4. In fact, the definition of the 'domicile' of companies or other legal persons provided for in Article 63(1) of the Regulation may prove in a collective redress setting to favour a claimant. Article 63(1) provides that the domicile of legal persons is linked to the statutory seat, central administration, or principal place of business. These criteria do not follow any hierarchical order and leave the claimant free to choose upon which to found jurisdiction.¹⁹ These places are all considered by law to be of a sufficient link to the dispute. However, from a forum shopping perspective, it may allow claimants to launch a collective suit in a certain Member State for the simple reason that the company has a registered office there. This

¹⁶ Supra Ch.1, 23; A. Layton, *Collective redress: Policy objectives and practical problems*, in D. Fairgrieve and E. Lein, *Extraterritoriality and collective redress* (OUP, (2012)), 5.39.

¹⁷ E. Lein (supra n.13), 8.12.

¹⁸ A. Nuyts, *The consolidation of collective claims under Brussels I*, in A. Nuyts, N.E. Hatzimihail, W. de Gruyter, *Cross-border class actions: The European way* (2013), 72.

¹⁹ E. Lein (supra n.13), 8.13.

raises questions of appropriateness when the selected forum is only tenuously linked to the dispute whilst the major focus of the case rests elsewhere. This Article thus provides both tactical advantages and disadvantages for both sets of parties depending on the particular set of circumstances.

Some suggest that the domicile of the defendant (or one of the defendants) should actually be the only rule of jurisdiction for collective redress.²⁰ By definition, these types of cases deal with a cross-border activity that causes damages in the territories or in the markets of more than one State. The harmful activity is spread across several States, and the victims or consumers who are harmed by this activity are based in different States. The domicile of the defendants would seem to provide in that case the only central point where all claims and interests can be consolidated and taken into account by a single court.²¹

Allocating jurisdiction to any court other than the court of the defendant would require that a choice be made amongst, potentially a large number of fora. This would create a number of problems. It would discriminate between end-consumers. The action would be brought in the Member State where some of the end-consumers are domiciled, but not others.

Forum shopping would be generated where the procedures and laws perceived to be the most advantageous are located. Moreover, allocating jurisdiction to more than one court could mean that collective redress proceedings could potentially be initiated concurrently in different Member States raising the issue of parallel collective proceedings.

In sum, jurisdiction at the place of the defendant's domicile would appear to be the most appropriate since it is easily identifiable and ensures legal certainty.²² It has nevertheless, a

²⁰ A. Nuyts (supra n.18).

²¹ Ibid., 71.

²² Commission Communication (supra n.4), 13.

great disadvantage for the potential collective claimants insofar as they may have to face the cost and difficulties of litigating abroad. Here, it is hard to reconcile both principles: legal certainty and the necessary consumer protections which are both stated objectives in the Commission's Recommendation.²³

2.3 Place where the harmful event occurred or may occur

Given the tortious nature of antitrust claims, Article 7(2) will be relevant.²⁴ This confers jurisdiction to the courts at the place 'where the harmful event occurred or may occur'. In general terms, the CJEU has understood this place as twofold: it will be either the place where the harmful event giving rise to the damage occurred (place of acting) or the place where the actual damage occurred (place where the harm was felt).²⁵

The choice between the two places is left to the claimant.²⁶ To place reliance exclusively on the place of acting could make Article 7(2) lose most of its effectiveness since ordinarily a person would act where they have their domicile and thus Article 4 would come in to play to the detriment of Article 7(2).²⁷ This so-called 'principle of ubiquity' avoids choosing between the putative defendant's activity and its results by attributing the same weight to both, and thereby favours the claimant, the alleged victim.²⁸

²³ B. Añoveros Terradas (supra n.10), 156.

²⁴ Claims based on antitrust law infringements brought by end-consumers most probably have an extra-contractual nature (tort). Depending on the facts of the case, the contractual nature of the infringement is also conceivable as a basis for an antitrust claim. Yet it is unlikely, especially for violations that occur at the level of the production/distribution chain that are so far from the end consumer and where no direct contractual relationship exists between the consumer and the competition law infringer. According to Article 7(1) of the Regulation, in matters relating to contract, the action can be brought in the courts of the place of performance of the contract.

²⁵ Case 21/76 *Handelskwekerij G.J. Bier B.V. v Mines de Potasse d'Alsace S.A.* [1976] E.C.R. 1735.

²⁶ *ibid.*, 1747, para. 24.

²⁷ *ibid.*, para. 20.

²⁸ U. Magnus, P. Mankowski and A. Calvo Caravaca, *Brussels I Regulation*, (European Law Publishing, (2007)), para 204.

The principle of ubiquity has been restricted by case law. In the case of *Shevill*²⁹ the CJEU developed the so-called 'mosaic principle'. At the place where the damage was sustained, a claim can only be brought for the damage arising in the forum state, not for the world-wide damage.³⁰ The advantage of having a *forum actoris* is combined with (and simultaneously poisoned by) a restriction. The mosaic principle should be regarded as a structural element in Article 7(2).³¹ It should be a much-welcome obstacle to forum shopping.³² To favour the claimant overly would constitute a windfall profit for the claimant and would deny, or at least neglect, the defendant's legitimate interests. The equality between the two options has to give way to procedural justice. The option to sue wherever damage was sustained still plays enough the claimant's hands and is favourable enough. Almost unlimited or universal jurisdiction by virtue of the places where damage was sustained, spread out would not serve the purpose of Article 7(2).³³

In an EU competition law case the English High Court opined that '[t]he jurisdiction based upon the place of the harmful event will be international, while the jurisdiction based upon the relevant harm will be restricted to England and Wales.'³⁴ Consumers may often prefer to sue at the place where damage occurred for the local harm only. Since there is a low mobility of consumers insofar as they prefer to sue in their home state, it is a relatively safe prediction that parallel proceedings would be bound to arise insofar as a number of consumers may wish to sue for the local harm in their home states.³⁵ This leads to an argument that Article 7(2) is not suited to allocate jurisdiction before a single forum in cross-border cases. That said, it is important to consider the elective nature of the special

²⁹ Case 68/93 *Fiona Shevill v Presse Alliance SA* [1995] E.C.R. I-415.

³⁰ *Ibid.*, paras. 28-33.

³¹ U. Magnus, P. Mankowski, A. Calvo Caravaca (supra n.28), para 208.

³² *Ibid.*

³³ *Ibid.*

³⁴ *SanDisk Corp. v Koninklijke Philips Electronics* [2007] E.W.H.C. 332 (Ch); [2007] Bus. L.R. 705 at 25.

³⁵ M. Danov, *Cross-border competition cases: level playing for undertakings and redress for consumers*, (2014) 35(10) E.C.L.R. 487, 490.

heads of jurisdiction under Article 7. The claimant always has the opportunity to resort to the general rule of Article 4 under which the proceedings may be centralised before the courts of the defendant's domicile.

It should be noted that, by relying on Article 4 of the Regulation, the injured party could avoid unnecessary and lengthy jurisdictional challenges which could be an important factor in cross-border EU competition cases.³⁶ However, as already touched upon, a major disadvantage for a claimant who wishes to sue under Article 4, stems from the fact that they will have to follow the defendant to the Member State of their domicile. It is well established that a 'cross-border litigant may, as a practical matter, require two lawyers, one in their home state to give preliminary advice, and one in the host state to conduct the litigation.'³⁷ This would fuel the costs of competition litigation which could be a disincentive for claims brought by consumers.³⁸

The interpretation of Article 7(2)

In recent years, case law has been shown to broaden the scope of Article 7(2), in particular as the basis for English jurisdiction.³⁹ In refusing to adopt a narrow interpretation of Article 7(2), the Court of Appeal in the case of *Deutsche Bahn* gives claimants more options to try to establish jurisdiction in the UK, in turn allowing them to take advantage of the perceived 'claimant-friendly' nature of the English judicial system. The most interesting implications

³⁶ *Ibid.*, 496.

³⁷ Green Paper, *Legal aid in civil matters: The problems confronting the cross-border litigant*, COM (2000) 51, 9.

³⁸ M. Danov (*supra* n.35), 496.

³⁹ The case of *Deutsche Bahn AG & 30 Ors v Morgan Advanced Materials plc. (formerly Morgan Crucible Company plc.) & 5 Ors* [2012] E.W.C.A. Civ 1055 has the potential to create greater exposure for non-UK undertakings. The Court of Appeal held that it could: '...see no justification for imposing on Article [7(2)] a gloss to the effect that...a harmful event must be one of which the putative claimant is the immediate victim. That would involve a search for a connecting factor and the putative jurisdiction rather than a connecting factor between the defendant and the putative jurisdiction, which is what the Regulation is concerned with'. [at para. 20]. The key factor is whether the damage claimed (direct or indirect) occurred in the UK.

of *Deutsche Bahn* are in relation to the UK Government's introduction of opt-in and opt-out collective actions in the Competition Appeal Tribunal (hereinafter 'CAT'). *Deutsche Bahn* could lead to more exposure to opt-out collective actions for non-UK domiciled defendants. The decision implies that an opt-out collective action could be brought in relation to all UK sales of the allegedly cartelised product even if none of the alleged cartelists have any UK domiciled entities in their corporate groups and even if the UK purchases were made indirectly through third parties (the defendant never having made any direct sales to the UK).⁴⁰

The CJEU has also considered the application of Article 7(2) in cartel damages claims.⁴¹ The CJEU confirmed that the place of a causal event of loss would be the place of the conclusion of the cartel, or as the case may be, the place in which one agreement in particular was concluded which can be linked to the sole causal event giving rise to the damage.⁴²

It is worth noting that AG Jääskinen took the view that in complex cartel cases the jurisdiction of the court should only be based on Articles 4 and 8 and not on Article 7(2) for the reason that it opens defendants up to claims in multiple jurisdictions.⁴³ The CJEU clearly disagreed. It has also been argued that had the Court excluded Article 7(2) as a basis for jurisdiction in cartel damages actions and forced claimants potentially to have to bring proceedings outside their country of domicile, it would have significantly impaired

⁴⁰ S. Garvey, *Indirect harm sufficient to found jurisdiction for antitrust claim*, available at <http://www.allenoverly.com/publications/en-gb/Pages/Indirect-harm-sufficient-to-found-jurisdiction-for-antitrust-claim-.aspx> (accessed 02.08.2016); See also R. Pike, *New Court of Appeal judgments likely to increase scope for competition damages claims*, available at <http://bakerxchange.com/rv/ff00138a65026fc97ca1c8113946880552271cfe#page=1> (accessed 02.08.2016).

⁴¹ Case 352/13 *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel NV* EU:C:2015:335 (CJEU).

⁴² *Ibid.*, para. 50.

⁴³ Opinion of AG Jääskinen 11.12.2014, *Cartel Damages Claims (CDC) Hydrogen Peroxide SA v Evonik Degussa GmbH and Ors*, ECLI:EU:C:2014:2443, para 50.

the claimant's right to obtain appropriate redress for the loss they have suffered, which is one of the key objectives of the Directive on Damages.⁴⁴

The comments made by AG Jääskinen may have relevance with regards to securing the most appropriate forum when considered alongside cases such as *Cooper Tire*.⁴⁵ Mr Justice Teare appeared to suggest that in many EU competition law cases, it may be very difficult to identify the appropriate court. On the one hand, the place where the event giving rise to the damage may be difficult to determine. On the other hand, the place where the damage occurred may be numerous. In particular, the judge held:

'In the present case the act complained of is a 'complex and continuous infringement' of Article [101] of the Treaty by agreeing price targets, sharing customers by non-aggression agreements and exchanging sensitive information relating to prices, competitors and customers. The meetings which gave rise to it took place in a number of locations including Milan, Vienna, Amsterdam, Brussels, Richmond-on-Thames, Frankfurt, Grosse Leder, and Prague. The cartel was ended at a meeting in London. I consider that this is a case where it is, at the very least, difficult to say where the event which gave rise to the damage occurred. [...] In truth the harmful events occurred in several countries.'⁴⁶

In other words, given the pan-European nature of the business activities (and the antitrust infringements), an injured party would often have a number of potential fora where they can sue for damages. Since cross-border EU competition law infringements would by their nature cause damage to businesses and consumers in a number of Member States, injured parties may often choose where to bring their EU competition claims (subject to being

⁴⁴ N. Boyle, G. Chhokar, S. Gartagani, *Jurisdiction in follow-on damages claims*, (2015) 8(3) G.C.L.R. R-58, R-60.

⁴⁵ *Cooper Tire* (2010) E.W.C.A. Civ 864.

⁴⁶ *Ibid.*, at 65.

prepared to pay the higher litigation costs which they may have incurred if they sue in a country other than their home state).⁴⁷ Therefore, in theory, Article 7(2) has the potential to encourage forum shopping on the basis that it opens the defendant up to being sued in multiple jurisdictions.

The place of acting in a collective antitrust case

To be clear, the ‘place of acting’ alone can induce several different possibilities. These could include the place of agreement and the seat of the cartelist.⁴⁸

The place of agreement may be more difficult to justify as an appropriate forum in certain cases. It can be entirely fortuitous (a meeting room at a conveniently located airport or a holiday resort) and may from a procedural point of view be relatively uninteresting. The only evidence located at the place of agreement would be witnesses to the fact that the cartelists met and actually had a meeting. In terms of the location of evidence relevant to proving anticompetitive behaviour and damage the respective seats of the cartelists could well be much more relevant. Furthermore, it may also be noted that the place of acting can often coincide with the defendant's domicile or principal place of business. In some cases, this place may not present an alternative forum to the one provided in Article 4.⁴⁹

⁴⁷ M. Danov (supra n.35), 490.

⁴⁸ J. Basedow, *International cartels and the place of acting under Article 5(3) of the Brussels I Regulation*, in J. Basedow, S. Francq and L. Idot, *International antitrust litigation: Conflicts-of-laws and coordination*, (Hart Publishing, (2012)), 33.

⁴⁹ Eva Lein, (supra n.13), 8.14.

Place where the harm was felt

With regards to the ‘place of damage,’ this can be quite useful if all the victims are located in one country. In a collective action led by a representative body this can often be the case since the representative body is quite likely to be territorial in nature and represent victims in its own jurisdiction. As soon as the damage occurs in several countries this ground of jurisdiction ceases to be useful to the collective members that want to consolidate their claims in a forum other than that of the defendant's domicile. This will be the case as long as a court chooses not to depart from the mosaic principle. Given that the Court on several occasions has indicated its great reluctance against anything that could be interpreted as general jurisdiction at the domicile of the claimant,⁵⁰ this is although not impossible, perhaps not likely.

However, the CJEU has made some interesting findings with regard to the concept of the ‘centre of gravity’ in cases where there is a plurality of consumer claimants having their domicile in different Member States. This was in a field unrelated to collective redress but is worthy of a mention. In the joined *e-Date and Martinez* case⁵¹ the CJEU was asked to consider the jurisdiction to entertain claims about the infringement of personality rights by means of the internet.

The CJEU in *e-Date* went beyond the findings made in *Shevill* and held that they could encompass ‘a wide range of infringements to personality rights recognised in various legal systems.’⁵² The harm in *Shevill* was caused by the printed publication and distribution of an article by the media. In contrast, the medium used to publish and distribute the

⁵⁰ See, for example, Case 168/02 *Kronhofer* [2004] E.C.R. I – 6009.

⁵¹ Joined Cases 509/09 and 161/10 *e-Date Advertising GmbH v X and Martinez v MGN Ltd.* [2011] E.C.R. I-10269.

⁵² *Ibid.*, at 44.

information which caused the harm to the claimants in *e-Date* was the internet. The CJEU ruled that the findings made in *Shevill* could also be ‘applied to other media and means of communication.’⁵³ However, it noted that ‘the placing online of content on a website is to be distinguished from the regional distribution of media such as printed matter.’⁵⁴ According to the Court, once information is placed online its distribution is ‘in principle universal,’⁵⁵ as it may be instantly consulted throughout the world by an unlimited number of internet users.⁵⁶ In addition, it was said that the distribution of content online was outside of the control and intentions of the person who placed it on the internet.⁵⁷ Further, it was noted that it is not always possible to quantify the distribution of content which is placed online, and it is therefore difficult to assess the damage caused within a particular Member State.⁵⁸

Claims for infringements of personality rights by means of content placed on the internet thus presented difficulties to the rules of jurisdiction previously recognised by the CJEU in *Shevill*. Accordingly, the CJEU decided that it was necessary to recognise an additional connecting factor between the claim and the forum upon which the jurisdiction of a court under Article 7(2) of the Regulation may be based. It held that in cases involving alleged infringements of personality rights committed by means of content placed on an internet website, an individual may bring proceedings before the court of a Member State where they have their ‘centre of interests.’⁵⁹ It was further held that such actions were in respect of all of the alleged damage caused to the individual.⁶⁰ In providing guidance on the meaning of this additional connecting factor, the CJEU stated that:

⁵³ Ibid.

⁵⁴ Ibid., at 45.

⁵⁵ Ibid., at 46.

⁵⁶ Ibid., at 45.

⁵⁷ Ibid.

⁵⁸ Ibid., at 46.

⁵⁹ Ibid., at 48 and 52.

⁶⁰ Ibid.

‘The place where a person has the centre of his interests corresponds to his general habitual residence. However, a person may also have the centre of interests in a Member State in which he does not habitually reside, in so far as other factors, such as the pursuit of a professional activity, may establish the existence of a particularly close link with that State.’⁶¹

Individuals may continue to bring proceedings before the courts of each Member State in which the content placed online has been accessed and causes damages. However, in accordance with *Shevill*, such courts will only have jurisdiction in respect of the damage caused in the territory of the Member State of the court seised.⁶²

This ruling may be relevant in the context of collective redress. It demonstrates that Article 7(2) of Regulation can be construed as including connecting factors that are absent from the text, when specific circumstances require to create such connecting factors.⁶³

The CJEU appeared to accept for the first time that jurisdiction at the place where part of the damage is suffered has jurisdiction to entertain claims that relate to damages suffered in other States.

To justify giving jurisdiction to the place of the centre of interests of the victim, the Court has considered that this is in accordance with (i) the 'objective of the sound administration of justice'; (ii) the need to attribute jurisdiction to the place which has a 'close connecting factor' to the dispute; and, (iii) the aim of predictability of jurisdiction. In respect of the last

⁶¹ Ibid., at 49.

⁶² Ibid., at 51-52.

⁶³ A. Nuyts (supra n.18), 77.

point, the Court has ruled that jurisdiction is fair for the defendant as, at the time at which they placed the content online, they are 'in a position to know the centre of interests of the persons who are the subject of that content.'⁶⁴

Applying this reasoning to the case of collective redress, it may not be such a big step to accept that jurisdiction is attributed at the place of the 'centre of interests' of the collective injured parties. It could be argued that jurisdiction is predictable at that place for the defendant, and that the consolidation of claims in one forum will foster the sound administration of justice. In the case of *Wintersteiger*,⁶⁵ the Court refused to extend the application of the forum of the victim's centre of interests to online infringements of trademarks. However, the Court justified this solution by reference to the territoriality of national trademarks. As for the infringement of personality rights, the situation involves a person whose personality rights are protected in all Member States, and thus is what requires, according to the Court, that a single forum be available at the place of the centre of interests of the victim. Similarly, the right to damages arising from a breach of EU competition law is a right which is available in all Member States. This reasoning could, again, support that Article 7(2) be construed as providing, in the context of collective redress, for a jurisdiction at the place of centre of interests of the collective injured parties.⁶⁶ Such a rule may have a spill-over effect, in the sense that the court of one Member State would rule on activities that have taken place entirely abroad, and have injured persons established abroad. However, the appliance of this spill over effect is precisely what the CJEU seems to have accepted in *e-Date/Martinez* (though in relation to one victim and one tortfeasor).⁶⁷

⁶⁴ *e-Date Advertising* (supra n.51), at 50.

⁶⁵ Case 523/10 *Wintersteiger AG v Products 4 Sondermaschinenbau GmbH* [2013] Bus. L.R. 150.

⁶⁶ A. Nuyts (supra n.18), 78.

⁶⁷ *Ibid.*, 79.

This still leaves one essential question that needs to be addressed with regard to establishing a ‘centre of interests’ for end-consumers domiciled in different Member States. Perhaps that ‘centre of interests’ connecting factor should be at the court of the Member State which is the most affected by the illegal practice. This is a very delicate issue. On the one hand, it might be thought that the jurisdiction should be restricted to the place which is mainly affected: this is in accordance with *e-Date*, under which jurisdiction is provided at the place of the centre of interests of the persons involved. This avoids excessive forum shopping. On the other hand, it may be difficult to identify the Member States or market which is the most affected by the mass harm. Moreover, such a concentrating rule could have the result of attributing jurisdiction only in Member States which have large markets, where harmful activities are felt on a wider basis. Injured parties from smaller markets would never enjoy the benefit of bringing collective proceedings in their home State. It may then have to be that the test should be that jurisdiction is provided at any place where loss is suffered that is sufficiently material to comply with the requirements of predictability and sound administration of justice.⁶⁸

It will be remembered that some stakeholders in the Communication requested the creation of an exclusive jurisdiction.⁶⁹ This would be where the majority of parties who claim to have been injured are domiciled. However, the above discussion reveals the problems surrounding such a concentrating rule. Although an exclusive forum is attractive in the context of cross-border collective litigation, the complexities associated with creating an exclusive jurisdiction rule make this option less attractive than others. Moreover, an

⁶⁸ Ibid.

⁶⁹ Commission Communication (supra n.4), para. 3.7.

exclusive jurisdiction rule will not necessarily solve the problem of parallel litigation if, for example, the courts of more than one Member State satisfy the rule.⁷⁰

It would appear, therefore that Article 7(2) of the Regulation has the potential to encourage forum shopping in cross-border end-consumer collective claims flowing from a breach of EU competition law.

2.4 The ‘anchor defendant’

Parties may wish to initiate a claim against multiple defendants. Article 8(1) of the Regulation states that a person domiciled in a Member State may be sued:

‘where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.’

This Article allows for the potential consolidation of claims against members of a cartel provided that one of them is domiciled in the jurisdiction in question (and so is subject to the jurisdiction of that court under Article 4). The English courts refer to such an entity as the ‘anchor defendant.’⁷¹

This Article permits a centralisation of collective litigation by bundling together parallel claims against several defendants domiciled in different Member States. It presupposes a

⁷⁰ J.N. Stefanelli, *Parallel litigation and cross-border collective actions under the Brussels I Framework: Lessons from abroad*, in D. Fairgrieve and E. Lein, *Extraterritoriality and collective redress* (OUP, (2012)), 9.34.

⁷¹ See for example, *Cooper Tire & Rubber Co Europe Ltd. v Bayer Public Co Ltd.* [2010] E.W.C.A. Civ 864.

close connection between the causes of action. Such a factual or legal connection is easy to argue in cartel claims. Hence, if several undertakings with headquarters in different Member States are sued for the same cause of action, the claimant may freely select among the courts of different Member States.⁷² Accordingly, this head of jurisdiction opens up the gateway for forum shopping in different courts and judicial systems of the different Member States. The CJEU rectified its former case law⁷³ and held that the close connection between the parallel claims does not presuppose that the claims are based on an identical basis.⁷⁴

The operation of Article 8 can be demonstrated by a case before the High Court of Dortmund resulting from the *Hydrogen Peroxide Cartel*.⁷⁵ Six undertakings were sued. The Commission sanctioned them by fines amounting to several hundred million Euros. In Dortmund, Cartel Damage Claims (CDC), a Belgian company, brought a lawsuit for damages sustained by 32 companies which had bought Hydrogen Peroxide from the members of the cartel. The claims had been assigned to CDC and the forum was seised on the basis of Article 8 as the anchor defendant, a German corporation, was domiciled in Essen. However, as the co-defendants operated the cartel in several EU Member States, jurisdiction could have also been founded under Article 8(1) in the fora of The Netherlands, Finland, Spain and Belgium.⁷⁶ The Regional Court of Dortmund sent a

⁷² A. Nuyts (supra n.18), 63: This concept is expressly endorsed by Article 6(3)(b) of the Rome II Regulation. Under this provision, several defendants can be sued in the court of a Member State where one defendant is domiciled if the market in that Member State is directly and substantially affected by the anticompetitive behavior of all defendants. The common anticompetitive behavior constitutes the connecting link among the co-defendants. It seems to be predictable that Article 8 will be interpreted systematically by reference to Article 6(3) of the Rome II Regulation.

⁷³ Case 539/03 *Roche Nederland BV v Primus and Goldenberg* [2006] E.C.R. I-6535.

⁷⁴ Case 145/10 *Eva-Maria Painer v Standard Verlags GmbH*, [2012] E.C.D.R. 6 (CJEU), at 84; See also H. Sheraton, R. Massey, B. Uphoff, V. Schroder, T. Hauss and F. Mattina, *CJEU rules on copyright protection of photographic portraits*, available at <http://www.lexology.com/library/detail.aspx?g=16806e75-1106-4f29-b6c9-e5966fc7b092> (accessed 01.08.2016); Case 645/11 *Land Berlin v Sapir*, [2013] C.E.C. 947 at 44 and 47; See also CJEU, Press Release No 40/13, Luxembourg, 11.04.2013, available at <http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-04/cp130040en.pdf> (accessed 01.08.2016).

⁷⁵ High Court Dortmund, Case No 13 0 23/09 (*Kart*) (Hydrogen Peroxide).

⁷⁶ Arnaud Nuyts (supra n.18), 63.

preliminary reference request to the CJEU in respect of the *Hydrogen Peroxide Cartel* damages claim.⁷⁷ The CJEU has confirmed that cartel victims will be able to sue jointly multiple defendants in one EU Member State where only one of the cartelists is domiciled. This was also confirmed by the Court to extend to circumstances where the claimant has withdrawn proceedings against the sole domestic domiciled co-defendant after proceedings are properly instituted. In addition, the Court held that cartel victims can alternatively bring damages actions at the courts of either the Member State where the cartel or a particular cartel agreement were concluded, or of the Member States where they are domiciled. The CJEU's judgment therefore widens the options for claimants, and significantly allows them to recover damages in their own domestic courts, consistent with the principle that victims of cartels should have an effective and real right to compensation.⁷⁸

The English courts have generally taken an expansive approach to questions of jurisdiction and a permissive approach to the use of 'anchor defendants.' They have accepted jurisdiction over many defendants domiciled in other Member States and outside the EU relying on the 'anchor defendant' mechanism in the Brussels Regime and a similar mechanism in the English courts' rules applicable to non-EU defendants.⁷⁹ The English courts have taken this approach even where the English 'anchor defendant' is not an addressee of the relevant infringement decision, but merely a subsidiary of a company

⁷⁷ Case 352/13 *Cartel Damages Claims Hydrogen Peroxide SA v Akzo Nobel NV* EU:C:2015:335 (CJEU); See also Opinion of AG Jääskinen, Case 352/13 *CDC Cartel Damages Claims Hydrogen Peroxide SA v Evonik Degussa GmbH*, ECLI:EU:C:2014:2443; See also S. Gartagani, N. Boyle, L. Hannah, *Jurisdiction in follow-on damages claims: AG Jääskinen's Opinion in the Hydrogen Peroxide Case*, (2015) 8(3) G.C.L.R. R.53; See also O. Giess and D. Horst, *Cartel damages claims Hydrogen Peroxide SA v Akzo Nobel NV and others: a summary and critique of the judgment of the European Court of Justice of May, 21 2015*, (2015) 36(10) E.C.L.R. 430.

⁷⁸ Arnaud Nuyts (supra n.18), 63; See also N. Boyle, G. Chhokar, S. Gartagani, *Jurisdiction in follow-on damages claims: update on the judgement of the European Court of Justice in the hydrogen peroxide cartel claim*, (2015) 8(3) G.C.L.R. R-58; See also R. Pike and Y. Tosheva, *CDC v Evonik Degussa (C-352/13) and its potential implications for private enforcement of European competition law*, (2015) 8(2) G.C.L.R. 82.

⁷⁹ J. Hitchin, P. Arnold, R. Galle, E. Besselink, *Competition litigation in the European Union: recent developments*, available at http://www.allenoverly.com/SiteCollectionDocuments/Global%20Trends%20in%20Antitrust%20PDFs/competition_litigation_in_the_EU.PDF (accessed 01.08.2016).

which is.⁸⁰ All this said, some cases before the English courts do suggest that there is a level of uncertainty as to the question of liability of various legal entities (forming part of the infringing undertaking) in cases where the infringement is committed by international groups of companies.⁸¹ The level of uncertainty would inflate costs, and as a result end-consumers may decide to avoid attempting to centralise litigation under Article 8(1).⁸²

The concept of anchor defendants has also been invoked in the Netherlands. In the follow-on proceedings in relation to the *Natrium Chloride Cartel*⁸³ and the follow-on proceedings in relation to the *Pre-stressing Steel Cartel*,⁸⁴ several cartel members contested the jurisdiction of the Dutch courts. The defendants argued, *inter alia*, that the necessary close connection between the claims submitted was lacking. However, the court held in both cases that there was a close connection, as both the cartels involved a single continuous infringement.⁸⁵

⁸⁰ See *Toshiba Carrier UK Ltd. & ors v KME Yorkshire Ltd. & ors* [2011] E.W.H.C. 2665 (Ch); [2012] EWCA Civ 1190; A. Gerbi and J. Shaerf, *Toshiba Carrier: private antitrust actions in England*, Corp. Brief. 2013, Feb, 2-4; See also A. Maton and R. Dhillon, *Case comment: Cooper Tyre and Rubber Co v Shell Chemicals UK Ltd.*, (2010) 3(1) G.C.L.R. 47; See also C. Brown, *United Kingdom: procedure – follow on actions*, (2011) 32(1) E.C.L.R. N22; See also J. Kwan, *The Damages Directive: end of England's eminence*, (2015) 38(11) E.C.L.R. 455; See also J. Ratliff, *Major events and policy issues in EU competition law, 2014-2015: Part 1*, (2016) 27(3) I.C.C.L.R. 65; See also T. Woodgate, P. Boylan and C. Owen, *Jurisdiction revisited*, (2015) 14(7) Comp. L.I. 16; See also N. Boyle, L. Hannah, S. Gartagani, *Case comment: United Kingdom: Supreme Court clarifies time limits for damages claimants in the CAT*, (2014) 7(3) G.C.L.R. R41.

⁸¹ It is well established that the concept of 'undertaking' which is widely used for the purposes of establishing an EU competition law infringement, 'can embrace a number of legal entities, as long as they act as a single economic unit, and no entity acts independently for any relevant purpose.' (*Provimi Ltd. v Aventis Animal Nutrition SA* [2003] E.W.H.C. 961 (Comm), at 30; See also *Cooper Tire & Rubber Co. Europe Ltd. v Shell Chemicals UK Ltd.* [2010] EWCA Civ 864 at, 47). However, given the fact that many of the pan-European business activities are often performed by corporate groups which consist of numerous subsidiaries, a level of uncertainty may continue to exist insofar as it may not always be clear 'which legal entities within a corporate group are liable for an infringement of Article 101(1) TFEU and to what extent.' (See the reference request by Mr Rabinowitz in *Cooper Tire* [2010] EWCA Civ 864, at 47) Should an 'injured party' (i.e. anyone who has suffered harm caused by an infringement of competition law as stated in the Directive at Article 4(6)) in relation to pan-European business activities be allowed to sue in any of the countries where any of the subsidiaries are incorporated? M. Danov (supra n.35), 489.

⁸² M. Danov (supra n.35), 496.

⁸³ Case number 200 156 295/01 available at <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHAMS:2015:3006> (accessed 01.08.2016).

⁸⁴ Case number C / 03/190094 / HA ZA 14-204 available at <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBLIM:2015:1791> (accessed 01.08.2016).

⁸⁵ Maverick Advocaten, *Dutch courts not afraid of high cartel damages claims*, available at <http://www.maverick-law.com/en/blogs/dutch-courts-not-afraid-of-high-cartel-damage-claims.html> (accessed 01.08.2016); See also Simmons and Simmons, *Choosing where to litigate antitrust damages actions*, available at <http://www.simmons->

2.5 Article 7(5)

Article 7(5) may also be of relevance. It states that, ‘a person domiciled in a Member State may, in another Member State, be sued as regards a dispute arising out of the operation of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated.’

There are two requirements under this provision. First, the defendant domiciled in a Member State must have a ‘branch, agency or other establishment’ in another Member State. A ‘branch, agency or other establishment’ has been defined by the CJEU⁸⁶ in terms of the typical characteristics of a branch office. The branch, agency or other establishment must: (i) have a fixed permanent place of business; (ii) be subject to the direction and control of the parent; (iii) have a certain autonomy; and (iv) act on behalf of and bind the parent.⁸⁷ Secondly, the dispute must arise out of the operations of the branch, agency or other establishment. This requirement is satisfied, *inter alia*, where there is a non-contractual action arising out of the activities of the branch, agency or other establishment.⁸⁸

simmons.com/~media/Files/Articles/2015/Antitrust%20and%20merger%20control/Choosing%20where%20to%20litigate%20antitrust%20damages%20actions.ashx (accessed 01.08.2016); See also M. Bredenoord-Spoek, C. Swaak, J. Kortmann, *Netherlands: parent company can serve as anchor defendant in sodium chlorate damages litigation*, (2014) 7(3) G.C.L.R. R38.

⁸⁶ Case 14/76 *De Bloos v Bouyer* [1976] E.C.R. 1497; Case 33/78 *Somafer v Saar-Ferngas* [1978] E.C.R. 2183; Case 139/80, *Blanckaert and Willems v Trost* [1981] E.C.R. 819; Case 218/86 *Sar Schotte GmbH v Parfums Rothschild SARL* [1987] E.C.R. 4905; Case 493/93 *Lloyd’s Register of Shipping v Soc Campenon Bernard* [1995] E.C.R. I-961.

⁸⁷ J. Fawcett, J. Carruthers, P. North, *Cheshire, North and Fawcett: Private International Law*, (OUP, (2008)), 258.

⁸⁸ J. Fawcett, P. Torremans, *Intellectual property and private international law*, (OUP, (2011)), 175.

The CJEU's broad interpretation of this provision suggests by analogy that this provision would also apply to the acts of subsidiaries in the context of competition law infringements.⁸⁹

It is a very useful provision in infringement cases. It would allow, for example, an action to be brought in England against a French manufacturing company that markets an infringing product in England through its English branch office. The branch office cannot be sued as a defendant since it is not a separate legal entity. It follows that the principle of joint infringement does not help in this situation. The French manufacturing company, however, can be sued in England by virtue of Article 7(5), provided that the dispute arises out of the operations of the branch.⁹⁰ On the other hand, if the French manufacturer merely happens to have a branch office in England which plays no part in the infringement, Article 7(5) will not be engaged.⁹¹

In cases where Article 7(5) is engaged, the question arises whether the jurisdiction is confined to damage to the claimant in the UK or if it can encompass damage that occurs abroad. In *IBS Technologies (PVT) Ltd. v APM Technologies*⁹² Michael Briggs QC, sitting as deputy judge of the High Court, stated *obiter*⁹³ that it was confined to damage within the UK. He justified his conclusion through the analogy of the territorial limit under Article 7(2) of the Regulation. However, if one considers the view of Fawcett and Torremans,⁹⁴ there is no such analogy to be drawn with Article 7(2). That provision allows

⁸⁹ See e.g. Case 33/78 *Somafer v Saar-Ferngas* [1978] E.C.R. 2183; Case 439/93 *Lloyd's Register of Shipping v Camperton Bernard* [1995] E.C.R. I-961; F. Cengiz, *Antitrust damages actions: lessons from indirect purchasers' litigation*, (2010) 59(1) I.C.L.Q. 39, 57.

⁹⁰ See *Somafer* (supra n.89).

⁹¹ J. Fawcett, P. Torremans (supra n.88), 175.

⁹² [2003] All E.R. (D) 105.

⁹³ *Ibid.*, at 61.

⁹⁴ J.P. Fawcett and P. Torremans (supra n.88), 176.

the claimant to recover for worldwide damage by using the ‘place of acting’ limb of Article 7(2). There is no such alternative under Article 7(5).⁹⁵

Article 7(5) could be used as a basis for jurisdiction in cross-border collective redress proceedings brought on behalf of end-consumers in competition law cases. One interesting element to consider for the purposes of Article 7(5) is where the subsidiary and parent company can be regarded as part of the same economic unit under the EU concept of ‘undertaking.’ EU competition law denies the narrow legalistic approach of whether the subsidiary can bind a parent contractually and adopts the notion of the ‘single economic unit.’⁹⁶ In other words, the end result of adopting the ‘single economic unit’ notion is making a foreign parent subject to jurisdiction by virtue of Article 7(5). Although it is true that the doctrine of ‘undertaking’ for the purposes of Articles 101 and 102 TFEU is different from the concepts of ‘legal entity’ or ‘persons’ which must be used when establishing jurisdiction under the Regulation, one may still argue that the economic reality should prevail when establishing jurisdiction in private antitrust claims brought under Article 7(5).⁹⁷

⁹⁵ Ibid.; see also J. Fawcett, J. Carruthers, P. North (supra n.87), 260.

⁹⁶ T-112/05 *Akzo Nobel NV v Commission* (also known as *Choline Chloride Cartel*) [2007] E.C.R. II-5049; T-102/92 *Viho Europe BV v Commission* [1995] E.C.R. II-17.

⁹⁷ L. Gorywoda, N. Hatzimihail, A. Nuyts, *Judicial cooperation in matters of market regulation*, in A. Nuyts, N.E. Hatzimihail, W. de Gruyter, *Cross-border class actions: The European Way* (2013), 50.

2.6 The rules of jurisdiction, forum shopping and the risk of parallel claims

Sections 2.1 to 2.5 have shown that rules of jurisdiction provide the potential to choose from a variety of fora in cross-border end-consumer collective competition cases. This can create two problems. First, the natural or most appropriate forum may not be chosen. Second, failure to consolidate an action concerning all victims of the anticompetitive conduct may result in the risk of parallel proceedings. This creates the risk of irreconcilable judgments.

The Brussels I Recast Regulation is based on the *lis pendens* system. The standard rule is located in Article 29(1) of the Regulation. The Article requires that where proceedings concerning the *same cause of action* between the *same parties* are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay proceedings until such time as the jurisdiction of the court first seised is established. Generally, this Article will be of limited use in the context of parallel collective redress proceedings as the ‘same parties’ requirement contained therein will not be easily satisfied.⁹⁸

Article 30(1) tends to be of more relevance. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.⁹⁹ The Article is designed to deal with those situations that do not fall within the strict matching of pairs as

⁹⁸Ibid., 52.

⁹⁹ Regulation 1215/2012, Article 30(3).

designated by Article 29. The objective of Article 30 is to improve coordination of the exercise of judicial functions within the EU and to avoid conflicting and contradictory decisions,¹⁰⁰ thus facilitating the proper administration of justice in the EU.¹⁰¹

There is no requirement that the parties are the same, and proceedings can relate to different causes of action. If the second court seised chooses not to use its discretion to stay proceedings before it or decline jurisdiction in favour of the first court (assuming that the first court seised has jurisdiction), the consequence is that multiple courts will be entertaining litigation on collective claims that are closely related, and could result in irreconcilable judgments. Surely this is the very outcome that the *lis pendens* rules are designed to avoid.¹⁰² Article 30 could be usefully employed in the context of parallel cross-border collective actions where Article 29 is inapplicable.¹⁰³ However, its usefulness is tempered by the fact that its application is not mandatory.

Article 30(2) of the Regulation may also be of relevance. It states that 'where the action in the court first seised is pending at first instance, any other court may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.' This provides the courts with greater capacity to consolidate proceedings and avoid parallel litigation of related claims.¹⁰⁴ Article 30(2) is essentially a loose form of *forum non conveniens* (FNC). FNC is a discretionary tool allowing the courts to decline jurisdiction in favour of another

¹⁰⁰ Case 406/92 *Owners of Cargo Lately Laden on Board the Tatry v Owners of the Maciej Rataj* [1994] E.C.R. I-5439, at 32 and 52.

¹⁰¹ *Ibid.*

¹⁰² Regulation 1215/2015, Recital 21: 'In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will be given in different Member States. There should be a clear and effective mechanism for resolving cases of *lis pendens* and related actions...'

¹⁰³ J.N. Stefanelli (*supra* n.70), 9.21.

¹⁰⁴ *Ibid.*, 9.25.

court with jurisdiction, provided that the interests of justice would be better served if proceedings took place in another court.¹⁰⁵

Only consolidation prevents duplication of judgments and better guarantees the right of a public hearing within a reasonable time. In light of this, consolidation seems to be the most effective remedy.¹⁰⁶ The problem is that consolidation is not mandatory and therefore does not guarantee that all actions be resolved consistently. Having such uniformity would promote legal certainty and enhance the functioning of Article 30. In the context of collective litigation, a test and determinative factors could help the courts sift through hundreds of claims and factual allegations in order to indicate when it is most appropriate to decline jurisdiction so that litigation can be consolidated.¹⁰⁷

Moreover, FNC may be appropriate when the court is first seised by a defendant who has filed an action for negative declaratory relief. In such cases, that forum may not necessarily be the most appropriate forum, especially in the context of collective proceedings. A natural response may be to cite the CJEU case of *Owusu v Jackson*.¹⁰⁸ In this case, the

¹⁰⁵ See R.A. Brand and S. Jablonski, *Forum non conveniens: History, global practice and future under The Hague Convention on Choice of Court Agreements* (Oxford University Press, (2007)); G. Hogan, *The Brussels Convention, forum non conveniens and the connecting factors problem*, (1995) 20(5) E.L.R. 471; In the English case of *Spiliada Maritime Corp v. Cansulex Ltd., The Spiliada*, [1987] A.C. 460, Lord Goff considered the factors for engaging FNC. These were: (a) The burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay (at 476), (b) The burden resting on the defendant is not just to show that England is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum (at 477), (c) The natural forum was that 'which has the most real and substantial connections,' (at 478 referring to Lord Keith in *The Abidin Daver* [1984] A.C. 398, 415). The connecting factors include convenience or expense, the availability of witnesses, the residence of the parties and the governing law, (d) if there is no other available forum 'which is clearly more appropriate for the trial of the action,' it will ordinarily refuse a stay, (e) if, however, the court concludes at that stage that there is some other available forum which *prima facie* is clearly more appropriate for the trial of the action, the court will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nonetheless be granted (at 478).

¹⁰⁶ Directorate General for Internal Policies, Policy Department A Economic and Scientific Policy, *Collective Redress in Antitrust*, 51, available at: [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/475120/IPOL-ECON_ET\(2012\)475120_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/475120/IPOL-ECON_ET(2012)475120_EN.pdf) (accessed 31.05.2016).

¹⁰⁷ J.N. Stefanelli, (supra n.70), 9.51.

¹⁰⁸ Case 281/02 [2005] E.C.R. I-1383; See C.J.S. Knight, *Owusu and Turner: the shark in the water?* (2007) 66(2) C.L.J. 288; See also R. Fentiman, *Case comment: English domicile and the staying of actions*, (2005) 64(2) C.L.J. 303.

CJEU was asked whether it was permissible under the Regulation for a court to exercise its discretion in declining jurisdiction to hear a case in favour of the courts of a non-contracting State. Answering in the negative, the CJEU held that allowing the application of FNC would negatively impact the uniform application of the Regulation which ‘precludes a court of a Contracting State from declining jurisdiction conferred on it [...]’¹⁰⁹and would undermine the legal certainty sought to be achieved by it.¹¹⁰ While this may appear to be the death knell for FNC under the Brussels Regime, two points must be highlighted. First, *Owusu* took place in the context of Article 4 of the Regulation and not within the provisions on *lis pendens* and related actions. Second, the fora at issue were not both contracting parties to the Regulation. The case dealt with the UK questioning the appropriateness of declining jurisdiction in favour of the Jamaican court.¹¹¹ The Court of Appeal’s reference to the CJEU in *Owusu* contained an additional question: was the FNC doctrine incompatible with the Regulation *in all circumstances*, or only in some and, if so, then which?¹¹² Unfortunately, the CJEU refused to deal with this question as it was deemed to be hypothetical in nature.¹¹³

It is therefore unclear whether FNC is forbidden in every context under the Regulation. Indeed, its inclusion in Article 30 would seem to counsel in favour of its application at least in a limited context. That being the case, it is important that the Member State courts should have guidelines as to how best to determine whether it is appropriate to decline jurisdiction.¹¹⁴

¹⁰⁹ *Owusu* (supra n.108), at 46.

¹¹⁰ *Ibid.*, at 41 and 45.

¹¹¹ A. Mills, *Private international law and EU external relations: think local act global, or think global act local?* (2016) 65(3) I.C.L.Q. 541.

¹¹² *Owusu* (supra n.108), at 59 *et seq.*

¹¹³ *Ibid.*, at 47-52; See also the Opinion of Advocate General Léger at 79-81, 217; I. Ovchinnikov, *Owusu, lis pendens and the recent recast of the Brussels I Regulation*, (2006) 19 *Trinity C.L. Rev.* 40.

¹¹⁴ J.N. Stefanelli, (supra n.70), 9.54.

In *Owens Banks*, AG Lenz evaluated the circumstances under which a decline of jurisdiction could be exercised.¹¹⁵ AG Lenz set out three main criteria to consider relevant to the exercise of discretion under Article 30: (i) the degree of connection between the two proceedings and the risk of irreconcilable decisions; (ii) the stage reached in each set of proceedings; and (iii) the proximity of the courts to the subject matter of the case.¹¹⁶ He then went on to state that a decline of jurisdiction would be sensible in cases where only an interim measure could be taken in the proceedings before the second court seised, so as to obviate the risk of mutually irreconcilable decisions.¹¹⁷ Finally, he noted the importance of the court being in the best position to decide on the matter at issue.¹¹⁸ One waits to see whether the CJEU will follow up on this.¹¹⁹ It is submitted that the general trend should be that wherever possible, the discretion should be exercised to avoid the risk of conflicting judgments. In relation to collective redress proceedings, particularly in an antitrust setting, this seems to be particularly paramount, as by definition, we are dealing with the same illegal activity, by the same corporate defendant that produces harmful events on a wide scale across borders.¹²⁰

The modern doctrine of FNC has been adopted and developed in the US. For example, the Supreme Court decision in *Gilbert*¹²¹ set out the basic principle that a court may decline jurisdiction if it is a seriously inconvenient forum, provided that another forum exists with jurisdiction. The Court then went on to list several private and public interest factors.¹²²

¹¹⁵ Case 129/92 *Owen Bank Ltd. v Fulvio Bracco and Bracco Industria Chimica SpA* [1994] E.C.R. I-117, at 74-9.

¹¹⁶ *Ibid.*, at 76.

¹¹⁷ *Ibid.*, at 77.

¹¹⁸ *Ibid.*, at 79.

¹¹⁹ J.N. Stefanelli (supra n.70), 9.54.

¹²⁰ A. Nuyts (supra n.18), 81. See also *Cooper Tire & Rubber Co. Europe & ors v Bayer Public Co Ltd. & ors* at 117–118 which demonstrates that under the current framework a court can choose not to stay its proceedings by exercising its discretionary power to proceed with the action.

¹²¹ J.N. Stefanelli (supra n.70), 9.55; *Gulf Oil Corp. v Gilbert* 330 US 501 (1947); J. Bies, *Conditioning forum non conveniens*, (2000) 67 U. Chi. L. Rev. 489; E.L. Barrett, *Doctrine of forum non conveniens*, (1947) 35 Cal. L. Rev. 390; J.E. Ryan, *Forum non conveniens*, (1970) 1 Pac. L. J 532.

¹²² *Gulf Oil* (supra n.121), at 508-9.

Private interest factors included: (i) accessibility of sources of proof; (ii) location of witnesses; and (iii) the availability of compulsory process for attendance of the unwilling. Public interest factors were described as administrative difficulties for courts, such as caseload build-up and the idea that jury duty should not be imposed on people from a community with no connection to the litigation.¹²³

Inspiration may also be drawn from a project of the American Law Institute (ALI) and the International Institution for the Unification of Private International Law (UNIDROIT). With regards to FNC, it has been suggested that:

'Jurisdiction may be declined or the proceedings suspended when the court is manifestly inappropriate relative to another more appropriate court that could exercise jurisdiction.'¹²⁴

It is also suggested that:

'the court should decline jurisdiction or suspend the proceedings when the dispute is previously pending in another competent court to exercise jurisdiction, unless it appears that the dispute will not be fairly, effectively, and expeditiously resolved in that forum.'¹²⁵

Commentary specifically identifies the *manifestly inappropriate* principle and emphasises that the existence of another more convenient forum is necessary in order to apply the principle properly.¹²⁶ The implementation rules suggest that a forum should decline

¹²³ Ibid.

¹²⁴ ALI/UNIDROIT, *Principles of Transnational Civil Procedure*, Principle 2.5 (Cambridge University Press (2006)); See also International Institute for the Unification of Private Law, available at <http://www.unidroit.org/work-in-progress-studies/current-studies/transnational-civil-procedure> (accessed 02.08.2016).

¹²⁵ ALI/UNIDROIT, Principle 2.6.

¹²⁶ ALI/UNIDROIT *Principles of Transnational Civil Procedure*, Principle 2, Comment P-2F.

jurisdiction in three situations: (i) where an exclusive jurisdiction agreement chooses another forum; (ii) where the forum is manifestly inappropriate; or (iii) where the dispute is pending in another forum that was seised first.¹²⁷ The forum may exercise its jurisdiction where it appears that the dispute would not be quickly and effectively solved, or for other compelling reasons, the latter of which are not specified in the implementation rules.¹²⁸

The above commentary is intended to illustrate the worth of having clear guidelines for the decline of jurisdiction under Article 30(2). The factors included in the examples above reveal that Member State courts should be considering the practical as well as the public interest when trying to justify the retention of jurisdiction in situations where it would be more sensible in terms of judicial economy and fairness for the parties to resolve the dispute in another forum.¹²⁹

In the context of collective actions, these factors become even more relevant. When faced with group litigation involving facts, witnesses, and evidence potentially from a multitude of jurisdictions, it is very important for a court seised to be able to evaluate properly whether it is indeed the most appropriate forum to hear the dispute, or whether it should decline jurisdiction in favour of a more appropriate forum in which most of the discoverable items and deposable witnesses are located.¹³⁰

¹²⁷ J.N. Stefanelli (supra n.70), 9.60.

¹²⁸ ALI/UNIDROIT (supra n.124), Principle 4.7.

¹²⁹ J.N. Stefanelli (supra n.70), 9.62.

¹³⁰ Ibid., 9.53.

2.7 Strengthening communication and interaction between the courts

In its Green Paper, the European Commission questioned whether problems encountered in the operation of the *lis pendens* and related actions provisions of the Brussels I Regulation might be solved by strengthening communication and interaction between the courts.¹³¹ Judicial cooperation could be vital to the determination of whether parallel collective actions come within *inter alia* the ambit of Article 30. Cooperation such as this has been recognised as vital in both the United States and Canada.¹³²

The Manual for Complex Litigation (the Manual) is used by judges and lawyers in the US in order to assist them in dealing with and managing complex cases, such as multi-jurisdictional litigation and class actions.¹³³ The Manual discusses coordination in several contexts, depending on whether the competing cases are filed in state or federal court. The Manual suggests that in situations where related actions are pending within different federal courts and consolidation is unavailable, judges should coordinate their proceedings in order to avoid duplication and conflicts. Specific suggestions include: (i) the designation of one case as ‘the lead case,’ which may include a stay in the other proceedings or an agreement that rulings in the lead can be given presumptive force; (ii) holding joint conferences of judges that might result in joint or parallel orders in the pending cases; (iii) encouraging methods by which to avoid duplicative discovery, for example, filing or cross-filing disposition notices and requests for production in related cases; and (iv) drafting ‘class definitions’ in order to prevent conflicts between class actions.¹³⁴

¹³¹ Green Paper on the review of Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters COM (2009) 175, 7.

¹³² J.N. Stefanelli (supra n.70), 9.38; See also Z.S. Tang, *Class action in cross-border contracts in Electronic consumer contracts in the conflict-of-laws* (Bloomsbury, (2015)), 295.

¹³³ Federal Judicial Centre, *Manual for Complex Litigation*, available at <https://public.resource.org/scribd/8763868.pdf> (accessed 02.08.2016).

¹³⁴ *Ibid.*, at Part II, section 20.14 (related federal cases) and section 20.3 (related state and federal cases).

Where multiple cases are pending in federal and state courts, whether to coordinate proceedings is determined on a case-by-case basis according to need and opportunity.¹³⁵In terms of necessity, the Manual specifies that ‘[t]he need to coordinate is especially acute where overlapping or multiple identical class actions are filed in more than one court.’¹³⁶In such cases and as a threshold step, the Manual recommends that the courts direct counsel to identify all similar cases in other courts, their procedural posture, and the judges assigned to each case.¹³⁷It goes on to suggest that as a minimum, judges should exchange case materials such as master pleadings, questionnaires, and discovery protocols.¹³⁸

In Canada, the Uniform Class Proceedings Act¹³⁹ was amended specially to include a cooperative model, as it was believed that Canadian class actions function effectively due in part to informal cooperation between class counsel.¹⁴⁰Moreover, the Uniform Law Conference of Canada’s (ULCC) Committee on National Class and Related Interjurisdictional Issues recommended that Canadian courts adopt the American Law Institute’s (ALI) Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (the Guidelines).¹⁴¹The Guidelines formally encourage courts to communicate with each other through various methods such as video-conferencing, or sending other courts copies of documents such as transcripts, orders, or judgments.¹⁴²They

¹³⁵ Ibid., at section 20.311-13.

¹³⁶ Ibid., at section 20.311.

¹³⁷ Ibid., at section 20.312.

¹³⁸ Ibid., at section 20.313.

¹³⁹ SO 1992, c 6 (consolidated 2006).

¹⁴⁰ Uniform Law Conference of Canada (ULCC), Civil Law Section, *Report of the Uniform Law Conference of Canada’s Committee in the national class and related inter-jurisdictional issues: Background, analysis, and recommendations* (ULCC Report) (2005), at 4-5, available at http://static1.1.sqspcdn.com/static/f/299713/3665806/1248395359747/ULCC_Report.pdf?token=kUXzzHM2WrJxNiWB0Nx53sIqF78%3D (accessed 02.08.2016).

¹⁴¹ The American Law Institute, *Guidelines applicable to court-to-court communications in cross-border cases*, available at: www.ibanet.org/Document/Default.aspx?DocumentUid=16C102A7-C52E-455B-A03A-E7D1280C1F66 (accessed 06.06.16).

¹⁴² Ibid., Guideline 6.

also discuss the possibility for joint hearings.¹⁴³The EU may wish to consider the adoption of similar guidelines to establish a more formal method of coordination among Member States.

Coordination and communication could be reinforced by a centralised registry of collective actions in the European Union. The creation of a registry in Canada was recommended by the ULCC,¹⁴⁴ and there is a specific legal basis for one in the Uniform Class Proceedings Act.¹⁴⁵This has been developed into the Canadian National Class Action Database.¹⁴⁶

The US does not yet have a central database for class actions. In the context of the EU, a registry could be established at moderate cost and be managed by a pre-existing European Union-wide body such as the European Judicial Network (EJN). Indeed, the Law Society of England and Wales suggested that the EJN be given a role in effectuating improved communication.¹⁴⁷ Moreover, the Czech Republic stated that it agrees that ‘the risk of negative conflicts of jurisdiction could be addressed by a cooperation and communication mechanism between the courts involved and by an obligation on the part of the court which declined jurisdiction to re-open the case if the court first seized declines jurisdiction.’¹⁴⁸ A similar response came from Hungary.¹⁴⁹ As more Member States adopt legislation allowing for collective redress proceedings, a central registry could act as a clearing house

¹⁴³ Ibid., Guideline 9.

¹⁴⁴ ULCC Report (supra n.140), at 16.

¹⁴⁵ The commentary to the Act provides in relation to s(2)(b) that ‘...a Canadian Class Proceedings Registry is to be established as a searchable electronic database of class proceedings [which] would include all class action filings and annotation of any subsequent material events.’

¹⁴⁶ The Canadian Bar Association, Class Action Database, available at <https://www.cba.org/Publications-Resources/Class-Action-Database> (accessed 06.06.2016).

¹⁴⁷ Response of the Law Society of England and Wales, available at http://ec.europa.eu/justice/newsroom/civil/opinion/files/090630/civil_society_ngo_academics_others/law_society_england_wales_en.pdf (accessed 22.08.2016), para 18.

¹⁴⁸ Response of the Czech Republic, available at http://ec.europa.eu/justice/newsroom/civil/opinion/files/090630/ms_governments/czech_republic_en.pdf (accessed 22.08.2016), 8.

¹⁴⁹ Response from Hungary, available at http://ec.europa.eu/justice/newsroom/civil/opinion/files/090630/ms_governments/hungary_en.pdf (accessed 22.08.2016), 6.

for lawyers to consult in order to determine the existence of collective proceedings and better avoid the filing of parallel cross-border collective proceedings.¹⁵⁰ At paragraph 35 of the Recommendation, it is stated that the Member States should establish a national registry of collective redress actions. Paragraph 36 states that the national registry should be available free of charge to any interested person through electronic means and otherwise. Websites publishing the registries should provide access to comprehensive and objective information on the available methods of obtaining compensation, including out of court methods. Moreover, paragraph 37 states that the Member States, assisted by the Commission should endeavour to ensure coherence of the information gathered in the registries and their interoperability. It is submitted that this could be carried out through the EJN.

However, there may be disadvantages to enhanced cooperation between courts, or the creation of a body to regulate parallel cross-border collective actions. This can extend the length of proceedings by delaying pending litigation and possibly affording one side advantages over the other.¹⁵¹ The creation of a body will also require political will-power which is often hard to garner in the context of supra-national initiatives. However, over all, it is argued that increased communication and cooperation is, for the most part, quite easily implemented and should be carefully considered at European level.¹⁵²

The EU may also wish to consider the possibility of assigning to one body the role of managing multi-jurisdictional collective actions. In the federal courts of the US, this is handled by the MDL Panel [Judicial Panel on Multidistrict Litigation]. The MDL Panel consists of seven federal circuit and district judges designated by the Chief Justice of the

¹⁵⁰ J.N. Stefanelli (supra n.70), 9.44.

¹⁵¹ Ibid., 9.45.

¹⁵² Ibid.

US and is authorised to transfer civil actions that involve common questions of fact to a common district for consolidation of pre-trial proceedings if it is determined that doing so would support the convenience of the parties and witnesses, and promote efficient resolutions of the actions.¹⁵³

When choosing the transferee district court, the MDL Panel considers factors such as: (i) which jurisdiction holds the largest number of pending cases; (ii) where discovery has occurred; (iii) where the cases have progressed the furthest; (iv) the site of the occurrence of the common facts; (v) the place where the cost and inconvenience would be most minimised; and (vi) the experience and caseloads of potential judges.¹⁵⁴

There may be scope for the EJC¹⁵⁵ to act as a sort of MDL Panel and to make decisions regarding transfer and consolidation of proceedings under Article 30 of the Brussels I Regulation. It may be preferable to have an external body making objective determinations regarding the appropriate forum for collective actions when faced with related actions across multiple Member States. Coupled with management of a central registry, the EJC would have a unique ability to assess fully the appropriateness of consolidation.¹⁵⁶

Consolidation of proceedings should also be viewed as an important tool in reducing parallel litigation. It is provided for already under Article 15 of the Brussels II bis Regulation concerning matrimonial property.¹⁵⁷ This is a discretionary mechanism that allows courts with jurisdiction to stay proceedings or transfer them to another court that: (i) 'has a particular connection' to the case (or child, in the context of Regulation); (ii) is better

¹⁵³ Ibid.

¹⁵⁴ See R. Wasserman, *Dueling Class Actions*, (2000) 80(2) Boston University Law Review 462.

¹⁵⁵ See S. Weatherill, *EU consumer law and policy*, (Edward Elgar Publishing, (2005)).

¹⁵⁶ J.N. Stefanelli (supra n.70), 9.48.

¹⁵⁷ Regulation 2201/2003/EC concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation 1347/2000 OJ L 338 23.12.2003 1.

placed to hear the case (or a specific part); and (iii) is in the best interests of the litigant (child).

Consolidation was suggested by the Commission in its Green Paper in the context of former Article 6(1) [now Article 8(1)].¹⁵⁸ It contemplated an extension of the Article which allows a claimant to sue one of a number of defendants in the forum where any one of them is domiciled, so long as the claim is very closely connected. The Green Paper suggested that the rule could be extended to allow for the consolidation 'if the court has jurisdiction over a certain quorum of defendants.' Consolidation in this manner did not make it into the Regulation.

Member State courts should make use of consolidation of proceedings, especially in the context of cross-border collective actions where it may be more efficient to determine all the related claims together. The decision whether to consolidate proceedings could be made jointly through any of the cooperation methods previously described, or it could be made by a centralised body, such as the EJN.

¹⁵⁸ Green Paper on the review of Regulation 44/2001, 7 (supra n.131).

2.8 The applicable law and competition law

The next part of this chapter shall focus on the relationship between forum shopping and the applicable law in cross-border collective competition cases involving end-consumers.

2.9 The rules governing the applicable law

The Rome II Regulation¹⁵⁹ on the law applicable to non-contractual obligations sets out an important cornerstone in the European harmonisation of conflict-of-laws rules alongside the Brussels I Recast Regulation on the recognition and enforcement of civil jurisdiction and judgments. It establishes a unified set of conflict-of-law rules for all non-contractual obligations arising in civil and commercial matters including violations of competition rules and thus enables the courts in all EU Member States (with the exception Denmark)¹⁶⁰ to determine the applicable substantive law on a common basis. The scope of the substantive law determined in accordance with the Rome II Regulation covers a wide area of liability-related issues. This includes *inter alia*, the basis and extent of liability, the determination of the persons that can be held liable and the determination and assessment of any damage or any remedy claimed and the limitation period applicable to such claims.¹⁶¹ Also the burden of proof and presumptions of law are considered matters of substance that fall within the scope of the Regulation.¹⁶² With respect to competition law, this means that the Regulation determines not only the applicable set of rules of substantive competition law but also the entire legal regime that governs the civil law claims arising from an infringement.

¹⁵⁹ Regulation 864/2007 on the law applicable to non-contractual obligations (Rome II) OJ L 199 21.7.2007 40.

¹⁶⁰ *Ibid.*, Article 1(4).

¹⁶¹ *Ibid.*, Article 15.

¹⁶² *Ibid.*, Article 22(1); Article 1(3) states that the Regulation shall not apply to evidence and procedure. These issues are governed by the *lex fori*.

Instead of applying the general rule expressed in Article 4¹⁶³ to competition law infringements, the Commission elected when drafting the Rome II Regulation to include applicable law rules which concern *inter alia* obligations arising from 'acts restricting free competition.' These rules, which are contained in Article 6(3) of the Regulation, 'may not be derogated from by agreement' and are accordingly mandatory. Recital 21 states that the special rule in Article 6 is not an exception to the general rule in Article 4(1) but rather a clarification of it.¹⁶⁴

Acts restricting free competition

Recital 23 states that for the purposes of this Regulation, the concept of restriction of competition should cover *inter alia* prohibitions on agreements between undertakings which have as their object or effect the prevention, restriction or distortion of competition within a Member State or within the internal market, as well as prohibitions on the abuse of a dominant position within a Member State or within the internal market. The rules as to private law antitrust claims are contained in Article 6(3), which provides as follows (emphasis added):

3. (a) The law applicable to a non-contractual obligation arising out of a restriction of competition shall be the law of the country where the market is, or is likely to be, affected.

¹⁶³ Article 4(1) concerns the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of the event occur.

¹⁶⁴ See E.R. Pineau, *Conflicts of laws comes to the rescue of competition law: The new Rome II Regulation*, (2009) 5. J. Priv. Int'l L. 311; V. Boucek, *European antitrust law in the Regulation Rome II*, (2012) 62(5) Zbornik PFZ 1731; C.H. Kaminsky, *Rome II Regulation: A comparative perspective on federalising choice of law*, (2010) 85(1) Tul. L. Rev. 55.

(b) When the market is, or is likely to be, affected in more than one country, the person seeking compensation for damage who sues in the court of the domicile of the defendant, may instead choose to base his or her claim on the law of the court seised, provided that the market in that Member State is amongst those directly and substantially affected by the restriction of competition out of which the non-contractual obligation on which the claim is based arises; where the claimant sues, in accordance with the applicable rules on jurisdiction, more than one defendant in that court, he or she can only choose to base his or her claim on the law of that court if the restriction of competition on which the claim against each of these defendants relies directly and substantially affects also the market in the Member State of that court.

The key element in determining the substantive law applicable to competition claims under the Rome II Regulation is the 'affected market.' If a market is affected (or is likely to be affected) *only in one country*, then the law of this country is applicable irrespective of where the claimant brings their claim. If a market is (or is likely to be) affected in *more than one country*, the claimant has the opportunity to choose the *lex fori* for their entire claim if the conditions of Article 6(3)(b) are met. The Regulation however remains silent on the applicable law in cases where the market is affected in more than one country, but the conditions of Article 6(3)(b) are not met.

The 'affected market'

The Regulation does not assist in determining when a market is 'affected.' Some commentators assume that in the absence of guidance, the usual methods of market definition have to be applied and thus the determination of the applicable law necessitates a

fully-fledged market definition as a prerequisite.¹⁶⁵ Holzmueller and von Koeckritz¹⁶⁶ do not share this view. They argue that market definition is a part of the substantive analysis of alleged restrictions of competition and thus a matter of substantive competition law. The purpose of Article 6(3) is the marking out of the laws of various jurisdictions and their respective territorial scope. This is in the first place a delineation of the geographical reach of national competition laws. An 'affected market' in a given country should be considered to exist if the goods or services that are allegedly subject to anti-competitive practices are sold/offered in or delivered into this country. In other words, it should be sufficient that the alleged conduct has (or is likely to have) effects in the territory of the relevant country.¹⁶⁷ It could be argued that Recital 21 speaks in favour of this interpretation. It states that the rules contained in Article 6 are not an exception to the *lex loci damni* principle of Article 4(1), but rather a 'clarification' of this principle.¹⁶⁸ Thus, the concept of the 'affected market' is meant further to specify the *locus damni* of a competition law violation. This is the geographic place where damage occurs or is likely to occur.

In Article 2(1) of the Regulation, damage relates to *any consequence* arising out of a tort/delict. Therefore, an affected market would be the place where the restriction of competition leads to (or is likely to lead to) 'consequences.' This could be deemed to be any place where the anti-competitive conduct in question is aimed, where the products or services affected by the anti-competitive practices are offered, sold or delivered and where the anti-competitive conduct is capable of having detrimental effects for competitors and consumers. This finding essentially corresponds to the application of the 'implementation

¹⁶⁵ A. Dickinson, *The Rome II Regulation: The law applicable to non-contractual obligations*, (OUP, (2008)), 6.63.

¹⁶⁶ T. Holzmueller and C. von Koeckritz, *Private enforcement of competition law under the Rome II Regulation*, (2010) 3(3) G.C.L.R. 91, 92.

¹⁶⁷ *Ibid.*

¹⁶⁸ M. Hellner, *Unfair competition and acts restricting free competition*, (2007) 9 Yearbook of Private International Law 49, 52.

doctrine' that is used in the EU for delineating the scope of applicability of its own competition laws.¹⁶⁹ Broadly speaking, a market in a certain geographic area is likely to be affected if it is likely that the anticompetitive practice is implemented in this territory. For this to happen, it is sufficient that the relevant goods or services affected by the alleged anticompetitive agreement are sold or delivered into the relevant geographic area.¹⁷⁰

Article 6(3)(a) and cases with several affected markets

In most cases relevant under the Rome II Regulation, the actual or likely effects of anticompetitive conduct will not be limited to the territory of a single Member State. Under these circumstances, Article 6(3)(a) will require the application of the law of each of the countries covered by the affected market on a distributive basis.¹⁷¹ The domestic law of each country in which a market is affected must be applied. This so-called 'mosaic principle' is a consequence of the strictly territorial effects regime of Article 6(3)(a). Especially with regard to damage claims against participants of international cartels, this could lead to unsatisfactory results if it implied that claimants would have to split their damages claims into national parts and collect each part under the respective national law. The mosaic view has therefore been widely criticised for being impractical and establishing a de facto barrier to the recovery of multinational damages.¹⁷²

¹⁶⁹ See John E. Ferry, *Towards completing the charm: the Woodpulp judgment*, (1989) 11(1) E.I.P.R. 19.

¹⁷⁰ L. Lanucara, *Globalization of antitrust enforcement: Governance issues and legal responses*, (2001) 9(2) *Ind. J. Global Legal Stud.* 433, 437.

¹⁷¹ T. Holzmueller and C. von Koeckritz (supra n.166), 94.

¹⁷² For a critical appraisal of the 'mosaic principle' on competition law claims see J. Fitchen, *Choice-of-law in international claims based on restrictions of competition: Article 6(3) of the Rome II Regulation*, (2009) 5(2) *J. Priv. Int'l. L.* 346, 355.

The lex fori in Article 6(3)(b)

Article 6(3)(b) offers the possibility to achieve what Article 6(3)(a) is not able to secure. This offers the allocation of a uniform law for the assessment of a competition-law infringement and its consequences in 'transnational cases' (i.e. cases with affected markets in more than one Member State). The rationale of this rule is to concentrate claims arising from restrictions of competition affecting more than one national market.¹⁷³ The rule is namely intended to facilitate the recovery of damages for international cartels and to limit the difficulties and costs arising from the application of foreign law.¹⁷⁴

Under Article 6(3)(b), the claimant may choose to select the application of a single law. This option is subject to several conditions that minimise the opportunity for the claimant to 'shop' for the appropriate law. First, Article 6(3)(b) will only apply to damages claims. Second, the claimant can only choose the *lex fori* and not the law of another country in which a market is (or may be) affected. Third, the choice of the *lex fori* is only possible if the claimant brings a claim in an EU Member State where at least one of the defendants has their domicile. This ensures that at least one of the defendants has a degree of familiarity with the local law given that it will be their own domestic law. Fourth, the claimant cannot choose the law of the forum state (domicile state of one of the defendants) only because the market in the forum state is *likely* to be affected. Rather, a market must be *directly and substantially affected* by the competition law infringement in question. This would seem to require a higher standard than the 'affected market' standard in Article 6(3)(a). It is not sufficient that the forum state is only very remotely or indirectly affected by the anticompetitive conduct in question, or that it is only 'likely' that the relevant

¹⁷³ Rome II Regulation, Recital 22.

¹⁷⁴ T. Holzmueller and C. von Koeckritz (supra n.166), 94.

conduct may affect the market in this country. Nevertheless, it remains unclear to what extent the standard of 'directly and substantially affected markets' goes beyond the basic effect of Article 6(3)(a). The reasons lying behind the imposition of this additional test are thought by some to be quite obscure.¹⁷⁵ Holzmueller and von Koeckritz argue that Article 6(3)(b) requires that the forum state must be one of the main places where the competitive practice in question is directly implemented by the defendant. There must be a 'genuine link' to the forum state.¹⁷⁶ This means that, in cases of 'restrictions by object', the anticompetitive conduct must be directly aimed at restricting competition in the forum state. In cases of 'restrictions by effect,' the forum state must be one of the countries in which the anticompetitive effects are directly felt.¹⁷⁷

The difficulty of the 'direct and substantial link may be demonstrated in practice. In price-fixing cases, for example, one way would be to measure the number of goods sold at inflated prices on a given market. If, for example, the cartel covers Luxembourg and Germany and one million items are sold at cartelised prices in Germany whereas 50,000 items are sold in Luxembourg, then only the German market would be 'directly and substantially' affected by the price-fixing. This solution would lead to the outcome that in most cases suits could not be concentrated in smaller EU Member States since in those States the number of goods sold is much lower than in larger countries with more demand.¹⁷⁸

¹⁷⁵ J. Segan, *Applicable law 'shopping'? Rome II and private antitrust Enforcement in the EU*, (2008) 7(3) C.L.J. 251, 260.

¹⁷⁶T. Holzmueller and C. von Koeckritz (supra n.166), 94.

¹⁷⁷ Ibid.

¹⁷⁸ S. Franq and W. Wurmnest, *International antitrust claims under the Rome II Regulation*, in J. Basedow, S. Franq, L. Idot, *International antitrust litigation: Conflicts-of-laws and coordination*, (Bloomsbury Publishing, (2012)), section vi, para. A.

Another way to demonstrate the required link would be to look at the coverage of the various markets. If, for example, a cartel manages to fix prices for 100 per cent of the goods sold in Luxembourg but not all suppliers of the German market join the price-fixing cartel such that only 40 per cent of the goods are sold in Germany at inflated prices, it can be argued that a plaintiff can invoke the concentration only before courts in Luxembourg. It may be argued that the latter interpretation would set too many incentives for forum shopping and should therefore not be followed.¹⁷⁹

Party autonomy

The substantive law as determined by Article 6(3) Rome II is not subject to a deliberate choice of the parties. Article 6(4) excludes competition law claims from choice-of-law agreements pursuant to Article 14. Beyond the scope of Article 6(3)(b) the parties can therefore not exercise any influence on the applicable competition law.

2.10 The Rome II Regulation and cross-border collective redress

According to Article 6(3)(b) Rome II Regulation, in cartels affecting more than one country, the claimant can choose the application of the law that combines the forum, the defendant's domicile and the affected market. On the face of it, the provision in its formulation is not applicable to cross-border collective actions. It appears to require that the claimants suffered injuries in more than one market, whereas the issue in cross-border collective actions is that multiple claimants suffered their injuries each in a different market. Regardless of whether this is the correct literal interpretation; however, based on

¹⁷⁹ Ibid.

its aims the provision should clearly apply to the multinational collective action, too.¹⁸⁰ Perhaps though, in the interests of certainty, some reference or guidance should be inserted into the Rome II Regulation. The Directive on rules governing damages actions for infringements of Articles 101 and 102¹⁸¹ which requires Member States to ensure full compensation by enabling an action for damages, has proved highly controversial. Aside from a fleeting reference in its explanatory memorandum to Article 6(3) of the Rome II Regulation, it does not address the questions of the law applicable to these mass damages claims.¹⁸²

2.11 A new conflicts-of-law rule specifically for collective redress in antitrust scenarios

The collective action may be greatly simplified if a new choice-of-law rule could be found. For example, the applicable law could be allocated on the basis of the defendant's domicile. This is a familiar connecting factor, especially in contract law.¹⁸³ From an antitrust perspective, as the defendant has allegedly caused the mass damage with victims in several countries, they must accept that for the sake of effective handling of the case, the law of the place of their conduct applies instead of the general *lex loci damni* rule.¹⁸⁴ This rule can be questionable, however. Application of the defendant's home state law creates the risk that defendants may deliberately incorporate (or choose their main place of

¹⁸⁰ R. Michaels, *European class actions and applicable law*, in in A. Nuyts, N.E. Hatzimihail, W. de Gruyter, *Cross-border class actions: The European Way* (2013), 131.

¹⁸¹ Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of competition law provisions of the Member States and of the European Union OJ L 349 5.12.2014 1.

¹⁸² A. Dickinson, *The Rome II Regulation: The law applicable to non-contractual obligations updating supplement*, (OUP, (2010)), 67; Damages Directive (supra n.181), Recital 13.

¹⁸³ Regulation 593/2008 on the law applicable to contractual obligations OJ L 177 4.7.2008 6, Articles 4(1)(a), (b), (e) and (f).

¹⁸⁴ A. Stadler, *Conflicts-of-laws in multinational collective actions: A judicial nightmare?* in D. Fairgrieve and E. Lein, *Extraterritoriality and collective redress* (OUP, (2012)), 11.45.

business) in low liability states,¹⁸⁵ including states outside the EU that do not comply with the *acquis communautaire*.

If one wishes to establish a common law based on the claimants rather than the defendant's interests, it would be possible to consider the place where most of the victims are domiciled.¹⁸⁶ A comparable approach would be to apply the law of the most affected market.¹⁸⁷ However, this will not necessarily provide a satisfactory connection. In cases in which the vast majority of injuries is suffered in this one market, the result may be justifiable. If, however, a large number of markets are affected and none of them alone combines a very large portion of the overall injury, it is not obvious why all claims should be subject to that one law. Furthermore, such an approach is likely to prioritise the laws of big countries over those of small countries. Finally, the most affected market can sometimes be hard to determine, leading to uncertainty about the applicable law, which is why the Commission chose to reject it.¹⁸⁸

McCloud and Rosenberg advocate the use of applying the 'average' of differing State laws in order to overcome this choice-of-law impediment to the use of collective actions, yet without compromising the functionality of the civil liability in any significant way.¹⁸⁹

They consider this from a US perspective:

'The existence of significantly different state laws currently poses a virtually insuperable obstacle to certification of multistate, diversity class actions. Interpreting and applying

¹⁸⁵ See *York-Erwin*, 2009 84 N.Y.U.L. Rev. 1815.

¹⁸⁶ See for example, European Parliament Resolution of 2 February 2012 on *Towards a coherent European approach to collective redress* (2011/2089 (INI)), 10, para. 27.

¹⁸⁷ Green Paper on consumer collective redress, COM (2008) 794, 14, para. 59.

¹⁸⁸ Commission Communication (supra n.4), 14.

¹⁸⁹ L. McCloud and D. Rosenberg, *A solution to the choice-of-law problem of differing state laws in class actions: Average law*, (2011) 79 G.W. L. Rev. 374.

many diverging, not infrequently conflicting state laws – often of all 50 states plus the District of Columbia and US territories – obviously can increase the complexity and cost of resolving numerous claims by class-wide trial. Indeed, though class actions rarely go to trial, it is presumed that a judge could not possibly, let alone practically, instruct the class action jury on the nuances and intricacies of the laws of the fifty states. In general, courts regard the potential management difficulties and diseconomies of this ‘daunting enterprise’ sufficient to tip the balance against class action certification. These concerns dominate even when all other indicators point in the direction of certifying the class, including the predominance of common factual questions, availability of formulaic, statistical, or other acceptable methods for estimating and distributing an aggregate damage award on an individual basis, and core policy favouring collectivised enforcement of recovery claims.’¹⁹⁰

McLeod and Rosenberg define the ‘average law’ as the mean recovery value that would result from resolving all collective claims under their respective governing state laws.¹⁹¹ They consider this trans-substantively to any case, regardless of its formal or conventional classification such as, *inter alia*, tort, contract, property, environmental hazard or competition. Ultimately, their aim in demonstrating the utility of the average law solution is to facilitate the wider and more effective use of the collective action, which provides the best, most socially appropriate means of resolving mass injury cases. They argue that the use of average law to determine a defendant’s aggregate liability and damages can increase the efficacy of collective actions generally.¹⁹² For high recovery claims, greater efficiency is seen as a function of the similarities among claims that enable courts and parties to capitalise on the scale efficiency from adjudication and litigating questions of common

¹⁹⁰ Ibid.

¹⁹¹ Ibid, 375.

¹⁹² Ibid.

import. Making a 'once-and-for-all' investment on those questions, and spreading the cost across all claims, avoids the expense of courts and parties having needlessly to repeat their efforts to resolve multiple, similar claims in separate actions. By spreading the collective or common question, the collective action yields great savings in processing costs, usually put in terms of absolute reductions in expenditures by the court and parties.¹⁹³

McLeod and Rosenberg offer a simple example of how the average law solution would work:

‘Suppose a class comprised of two small-recovery claims, each governed by different state laws, one that would impose liability and one that would deny liability. Further, assume that the class would be certified but for the costs of applying the varying state laws at class-wide trial to determine the defendant’s aggregate liability and damages. In this case, the court could solve the choice-of-law problem by deriving the average (or mean value) of the two conflicting laws analytically by conceptualising some appropriate intermediate liability rule or statistically by random sampling. The reliability and comparatively low cost of statistical averaging renders it decidedly preferable to analytical averaging that necessarily requires finding words to express the mean value with a tolerable degree of precision. Our analysis proceeds on this preference for statistical over analytical averaging. Nevertheless, assuming their equivalent effectiveness in the example, both methods would produce identical results. Under the average analytically-derived liability rule or statistically-derived norm of probability discounted liability, the defendant would be liable on each claim for 50% of the causally-related loss, which by assumption the court could appropriately distribute among class members.’

¹⁹³ Ibid., 392.

McLeod and Rosenberg are not the first to consider the use of the average law solution. Most notably, the ALI's Principles of the law of aggregate litigation¹⁹⁴ identified average law as one approach to solving the differing law problem in class action. However, they dismissed it as 'foreclosed by the recognition that each body of substantive law derives from a particular sovereign and that courts lack authority to resolve choice-of-law disputes in class action through amalgamation of laws of multiple sovereigns'¹⁹⁵ This argument came from Judge Posner's ruling over the certification of a national product liability class action. He held that there had been an abuse of discretion in part because of the district court's effort to solve the choice-of-law problem by melding 50 differing state negligence standards into a single class-wide jury charge. Posner criticised the lower court for subjecting the defendants to class-wide trial under a law that was 'no actual law of any jurisdiction' but rather 'a kind of Esperanto instruction.'¹⁹⁶ The Principles supplements Posner's objections with the explanation that application of the average rather than the actual differing state laws 'risks exposing the defendant to a legal standard for which it did not have notice at the time of underlying conduct.'¹⁹⁷

McLeod and Rosenberg argue that this outlook is mistaken.¹⁹⁸ They state that this resistance to the average law stems from the prevailing view among courts and commentators that the nature of the governing law and businesses' understanding and response to it at the time of the underlying conduct is the same regardless of whether the contemplated activity involves an intrastate or interstate risk. They state that their principal contribution is a basic, straightforward point: the average of differing state laws is in reality the actual law that in fact ultimately governs the choice a business will make and

¹⁹⁴ American Law Institute, *Principles of the law of aggregate litigation*, (2010).

¹⁹⁵ *Ibid.*, Principle 2.5. Comment.

¹⁹⁶ *In re Rhone-Poulec Rorer, Inc.*, 51 F. 3d. 1293, 1300 (7th Cir. 1995).

¹⁹⁷ American Law Institute, Principle 2.05, Comment b.

¹⁹⁸ L. McCloud and D. Rosenberg (*supra* n.189), 379.

expresses the choice the multiple states involved expect and presumably want the business to make regarding whether and how safely it should engage in activities involving interstate risk.¹⁹⁹

Any attempt to create a choice-of-law rule exclusive to cross-border collective redress does not come without major obstacles. The primary issue is that choice-of-law rules are substantive in nature. They define the parties' rights. They must also be clear, reliable, and foreseeable. In the European context, a new conflicts rule designed particularly for mass litigation would be in clear contrast to Article 6 of the Rome II Regulation. Antitrust victims would have to accept the application of a different substantive law merely owing to the fact that they are not the only victims of the wrongdoing. The general concept of collective action is that a coherence of the claims already exists. To use a class action as the justification for altering choice-of-law rules would be 'to put the cart before the horse.'²⁰⁰

Changing conflict-of-laws rules for the efficient use of litigation resources can be tolerated only where a public interest clearly prevails and no other solutions arise. For the US law, Larry Kramer argues that whatever choice-of-law is to be used, it should be the same both for ordinary and for complex cases:

'[I]t should not change simply because, as a matter of administrative convenience and efficiency, we have combined many claims in one proceedings.'²⁰¹

¹⁹⁹ Ibid.

²⁰⁰ L. Silberman, *The role of choice-of-law in national class actions*, (2008) 15(6) U. PA. L. Rev. 2001, 2022.

²⁰¹ L. Kramer, *Choice-of-law in complex litigation* (1996) 71 N.Y.U.L. Rev. 547, 549.

In the Commission Communication²⁰² stakeholders raised the problem that, under the EU's current conflicts-of-laws rules, a court to which a collective dispute is submitted in a case involving claimants from several Member States would sometimes have to apply several different laws to the substance of the claim. The Commission admitted that there can be situations where the conflicts-of-laws rules can render cross-border litigation complex, in particular if the court has to apply several compensation laws to each group of persons sustaining the damage. However, the Commission was not persuaded that it would be appropriate to introduce a specific rule for collective claims which would require the court to apply a single rule for collective claims which would require the court to apply a single law to a case.

2.12 Concluding remarks on the conflicts-of-laws

Where there has been anticompetitive conduct harming end-consumers in multiple Member States, it is desirable for collective damages actions to be consolidated as much as possible to ensure the equal redress of EU-wide anticompetitive harm. On the face it, the Commission's Recommendation seems to be a step forward in realising this ambition. It underlines that when a dispute concerns natural or legal persons from several Member States, a single collective action should be encouraged and that any rules on admissibility or issues to do with standing of the foreign groups or claimants or the representative entities originating from other national legal systems should be overcome. It also advocates that European civil procedural law and the applicable law should work efficiently in practice to ensure proper coordination of national collective redress procedures. The Commission desires a system of cross-border collective redress which focuses on the best

²⁰² Commission Communication (supra n.4), 14.

placed venue to hear the case. However, none of the Member States are bound to follow the Recommendation. This leaves the opportunity for distortions.

Moreover, the Commission advocates reliance on a conflicts-of-laws regime which was created for and guided by the leitmotiv of two-party proceedings. In many ways it is difficult to envisage how existing rules can be adapted to cope with collective proceedings in the aftermath of an EU-wide cartel. Arguably, one cannot deal with the jurisdictional aspects of both 'traditional two-party' proceedings and collective cross-border litigation with a one-size-fits-all approach. Cross-border collective redress may in many cases have very specific needs which are different from traditional two-party litigation. And they do. The main issue is the scale of the damage and making sure that each individual victim who has suffered from the same cartel is treated equally irrespective of where in the EU they have suffered that harm. The Commission appears to consider that the existing rules of both jurisdictions and choice-of-law should be fully exploited. From this, one should infer that no amendments shall be provided in the near future.

At this juncture, one considers that so long as there is the opportunity for the claimant to choose between various laws and applicable fora, forum shopping remains relevant. There are tactical advantages and disadvantages for both claimant and defendant. Both the Brussels I Recast and the Rome II Regulations provide parties with an element of opportunity to influence the choice of forum and the applicable law. Some of the national courts would appear to encourage forum shopping.

CHAPTER 3 ARBITRATION AS AN APPROPRIATE FORUM FOR CROSS-BORDER END-CONSUMER REDRESS IN THE WAKE OF ANTICOMPETITIVE CONDUCT

3.0 Introduction

The previous chapter considered the relationship between forum shopping and the conflicts-of-laws with particular reference to end-consumer cross-border collective redress. This made the assumption that the traditional court process is the best way to remedy cross-border mass harm situations. However, one must take in to account the growth of alternative dispute resolution (ADR) practices and their potential to resolve mass disputes through mechanisms such as collective arbitration. In the US, class arbitration is a well-known device. One of the hallmarks of arbitration is the ability of parties to tailor the arbitration agreement and process to meet their needs. While negotiating terms of the arbitration agreement, parties generally rely on the rules of arbitration institutions due to their ability to provide predictability, stability and expertise.¹

In paragraph 3.8 of the Commission Communication ‘Towards a European Horizontal Framework for Collective Redress’² it was mentioned that stakeholders recognised the benefits provided to parties by what the Communication refers to as ‘collective consensual dispute resolution.’ These include a fast, low-cost means of resolving a dispute. It was considered that parties to collective proceedings should therefore have the possibility to resolve their disputes collectively out of court with, *inter alia*, the intervention of a third party using mechanisms such as arbitration. In Recital 16 of the Recommendation on

¹J. Tseng, *The arbitration institution dilemma: achieving a balance on large-scale redress issues*, (2016) 19(1) I.A.L.R. 19, 19.

² COM (2013) 401.

common principles for injunctive and compensatory collective redress mechanism in the Member States concerning violations of rights granted under Union Law,³ it was recognised that ADR procedures can be an efficient way of obtaining redress in mass harm situations. In paragraph 25, the Recommendation mentions that the Member States should ensure that the parties to a dispute in a mass harm situation are encouraged to settle the dispute about compensation consensually or out-of-court, both at the pre-trial stage and during civil trial. Moreover, paragraph 26 states that the Member States should ensure that judicial collective redress mechanisms are accompanied by appropriate means of collective ADR available to the parties before and throughout the litigation. With this in mind, this chapter examines the US experience and assesses critically the appropriateness of a similar model for EU cross-border collective redress.

3.1 The appeal of US-style class arbitration to an EU setting

Collective litigation is well established in many jurisdictions as a means of resolving the grievances of a large number of claimants. Collective arbitration, by contrast, is a relatively novel entity (for the EU at least). It offers a neutral forum for resolving disputes flowing from international transactions and an opportunity to address large scale claims through a single mechanism (without a jury as would be the case in the US). From the claimant's perspective, collective arbitration offers the ability to seek satisfaction of claims that may be costly to pursue individually, as well as awards that are potentially enforceable in a broad range of jurisdictions. Arbitration clauses are being included as a dispute resolution mechanism of choice in a wide variety of consumer product contracts.⁴ Supporters of arbitration clauses argue that arbitration is cheaper, faster, and more effective as a means

³ OJ L 201 26.7.2013 60.

⁴ Herbert Smith Freehills, *Dispute Resolution, A matter of class: The spectre of class action arbitration in consumer product disputes*, available at <http://hsfnotes.com/arbitration/2013/12/13/a-matter-of-class-the-spectre-of-class-action-arbitration-in-consumer-product-disputes/> (accessed 03.08.2016).

for dispute resolution than litigation.⁵ Arbitral outcomes are said to be at least as favourable to consumers as the outcomes of litigation, and a majority of participants express satisfaction with the process.⁶ Large scale cross-border disputes are one of the biggest issues facing the international legal community today, and collective arbitration is uniquely placed to provide parties from different states with the opportunity to resolve their claims at a single time in a single, neutral venue, not only helping parties obtain justice more quickly and efficiently but also overcoming associated problems with obtaining jurisdiction over parties from a variety of states. The previous chapter emphasised that consolidated claims are more desirable while parallel claims have the potential to bring about irreconcilable judgments.

In addition to its consensual nature and its procedural flexibility, arbitration is a desirable means of collective dispute resolution in the European cross-border consumer redress context because 'arbitral awards are almost universally easier to enforce internationally than court judgments.'⁷

Generally speaking, most European countries strongly endorse international arbitration. In France, for example, the Court of Appeal and the Cour de Cassation highlight the strong

⁵ T. Eisenberg, G.P. Miller, E. Sherwin, *Arbitration's summer soldiers: An empirical study of arbitration clauses in consumer and non-consumer contracts*, (2008) 41 U. Mich. J. L. Rev. 871, 882; G. Blanke and R. Nazzini, *Arbitration and ADR of global antitrust disputes: taking stock: Part 1*, (2008) 1(1) G.C.L.R. 46, 47: 'In the light of their more streamlined procedures and their inbuilt flexibility, arbitration proceedings are generally more cost-efficient and can easily be adjusted to procedural and substantive requirements of competition law disputes. More importantly, the arbitrator can be selected on the strength of his competition law experience. In an increasingly globalizing and market driven world, a majority of international commercial agreements, many of which are prone to give rise to antitrust and competition law concerns, specify arbitration as their chosen dispute resolution forum.'

⁶ L.B. Bingham, *Is there a bias in arbitration of non-union employment disputes? An analysis of active cases and outcomes*, (1995) 6 Int'l. J. Case Management 369, 378 (reporting favourable employee win-rates in employment related arbitration, for example).

⁷ J. Beess und Chrostin, *Collective redress and class action arbitration in Europe, where we are and how to move forward*, (2011) 14(2) I.A.L.R. 111, 119.

support and deference given by the courts to arbitrators.⁸ In the *Putrabali* case,⁹ for example, the Cour de Cassation affirmed that an international arbitration award was 'not anchored in any national legal system' which in essence:

'qualifies the arbitral award as an international judicial decision... [the *Putrabali* holding hence] confirms the existence of an arbitral legal order which is independent from national legal orders.'¹⁰

The supranational element of international class arbitration would appear, *prima facie*, to remove concerns associated with forum shopping and the potential diversity associated with private enforcement of competition law by the national courts.

Similarly, Germany, although still highly sceptical of collective dispute resolution, strongly endorses international arbitration. For example, even though appeals of arbitral awards to the German Supreme Court are possible, the court very rarely accepts such cases for review. This suggests that strong deference is given to arbitrators and their competency in deciding disputes.¹¹

It is submitted that The Netherlands has one of the best ADR regimes. All of industry and commerce is covered by sectoral boards to which companies are obliged to join to protect their reputation. There is an overarching Dispute Resolution Committee

⁸ See for example, G. Blanke and R. Nazzini, *French Supreme Court confirms minimalist review of competition law awards*, (2008) 1(2) G.C.L.R. R44.

⁹ Case number 05-18.053, France, Cour de cassation, 29.6.2007, *Société PT Putrabali Adyamulia v Société Rena Holding et Société Moguntia Est Epice*; See also Reed Smith LLP, *Enforcement of arbitration awards in France*, available at <http://www.lexology.com/library/detail.aspx?g=296a065e-da7d-422c-b603-b7da54f4439c> (accessed 03.08.2016).

¹⁰ P. Pinsolle, *Recent significant French judicial decisions involving international arbitration*, in A.W. Rovine, *Contemporary issues in international commercial arbitration and mediation: The Fordham Papers*, (2008), 117.

¹¹ J. Beess und Chrostin (supra n.7), 119.

(Geschillencommissie) that assures standards and good practices. It also provides a single point for consumers wanting to know where to lodge a complaint. Once a complaint is lodged with any of the sectoral boards, it is processed and companies are obliged to obey its ruling. This system processes in excess of 11000 complaints each year.¹²

There is no decision of the EU legal order explicitly pronouncing EU competition law to be arbitrable, although that is not doubted since it is an inference which can be drawn from cases such as *Eco Swiss*¹³. Here the CJEU wished not to interfere with arbitration and the finality of arbitral awards. In that case, moreover, it limited the required material review of arbitration awards to review for public policy violations. By inference then, in *Eco Swiss*, the CJEU, and with it the EU legal order, accepts the arbitrability of EU competition law.

Class action, accepted as an extraordinary but acceptable procedure in the US, still instils an element of fear in European lawyers. Over the past 20 years, the US has developed a system of class arbitration, whereas, in Europe, collective arbitration provisions are rare.¹⁴ Europe is a large market, benefiting from free movement of goods and services, with close to half a billion customers. As business becomes increasingly international, it becomes increasingly important to have an efficient system in place for resolving mass claims. However, the approach taken to collective redress differs across the EU Member States, and, whilst the EU Commission has been working for several years on developing European standards of collective redress, these are far from promoting a homogenous

¹² European Justice Forum, *Collective redress*, available at <http://europeanjusticeforum.org/faq/current-issues/collective-redress.html> (accessed 03.08.2016).

¹³ Case 126/97 *Eco Swiss China Time Ltd. v Benetton International NV* [1999] E.C.R. I-3055; See K.J. Dhuner, *Arbitration and EC competition law: legal effects on arbitral awards*, *Arbitration* 2009 75(1) 86; See also L. D'Arcy and M. Furse, *Eco Swiss China v Benetton: EC competition law and arbitration*, (1999) 20(7) E.C.L.R. 392; See also D. Wong, *The 'middle way' review standard of arbitral awards – safeguarding effective EU competition law enforcement: theoretical appraisal, practical application and potential obstacles*, (2016) 9(1) G.C.L.R. 1.

¹⁴ See R. Khodykin, *Why is class arbitration unpopular across the pond?* in A.W. Rovine, *Contemporary issues in international arbitration and mediation: The Fordham Papers* (2013).

landscape. The Recommendation ‘invites’ Member States to implement measures of collective redress but they are not bound to do so. In essence, the current picture of EU cross-border collective redress depicts a heterogeneous landscape. The advantage of collective arbitration over the traditional court process is that a procedure could be designed free from interference from Member States. If that procedure was more efficient and user friendly than collective litigation, it could attract considerable support. Where a significant number of persons have been harmed by the same anticompetitive practice, the availability of an effective collective redress mechanism is an important factor. Therefore, in global cartels, jurisdictions such as the United States, Canada and Australia will offer significant advantages over legal systems where no collective proceedings are available. In this area, the Commission has attempted to invite EU-wide reform. The White Paper on actions for damages for breach of Articles 101 or 102 of the TFEU stated that:

‘Due consideration should be given to mechanisms fostering *early resolution of cases*, e.g. by settlements. This could significantly reduce or eliminate litigation costs for the parties and also the costs for the judicial system.... The Commission therefore encourages Member States to design procedural rules fostering *settlements*, as a way to reduce costs.’¹⁵

The Green Paper¹⁶ complements this approach by promoting ‘collective mediation and arbitration’,¹⁷ which could arguably also be leveraged in a competition context depending on the specific facts of each individual case.¹⁸

¹⁵ White Paper on damages actions for breach of the EC antitrust rules, COM (2008) 165, 9 (emphasis in the original).

¹⁶ Green Paper on consumer collective redress, COM (2008) 794.

¹⁷ European Commission, Press Release, MEMO/08/741, *Green Paper on Consumer Collective Redress-- Questions and Answers*, para.4, available at http://europa.eu/rapid/press-release_MEMO-08-741_en.htm (accessed 03.08.2016).

¹⁸ See also D. Shapiro, *Consumer class actions made easy*, (2008) 7 Comp. Law 203.

As mentioned in the introduction, this is echoed in the Commission Communication and Recommendation.

3.2 The class action experience in the US

Class arbitration has been characterised as a 'uniquely American device'¹⁹. The US is one of the very few countries that accept class arbitration proceedings as a procedural variant. It is a somewhat controversial dispute resolution device that takes certain procedures more commonly seen in judicial class actions and transplants them into arbitration.²⁰ Some argue that it developed in the US as a result of a unique confluence of facts: a strong public policy in favour of class relief, a robust view of arbitration as a legitimate means of resolving disputes, and an overwhelming need to maintain a consistent response to mass legal injuries, regardless of the forum chosen to hear those claims.²¹

Class arbitration owes its existence to the US corporate community's opposition to judicial class actions and a belief, prevalent in the late 1980s and 90s, that arbitration would eliminate the possibility of class suits by forcing claimants to resolve their claims individually.²² However, it did not turn out this way. Instead, when class claims were asserted in cases involving arbitration agreements, the disputes were not automatically sent to bilateral arbitration. Judges viewed the situation as presenting several different possibilities. On the one hand, a court may give precedence to one form of dispute resolution over another (either arbitration over class actions or class actions over

¹⁹ S.I. Strong, *Does class arbitration 'change the nature' of arbitration? Stolt-Nielsen, AT&T, and a return to first principles*, (2012) 17 Harv. Neg. L. Rev. 201, 206.

²⁰ S.I. Strong, *Resolving mass legal disputes through class arbitration: The United States and Canada compared*, (2012) 37 N. C. J. Int'l. L. & Com. Reg. 921, 922.

²¹ *Ibid.*, 936.

²² *Ibid.*; See also M.R. Davis, *The perspective of in-house counsel: organization, compliance/enforcement programs, negotiated sales, transfer, termination and advertising and franchise sales*, (1989) 486 P.L.I.C. 561, 590.

arbitration). On the other hand, a court might find a way to harmonise the two processes in some way on the ground that they were not mutually inconsistent. As time went on, an increasing number of judges chose to adopt the latter of the two alternatives, resulting in the creation of an entirely new form of dispute resolution: class arbitration. It was not until 2003 when the US Supreme Court gave its implicit approval to the procedure in *Green Tree Financial Corp v Bazzle*²³ that various US-based arbitral institutions promulgated their specialised rules on class arbitration. The Court also endorsed the arbitration of antitrust class actions by not prohibiting clauses that authorised the use of such procedures. The Court held that the question of whether an arbitration agreement allowed class action claims was a matter of contract interpretation to be decided by the arbitrator, not the courts.

There are two sets of rules currently in use. These are the American Arbitration Association's Supplementary Rules for Class Arbitration (AAA Supplementary Rules)²⁴ and the JAMS (Judicial Arbitration and Mediation Services) Class Action Procedures.²⁵ They are very similar to one another. This is not surprising given that both were intentionally modelled on Rule 23 of the Federal Rules of Civil Procedure²⁶ so as to allow courts and arbitrators to rely on existing case law when construing the provisions of new arbitral rules.²⁷ Despite class arbitration's lengthy presence on the US legal stage, there has been no statute, state or federal, prescribing the rules of procedure for class arbitrations to ensure that the process is uniform, fair or efficient. Moreover, whether any level of court involvement is required is open to question. The issue of judicial involvement has become

²³ *Green Tree Financial Corp. v Lynn W. Bazzle* 539 US 444 (2003).

²⁴ Available at

https://www.adr.org/aaa/ShowPDF?url=/cs/groups/commercial/documents/document/dgdf/mda0/~edisp/adrstg_004129.pdf (accessed 29.8.2016).

²⁵ Available at https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Class_Action_Procedures-2009.pdf (accessed 29.8.2016).

²⁶ Available at <https://www.federalrulesofcivilprocedure.org/frcp/title-iv-parties/rule-23-class-actions/> (accessed 29.8.2016).

²⁷ S.I. Strong (supra n.20), 938.

particularly contentious following the US Supreme Court's 2010 decision in *Stolt Nielsen SA* (discussed below).²⁸

Class arbitration in the US is primarily used in large-scale consumer and employment disputes.²⁹ and covers everything from insurance and finance to maritime and antitrust claims.³⁰ The one notable difference is that class arbitrations do not generally arise in cases exclusively to do with tort, since parties to such disputes seldom have a pre-existing contractual relationship and thus rarely have an arbitration agreement in place at the time the injury arises. It is possible for the parties to agree to arbitration after the dispute has arisen, however post-dispute arbitration agreements are very difficult to come by, even in cases where there are only two parties involved.³¹

3.3 When is class action available?

The existence of an arbitration agreement between the parties must be demonstrated and created either before or after the dispute has arisen. There can be either one agreement

²⁸ *Stolt-Nielsen S.A. v Animal Feeds International Corp.* 130 S. Ct. 1758 (2010).

²⁹ See Brief of American Arbitration Association as Amicus Curiae in Support of Neither Party, *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 130 S. Ct. 1758 (2010), at 22 (noting 37% of all class arbitrations administered by the AAA involved consumer actions, 37% involved employment actions, 7% involved franchising, 7% involved healthcare, 3% involved financial services, and 11% involved other business-to-business concerns).

³⁰ E.F. Sherman, *Group litigation under foreign legal systems: variations and alternatives to American class actions*, (2002) 52 D.L.R. 401, 407: discussing areas where class actions are likely; See also L.G Radicati Di Brozolo, *Arbitration and competition law: The position of the courts and of arbitrators*, (2011) 27(1), *Arbitration International* 6: Since the seminal *Mitsubishi* judgment, courts and commentators almost universally accept that the relevance of an issue of competition law to the settlement of a dispute is not a bar to arbitrability. [*Mitsubishi Motors Co V Soler Chrysler-Plymouth*, 473 US 614 (1985)] The consensus on this point rests to a large extent on the dual premise that arbitrators are under a duty to apply, and will apply, the relevant competition rules, more often than not just as national judges, if not more so; and that in any case, in setting aside and enforcement proceedings, the courts retain the possibility to take a 'second look' at the solution reached by the arbitrators. On a practical level, the justification for permitting the arbitrability of antitrust disputes rests on the fact that today the importance of competition law is almost universally recognized since more legal systems contain some form of competition rules. Given the potential relevance to competition in a broad range of disputes, if antitrust matters (just like matters of any other mandatory law) were not arbitrable, there would be enormous scope for tactical maneuvers aimed at interfering with the proper effect of the arbitration agreement.

³¹ S.I. Strong (supra n.19), 209.

binding on all the parties or a series of bilateral agreements between each of the claimants and the respondent. In the latter case, the documents must each include an arbitration clause which is substantially similar to that signed by the class representatives and the class members.³²

Once it is established that the parties agreed to arbitrate their dispute, it is necessary to consider the procedure that will be used to resolve the matter. Here, there is more than one possible procedure. The agreement(s) in question will either (1) include language expressly contemplating a class action or (2) be silent and ambiguous to the point. Each shall be considered in turn.

3.4 Express contemplation of arbitration agreement in the US

If the agreement contains an express provision allowing class arbitration, that language will be given effect. If the agreement contains an express prohibition (i.e. a waiver of class treatment) then it is necessary to consider whether the waiver is effective. The issue was considered by the US Supreme Court in *AT&T Mobility LLC v Concepcion*.³³ Ultimately, the Court held that the Federal Arbitration Act (FAA) forestalls states from invalidating class action waivers in arbitration agreements because these invalidations stand as an obstacle to the purposes behind the FAA.³⁴ It can be argued that the effect of this is to allow business to turn to their contracts for protection.³⁵ By inserting class action waivers into their arbitration agreements (agreements that were part of larger contracts with consumers, employees and other actors in the marketplace) businesses attempted narrowly

³² S.I. Strong (supra n.20), 944.

³³ *AT&T Mobility LLC v Vincent Concepcion*, 131 S. Ct. 1740 (2011).

³⁴ *Ibid.*, at 1753.

³⁵ F. Blechschmidt, *All alone in arbitration: AT&T Mobility v Concepcion* and the substantive impact of class action waivers, (2012) 160 U. Pa. L. Rev. 541, 543.

to circumscribe the procedures available to their adversaries.³⁶ In essence, once an opposing party agreed to arbitrate any future claims and also to waive their right to bring proceedings as a class, the only remaining option would be bilateral arbitration: arbitration between two individual parties. The viability of end-consumer claims suffers greatly if there is no collective mechanism in place.

Writing for the majority in *Concepcion*, Justice Scalia described bilateral arbitration as streamlined, efficient and cheap.³⁷ Interestingly, he did not provide empirical data to support his description of bilateral arbitration. He characterised class arbitration, by contrast as 'slower, costlier, and more likely to generate procedural morass.'³⁸ The majority further asserted that class arbitration, with no effective means of judicial review, imposes higher risks on defendants who are unlikely to 'bet the company' on such a process.³⁹ It was only a matter of time before this was disputed in court. In particular, consumers pleaded that class action waivers were exculpatory provisions in the small claims setting because the inclusion of these waivers in arbitration agreements effectively relieved businesses from liability.⁴⁰ Without class proceedings, no individual consumer in the small claims setting have an incentive to file a claim.⁴¹ An early opinion in California (*Discover Bank*) held that such class action waivers provided defendants with a 'get out of jail free card.'⁴² The waivers were also considered troublesome because they were almost always found in contracts of adhesion, or on a 'take it or leave it' basis.⁴³

³⁶ Ibid.

³⁷ *Concepcion* (supra n.33), at 1749.

³⁸ Ibid., at 1751.

³⁹ Ibid., at 1752.

⁴⁰ F. Blechschmidt (supra n.35), 544.

⁴¹ For example, *Scott v Cingular Wireless*, 161 P.3d 1000, at 1007. This case examined whether a class action waiver in a mobile phone contract's arbitration agreement 'effectively exculpated' its drafter from liability for a large class of wrongful conduct. The case noted that the customers in the dispute had brought no individual claims against the mobile phone provider over a six-year period.

⁴² *Discover Bank v Superior Court* 36 Cal. 4th 148 (2005); J. Rizzarda, *Discover Bank v Superior Court of Los Angeles*, (2006) 21(3) Ohio St. J. Disp. Res. 1093, 1097.

⁴³ E. J. Shustak, *The US Supreme Court endorse arbitration clauses in consumer contracts which contain waivers of the right to class action resolution*, available at <http://www.shufirm.com/the-u.s.-supreme-court->

Businesses justified the upholding of class action waivers on the basis that virtually all arbitration agreements in dispute were governed by the FAA,⁴⁴ a federal statute that the Supreme Court has consistently held to proclaim 'a liberal federal policy favouring arbitration agreements.'⁴⁵ Thus, the common argument defendants raised in motions to compel arbitration was that the FAA required courts to enforce the arbitration agreements, and with them, the class action waivers.⁴⁶ *Concepcion* in a strongly divided court (5-4) upheld the waiver, based on the finding that the state law acted as a hindrance to arbitration, contrary to the pro-arbitration policy embodied by the FAA. In doing so, the majority appeared to operate on the assumption that class arbitration was in some way fundamentally different to bilateral arbitration, a conclusion that was challenged by four dissenting judges.⁴⁷

Although *Concepcion* has been heralded as marking the end for class arbitration and class actions in the US (since it is believed that the vast majority of corporate defendants will use arbitration agreements in conjunction with class waivers to eviscerate class suits in both court and arbitration), that conclusion may be somewhat precipitous. If we look, for example, at the case of *Carey v 24 Hour Fitness, USA, Inc.*⁴⁸ the denial of a motion to compel arbitration was affirmed and a putative class action suit was permitted to go forward despite an arbitration agreement prohibiting class arbitration. In *Feeney v Dell*

endorses-arbitration-clauses-in-consumer-contracts-which-contain-waivers-of-the-right-to-class-action-resolution (accessed 03.08.2016).

⁴⁴ 9 US Code Chapter 1 section 2: The Act provides that 'an agreement in writing to submit to arbitration an existing controversy out of...a contract, transaction, or refusal [involving commerce], shall be valid, irrevocable, and enforceable, save upon such grounds as exist in law or in equity for the revocation of any contract.'

⁴⁵ *Howsam v Dean Witter Reynolds Inc.*, (2002) 537 US 79, 83 (quoting *Moses H. Cone Mem'l Hosp. v Mercury Constr. Corp.*, (1987) 460 US 483, 489).

⁴⁶ For example, in *Scott v Cingular Wireless* (supra n.41), at 1008 the defendant's argument was introduced that its phone contract was covered by the FAA.

⁴⁷ S.I. Strong (supra n.20), 945.

⁴⁸ *Carey v. 24 Hour Fitness USA Inc.*, 669 F.3d 202 (5th Cir. 2012).

*Inc.*⁴⁹ a Massachusetts court found that arbitration agreements that precluded class arbitration were void as against public policy, distinguishing *Concepcion* on its facts, which it noted involved larger individual claims and a favourable procedure in place to arbitrate individual claims, whereas the claimants in *Dell* had small individual claims and no favourable individual claim resolution procedure. State policy against a class waiver prevailed, the court found, because arbitration of individual claims was 'infeasible as a matter of fact' leaving no 'federal interest with which the state law might conflict.'⁵⁰

Courts such as those above have treated arbitration agreements prohibiting class actions as a case-by-case factual issue and have measured them against a potential violation of a state law. The US Supreme Court, however, has been quick to issue some follow-up guidance. One of the Court's strongest signals came from its *per curiam* opinion in *Marmet Health Care Centre, Inc. v Brown*.⁵¹ There, the Court reviewed a West Virginia Supreme Court's decision which invalidated an arbitration agreement on public policy grounds, where the underlying claims were personal injury claims against a nursing home. As an opening salvo, it cited the US Constitution's Supremacy Clause, and then stated, '[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward; the conflicting rule is displaced by the FAA.' It vacated and remanded.⁵² *Marmet* signals a strong push back by the Supreme Court against any state law that would contravene the broad command of the FAA favouring arbitration as bargained for.

However, in *Brewer*, the Missouri Supreme Court (having been reversed once already by the US Supreme Court's summary order citing *Concepcion*) issued a new decision a month

⁴⁹ *Feeney v. Dell Inc.*, 454 Mass. 192 (2009).

⁵⁰ *Ibid.*

⁵¹ *Marmet Health Care Centre v Brown* 565 US (2012).

⁵² J. Pitblado, *Revisiting Concepcion: can you hear me now?* available at <http://www.lexology.com/library/detail.aspx?g=e3851994-07f3-439f-92b6-58c8c788fc66> (accessed 03.08.2016).

after *Marmet* that still invalidates an arbitration agreement. Noting the fact of reversal for 'further consideration' in the light of *Concepcion*, the court stated:

'The Court ... applies traditional Missouri contract law in looking at the agreement as a whole to determine the conscionability of the arbitration provision. This Court holds that Brewer has demonstrated unconscionability in the formation of the agreement. The appropriate remedy is revocation of the arbitration clause contained within the agreement.'⁵³

Like the Massachusetts court in *Feeney*, the Missouri court distinguished *Concepcion* on its facts. We shall soon see whether the *Brewer* opinion is simply one court's preference to sympathise with consumers perceived to be outmatched in bargaining power, or whether it ushers in a new phase of attack by state courts seeking to chip away at the *Concepcion* holding.⁵⁴

Another case which is interesting is *D.R. Horton*.⁵⁵ The National Labour Relations Board [NLRB] decided that class action waivers are unlawful under the National Labour Relations Act, even if the FAA pre-empts state laws from prohibiting them. The National Labour Relations Act is a federal law. The NLRB argued that a class action is a form of 'protected concerted activity' and that requiring employees to waive their right to sue in a collective action is unlawful. The Court of Appeals for the Fifth Circuit disagreed with the Board. This was not the end of the matter however. The Seventh Circuit has ruled in favour of the NLRB's position in a case involving a non-union employer's motion to compel arbitration in a federal court. In *Lewis*⁵⁶ the US Court of Appeals for the Seventh Circuit

⁵³ *Brewer v Missouri Title Loans* 323 S.W. 3d 18 (Mo. 2010).

⁵⁴ John Pitblado, (supra n.52).

⁵⁵ *In re D.R. Horton* 357 N.L.R.B 2277 (2012).

⁵⁶ *Lewis v Epic Sys. Corp.*, No 15-2997 U.S. LEXIS 9638 (7th Cir., 2016).

found that the company's arbitration agreement, which prohibits employees from participating in 'any class, collective or representative proceeding,' violated the employees' right to engage in concerted activity under the National Labour Relations Act. The decision therefore creates a Circuit split, and given the importance of the issue, sets the stage for further Supreme Court review. In the meantime, class and collective action waivers will not be enforced in federal courts sitting in Illinois, Indiana and Wisconsin, the states within the Seventh Circuit's jurisdiction. The very same agreement should not be enforced in federal courts sitting in the circuits that have rejected *D.R. Horton*, and federal courts within circuits that have yet to opine on the matter will have a choice. Further muddling the matter, state courts will not necessarily feel bound by the NLRB, thus creating more opportunity for inconsistency and confusion in a high-stakes area of the law.⁵⁷

Another case which is of relevance is the US Supreme Court's decision in *DIRECTTV*⁵⁸ in which it once again held that class action waivers contained in an arbitration agreement are enforceable under the FAA and cannot be invalidated on state law grounds inapplicable to any other contract.⁵⁹ Again this is a clear message from the Supreme Court holding that state courts cannot single out and apply different standards to invalidate class waivers. Despite the Supreme Court's decision, there is little doubt that the claimant's employment bar will continue to attack the enforceability of class action waivers. See the Court of Appeals of the Seventh Circuit decision of *Lewis* referred to above as an example.⁶⁰

⁵⁷ H.D. Lederman, S.M. McCrory, W. Emmanuel, *Seventh Circuit finds class action waivers in arbitration agreements are illegal and unenforceable under the NLRA*, available at <https://www.littler.com/publication-press/publication/seventh-circuit-finds-class-action-waivers-arbitration-agreements-are> (accessed 07.06.2016).

⁵⁸ *DIRECTTV, Inc. v Imburgia*, No 14-462, 577 U.S., 2015 WL 8546242 (2015).

⁵⁹ S.P. Caplow, *Case comment: US Supreme Court settles debate over the 'law of your state'*, (2016) 82(2) Arbitration 198.

⁶⁰ G.D. Kennedy and J.A. Piesco, *United States Supreme Court reaffirms use of class action waivers in arbitration agreements; next stop – employment contracts*, available at <https://www.dlapiper.com/en/us/insights/publications/2015/12/us-supreme-court-reaffirms-use-of-waivers/> (accessed 03.08.2016).

When considering the feasibility of class arbitration in the EU, one is concerned that the survival of a class arbitration waiver would mean that end-consumers who have suffered from a breach of competition law would have to arbitrate on an individual basis. It is commonplace that this acts as a significant disincentive for many victims of anticompetitive conduct given the lack of individual benefit versus the effort and costs associated with filing a claim. Rational apathy and behavioural economics will always prevail. If class arbitration becomes a permanent fixture in the EU, counsel responsible for managing an EU-based company's dispute resolution program will hope that the US Supreme Court's decision in *Concepcion* will be followed. Companies may insert into a standard-form contract a clause which expressly forbids collective treatment or consolidation of separate arbitrations. They may take a further step and use a 'choice-of-law' clause that refers to the internal law (exclusive of conflict-of-law principles) of a jurisdiction that (a) has ruled that no collective actions are permitted in arbitration unless the parties expressly agree to such procedure and/or (b) has been willing to enforce no-collective-action clauses. Of course, to have enforceable effect, especially in consumer contracts, the forum whose law is to be selected must have some plausible relation to the parties or the transaction.⁶¹

Philip Allen Lacovera submits that counsel may advise their clients to consider whether, if a class waiver is struck down, the company would rather confront a class action in an arbitral forum or in court. He argues that the problem is one of 'severability'. When courts strike down these clauses, some find that they are not 'severable' from the obligation to arbitrate, so the arbitration clause itself will become unenforceable and the claimant is free

⁶¹ P.A. Lacovera, *Class action arbitrations: The challenge for the business community*, (2008) (24)(4) *Arbitration International* 541, 559.

to proceed in court, with a class action, if the claimant desires. Other courts simply disregard the waiver clause and leave the company committed to arbitrate but on a class-wide basis. This may be the worst course for companies, because arbitral rulings both on establishing a collective and granting ultimate relief will be subject to far less judicial or appellate review than would be comparable rulings in court. Lacovera would advise counsel that the contract language should therefore specify what happens if a court decides that the arbitration may proceed on behalf of a class, despite the presence of a class action waiver.⁶²

If Europe follows closely the decision of *Concepcion*, undertakings will inevitably seek to promote class action waivers. A consumer would have no option other than to pursue their claim individually, hence with no option at all.⁶³ This may signal the end of EU consumer class arbitration before it even begins. Companies may wish to argue that the avoidance of such aggregate claims will help to save money. However, there is absolutely no guarantee that the savings will be passed on to consumers.

3.5 US class action waivers specific to antitrust

In *Italian Colors*⁶⁴ a sharply divided Supreme Court stated that 'antitrust laws do not guarantee an affordable procedural path to the vindication of every claim,' and ruled that courts must enforce arbitration agreements that contain class action waivers under the FAA. In doing so, the Supreme Court rejected a 'judge-made' exception to arbitration that some courts applied when claimants demonstrate that the cost of pursuing an antitrust or other statutory claim on an individual basis would exceed the amount of any potential

⁶² Ibid.

⁶³ G. Pailli, *Global deterrence of wrongful behaviour and recent trends in class action and class arbitration: Is the US stepping down as the world's problem solver?* (2014) 33(3) C.J.Q. 266, 277.

⁶⁴ *American Express Co. v Italian Colors Restaurant*, 133 S. Ct. 2304 (2013).

recovery. The Supreme Court noted that the 'vindication of statutory rights' exception derives from dicta in its 1985 opinion in *Mitsubishi Motors Corp v. Soler Chrysler-Plymouth Inc.*⁶⁵ In that case, the Supreme Court expressed a willingness on public policy grounds to invalidate arbitration agreements that 'operate as a prospective waiver of a party's right to pursue statutory remedies.'⁶⁶ The *Mitsubishi* court dismissed concerns that the arbitral forum was inadequate, stating 'so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.'⁶⁷

In *Italian Colors*, the Supreme Court again recognised the adequacy of the arbitral forum. The Supreme Court noted that there could be limited instances in which an arbitral forum was inadequate and operates as a 'prospective waiver of a party's right to pursue statutory remedies,' such as 'a provision in an arbitration agreement forbidding the assertion of certain statutory rights' or 'filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable.'⁶⁸ However, in rejecting the rationale of the 'effective vindication' doctrine, the Supreme Court held '[b]ut the fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue a remedy.'⁶⁹ 'Too bad', the Supreme Court's majority effectively said, it did not matter that the claimants could not afford to bring the arbitration.⁷⁰

⁶⁵ *Mitsubishi Motors Corp v. Soler Chrysler-Plymouth Inc.*, 473 US 614.

⁶⁶ *Ibid.*, at 637.

⁶⁷ *Ibid.*

⁶⁸ See R. Wolf, 'To a hammer everything looks like a nail': *The Supreme Court's misapplication of the vindication of rights doctrine*, (2013) 21(4) *American University Journal Gender Social Policy and Law* 953, 963.

⁶⁹ D. Brown, *American Express Co v Italian Colors Restaurant: a contractual waiver of class arbitration is enforceable under the Federal Arbitration Act, even when pursuit of an individual claim would be irrational*, (2013) 6(3) *G.C.L.R.* R-61, R-62.

⁷⁰ L. Guth Barnes, *Calling on Congress: How mandatory arbitration agreements and class action waivers undermine consumer rights*, available at <http://www.hbsslaw.com/newsroom/Calling-on-Congress-How-Mandatory-Arbitration-Agreements-and-Class-Action-Waivers-Undermine-Consumer-Rights> (accessed 03.08.2016).

The Supreme Court also rejected the claimant's arguments that relied on the existence of Rule 23 FRCP. It did not 'establish an entitlement to class proceedings for the vindication of statutory rights,' and '[t]he individual suit that was considered adequate to assure 'effective vindication' of a federal right before adoption of class action procedures did not suddenly become 'ineffective vindication' upon their adoption.'⁷¹ The Court further observed that, 'truth to tell, our decision in [*Concepcion*] all but resolves this case' because, in *Concepcion*, the Supreme Court 'invalidated a law conditioning the enforcement of arbitration on the availability of class procedure because that law 'interfered with fundamental attributes of arbitration.'

The dissent argued that this was a 'betrayal of our precedents, and of federal statutes like the antitrust laws.'⁷² They argued that the arbitration agreement, 'imposes a variety of procedural bars that would make pursuit of the antitrust claim a fool's errand...If the arbitration is enforceable, AmEx has insulated itself from antitrust liability - even if it has in fact violated the law...'⁷³The dissent warns that in the hands of the majority, rather than facilitating the redress of injuries, 'arbitration threatens to become more nearly the opposite - a mechanism easily made to block the vindication of federal claims and insulate wrongdoers from liability.'⁷⁴

Another thing to note is that in *Italian Colors*, the claimants were merchant clients of American Express, including Italian Colours, which was a restaurant. It was testified that the maximum recovery for each merchant in the putative class would be \$12,850 (\$38,549

⁷¹ *Italian Colors* (supra n.64), at 2312.

⁷² *Ibid.* at 2313.

⁷³ D. Brown (supra n.69), R-63.

⁷⁴ *Italian Colors* (supra n.64), at 2320.

if trebled under US law).⁷⁵ For the purpose of its consideration, the majority essentially acknowledged that even with the possibility of treble damages, the antitrust laws would not provide an 'affordable procedural path' to vindicate the merchants' claim on an individual basis.⁷⁶ If this is not an affordable business path for an established business, then this begs the question as to how end-consumers would be able to afford to vindicate their own claims on an individual basis. One wonders whether *Italian Colors* will stretch that far.

The Supreme Court's decision in *Italian Colors* removes the last significant defence to avoiding an individual arbitration clause when a consumer would prefer to pursue a class action. Counsel for plaintiff Italian Colors Restaurant, Deepak Gupta, stated that the decision was 'a near bloodbath for class-action plaintiff's lawyers.'⁷⁷ The erosion of the effective vindication rule by *Italian Colors* continues the Court's trend of limiting the basis for challenges to the enforceability of agreements to arbitrate claims on an individual basis. As other countries around the world begin to experiment with class adjudication, the Court seems determined to reverse the trend in the US.⁷⁸ It is interesting that in the EU, Advocate General Jääskinen has stated that it would undermine the effectiveness of competition rules if cartelists could act in advance to disperse claims by requiring counter-parties to agree to arbitration clauses when their involvement in a cartel was not yet known.⁷⁹ It remains to be seen how these issues would be dealt with in the EU. In the US, Lauren Guth writes that congressional action is essential. Without it, 'these ubiquitous binding arbitration clauses and class-action bans will continue to lead to the predictable result of both unfairness to

⁷⁵ *Ibid.*, at 2304.

⁷⁶ *Ibid.*, at 2304, 2309–2310. See also 2316–2317 (cost of bringing an individual antitrust claim prohibitive because: '[n]o rational actor would bring a claim worth tens of thousands of dollars if doing so meant incurring costs in the hundreds of thousands').

⁷⁷ J. Schurz, *Consumer class actions take another hit: Supreme Court rules class action arbitration waiver covers antitrust claims*, available at <http://media.mofo.com/files/Uploads/Images/130712-Arbitration-Waiver-Covers-Antitrust-Claims.pdf> (accessed 03.08.2016).

⁷⁸ S. Caplow, *Case comment: US Supreme Court Italian Colors decision raises the white flag on the effective vindication rule*, (2014) 80(1) *Arbitration* 113, 113.

⁷⁹ R. Pike and Y. Tosheva, *CDC v Evonik Degussa (C-352/13) and its potential implications for private enforcement of European competition law*, (2015) 8(2) *G.C.L.R.* 82, 85.

injured consumers and a systematic failure to hold accountable those companies who abused the trust placed in them. Consumers - indeed, the whole American public - lose.⁸⁰ This is just a piece of a much broader picture. The US legislatures and courts are making it increasingly difficult for claimants to bring cases. One of the most prominent antitrust cases is *Bell Atlantic Corp v Twombly*⁸¹ in which the Supreme Court raised the threshold that antitrust claimants must meet when they file their initial pleadings. Another prominent example is the Class Action Fairness Act of 2005,⁸² which restricts class actions in state courts and imposes restrictions on certain types of remedies. The US – the pioneer of private enforcement in antitrust and collective redress – in many ways seems to be taking back some of its claimant-friendly reputation.

⁸⁰ S. Berman, *Calling on Congress: How mandatory arbitration agreements and class action waivers undermine consumer rights*, available at <http://www.hbsslaw.com/newsroom/Calling-on-Congress-How-Mandatory-Arbitration-Agreements-and-Class-Action-Waivers-Undermine-Consumer-Rights> (accessed 03.08.2016).

⁸¹ *Bell Atlantic Corp v Twombly* 550 US 544 (2007).

⁸² Class Action Fairness Act of 2005 (CAFA) Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

3.6 Class arbitration in the absence of an agreement

The other issue to consider is when the availability of class arbitration is not mentioned in an agreement. In the US, the case of *Stolt-Nielsen*⁸³ addressed the availability of class arbitration where the arbitration clause did not explicitly address it. The two sentence arbitration agreement was a standard 'charter party' shipping agreement and provided for, '[a]ny dispute arising from the making, performance or termination of' the agreement to be settled in the state of New York by a panel of two arbitrators, one selected by each party.⁸⁴ The parties stipulated that the arbitration clause was 'silent' on whether the clause allowed for class arbitration. They had reached no agreement on it. The arbitration panel concluded that the arbitration clause did allow class arbitration. The district court vacated the award, finding that the arbitrators acted in manifest disregard of the law by not conducting a choice-of-law analysis and analysing the arbitration clause under federal maritime law. The Second Circuit reversed, holding that the arbitrators did not manifestly disregard the law because the defendants pointed to no rule against class arbitration in federal maritime or state law. The Supreme Court granted certiorari to determine 'whether imposing class arbitration on parties whose arbitration clauses are 'silent' on that issue is consistent with the [FAA]'⁸⁵

First, the Supreme Court set forth the standard of review for vacating the arbitration panel's award. A serious error was not enough to show that the arbitrator exceeded their powers under the FAA. Because 'the task of an arbitrator is to interpret and enforce a contract,' an arbitration award may be vacated 'only when [an] arbitrator strays from interpretation and

⁸³ *Supra* n.28.

⁸⁴ *Ibid.*, at 1765.

⁸⁵ *Ibid.*, at 1764.

application of the agreement and effectively dispens[es] his own brand of industrial justice.¹⁸⁶

Next, the Court explained that the arbitration panel's decision must be evaluated based on 'the basic precept that arbitration 'is a matter of consent, not coercion.'¹⁸⁷ Arbitrators construing an agreement must effectuate 'the contractual rights and expectations of the parties.'¹⁸⁸ It was said to follow, 'that a party may not be compelled by the FAA to submit to class arbitration unless there is a contractual basis for concluding that the parties *agreed* to do so.'¹⁸⁹ Thus, an arbitrator may not infer '[a]n implicit agreement to authorise arbitration...solely from the fact of the parties' agreement to arbitrate.'¹⁹⁰ The Court noted that a class action arbitration fundamentally changes the nature of the proceeding by adjudicating the rights of absent parties in high stakes disputes with limited judicial review.¹⁹¹ The Court found 'the differences between bilateral and class-action arbitration...too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class action arbitration constitutes consent to resolve their disputes in class proceedings.'¹⁹²

Applying these principles to the facts at issue, the court held that the arbitration panel exceeded its powers by 'impos[ing] class arbitration even though the parties concurred that they had reached 'no agreement' on that issue...'¹⁹³ The panel's decision centred on the fact that the defendants failed to show that the parties 'intended to *preclude* class arbitration'

¹⁸⁶ Ibid., at 1767.

¹⁸⁷ Ibid., at 1773.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid.

¹⁹⁰ Ibid., at 1775.

¹⁹¹ Ibid.

¹⁹² Ibid.

¹⁹³ Ibid.

and 'regarded the agreement's silence on class arbitration as dispositive.'⁹⁴ The panel failed to apply any rule of contractual interpretation to determine whether class arbitration was available under the agreement in the absence of express consent, but based its decision on its perception of an arbitral consensus in favour of class action, which the court viewed as the panel 'impos[ing] its own conception of sound policy.'⁹⁵ This contradicted the circumstances of the arbitration clause, where the 'parties are sophisticated business entities, there is no tradition of class arbitration under maritime law, and the standard shipping agreement chosen by the parties had never been the basis of a class action.'⁹⁶ Therefore, the arbitrators impermissibly inferred the availability of class arbitration solely from the parties' agreement to arbitrate. The court was careful to note, however, that it had 'no occasion to decide what contractual basis may support a finding that the parties agreed to class action arbitration,' because the parties stipulated that there was no agreement on this issue.⁹⁷ The majority decision placed great emphasis on the importance of party intent, holding that differences between bilateral and class action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class action arbitration constitutes consent to resolve their disputes in class proceedings.⁹⁸

Another interesting point which came out of *Stolt-Nielsen* was the majority's appearance (albeit in dicta) to be very much in favour of allowing early review of partial final awards.⁹⁹ The court may be seen as taking an interventionist road despite the fact that the parties had expressly and unambiguously agreed to submit the question of class treatment to a panel of arbitrators under the so-called 'Class Rules' of the AAA, which require an

⁹⁴ Ibid.

⁹⁵ Ibid., at 1769.

⁹⁶ Ibid., at 1775.

⁹⁷ Ibid., at 1776.

⁹⁸ Ibid.

⁹⁹ Ibid., at 1767.

arbitrator to decide as a threshold matter whether the applicable arbitration clause permits the arbitration to proceed on a class basis. The aspect of the case moved Justice Ruth Bader Ginsburg to write in her dissent, '[t]he court acts without warrant in allowing Stolt-Nielsen essentially to repudiate its submissions of the contract-construction issue to the arbitration panel, and to gain, in place of the arbitrators' judgment, the court's *de novo* determination.'¹⁰⁰ Nonetheless, after acknowledging that petitioners would need to 'clear a high hurdle' to obtain a reversal of the arbitral panel's ruling, the court ruled that this standard had been met, because in its view, the panel had failed to 'identify and apply a rule of decision derived from the FAA or on maritime or New York law,' but instead had 'imposed its own policy choice and thus exceeded its powers.'¹⁰¹ Indeed, the court refused even to remand the class treatment decision to the arbitral panel for further consideration. Instead, the court concluded that there was 'only one possible outcome on the facts,' and it conclusively vacated the class action arbitral order, leaving the arbitration to proceed on a bilateral basis.¹⁰²

The decision in *Stolt-Nielsen* is unquestionably one of the Supreme Court's most significant cases in the arbitration field since its decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*¹⁰³ in which the Court declared that the statutory grounds for judicial review of arbitration awards provided by the FAA are exclusive. The decision in *Hall Street* was understood in many quarters as providing strict limits on the extent to which US courts acting under federal law could review arbitral awards. Indeed, the *Hall Street* decision led

¹⁰⁰ *Ibid.*, at 1780.

¹⁰¹ *Ibid.*, 1765.

¹⁰² C.K. Tahbaz and S.S. Michaels, *Arbitration and the U.S. Supreme Court: Class actions, manifest disregard, and the ongoing debate over U.S. judicial review of arbitral awards*, Bloomberg Law Reports, available at http://www.debevoise.com/~media/files/insights/publications/2010/07/arbitration%20and%20the%20us%20supreme%20court%20class%20action_/files/arbitration%20and%20the%20us%20supreme%20court%20class%20action_/fileattachment/arbitrationandtheussupremecourt.pdf (accessed 03.08.2016).

¹⁰³ *Hall Street Associates, L.L.C. v Mattel, Inc.* 552 U.S. 576 (2008).

the Fifth Circuit Court of Appeals to go so far as to reject the notion that US courts can overturn arbitral awards, issued in 'manifest disregard of the law,' holding that *Hall Street* now forecloses such judge-made standards for review.¹⁰⁴ Moreover, three days after the court handed down *Stolt-Nielsen*, the Eleventh Circuit joined the Fifth Circuit in holding that 'manifest disregard of the law' could not form the basis for a legal challenge to the validity of an arbitral award.¹⁰⁵ Whatever one thinks of the correctness of the reasoning in *Stolt-Nielsen*, the case raises the immediate question of whether, by reaching out to overturn what was arguably a considered decision of an arbitral panel, the court erased the limits on review of arbitral awards it had confirmed only two years before in *Hall Street*.

The practical effect of *Stolt-Nielsen* is to return business interests essentially to where they were before *Bazzele*. They may avoid class arbitrations where the parties do not explicitly agree to class arbitrations in their contract. In other words, an agreement to arbitrate claims is not an agreement to class arbitration. If a party wants to have its claims subject to class arbitration, the party must include such a term in the agreement to arbitrate. Moreover, if a rogue arbitrator orders class action when a contract is silent on the issue, the Supreme Court has provided a roadmap for appeal of that decision even though appeals of arbitration decisions generally are precluded. While *Stolt-Nielsen* appears to have a dramatic effect on class arbitrations, the ultimate scope of the decision is really yet to be determined. *Stolt-Nielsen* involved negotiated contracts by sophisticated businesses. In her dissent, Justice Ruth Bader Ginsburg seems to imply that a different rule could apply to claims brought by consumers, especially if they have no other way to vindicate their rights than class arbitration. However, one must bear in mind the case of *Italian Colors*.

Questions of scope aside, there is little doubt that, by requiring class arbitration clauses to

¹⁰⁴ See *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349, 353-55 (5th Cir. 2009).

¹⁰⁵ *Frazier v. CitiFinancial Corp., L.L.C.*, 604 F.3d 1313 (11th Cir. 2010).

be explicit, *Stolt-Nielsen* will have the effect of at least reducing the number of class arbitrations.¹⁰⁶

The Second Circuit was one of the first courts to limit the reach of *Stolt-Nielsen* to the facts of the case. In *Jock v. Sterling Jewellers Inc.*,¹⁰⁷ the court upheld an arbitrator's interlocutory decision allowing an employment case to proceed to class arbitration. The court reasoned that the employer's ADR program clearly 'intended' to make available all remedies and rights that would be available in court. Because neither the arbitration agreement nor the law categorically prohibited the arbitrator from ordering class arbitration, the court determined that an arbitrator could decide whether an arbitration clause allowed class arbitration. The Supreme Court denied certiorari in this case.¹⁰⁸

In *Sutter v. Oxford Health Plans L.L.C.*,¹⁰⁹ the Third Circuit affirmed an arbitrator's decision to allow class arbitration based on an arbitration agreement that was silent on the issue. The court determined that the arbitration decision could not be vacated because the arbitrator had performed his duty appropriately by basing his decision on a thorough analysis of the text of the arbitration agreement. The court stated that had the arbitrator merely inferred the parties' intent to authorise class arbitration from their failure to preclude it, the court's decision would have been different.

The court stressed that *Stolt-Nielsen* did not establish a fixed rule that class arbitration is allowed only under an arbitration agreement that expressly provides for aggregate

¹⁰⁶ D.M. Allen and R.N. Shwayri, *The Supreme Court's class action arbitration 'do over' in Stolt-Nielsen*, Bloomberg Law Reports, available at <https://www.carltonfields.com/files/upload/The%20Supreme%20Court's%20Class%20Action%20Arbitration%20-%20Do%20Over.pdf> (accessed 03.08.2016).

¹⁰⁷ *Jock v Sterling Jewellers Inc.*, 646 F. 3d 113 (2011).

¹⁰⁸ J.J. Range, *Alternative Dispute Resolution*, (2013) A.B.A. Recent. Dev. Pub. Util. Comm. & Transp. Indus. 1, 16.

¹⁰⁹ *John Ivan Sutter v Oxford Health Plans L.L.C.* 675 F.3d. 215 (2012).

procedures. Instead *Stolt-Nielsen* 'established a default rule' that parties may not be compelled to class arbitration unless the contract indicates the party consented to class arbitration. The court's holding is narrow, applying only in cases where (1) the parties' arbitration agreement does not expressly preclude class-wide arbitration and (2) the parties delegate to the arbitrator, either in their agreement or by stipulation, the question of whether the parties agreed to class-wide arbitration.¹¹⁰

In *Reed v. Florida Metropolitan University, Inc.*,¹¹¹ the Fifth Circuit vacated an arbitration award that permitted class arbitration. The court explained that it was abandoning the deference that it typically grants to decisions by arbitrators because of the two recent Supreme Court decisions, *Stolt-Nielsen* and *Concepcion*. The court based its holding on the fact that neither of the arbitration clauses cited by the arbitrator could properly be interpreted as constituting a contractual basis upon which to conclude that the parties agreed to authorise class arbitration. The Fifth Circuit's decision in *Reed* appears to create a Circuit split as to how *Stolt-Nielsen* is to be applied. The ultimate answer as to when an arbitrator exceeds its powers by engaging in class arbitration may have to await yet another decision from the Supreme Court. More broadly, *Reed* evidences the difficulty of determining how much leeway arbitrators have in construing a contract before they exceed their powers.¹¹²

The Second and Third Circuits have now concluded that broadly worded arbitration clauses may permissibly give rise to an inference by an arbitrator of an intent by the parties

¹¹⁰ R.M. Haggerty and M.P. Daly, *United States: Supreme Court allows class-wide arbitration in Oxford Health Plans L.L.C. v Sutter*, available at <http://www.mondaq.com/unitedstates/x/246128/Class+Actions/Supreme+Court+Allows+ClassWide+Arbitration+In+Oxford+Health+Plans+LLC+v+Sutter> (accessed 07.09.2015).

¹¹¹ *Jeffrey H. Reed v Florida Metropolitan University*, 681 F.3d 630 (2012).

¹¹² J. Carnegie, *United States: Class arbitration: who decides and when are they wrong?* available at <http://www.mondaq.com/unitedstates/x/182426/Arbitration+Dispute+Resolution/Class+Arbitration+Who+Decides+And+When+Are+They+Wrong> (accessed 07.09.2015).

to engage in class arbitration. Courts in these circuits may not use the presence or absence of words such as 'class arbitration' or 'class action' as the sole basis on which to rule on the availability of class arbitration. In sharp contrast, the Fifth Circuit has concluded that broad phrases such as 'any dispute' or 'any remedy' do not constitute a valid contractual basis upon which to conclude that the parties agreed to submit to class arbitration.¹¹³

Judge Colleen McMahon issued a decision in *Edwards v Macy's*¹¹⁴ demonstrating that businesses do not have complete control when drafting their arbitration agreements. The claimant in *Edwards* had opened a credit card account at Macy's department store. This card was offered by DSNB, a subsidiary of Citibank that issues credit cards for retail stores. When the claimant opened the account she accepted enrolment in a 30-day free trial of DSNB's 'Credit Card Protection Program.' The Program's terms and conditions were contained in an amendment to the credit card agreement, both of which contained arbitration clauses. The claimant sued in federal court alleging individual and class claims, citing fraud, unjust enrichment and unlawful trade practices. The defendants moved to compel arbitration under the FAA, but asked the court to order arbitration only as to the claimant individually, asserting that they would rather litigate in the event the court declined to limit the arbitration to the claimant's individual claims.

Finding that the claimant had agreed to arbitrate disputes related to the program, and that the arbitration agreement *prima facie* was valid, Judge McMahon issued an order compelling arbitration between the claimant and the defendant. She declined, however, to grant the defendant's request that she determine that arbitration proceed only against the claimant and not on a class-wide basis. Judge McMahon held that whether the arbitration

¹¹³ P.J. Baker, *Associational Arbitration: First circuit finds a new way to limit Stolt-Nielsen*, available at <http://apps.americanbar.org/litigation/committees/adr/articles/spring2013-062413-associational-arbitration-first-circuit.html> (accessed 07.09.2015).

¹¹⁴ *Edwards v Macy's Inc.* 2015 WL 4104718 (S.D.N.Y. 2015).

should proceed on an individual or a class basis should be decided by the arbitrator, and not by the court (at least in the circumstances relating to the facts of the case).

She began her analysis with the proposition that under *Stolt-Nielsen*, the arbitration agreement was silent on the question of class arbitration and the parties had stipulated that they had reached no agreement on the issue. This was a fact that the Supreme Court found dispositive, holding that in the absence of such an agreement there was no basis for which consent to class arbitration could be inferred.

By contrast, the agreement in *Edwards* had what Judge McMahon termed 'a most unusual coda.'¹¹⁵ Even though the agreement did not mention the word 'class' or 'class-wide arbitration,' it provided broadly that in addition to arbitration of any dispute or controversy out of or relating to the agreement, '[i]f we, a claimant, or a third party have any dispute that is directly or indirectly related to a dispute governed by the arbitration provision, the claimant and we agree to consolidate all such disputes.'¹¹⁶

Reasoning that the claims of putative class members arising from the same agreement arguably related to the claimant's dispute under arbitration with the defendants, and that the term 'consolidate' may also permit class arbitration, Judge McMahon concluded that '[t]his reference to consolidation of plaintiff's dispute with related third party disputes can certainly be read to authorise class-wide arbitration.' Acknowledging that there might be other ways to read the agreement, she held that under principles of *contra preferentum*,

¹¹⁵ *Edwards* (supra n.114), at 3; E.M. Spiro and J.L. Mogul, *Class arbitration: Dying but not dead*, available at http://www.maglaw.com/publications/articles/00401/_res/id=Attachments/index=0/Spiro%20Mogul%208.18.pdf (accessed 03.08.2016).

¹¹⁶ *Edwards* (supra n.114), at 3.

because the defendants had drafted the agreement, it might be best to read it as consent to class arbitration.¹¹⁷

Entities whose business relationships with the public are governed by form agreements such as the one at issue in *Edwards* have virtually complete control over the scope of the arbitration agreements to which their customers will be bound. *Stolt-Nielsen* made clear that a broad 'any and all disputes' arbitration clause that is silent on the question of class arbitration does not permit class arbitration, and cases such as Judge Marrero's decision in *Anwar v Fairfield Greenwich*¹¹⁸ provides strong support for the proposition that courts may compel an individual to forgo class litigation and arbitrate their claims individually. *Edwards*, however, serves as a cautionary reminder that broader is not always better, and that trying to sweep third party claims within the scope of an arbitration clause may radically reduce the protections such clauses are designed to provide.¹¹⁹

In response to the Supreme Court judgments, The Consumer Financial Protection Bureau (CFPB) 2015 Arbitration Study,¹²⁰ released in conjunction with a speech by CFPB Director Richard Cordray, lays the groundwork for rule-making to restrict broadly the use of arbitration provisions, including class action waivers, in consumer financial services contracts. The CFPB's Study arose under the Dodd-Frank Wall Street Reform and Consumer Protection Act's¹²¹ requirement that the CFPB prepare to submit to Congress a report on the use of pre-dispute arbitration clauses in consumer financial contracts. This Study took three years and foreshadows a seismic change for any company that operates a

¹¹⁷ *Ibid.*, at 10.

¹¹⁸ *Anwar v Fairfield Greenwich* 950 F.Supp.2d 633 (S.D.N.Y. 2013).

¹¹⁹ E.M. Spiro and J. L. Mogul (supra n.115).

¹¹⁹ 2015 WL 4104718 (SDNY June 30, 2015), at 10.

¹²⁰ E.M. Spiro and J. L. Mogul (supra n.115).

¹²¹ Available at http://www.cftc.gov/idc/groups/public/@swaps/documents/file/hr4173_enrolledbill.pdf (accessed 29.8.2016).

retail banking unit or, more broadly, any business that offers or provides to consumers a financial product or service through a contract that includes arbitration clauses. In the credit-card industry alone, the Study estimates that contracts containing such clauses could bind at least 80 million Americans.¹²² The initial effect of this Study will impact on banks. However, the long term outlook is that the ultimate effect will spill over into many other consumer contracts. The intention is to restrict significantly both the use of arbitration provisions and class-action waivers in most consumer contracts even when the business at issue is not involved directly in the provision of financial products to consumers.¹²³

The Study was based on an empirical review of at least 850 consumer finance agreements, 1800 consumer finance arbitration disputes, 562 consumer finance class actions filed in federal or state courts, 40,000 small claims filings, 400 consumer finance class action settlements in federal court, and over 1,100 government enforcement actions in the consumer finance context. The Study *inter alia*, found that:

- Consumer arbitration clauses are prevalent; credit card issuers representing more than half of all credit card debt have arbitration clauses in their consumer contracts;
- Consumers are sometimes afforded an opportunity to opt-out of arbitration clauses, but they are generally unaware of this option or do not exercise it;
- The private sector may not be doing enough to stem potentially unfair practices, and further regulation is needed;
- Arbitration clauses are effective for eliminating class actions; for instance, when credit card issuers with an arbitration clause were sued in a class action, the issuers

¹²² J. Lee and I. Ord, *Arbitration study; Coming curbs on consumer financial services contract arbitration provisions - 6 steps for business*, available at <https://www.dlapiper.com/en/us/insights/publications/2015/03/cfpb-2015-arbitration-study/> (accessed 03.08.2016).

¹²³ *Ibid.*

invoked arbitration clauses to dismiss the class action nearly 66 percent of the time.¹²⁴

Never before has a federal regulator proposed rules that would make it unlawful to force consumers to go to arbitration. This represents a sea change in the ability of companies to resolve consumer disputes by arbitration. The CFPB will likely conclude that arbitration clauses (or at least class arbitration waivers) have a very limited place in consumer financial services contracts. If this is the ultimate result of the CFPB's rule making efforts, almost all consumer financial services disputes will need to be resolved in court rather than by arbitration or arbitration tribunals will see greater attempts by consumers to proceed on a class basis.¹²⁵

3.7 The relevance of the US experience to Europe and the appropriateness of a class arbitration mechanism for end-consumer redress following anticompetitive conduct

The benefits of arbitration are well known. Arbitration offers a degree of flexibility towards dispute resolution which the court process perhaps could not. It is also recognised as a viable mechanism in most countries throughout the EU. However, the question remains whether arbitration, more specifically arbitration in a collective setting, is the most appropriate way forward in addressing end-consumer harm in the wake of anticompetitive conduct.

The whole point of arbitration is that it is a consensual practice. One wonders whether a well-informed undertaking would elect to proceed to arbitration at all if it knew it would

¹²⁴ Ibid.

¹²⁵ Ibid.

most likely have to progress on a collective basis. The answer is, probably not. Apathy most likely prevails. Collective arbitration is a high cost and high stakes process with an uncertain preclusive effect on collective members. Even if Europe was to ban US-style class action waivers in their entirety (or at least strictly regulate them), the end result would most likely be for arbitration as the chosen forum to disappear completely from any contract. Litigation would remain the only method. Given the diversity of collective litigation mechanisms throughout Europe, a well-informed undertaking would surely sooner take its chances in the court setting than be forced to commit itself to collective arbitration and in essence make it easier for aggregate claims. This may well induce forum shopping with companies establishing themselves in defendant-friendly jurisdictions.

Consent is therefore key, and undertakings surely will do everything in their power to absolve themselves from liability. The US experience is telling. This country essentially pioneered class arbitration and is arguably closing it down. Even in circumstances where it is clear that individual claims are not financially viable, making claimants unable to seek vindication of their rights, the Supreme Court has insulated wrongdoers from liability by refusing to interfere with the fundamental attributes of arbitration. The court has given effect to the class waiver and refused to take into account the imbalance of bargaining power between the parties. It remains to be seen whether an EU arbitration mechanism would maintain this outlook. It may be that EU collective arbitration becomes mandatory. However, this could infringe the right of access to the courts under Article 6 ECHR. An interesting case¹²⁶ was decided by the CJEU in relation to the implementation of the Universal Services Directive¹²⁷ requiring that Member States shall ensure that transparent, simple and inexpensive procedures are drawn up for dealing with users' complaints. It was

¹²⁶ See J. Davies and E. Szyszczak, *ADR: Effective protection of consumer rights?* (2010) 35(5) E.L. Rev. 695, 695; Case 317/08, 319/08 and 320/08 *Rosalba Alassini v Telecom Italia SpA* [2010] E.C.R. I-2213.

¹²⁷ Directive 2002/22/EC on universal services and users' rights relating to electronic communications networks and services (Universal Services Directive) OJ L 108 24.4.2002 51.

alleged that the general principle of effective judicial protection was compromised by the Italian law which made mandatory an out-of-court dispute resolution procedure before a dispute was admissible in the ordinary court process. The court was of the opinion that the USD does not set out the precise content or specific nature of the out-of-court procedures that have to be introduced at national level. The only criteria were those set out by the USD: the principles of effectiveness, legality, liberty and representation. The court found that none of those principles limited the power of the Member States to create out-of-court procedures for the settlement of telecoms disputes between consumers and service providers.¹²⁸ The only requirements are the maintenance of the right to bring an action before the courts for the settlement of disputes and for ensuring that the Directive remains effective.¹²⁹ It could be the case that collective arbitration be mandatory as long as the right of access to the court is maintained.

Even if these issues were resolved, one is also concerned that these aggregate claims may be decided by private arbitrators who may seek to ingratiate themselves with companies that frequently use their services.¹³⁰ It may also be argued that arbitration is detrimental to the public interest in open resolution of legal controversies.¹³¹ Typically, arbitration proceedings are held in private and do not result in published opinions. Therefore, decisions rendered by arbitrators contribute nothing to the body of the law, have little deterrent effect on future wrongdoing, and fail to stimulate interest in legal reform.¹³² The lack of transparency and the 'closed' setting of the arbitration process really lead one to

¹²⁸ *Alassini* (supra n.126), at 42.

¹²⁹ C. Hodges, *Current discussions on consumer rights: Collective redress and ADR*, Academy of European Law Annual Conference on European Consumer Law, (2011), available at https://www.law.ox.ac.uk/sites/files/oxlaw/here_2_2.pdf (accessed 03.08.2016), 16.

¹³⁰ T. Eisenberg, G.P. Miller, E. Sherwin (supra n.5), 873.

¹³¹ *Ibid.*

¹³² *Ibid.*

wonder whether this forum is appropriate for end-consumer redress.¹³³ This is particularly the case in terms of competition law which has a clearly visible public interest element. This then begs the question whether dispute resolution can be independent and unbiased, particularly if it is left to the private sector. Techniques have been developed to achieve this. They rely first on applying the essential requirements through combinations of scrutiny by customers, competitors, regulators and the media. A leading example includes the criteria and systems established in the UK for the telecommunications sector by Ofcom.¹³⁴

Moreover, one has to wonder whether arbitrators would be qualified to deal with collective cases. In *Stolt-Nielsen*, the majority spent a lot of time outlining the complexity of class arbitrations and remarked on the amount of money at issue in such disputes. Furthermore, Justice Ginsburg suggests in her dissenting remarks in *Stolt-Nielsen* that the majority takes the view that arbitrators ordinarily are not equipped to manage class proceedings.¹³⁵ This could, of course, implicate the adjudicatory aspect of arbitration, in that arbitral procedures must be conducted in a manner which affords the parties an opportunity to be heard in an adjudicatory or quasi-judicial manner.¹³⁶ One wonders whether there would be checks and balances in place to police collective arbitration and if there would be a system in place to make sure that it was uniform and fair across the whole of the European Union.

¹³³ R.M. Alderman, *Pre-dispute arbitration in consumer contracts: A call for reform*, (2001) 38 *Houston Law Rev.* 1237, 1246.

¹³⁴ See OFT, *Mapping UK consumer redress: A summary guide to dispute resolution systems*, available at http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.offt.gov.uk/shared_offt/general_policy/OFT1267.pdf (accessed 04.08.2016).

¹³⁵ *Stolt-Nielsen* (supra n.28), at 1783 (Ginsburg J, dissenting); see also *Concepcion* (supra n.33) at 1751 (stating that: '[w]e find it unlikely that in passing the FAA, Congress meant to leave the disposition of these procedural requirements to an arbitrator').

¹³⁶ S.I. Strong (supra n.19), 261.

In addition, if the private nature of arbitration was a concern, there is the question of whether we could have arbitration in a public setting. One could also consider the role of ombudsmen in collective arbitration. Ombudsmen are independent, neutral parties. They investigate whether the law has been observed and handle complaints about malpractices allegedly committed by traders and businesses. Consumer ombudsmen are of particular importance to protect collective interests of consumers. Scandinavian countries have equipped ombudsmen with legal powers to require businesses to observe the law. The Danish Consumer Ombudsman, for example, is an enforcer of consumer law with collective redress powers. The Ombudsman may seek a collective redress order against a trader to agree to pay restitution or work out repayment plans with infringers. Collective actions are also possible in Sweden, where the Konsumentombudsmannen has the power to bring proceedings before the National Board for Consumer Complaints (Allmänna reklamationsnämnden) on behalf of a group of consumers seeking settlement of a series of individual claims stemming from the same circumstances. The National Board for Consumer Complaints is a cross-sectoral ADR scheme with national coverage. If the Ombudsman takes no action, group proceedings can be initiated by a consumer association. This type of representative collective ADR mechanism requires no identification of the individual victims in order for the Board to take action. This claim extends automatically to all members of the group.¹³⁷

Beyond Scandinavia, a system for identifying and processing mass cases has also been developed by the UK Financial Ombudsman Service which offers consumer protection in relation to financial services products. Although it has no specific collective redress mechanisms, the FOS has developed certain case handling strategies to handle mass claims

¹³⁷ British Institute of International and Comparative Law, *Focus on collective redress, ADR and collective redress*, available at <http://www.collectiveredress.org/collective-redress/alternative-adr> (accessed 04.08.2016).

(for example the miss-selling of Payment Protection Insurance), which represent around half of its case load. Recently, a consumer ombudsman system was introduced in Greece. It will have the authority to mediate in all business to consumer disputes. Although it may deal with individual claims, the ombudsman may also engage in the protection of collective consumer interests. Collective cases have also been brought by the Rail Ombudsman Service in Belgium, before which a complaint can be filed concerning disputes between the rail company and its customers. The service offers to mediate between the parties to reach an amicable agreement. If no agreements can be reached, non-binding recommendations are used.¹³⁸

3.8 The relevance of ‘unfair terms’ in consumer contracts

This section refers to the impact of Directive 93/13/EEC on unfair terms in consumer contracts¹³⁹ on consumer arbitration. Article 3 states that ‘a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.’ This general requirement is supplemented by a list in the Annex to the Directive of examples of terms that may be regarded as unfair. The Directive’s Preamble states that contracts should be drafted in plain, intelligible language and that when in doubt, the interpretation most favourable to the consumer should prevail.¹⁴⁰

¹³⁸ Ibid.

¹³⁹ Directive 93/13/EEC on unfair terms in consumer contracts OJ L 95 21.4.1993 29.

¹⁴⁰ See also European Commission, Consumers, Consumer rights, Rights-contracts, Unfair-contract, available at http://ec.europa.eu/consumers/consumer_rights/rights-contracts/unfair-contract/index_en.htm (accessed 04.01.2017).

This Directive has been interpreted by the CJEU in relation to consumer arbitration clauses in two important cases. The first case is *Mostaza Claro v Centro Móvil Milenium SL*.¹⁴¹ The case arose before the CJEU following proceedings in Spain between Ms. Mostaza Claro and Móvil. The Spanish proceedings concerned the validity of an arbitration clause included in a mobile telephone contract concluded between Mostaza Claro and Móvil. The arbitration clause referred any disputes arising from the contract to the European Association of Arbitration in Law and Equity (AEADE).

As Mostaza Claro did not comply with the minimum subscription period, Móvil initiated arbitration proceedings before the AEADE. Mostaza Claro was granted a period of 10 days in which to refuse arbitration proceedings. In the event of refusal, she could bring legal proceedings. Mostaza Claro presented arguments on the merits of the dispute, but did not repudiate the arbitration proceedings or claim that the arbitration agreement was void. The arbitration proceedings subsequently took place and the arbitrator found against her. Mostaza Claro subsequently contested the arbitration decision delivered by the AEADE before the referring court, submitting that the unfair nature of the arbitration clause meant that the arbitration agreement was null and void.

The referring court stated that there was no doubt that the arbitration agreement included an unfair contractual term, and was therefore null and void.¹⁴² However, as Mostaza Claro did not plead that the agreement was invalid in the context of the arbitration proceedings, and in order to interpret the national law in accordance with the Directive, the Spanish court decided to stay the proceedings and refer to the CJEU for a preliminary ruling.¹⁴³ The Spanish court asked the following question:

¹⁴¹ Case 168/05 *Mostaza Claro v Centro Móvil Milenium* [2006] I-10421.

¹⁴² *Ibid.*, para 19.

¹⁴³ *Ibid.*, par 20.

‘May the protection of consumers under Council Directive 93/12/EEC...require the court hearing an action for annulment of an arbitration award to determine whether the arbitration is void and to annul the award if it finds that that arbitration agreement contains an unfair term to the consumer’s detriment, when that issue is raised in the action for annulment but was not raised by the consumer in arbitration proceedings.’¹⁴⁴

The CJEU found that the system of protection introduced by the Directive was based on the idea that the consumer was in a weak position vis-à-vis the seller or supplier (as regards both their bargaining power and level of knowledge). This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms.¹⁴⁵ Such an imbalance could only be corrected by positive action unconnected with the actual parties to the contract.¹⁴⁶ It was on the basis of those principles that the CJEU ruled that the national court’s power to determine of its own motion whether a term is unfair constitutes a means of achieving the result sought by Article 6 of the Directive, namely preventing an individual consumer from being bound by an unfair term.¹⁴⁷ Moreover, if the court undertakes such an examination, this may act as a deterrent and contribute to preventing unfair terms in contracts concluded between consumers and sellers or suppliers.¹⁴⁸ The nature and importance of the public interest underlying the protection that the Directive conferred on consumers justified the national court being required to assess of its own motion whether a contractual term was unfair, compensating in this way for the imbalance that existed between the consumer and the seller or supplier.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid., para 25.

¹⁴⁶ Ibid., para 26.

¹⁴⁷ Ibid., para 27.

¹⁴⁸ Ibid.

Consequently, the Directive was to be interpreted as meaning that a national court seized of an action for annulment of an arbitration award had to determine whether the arbitration agreement was void, and annul that award where that agreement contained an unfair term, even though the consumer had not pleaded that invalidity in the course of the arbitration proceedings, but only in that of the action for annulment.¹⁴⁹

The second relevant case before the CJEU is *Asturcom Telecommunications SL v Rodriguez Nogueira*.¹⁵⁰ A mobile telephone contract between Asturcom and Mrs. Rodriguez Nogueira contained an arbitration clause under which any dispute concerning the performance of the contract was to be referred for arbitration to the AEADE. Rodriguez Nogueira defaulted on her payments and terminated the contract before the agreed minimum subscription period had expired. Asturcom initiated arbitration proceedings against her before the AEADE. The award ordered Rodriguez Nogueira to pay €669.60. Asturcom brought an action before the court in Bilbao for enforcement of the arbitration award, once the award became final. Up to this point, Rodriguez Nogueira did not participate in the arbitral procedure nor did she initiate proceedings for the annulment of the award.

The Spanish referring court stated in its order for reference that the arbitration clause in the contract was unfair because: (1) the costs incurred by the consumer in travelling to the seat of the AEADE arbitration tribunal were greater than the amount at issue in the dispute in the main proceedings;¹⁵¹ (2) the arbitration seat was located at a considerable distance from

¹⁴⁹ anon., *Case comment, Unfairness of contract term may be raised on challenge to arbitration award*, (2006) 198 EU Focus 5, 5. See also C. Liebscher, *Case C-168/05, Elisa Maria Mostaza Claro v Centro Móvil Milenium SL*, (2008) 45(2) C.M.L.Rev. 545; See also C.M.D.S. Pavillon, *ECJ 26 October 2006, Case C-168/05 Mostaza Claro v Centro Móvil Milenium SL – The Unfair Contract Terms Directive: the ECJ's third intervention in domestic procedural law – the Dutch case note*, (2008) 15(5) E.R.P.L. 735.

¹⁵⁰ Case 40/08 *Asturcom Telecommunications SL v Rodriguez Nogueira*, (2009) I-09579.

¹⁵¹ *Ibid.*, para 25.

the consumer's place of residence and its location was not indicated in the contract;¹⁵² (3) AEADE itself draws up the contracts which are subsequently used by telecommunications undertakings.¹⁵³

The referring court also pointed out that arbitrators were not permitted under Spanish arbitration law to examine of their own motion whether unfair arbitration clauses were void. Moreover, the relevant law on Spanish civil procedure did not contain any provision dealing with the assessment to be carried out by the court or tribunal having jurisdiction as to whether arbitration clauses were unfair when adjudicating on an action for enforcement of an arbitration award that become final. Therefore, doubts were cast as to whether domestic procedural rules were compatible with EU law and the Bilbao court decided to stay the enforcement of the award proceedings and to refer to the CJEU the following question for a preliminary ruling:

‘in order that the protection given to consumers by Directive 93/13 should be guaranteed, is it necessary for the court hearing an action for enforcement of a final arbitration award, made in the absence of the consumer, to determine of its own motion whether the arbitration agreement is void and, accordingly, to annul the awards if it finds that the arbitration agreement contains an unfair clause that is to the detriment of the consumer?’¹⁵⁴

The CJEU held that:

‘Council Directive 93/13/EEC....must be interpreted as meaning that a national court or tribunal hearing an action for enforcement of an arbitration award which has become final

¹⁵² Ibid.

¹⁵³ Ibid.

¹⁵⁴ Ibid., para 27.

and was made in the absence of the consumer is required, where it has available to it the legal and factual elements necessary for that task, to assess of its own motion whether an arbitration clause in a contract concluded between a seller or supplier and a consumer is unfair, in so far as, under national rules of procedure, it can carry out such an assessment in similar actions of a domestic nature. If that is the case, it is for the court or tribunal to establish all the consequences thereby arising under national law, in order to ensure that the consumer is not bound by that clause.’¹⁵⁵

The court reached its conclusion distinguishing the present case from former cases in that:

‘Mrs Rodriguez Nogueira did not in any way become involved in the various proceedings relating to the dispute between her and Asturcom and, in particular, did not bring an action for annulment of the arbitration award made by the AEADE in order to challenge the arbitration clause on the ground that it was unfair, so that that award now has the force of *res judicata*.’¹⁵⁶

It was therefore necessary to determine whether the need of an effective balance which re-establishes equality between the parties to the contract requires the national court responsible for enforcement to ensure that the consumer is afforded absolute protection, even where the consumer has not brought any legal proceedings in order to assert their rights and notwithstanding the fact that the domestic rules of procedure apply the principle of *res judicata*.¹⁵⁷ Then, the CJEU then stated that:

¹⁵⁵ Ibid., para 60.

¹⁵⁶ Ibid., para 33.

¹⁵⁷ Ibid., para 34.

‘Community law does not require a national court to disapply domestic rules of procedure conferring finality of a decision, even if to do so would make it possible to remedy an infringement of a provision of Community law, regardless of its nature, on the part of the decision at issue.’¹⁵⁸

Nevertheless, national rules governing finality and *res judicata* applicable to Community law actions must not be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by Community law (principle of effectiveness) and must be no less favourable than those governing similar domestic actions (principle of equivalence).

Concerning the principle of effectiveness, the CJEU found that a two-month time limit, running from the date of notification of the arbitration award, such as that laid down in the relevant Spanish arbitration law, upon the expiry of which, in the absence of any action for annulment, an arbitration award becomes final and thus acquires the authority of *res judicata* does not make it impossible or excessively difficult to exercise the rights conferred on consumers by Directive 93/13.¹⁵⁹

Concerning the principle of equivalence, the CJEU placed on the national court the burden to decide whether the national procedural law is consistent with that principle.¹⁶⁰ However, the national court had to consider Article 6 of the Directive as a mandatory provision of equal standing than national rules of public policy. Moreover, the CJEU stressed that according to the Spanish Government, the court or tribunal responsible for enforcement of an arbitration award which has become final has jurisdiction to assess of its own motion

¹⁵⁸ *Ibid.*, para 37.

¹⁵⁹ *Ibid.*, para 42.

¹⁶⁰ *Ibid.*, para 49.

whether an arbitration clause in a contract concluded between a consumer and a seller or supplier is null and void on the ground that such a clause is contrary to national rules of public policy; and that a number of recent judgments of the Audiencia Provincial de Madrid and Audiencia Nacional have acknowledged that jurisdiction.¹⁶¹ Therefore it seems clear that the referring Spanish court was wrong in confronting Spanish procedural law to EU law, since the former is interpreted by higher courts allowing *ex officio* judicial control of unfair arbitration clauses in consumer contracts.¹⁶²

3.9 Proposals for harmonised collective ADR

If class arbitration was something with which the EU wished to move forward, perhaps one could consider the outline as constructed by Jessica Beess und Chrostin.¹⁶³ She argues that the EU should implement an EU directive specifically to deal with collective redress to ensure some degree of uniformity. She prescribes the following features.

3.10 Arbitration agreement and opt-in procedure

As the US Supreme Court pointed out in *Stolt Nielsen*, arbitration is a purely consensual private means of dispute resolution. As such, it requires that all parties to the arbitration have consented to having their claims defended in an arbitral procedure. Jessica Beess und Chrostin suggests that having a collective redress mechanism that takes the form of collective arbitrations with an opt-in procedure would hence comport with European notions of individualised justice because it would ensure that all participants in the suit are aware of and have consented to having their rights bound by the collective representatives.

¹⁶¹ Ibid., para 55.

¹⁶² M. Torres, *Case C-40/08 Asturcom Telecommunications SL v Rodriguez Nogueira: European Union – unfair contract terms – arbitration clauses in consumer contracts*, (2010) 21(2) I.C.C.L.R. N11.

¹⁶³ J. Beess und Chrostin (supra n.7), 111.

Consumer awareness of arbitration would therefore have to be increased. It may be argued that this does not go far enough. From the claimant's perspective, it is generally accepted that opt-out systems are more desirable than opt-in systems.¹⁶⁴ The opt-in system in the court setting does not garner a great deal of uptake by potential claimants.¹⁶⁵

3.11 Discovery

Beess und Chrostin argues that the greater flexibility of discovery procedures offered by arbitration would appear to provide a further reason in favour of adopting collective arbitration as the predominant mechanism for collective redress in Europe.¹⁶⁶ As the various international arbitration associations have slightly varying provisions concerning the scope of discovery permitted, arbitration would give parties to the proceeding the option to choose the set of discovery rules that seem best suited to their needs. As it is likely, however, that the parties might disagree as to which arbitration association provides the most favourable discovery guidelines, the European class arbitration mechanism here proposed should have a fall-back discovery similar to that provided by the International Centre for Dispute Resolution [ICDR].¹⁶⁷

The ICDR guidelines state that it is their primary goal to provide a dispute resolution mechanism that is 'simpler, less expensive and more expeditious' than resort to litigation in

¹⁶⁴ Ibid., 120; See also S.I. Strong, *The sounds of silence: Are US arbitrators creating internationally enforceable awards when ordering class arbitration in cases of contractual silence and ambiguity?* (2009) 20 Mich. J. Int'l L. 1017, 1053.

¹⁶⁵ R. Khodykin, *Class arbitration: Is there an appetite for it in Europe?* Available at <https://www.blplaw.com/expert-legal-insights/articles/class-arbitration-appetite-europe/> (accessed 04.08.2016).

¹⁶⁶ J. Beess und Chrostin (supra n.7), 120.

¹⁶⁷ Ibid.; See International Centre for Dispute Resolution, *ICDR Guidelines for Arbitrators on Exchange of Information*, available at https://www.icdr.org/icdr/faces/icdrresources/icdrarbitratorsmediators;jsessionid=1hpVbBV9luRCvyJbdt8BOob2IbhOTX51o0iRNhhsMIT1nOE4hxB!509556955?_afLoop=1154975353995667&_afWindowMode=0&_afWindowId=null#%40%3F_afWindowId%3Dnull%26_afLoop%3D1154975353995667%26_afWindowMode%3D0%26_adf.ctrl-state%3Dac6ycv81s_4 (accessed 04.08.2016).

national courts.¹⁶⁸ In this vein, the guidelines instruct arbitrators to manage their exchange of information between parties with a view to maintain efficiency and economy. The ICDR further requires that arbitrators:

'endeavour to avoid unnecessary delay and expense while at the same time balancing goals of avoiding surprise, promoting equality of treatment, and safeguarding each party's opportunity to present its claims and defences fairly.'¹⁶⁹

According to Beess und Chrostin, the ICDR's guidelines for discovery appear to strike a desirable balance between permitting discovery that is extensive enough to meet the parties' needs and ensuring that such discovery does not become exorbitantly expensive. Especially today, when electronic discovery is becoming increasingly common, the costs of discovery procedures appear to be increasing and a focus on economical yet practical discovery is hence crucial to any successful system for collective dispute resolution, especially one that depends on the voluntary agreement of all parties concerned.¹⁷⁰

Additionally, the ICDR guidelines provide that arbitrators only grant requests by one side for documents in the possession of the opposing party if the documents are reasonably believed to exist and to be relevant and material to the outcome of the case.

These requirements ensure that discovery will likely be more limited than in the US and therefore less costly and more similar to European discovery procedures. This is especially advantageous should a party to an arbitration need to request a local European court to enforce the discovery order, a likely scenario should the opposing side refuse to comply

¹⁶⁸ *ICDR Guidelines for Arbitrators on Exchange of Information*, 1.

¹⁶⁹ *Ibid.*

¹⁷⁰ J. Beess und Chrostin (*supra* n.7), 120.

with the arbitrators' orders. The necessity for such enforcement procedures, however, should be minimal given that the ICDR guidelines provide that the arbitrators may draw adverse inferences from a party's refusal to comply with discovery orders and may take such refusal into account in allocating costs.¹⁷¹

Such a flexible procedure admittedly gives the arbitrators broad discretion in determining the scope of appropriate discovery. However, given that the guidelines provided under the ICDR procedures are likely to be no less detailed than discovery rules for judges hearing a case in a local court, it is unlikely that the parties will be adversely affected by these provisions, especially since the parties are free to choose the arbitrators hearing their case. Additionally, should a party believe that the arbitrators' discovery orders are generally unfair or in violation of the discovery guidelines, that party is still free to defend their position should the opposing side decide to seek enforcement in a local court. In sum, this flexible approach to discovery provides pragmatic guidelines that allow for sufficiently broad discovery to ensure that each side can adequately present their case while striving to keep discovery costs as low as possible.

3.12 Consumer Agency Approval

The EU Member States under consideration currently permit agencies, associations or other public bodies to bring claims to protect the rights of consumers, even in countries that do not allow individuals to bring claims on behalf of a collective. This comports with the general European tradition of preferring regulatory solutions over individual litigation.¹⁷² Given the importance of regulatory schemes in European legal jurisprudence

¹⁷¹ Ibid.; *ICDR Guidelines for Arbitrators on Exchange of Information*, 3.

¹⁷² J. Beess und Chrostin (supra n.7), 120.

and the need for effective funding solutions, a collective redress mechanism that incorporates an element of regulatory supervision might be more acceptable to those European nations that are currently still sceptical of a uniform system of collective dispute resolution than one that has no place for regulatory involvement. The following structure would give consumer agencies a place in the collective dispute resolution mechanism while ensuring that individuals are still free to defend their own rights in class proceedings should they prefer to do so.¹⁷³

For cases in which the underlying contract(s) contains an arbitration clause that is construed to permit collective arbitrations or where all parties agree to arbitrate their claim, a regulatory government branch such as a national or EU consumer agency should be required to approve a claim before a collective representative or claimants' attorney proceeds to arbitration. In this scenario, the agency does not decide whether a claim is likely to succeed on the merits or whether an arbitrator is likely to certify the plaintiff class: the approval procedure should focus solely on whether the claim appears to be frivolous. This is a very low standard of review, but one that provides a safeguard against abusive filing of claims to harass or coerce a defendant business into settling. To assuage fears that consumer agencies might, consciously or subconsciously, (dis-)approve claims based on the perceived merits of the case, the agency's decision should be appealable in court where the decision should be reviewed *de novo*.¹⁷⁴

For cases in which there is no arbitration clause and the parties affected by the claim cannot unanimously agree to class arbitration, the consumer agency should decide whether a regulatory response would effectively address the problem and redress the harm. If so, a

¹⁷³ Ibid.

¹⁷⁴ Ibid., 121.

regulatory response to the problem should be adopted to save the cost of litigation. However, where a regulatory response will either be less effective in rectifying the wrong or determining future wrongdoing, or where such a response will not adequately compensate the harmed consumers, the claim should proceed on a collective basis. While this structuring would give consumer agencies significant leeway in deciding how to respond to large-scale wrongdoing, such a scheme would simply follow the already existing tradition of preference for regulatory responses while simultaneously at least opening the door for the option of collective actions where such a procedure would be superior.¹⁷⁵

3.13 Fee-shifting Provision - Loser pays

The 'loser pays' principle is an embedded feature of civilian litigation tradition. This principle could be retained in arbitration, with one difference. It may only apply where the arbitrators determine that a claim is so meritless that it could have been brought for improper purposes. This procedure would complement the agency approval stage and provides a further safeguard against abusive litigation. In the approval stage, the agency is only permitted to disprove a claim if it finds the claim to be frivolous.¹⁷⁶ In reaching its decision, the agency is limited to a consideration of the basic allegations and facts of the case as alleged by the claimant collective. As this means that the agency has no recourse to independent investigation of the veracity of the factual allegations or to the defendant's side of the case, it is possible that the meritless and/or maliciously motivated claims might proceed to arbitration. Providing that the loser pays the opposing side's costs where the

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

arbitrator determines that a claim was filed for abusive purposes will dissuade such claims.¹⁷⁷

3.14 Capped punitive damages

Jessica Bees und Chrostin argues that although punitive damages have traditionally not been available in most European countries, they should be introduced in the consumer collective arbitration context for intentional or reckless wrongdoing for two reasons. First, widespread harm to consumers might frequently involve small claims that would not be worth litigating individually. In the US, where class actions involve an opt-out procedure, the value of the individual claim is less problematic because the onus is on the class member to opt-out, an unlikely event if the individual has no incentive to litigate the claim on their own. In the European scheme proposed here however, the value of the claim might be so small as to render it not worth opting-in to a class proceeding. In order to ensure that small but widespread wrongs, that in the aggregate likely benefit the wrongdoing company, are redressed by the system, punitive damages should be permitted where the defendant has acted either intentionally or recklessly in causing harm to the group of consumer claimants. Secondly, punitive damages should be permitted as an additional deterrent against defendant misconduct.¹⁷⁸

Recognising, however, that punitive damages are not part of the European legal tradition and that the frequency of exorbitant punitive damages awards in class action litigation in the US is perceived as one of the sources of abusive litigation, the availability of such damages should be strictly limited in Europe. The cap should allow punitive damages high

¹⁷⁷ Ibid.

¹⁷⁸ Ibid., 122.

enough to provide an incentive for individuals with valid claims to bring a collective arbitration to hold a wrongdoing defendant accountable, but not high enough for a potential claimant to assume the risk of triggering the fee-shifting loser pays provision described above.

One also has to keep in mind that the EU's latest offering towards collective redress in the form of the Recommendation maintains a strict refusal to endorse punitive damage.

Paragraph 31 states that 'the compensation awarded to natural or legal persons harmed in a mass harm situation should not exceed the compensation that would have been awarded, if the claim had been pursued by means of individual actions. In particular, punitive damages, leading to overcompensation in favour of the claimant party of the damage suffered, should be prohibited.'

3.15 Concluding remarks on collective arbitration

The model proposed above by Beess un Chrostin would result in radical changes to the currently available mechanisms for collective redress in Europe and one remains uncertain whether the EU and its Member States would have the political will and drive to make such changes.

Class arbitration by US standards is not appropriate for addressing the gap in end-consumer redress flowing from anticompetitive behaviour. The consensual nature of arbitration, and the fact that agreements are drafted by the expert legal teams of powerful undertakings leave too much of an imbalance of power in favour of these companies. The private nature of arbitration and the lack of contribution to the body of law may be dangerous, particularly when one considers the wide-spread public interest flowing from

mass consumer claims. That is not to say that class arbitration, or indeed other forms of ADR are unwelcome to the table. The flexibility that these systems provide, the speed of proceedings and high regard that certain Member States hold for such proceedings cannot be ignored. What is being suggested is that if class arbitration is going to be a viable game-change in the mass redress sphere, the EU has to approach it in a different manner. Using public ombudsmen and sectoral regulation may ensure transparency and legitimacy in these proceedings. Encouraging undertakings to submit to certain arbitral regimes which are held in high esteem by both commerce and the regulators may instil trust in the process. This may also benefit the reputations of big undertakings that choose to submit only to transparent and highly regarded regimes. Sectoral processes could also be set up to maintain decisions which are tailor-made to the specific needs of industry and its respective consumers.

What this chapter has shown is that in the light of criticism surrounding traditional court procedure and its ability to deal with aggregate harm, class arbitration and other forms of ADR (although not entirely resolved at present) may well form part of the remedy in moving forward.

CHAPTER 4 THE NEED TO REALIGN THE FOCUS AND CONSIDER THE APPROPRIATE REMEDY FOR END-CONSUMER REDRESS

4.0 Introduction

It has been considered that the current conflicts-of-laws rules are open to forum shopping. There is a great diversity in approach towards consumer collective redress across the Member States. The opportunity to improve and align collective redress procedures throughout the EU by adjusting civil procedure and/or introducing more flexible mechanisms of alternative dispute resolution such as collective consumer arbitration has also been considered. However, perhaps one needs to take a further step back and question what the appropriate remedy should be for an end-consumer.

There are lots of questions to be resolved. For example, one wonders whether the courts should award a lump sum to be divided between all end-consumers. Furthermore, there is the issue of what should be done with any unclaimed funds. It may be given to charity, to representative organisations, or simply returned to the defendant. No EU-wide consensus has emerged on how to reconcile these issues of economics and justice.¹

¹ See for example, C. Hodges, *From class actions to collective redress: a revolution in approach to compensation*, (2009) 28(1) C.J.Q. 41.

4.1 Private enforcement goals: ideals and realities

Compensation is considered to be the ultimate goal of private enforcement of EU competition law. Article 3 of the Damages Directive² states that:

'Member States shall ensure that *any* natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and obtain full compensation for that harm.'

The *ratio* for this is to deliver the person who has suffered harm back to the position in which they would have been had the infringement not taken place. Compensation includes recompense for actual loss and loss of profit, plus payment of interest.³ The Directive does not provide for punitive or multiple damage.⁴ The problem with the broad scope of this Article is that it implies a one-size-fits-all approach to compensation.

When one compares the difference between the actual loss suffered by an individual end-consumer and an undertaking, the levels of damage are unparalleled. For an end-consumer, the overcharge as a result of a cartel will generally amount to a few cents. On the converse, an undertaking which has suffered as a result of a cartel may suffer a much more substantial loss. The latter will have a much greater interest to launch a claim given the higher stakes and the potential damage to their business. Also, as they are closer to law

² Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union OJ L 349 5.12.2014 1.

³ *Ibid.*, Article 3(2).

⁴ *Ibid.*, Article 3(3).

breaking firms on the supply chain, traders (suppliers and buyers) may be better aware of the existence of hardcore cartels than final consumers.⁵

The asymmetry in financial stakes leads us to a dichotomy, a gulf between viable and non-viable claims. Despite the fact that on paper both groups have the same rights to compensation, the end-consumer as a lone individual has little incentive to sue for compensation when the costs of litigation outweigh the anticipated compensation. Indeed, in this context, Judge Posner indicated that, 'only a lunatic or a fanatic sues for \$30.'⁶ This is rational apathy. To an extent, rational apathy has been overcome by the initiation of collective actions. However, there are ongoing disagreements within the EU as to the correct procedure for such actions (i.e. whether to have an opt-in or opt-out mechanism), as well as issues with funding and judgment recognition and enforcement. Access to justice for end-consumers has become entangled in a quagmire. The inability to agree upon and to deliver a coherent and effective private enforcement system with the aim of redressing end-consumers for actual loss leads us to question whether compensation as the ultimate goal is the correct remedy for this category of claimant.

4.2 Consumer attitudes

To explain this better, one must consider the attitudes of consumers towards anticompetitive harm as well as low-value harm to each consumer more generally. For example, consider the scenario of one consumer from another EU Member State going to Milan on holiday and purchasing a handbag costing €80 from an Italian department store.

⁵ R. Van den Bergh, *Private enforcement of European Competition Law and the persisting collective action problem*, (2013) 20(1) M.J. 12, 17; See R. Nazzini, *The objective of private remedies in EU competition law*, (2011) 4(4) G.C.L.R. 131.

⁶ *Carnegie v Household International Inc* 376 F 3d 656, 661 (2004), referred to in B. Wardhaugh, *Bogeymen, lunatics and fanatics: Collective actions and the private enforcement of European competition law*, (2014) 34 L.S. 1, 2.

They return to their home Member State to discover it is faulty. Clearly this is an inconvenience and a disappointment to the purchaser. They may take no further action and put it down to experience. They may complain to the seller via email. They may write an online review of the department store if the seller fails to take any satisfactory remedial action. In the absence of a satisfactory remedy, one wonders whether the wronged consumer would be willing to launch a cross-border action for damages against the Italian department store. The costs of instructing a solicitor and going to court as well as the costs associated with the cross-border element would most likely outweigh any potential compensation.

Consider another scenario. A consumer from the UK visits Spain and purchases a Real Madrid football strip from the official store. Seven years later a cross-border cartel has been uncovered following a joint investigation by the UK and Spanish competition authorities. It has been discovered that there has been the price-fixing of certain replica football kit. The Real Madrid football strip purchased by that consumer 7 years ago is one of the lines involved in the cartel. One questions how strongly that consumer would feel about claiming compensation for a product they purchased 7 years ago. The compensation they would likely receive would equate to a few Euros. The effort of filling out forms, establishing proof of purchase etc. would surely outweigh the potential benefit. If we think about the cost of going to court, the length of time that has passed (a cartel usually takes a long period of time to uncover) and establishing harm, then the award of a small sum in compensation at the end of a lengthy process would not (for most people) equate to a worthwhile payoff.

4.3 Consumer attitudes towards cross-border trade and consumer protection

Consumer attitudes are well documented by the EU which regularly conducts surveys on consumer perceptions of cross-border trade and consumer protection.⁷ For this reason, this thesis has chosen not to undertake its own empirical research. In one survey it was established that following an unsatisfactory resolution of their complaints to sellers/service providers, nearly one in two (46%) consumers had given up and taken no further action.⁸ The youngest consumers (15-24 year olds) and full time students were the least likely to have taken action (55% and 61% respectively).⁹ Around one in three of this group of unsatisfied consumers chose to take their complaint to a third party consumer complaint body: 16% had asked for advice from a consumer association or helpdesk.¹⁰ 8% had complained to a consumer authority, 3% had taken the matter to arbitration, mediation or conciliation body. 7% of these unsatisfied consumers had consulted a lawyer and 2% had taken the matter to court.¹¹

Consumers who had encountered a problem when buying goods or services but who had not made a complaint about it to the seller or provider were asked for their reasons for not doing so.¹² Two reasons were prevalent: the amount of recovery being too little and the lack of confidence in getting a satisfactory resolution to the problem.¹³

⁷ See for example, European Commission, *Flash Eurobarometer: Consumer attitudes towards cross-border trade and consumer protection, analytical report*, (2011), available at http://ec.europa.eu/public_opinion/flash/fl_299_en.pdf (accessed 04.08.2016).

⁸ *Ibid.*, 7.

⁹ *Ibid.*, 45.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*, 7.

When presented with various statements about the protection of their rights as consumers, in all EU Member States (with the exception of Hungary), a majority of respondents agreed that they would be more willing to defend their rights in the court if they could join with other consumers who were complaining about the same thing (from 60% in Estonia to 90% in Ireland). Furthermore, in 4 Member States, roughly half of consumers strongly agreed with this proposition: Sweden (48%), France (49%), Greece and Malta (both 50%).¹⁴

Member States' national reporters were asked to estimate the threshold for claims under which a rational consumer would refrain from seeking individual redress through ordinary court procedures. The answers provided varied widely and depicted certain diversity in consumer willingness to bring individual claims in different Member States. What can be deduced from the relevant responses is that in all Member States consumers are reluctant to file a claim if its value is lower than €50.¹⁵ However, it seems that generally consumers would be reluctant to start procedures even if their claim amounts to €100 or more.¹⁶ In addition, the complexity of competition claims would also influence consumer willingness to undertake competition litigation since this directly impacts on their chances of success.¹⁷ With reference to the Small Claims Regulation¹⁸ Maria Ioannidou suggests that as much as €2,000 could serve as an upper limit for consumers deciding whether to become involved in a claim for competition damages.¹⁹ Given the complexity of competition claims it seems unlikely for consumers to bring claims exceeding several hundred Euros and in any case

¹⁴ Ibid., 55.

¹⁵ Since this was the lowest threshold provided in Germany, M. Ioannidou, *Enhancing consumers' role in EU private competition enforcement: A normative and practical approach*, (2011) 8(1) Comp. L. Rev. 59, 70; See also generally M. Ioannidou, *Consumer involvement in private EU competition law enforcement*, (OUP, (2015)).

¹⁶ M. Ioannidou, *Enhancing the consumers' role in EU private competition law enforcement* (supra n.15), 70.

¹⁷ Ibid.; See also footnote 60 of this article: 'According to rational choice theory a consumer would only undertake court procedures if the value of his/her claim exceeds judicial costs multiplied by his/her chances of success.'

¹⁸ Regulation 861/2007 establishing a European Small Claims Procedure OJ L199 31.7.2007 1, Article 2(1).

¹⁹ M. Ioannidou (supra n.15), 70.

consumer damage flowing from a competition law violation would in the majority of cases be lower than this threshold.²⁰

Indeed, one also has to consider that individual consumers have different outlooks on price. Where one person may feel that they have been over-charged, another may feel that they have paid a reasonable price. This is evident particularly in the luxury product sector. It has been shown that certain categories of consumers perceive high prices to reflect the high quality of the product.²¹ Monetary value associated with an item is subjective and varies from person to person. Furthermore, it is not uncommon for the value an individual places on a particular object to be above or below its actual market price.²² In addition, outlook and expectation might vary as a result of individual characteristics such as age, sex, hobbies, and income level.

These characteristics may point towards the difficulty of gaining consumer consensus that their rights have been violated, and indeed whether they intend to vindicate such rights. As a bystander, one may see people queuing up overnight outside electronic shops to buy the latest games console or smart-phone. When new products come to market, they are usually more expensive, yet many consumers will proceed to purchase in the knowledge that prices may drop after the initial hype. Some people are driven by the emotional appeal and response to a recognisable style and participation in the lifestyle associated with a particular brand.²³ Of course, one is careful to point out that this research is linked closely

²⁰M. Ioannidou, 71.

²¹ A. Khare, D. Ahtani, M. Khattar, *Influence of price perception and shopping motives on Indian consumers' attitudes towards retailer promotions in malls*, (2014) 26(2) *Asia Pacific Journal of Marketing and Logistics* 272, 277.

²² A. Brun, C. Castelli, *The nature of luxury; a consumer perspective*, *International Journal of Retail & Distribution Management* (2013) (41)(11) 823, 836.

²³ *Ibid.*, 841.

to luxury products. Consumers may have different attitudes regarding everyday essential products such as food or fuel.

One should not make too general an assumption. Consider a consumer of dairy products by way of an example: whether a consumer who has purchased a product from an infringing store, when presented with the choice, would not rather take their custom elsewhere than seek compensation in order to vindicate their rights. Here we arrive back at rational apathy. The effort of claiming outweighs any potential gain from making a claim.

The experience with football shirts in *JJB Sports*²⁴ shows in a nutshell the difficulty of encouraging consumers to come forward and state that their rights have been violated. When the case was settled at the beginning of 2008, £20 was paid to each registered claimant and £10/15 to unregistered claimants. Operating under an opt-in system meant that uptake was very low considering the degree of publicity, the resources spent and the external legal costs.²⁵

Which? (the consumer body acting on behalf of the collective) argued that had there been an opt-out mechanism available, the case would have made a greater financial impact thereby ensuring that affected customers were properly compensated, either directly or indirectly, and tangentially this would have the effect of acting as a stronger deterrent to companies from engaging in activities that cause consumer detriment.²⁶ In an interview, Deborah Prince, then head of legal at Which? commented that after dedicating 20 per cent of her workforce to a collective action against the sports retailer JJB Sports and amassing

²⁴ *The Consumers Association v JJB Sports Plc.* (1078/7/9/07).

²⁵ Which? *Collective redress case study*, available at <http://www.which.co.uk/documents/pdf/collective-redress-case-study-which-briefing-258401.pdf> (accessed 01.10.2014).

²⁶ *Ibid.*

significant legal costs, 'it's not looking likely that [they] would do it again.'²⁷ Despite an intensive media campaign by the consumer association, including a front page feature in The Sun newspaper, take up on the compensation was low, and the action named just 500 individuals.

Prince submitted that the case had been a 'journey of discovery' that had thrown up some practical issues with collective actions. Passage of time is the biggest problem, she commented. Anyone wishing to make a claim would need proof of purchase. Prince added: 'I have a 17-year-old son who I've bought clothes for. How am I supposed to remember what I bought six years ago? Would anybody? Who would be expected to keep receipts for that length of time?'²⁸ The low value of individual pay-outs (£20 per consumer) also gave little incentive for claimants to participate. A lot of time was dedicated to the case by case-handlers. One person worked on the case for six months.²⁹

Mulheron examined comparative figures for participation in collective actions across opt-in and opt-out regimes. She confirmed that opt-out 'catches more litigants in the fishing net.'³⁰ Where modern empirical data exists, the median opt-out rates have been as low as 0.1% and no higher than 13%.³¹ Where widespread empirical data does not exist as yet, judicial summations of opt-out rates indicate a range of opt-outs between 40% (which is rare on the cases surveyed) and 0% with a tendency for the rates of participation under opt-out regimes to be high. On the other hand, whilst the experience in English group

²⁷ The Lawyer, *Class action is one big headache, says Which?* Available at <http://www.thelawyer.com/class-action-is-one-big-headache-says-which/135901.article> (accessed 01.10.2014).

²⁸ Ibid.

²⁹ Ibid.

³⁰ R. Mulheron, *Reform of collective redress in England and Wales: A perspective of need*, available at <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/CJC/Publications/Other+papers/reform-of-collective-redress.pdf> (accessed 04.08.2016), 147 - 160; See also J. Sorabji, *Coping with complexity and securing justice through multi-party litigation: Lessons from the CAT and JJB Sports*, (2014) 25(4) E.B.L.R. 527, 533.

³¹ R. Mulheron (supra n.30), 160.

litigation indicates that, under an opt-in regime, the opt-in rates vary considerably, from very low percentages (<1%) to almost all group members opting to participate in the litigation, European experience sometimes indicates a very low rate of participation (less than 1%) where resort to opt-in was necessary in consumer claims and where the size of the collectives were very large.³² In the US too, a much lower participation rate has been evident under opt-in than under opt-out. In that respect, the dual pillars (i.e. access to justice and judicial efficiency in disposing of the dispute once and for all) are enhanced by the opt-out regime.³³

Had *JJB Sports* been pursued on an opt-out basis rather than opt-in (which had a 0.07% participation), an opt-out regime would have produced a class of 60-100% participation (participation here ranging from an active choice to remain in the collective to apathy whether to do so or ignorance as to the existence of the collective).³⁴ This, *prima facie* appears to be a far more effective means of securing rights-vindication. However, on closer inspection the class is likely to contain end-consumers within the class who are at best indifferent to the question whether their rights are vindicated or not.³⁵

What is really insightful about *JJB Sports* is the rate at which the collective members made a claim under the settlement reached in the *JJB Sports* claim.³⁶ Only 1% of the eligible collective members claimed under the settlement. The settlement was open to all affected collective members, whether or not they had opted-in to the claim. In other words, the settlement applied as if the action was brought on an opt-out basis and no collective member had opted-out.³⁷ Yet, of the potential 1.2 to 1.5 million members, the fact was that

³² Ibid., 154.

³³ Ibid., 161.

³⁴ J. Sorabji (supra n.30), 533.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Ibid.

99% of eligible members did not seek compensation for their loss. They did not seek to vindicate their rights. While many would not have been able to produce proof of purchase, many more undoubtedly took the view that the £15 loss they had suffered was simply not worth it, even if all they had to do was claim under a settlement. They took the view that they did not want to vindicate their rights; the claim was *de minimis*.³⁸ Of course, one may put this down to consumer education and knowledge of their ability to claim under the settlement. Having said that, Which? did launch a high profile media campaign which did not appear to have any success in increasing levels of interest.

4.4 Lessons to be learned from consumer attitudes

With consumer interest limited, perhaps one needs to reconsider the role of the end-consumer in private enforcement of competition law and the goals that such participation seek to achieve. One avenue to explore may be the redress of end-consumers in a much broader sense (rather than the payment of compensation to each individual). The Civil Justice Council 2008 Report³⁹ acknowledges that following an opt-out collective action, or collective settlement, there is often a very significant amount that goes unclaimed. In some jurisdictions, the courts have been provided with a cy-pres power so that the residue can be distributed either for a purpose that will benefit the collective generally or benefit, for instance, a charity related to the issue which gave rise to the collective action.

Indeed, the publication, 'Private actions in competition law: a consultation on options for reform - government response,'⁴⁰ by the Department for Business, Innovation and Skills

³⁸ Ibid.

³⁹ Civil Justice Council, Annual Report 2008-9, available at <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/CJC/Publications/Annual+reports/cjc+annual+report+2008-09.pdf> (accessed 04.08.2016).

⁴⁰ Department for Business Innovation & Skills, *Private actions in competition law: a consultation on options of reform – government response*, available at

concluded that the optimum choice would be to ensure that such a residue, where it arose in opt-out proceedings, must be given to the Access to Justice Foundation, a charity that provides funding for pro bono legal advice and to support agencies and bodies.⁴¹ However, given the difference in stakeholder opinions on this matter, the Government proposed to ensure that future legislation in this area included a provision to allow the destination to be changed in future.⁴² Regard must be made to the Consumer Rights Act 2015⁴³ which heralded the introduction, via Sch. 8⁴⁴ of the UK's opt-out collective action. Moreover, where an opt-out is *settled*, any unclaimed damages sum can be paid to any destination which is judicially approved such as a cy-pres distribution, or a reversion to the defendant, or other. This differential treatment, as between a judgment and a settlement, was a deliberate decision on the Government's part,⁴⁵ and means that the CAT may be called upon to determine the reasonableness of a reversion, or of a cy-pres recipient at a fairness hearing. Quite late in the reform process, the Government reiterated that, in the case of a judgment, there would be no reversion to the defendant:

'[w]e believe that the decision not to allow defendants to recoup undistributed damages will play a significant role in the deterrence effect of the reformed private actions regime.'⁴⁶

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/70185/13-501-private-actions-in-competition-law-a-consultation-on-options-for-reform-government-response1.pdf (accessed 30.08.2016).

⁴¹ John Sorabji (supra n.30), 534.

⁴² G. Downie and M. Charrier, *UK and EU developments in collective action regimes for competition law breaches*, (2014) 35(8) E.C.L.R. 369, 374.

⁴³ 2015 c.15.

⁴⁴ Schedule 8 inserts new relevant provisions into Pt 1 of the Competition Act 1998 and into the Enterprise Act 2002. The text of the Act is available at <http://www.legislation.gov.uk/ukpga/2015/15/contents/enacted> (accessed 04.08.2016).

⁴⁵ Department for Business Innovation & Skills, *Private actions in competition law: A consultation on options for reform* (2012), available at

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31528/12-742-private-actions-in-competition-law-consultation.pdf (accessed 04.08.2016), paras, 5.64-5.65; and the *Government Response* (2013), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/70185/13-501-private-actions-in-competition-law-a-consultation-on-options-for-reform-government-response1.pdf (accessed 04.08.2016), 26.

⁴⁶ Department for Business Innovation and Skills, *Competition Appeal Tribunal (CAT) Rules of Procedure: Government Response* (2015), available at

Whether such a reversion would be appropriate in a settlement, however, could well become a ‘live’ issue, early in the life of the UK Competition Collective Action.⁴⁷

4.5 The cy-pres doctrine

The cy-pres doctrine originated in the US as a rule in the law of trusts and estates, allowing courts to provide for the next-best use of gifts or fair disposition of charitable trusts or wills that would otherwise fail.⁴⁸ The doctrine allows a reinterpretation of the terms of a charitable trust when the literal application would amount to impossibility or illegality. Under this doctrine, trust funds can be applied towards a purpose that is ‘cy-pres comme possible’ (in medieval French: ‘as near as possible’) to the stated purpose of the trust. In the context of US class actions, the doctrine is used to justify the allocation of unclaimed class action funds to charitable causes. The result is a complete departure from the charitable compensatory principle.

As a next best scenario in the antitrust sense, it has a three-fold purpose: to protect or restore competition in the market, to deter anticompetitive behaviour, and to compensate victims of illegal conduct.⁴⁹ Allowing courts to formulate broad cy-pres distribution of damages has several significant benefits. First, deterrence is served because, after an amount of damages having been determined, the unclaimed funds do not return to the defendant. Second, the defendant is not unjustly enriched if all potential claimants do not

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/460442/BIS-15-357-competition-appeal-tribunal-rules-of-procedure-government-response.pdf (accessed 04.08.2016), 38.

⁴⁷ See R. Mulheron, *A spotlight on the settlement criteria under the United Kingdom’s new competition class action*, (2016) 35(1) C.J.Q. 14.

⁴⁸ A.A. Foer, *Enhancing competition through the cy-pres remedy: Suggested best practices*, (2010) 24(2) Antitrust 86, 87.

⁴⁹ See *United States v Microsoft Corp.*, 253 F.3d 34, 103 (D.C. Cir. 2001).

assert their claim. Third, because the funds will be used to promote competition or dissuade anticompetitive conduct, class members who did not assert a claim are indirectly benefited.⁵⁰

Adapting a cy-pres system at EU-level might be complex on the basis that the ultimate goal of private enforcement is compensation and not deterrence. However, note that recent moves by the UK to encourage the cy-pres doctrine make explicit reference to the ‘deterrent’ function of private actions.⁵¹

Previously, and in an effort to maximise the potential of private enforcement, the Commission in its Green Paper attempted to put the goals of compensation and deterrence on an equal footing.⁵² The International Chamber of Commerce (ICC) felt, however, that the general enforcement of competition law should remain the task of the Commission and the national competition authorities and that deterrence should never be an objective of private actions.⁵³ The White Paper was amended to reflect the preference that compensation was the guiding principle for improving private enforcement. Deterrence, previously a stand-alone principle, would inherently flow from the Commission's commitment to improving compensation.⁵⁴ Compensation is observed to be the primary objective of the Damages Directive.⁵⁵ Note that the Damages Directive refers to deterrence

⁵⁰ A.A. Foer (supra n.48), 86.

⁵¹ Supra n.46.

⁵² Green Paper on damages actions for breach of the EC antitrust rules COM (2005) 672, 1.1.

⁵³ International Chamber of Commerce, *ICC Comments on the Commission Green Paper on damages actions for breach of the EC antitrust rules*, available at http://ec.europa.eu/competition/antitrust/actionsdamages/files_green_paper_comments/icc.pdf (accessed 01.10.2014).

⁵⁴ White paper on damages actions for breach of the EC antitrust rules, COM (2008) 165, 1.2.

⁵⁵ Supra n.2; The Directive reaffirms the *acquis communautaire* on the Union right to compensation for harm caused by infringements of Union competition law...Anyone who has suffered harm caused by an infringement can claim compensation for the actual loss (*damnum emergens*), for the gain of which he has been deprived (loss of profit or *lucrum cessans*) plus interest.

only in the context of private enforcement potentially deterring cooperation with the competition authorities.⁵⁶

If one looks at the case law of *Courage*⁵⁷ and *Manfredi*,⁵⁸ the CJEU would appear to accept the potential for damages actions to increase compliance with competition law norms and therefore act in the public interest. The CJEU's wording and reasoning attribute greater importance to the functional aspect of the right to damages in contributing to the effective application of competition law than the actual provision of compensation to the victims.⁵⁹ As the Advocate General in *Courage* points out, the deterrent effect is seen as an implication of the direct effect of the competition provisions.⁶⁰

The above analysis indicates that private enforcement of EU competition law not only caters for the effective judicial protection of victims. It also, and perhaps even more importantly from an overall enforcement perspective, contributes to the functioning of effective competition by increasing compliance with the relevant substantive norms.⁶¹ European courts place particular emphasis on the latter function. Regrettably, the Commission has distanced itself in its rhetoric from the relevant case law.⁶² Instead, the Commission chose to conceal the deterrence goal, thereby risking the success of any future initiative in the field of private competition law enforcement.⁶³

⁵⁶ Damages Directive (supra n.2), Recital 26.

⁵⁷ Case 453/99 *Courage Ltd v Bernard Crehan* [2001] E.C.R. I-6297.

⁵⁸ Joined Cases 295/04 to 298/04 *Vincenzo Manfredi and Others v Lloyd Adriatico Assicurazioni SpA and Others* [2006] E.C.R. I-6619.

⁵⁹ M. Ioannidou (supra n.15), 64.

⁶⁰ Opinion of AG Mischo in *Courage* at 56-58.

⁶¹ *Ibid.*, 65.

⁶² *Ibid.*

⁶³ *Ibid.*

It is submitted that exploiting further the deterrence component of private enforcement EU competition law would open up many possibilities for end-consumer actions. Where the likelihood of consumer participation is low and where there is a potentially large fund in the wake of a successful collective litigation which would otherwise go unclaimed, a cy-pres mechanism could become useful.

In the US, it has been established that the essence of the cy-pres doctrine is that distributions should be made 'for a purpose as near as possible to the legitimate objectives underlying the lawsuit.'⁶⁴

In the US it is not necessary for the nexus between the injured consumers and the cy-pres recipients to be direct in order to be adequate. For example, it has generally been sufficient for the proposed use of cy-pres funds to be related to the industry in which the antitrust violation occurred, without requiring a relationship to the particular product in the case.⁶⁵

Judge Kollar-Kotelly's *Diamond Chemical Opinion* provides one of the most interesting discussions of an antitrust cy-pres award.⁶⁶ The class claimant sought distribution of the undistributed settlement funds, which amounted to more than \$5 million, to George Washington University Law School for the purpose of establishing an endowment for a new Centre of Competition Law. In approving this, the court noted that the award would be closely related to the underlying action (price fixing by an international cartel) and would benefit members of the injured class because the new centre would focus on problems of globalisation and private antitrust enforcement.⁶⁷

⁶⁴ *In re Airline Ticket Comm'n Antitrust Litigation.*, 307 F.3d 679, 682 (8th Cir. 2002).

⁶⁵ A.A. Foer (supra n.48), 87.

⁶⁶ *Diamond Chem. Co v Akzo Nobel Litig.*, 160 F. Supp. 2d. 1392 (N.D. Ga. 2001).

⁶⁷ A.A. Foer (supra n.48), 87.

It was made clear that a class action cy-pres settlement may be approved, even over the defendant's objection, where the proposed expenditure will support pro-enforcement activity aimed at the type of violation that occurred, even without connection to the specific industry involved.⁶⁸ Put differently, education, research and advocacy involving the enhancement of the antitrust enterprise can be appropriate 'next best' uses of a class action remedial fund in an antitrust case.⁶⁹

Another case resulted in a cash settlement with a creative remedy that: (i) funded the development of a public entity that provides risk management education and technical services to small business, public entities and non-profits; and (ii) provide funds to the states to develop risk databases for municipalities and local governments.⁷⁰

In the EU, the cy-pres concept may have a proper role in the context of private enforcement of competition law. For example, if we assume that the *JJB Sports* case had proceeded on an opt-out basis it would have produced a situation where damages of £15-20 per collective member could have been awarded i.e. a total aggregate sum of between £20-30 million.⁷¹

Assuming, as happened under the *JJB Sports* settlement, which operated as if the proceedings had been opt-out and no class member opted-out, that 15,000 class members, each of whom could prove they had suffered a loss, actually then claimed their damages, and thereby ensured their loss was made good and their rights vindicated, that would have left a sum (assuming all claimed £20) of between £19.7-29.7 million unclaimed.⁷²

⁶⁸ Ibid.

⁶⁹ Ibid., 88.

⁷⁰ R.H. Lande and J.P. Davis, *Of myths and evidence: an analysis of 40 cases for countries considering a private right of action for competition law violations*, (2009) 2(3) G.C.L.R. 126, 131.

⁷¹ John Sorabji (supra n.30), 534.

⁷² Ibid.

John Sorabji considered that the sum could simply be paid to the Access to Justice Foundation, a body that had nothing whatsoever to do with the litigation in question.⁷³ He argued that the vast majority of the damages would thus be paid out in a way that in no way vindicated the rights in question.⁷⁴ Notwithstanding the fact of opt-out proceedings, 99 per cent of the infringed rights would remain unenforced: they would not have been vindicated and a charitable body would have obtained a windfall payment.⁷⁵

The US Chamber Institute stated that, 'the goal of collective redress, if implemented, must be to provide compensation to claimants who have actually been injured by the defendant.'⁷⁶ It went on to say that 'it is also ill-suited to promote social objectives through cy-pres awards distributions. Cy-pres awards do not provide compensation to injured group members, and thus depart from the objectives of the system.'⁷⁷ Professor Martin Redish of North-western University School of Law has argued that 'cy-pres awards merely create the illusion of compensation.'⁷⁸ As one critic of cy-pres distribution noted: 'allowing judges to choose how to spend other people's money is not a true judicial function and can lead to abuses.'⁷⁹ It could be argued that cy-pres awards also create the potential for conflicts of interest between group counsel and the absent group members, particularly where group counsel has a relationship with the recipient charity. One class action settlement in a US antitrust case, for example, included an award of \$5.1 million of unclaimed settlement

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Ibid., 535.

⁷⁶ Response of the United States Chamber Institute for Legal Reform to the consultation on collective redress, available at http://ec.europa.eu/competition/consultations/2011_collective_redress/us_chamber_institute_en.pdf (accessed 31.08.2016).

⁷⁷ Ibid.

⁷⁸ M. Redish, *Wholesale justice: Constitutional democracy and the problem of class action lawsuit*, (Stanford Law Books, (2009)), 14.

⁷⁹ A. Liptak, *Doling out other people's money*, N.Y. Times, available at <http://www.nytimes.com/learning/students/pop/articles/26bar.html> (accessed 30.08.2016).

funds to the claimant's lawyers' alma mater.⁸⁰ The diversion of funds to an organisation in which class counsel has such a personal interest clearly runs counter to class counsel's duty to 'fairly and adequately protect the interests of the class.'⁸¹ Moreover, cy-pres awards create the potential for representative parties to steer money to a favoured charity to satisfy their own financial interests. For example, in a recent AOL case, the cy-pres settlement was heavily criticised in the US because one of the named claimants was employed by the recipient charities.⁸² The Economic and Monetary Affairs Committee has objected to the introduction of the cy-pres principle:

'The damage actually suffered must be compensated for. The doctrine of cy-pres derived from common law (apportionment that is as accurate as possible) contradicts this principle, since the damages actually incurred are not paid out. Neither must portions of the damages sued for be left in the hands of the representative association, since this would raise the incentive for the association to lodge possibly unfounded claims and since it runs counter to the concept of compensation.'⁸³

However, Which? in its submission to the 2011 European Commission Consultation on Collective Redress pointed out that most consumers were happy that action was being taken in respect of the football shirts. They were satisfied that cartelists were being denied their unlawful profit and would be far happier for the money to go to a good cause which may or may not benefit affected consumers indirectly. Which? acknowledged that this was not in line with the general legal principles of damages being paid to the affected

⁸⁰ A. Roberts, *Law School gets \$5.1 Million to fund new center*, in T.H. Frank, *Statement before the House Judiciary Committee, Subcommittee on the constitution and civil justice examination of litigation abuse, cy-pres settlements*, (2013), available at <https://cei.org/sites/default/files/Testimony%20-%20Cy%20Pres.pdf> (accessed 08.08.2016).

⁸¹ Federal Rules of Civil Procedure, Rule 23(a)(4).

⁸² Brief for Objector-Appellant at 7-8, *Nachsin v AOL, LLC*, No. 10 - 55129 (9th Cir. 20 July 2010).

⁸³ European Parliament, *Report on the White Paper on damages actions for breach of the EC antitrust rules*, (2008/2154(INI)) 9.03.2009, 10.

individuals. However, they believed that this should not necessarily be viewed as a legal issue but as a policy issue and as such accommodation should be made for consumers' clear preference for all unlawful profits to be extracted from law-breaking companies, and used for good causes if not all affected consumers claim what is due to them.⁸⁴

It is submitted that it depends on how one views 'rights vindication.' In order for a collective to be vindicated one questions whether that means that every single person must physically receive their compensation. Perhaps not. Perhaps the focus needs to be shifted to consider rights vindication in a much broader sense, i.e. in the public interest. The 'next best use' concept allows for the collective to benefit indirectly. Surely this assuages doubts regarding rights vindication when it is impossible to compensate victims directly.

Which?'s response to the EU Consultation on Collective Redress makes the point that the common reasons cited for consumers not signing up to actions (rational apathy, proof of purchase etc.) should not be taken to indicate that consumers are happy with cartelists keeping the spoils of their breach. Many consumers want to see action taken and are happy for undistributed money to be applied to charitable causes rather than stay with the cartelist. Alternatively, customers would be happy for a benefit of some sort being generally applied to an affected group. For example, had common grocery goods been subject to cartel activity, given the difficulty in proving personal eligibility, individual sums of compensation being low and the prevalence of loyalty cards, the majority of consumers would favour a fixed credit to be applied to a retailer loyalty card. Even if this

⁸⁴ D. Prince, Head of In-House Legal at Which?, *Consultation Response: Towards a coherent European approach to collective redress*, 26.04.2011 available at http://ec.europa.eu/competition/consultations/2011_collective_redress/which_en.pdf (accessed 08.08.2015); See also R.J. Gaudet, *Hard teeth, dentures or gums: The European Commission's options for consumer protection*, (2009) 20(10) I.C.C.L.R. 347.

did not benefit all victims, it would most likely benefit and avoid expensive repayment processes for small amounts of money.⁸⁵

Rachel Mulheron, in her research for the Civil Justice Council in the UK, used the example of the Competition and Markets Authority's (CMA) milk price-fixing case.⁸⁶ It was reported that the CMA fined Sainsbury's, Asda, Safeway, Dairy Crest, Wiseman and the Cheese Company a total of £116 million for their parts in a price-fixing conspiracy.⁸⁷ It was also reported that the '...price collusion is estimated to have cost consumers £270m in higher prices.'⁸⁸ Mulheron cited this case as an occasion that would have been ideal for an 'opt-out' collective action with the ability to apply the cy-pres doctrine, if such an option had been available. Mulheron advocated the use of the doctrine:

'...in respect of the milk price-fixing case where the profits made from the cartel clearly outstrip the fines imposed, where the purchasers have no prospect of proving the fact of purchase, where the amount per claim is very small, but where the aggregate profits have no realistic prospect of being stripped without aggregate damages and cy-pres distributions...'⁸⁹

In some Member States of the EU, some notable cy-pres distributions have occurred. One of the principal cases which demonstrates this remedial approach was that instituted by the

⁸⁵ D. Prince (supra n.84).

⁸⁶ Office of Fair Trading, *OFT welcomes early resolution agreements and agrees over £116 penalties, Investigations continue against other supermarkets and a dairy processor*, available at <http://webarchive.nationalarchives.gov.uk/20140525130048/http://www.offt.gov.uk/news-and-updates/press/2007/170-07> (accessed 08.08.2016).

⁸⁷ Ibid.

⁸⁸ R. Smithers, *Supermarkets fined £116m for price fixing*, The Guardian, 8.12.2007, available at <https://www.theguardian.com/business/2007/dec/08/supermarkets.asda> (accessed 08.08.2016).

⁸⁹ Irish Competition Authority, *Submission to the European Commission public consultation: Towards a coherent European approach to collective redress*, available at http://ec.europa.eu/competition/consultations/2011_collective_redress/irish_competition_authority_en.pdf (accessed 08.08.2016), 14.

Portuguese Association for Consumer Protection, DECO, against Portugal Telecom, pursuant to the opt-out regime implemented in Portugal in 1995.⁹⁰ In an action for telephone rates overcharges, DECO represented a collective of Portuguese consumers (around 2 million or so), in a case involving around €120 million. Portugal Telecom and DECO reached a cy-pres settlement that allowed customers to make free phone calls every Sunday for one year and on Consumers' International Day.⁹¹

In the *Royal Dutch Shell* settlement, any money that was left over after the distributions to class members was to be disbursed as a 'charitable contribution.'⁹²

Moreover, one notes that the US District Court of the Southern District of California considered whether a cy-pres damages distribution should be ordered in respect of the BA/Virgin price-fixing action that affected English consumers (the fact that this case was determined by a US court in the first place is in part as a result of the (then) non-availability of an opt-out class action regime in England).⁹³ One English consumer, following the BA/Virgin fuel surcharge settlement, commented that:

'I strongly suspect that... the airlines will rely on the inertia and difficulty [of the claims process] to put passengers off claiming. In order to avoid this type of accusation, perhaps

⁹⁰ E. Falla, *The role of the court in collective redress litigation: comparative report* (Primento, (2014)), 3.4.

⁹¹ R. Mulheron, *A new era for consumer redress*, (2009) 20(2) E.B.L. Rev 307, 311; R. Mulheron, *The impetus for class actions reform in England arising from the competition law sector*, in S. Wróka, S. Van Uytsel, M. Siems, *Collective actions: Enhancing access to justice and reconciling multilayer interests?* (2012), 394; See also R. Mulheron, *The modern cy-pres doctrine: Applications and implications*, (Routledge Cavendish, (2006)), chapters 7 and 8.

⁹² Royal Dutch Shell Settlement Agreement, 13; See generally R. Gaudet, Jr., *Lessons learned from Swedish, Danish, Dutch, and Norwegian class actions: Comments on the White Paper on damages actions for breach of the EC antitrust rules*, available at http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/gaudet_en.pdf (accessed 31.08.2016).

⁹³ Rachel Mulheron, *A New Era for Consumer Redress* (supra n.91), 307

they should both make a commitment to donating any unclaimed funds to charity after a set cut-off date.⁹⁴

If a cy-pres doctrine were to be developed in the EU, one issue would be regarding the proportion of damages. Once a fund is created, the question remains whether the cy-pres distribution should be available from the outset as soon as the judgment or settlement is reached. Alternatively, it may only be the unclaimed amount is available for cy-pres distribution.

Judge Weinstein has favoured only the unclaimed amounts being dealt with by cy-pres distribution. This is because the overall procedure 'eliminates the need for representative litigation of individual damages claims, while allowing courts to hold defendants liable for the harm caused by them, and compensating those harmed.'⁹⁵The last phrase is significant. The primary aim of the collective action is to compensate the members insofar as it is possible, especially in a modern age in which purchasers and consumers can, increasingly, be electronically tracked (and paid).⁹⁶ Moreover, to permit a time frame for individual claimants to file their claims, whilst enhancing the compensatory objective of the collective action, also reiterates that a cy-pres distribution was not the main purpose of creating the fund but a supplementary device to cope with large-scale litigation. Other American cases reiterate that an opportunity for individual claims must be permitted before cy-pres can arise. In *Masters v Wilhelmina Model Agency Inc.*,⁹⁷ the US Court of Appeal for the Second Circuit referred to unclaimed funds as being the proper province of a cy-pres award. A Texas District Court subsequently noted that *Masters* exemplifies that the

⁹⁴ BBC News, *BA and Virgin to pay out refunds*, 15.02.2008, available at <http://news.bbc.co.uk/1/hi/business/7246242.stm> (accessed 08.08.2016).

⁹⁵ *Schwab v Phillip Morris USA Inc.*, 449 F Supp 2d 992, 1254 (EDNY 2006), certification reversed.

⁹⁶ J. Kleefeld, *Book review: The modern cy-pres doctrine: applications and implications*, (2007) 4 Canadian Class Action Rev 203, 209.

⁹⁷ *Masters v Wilhelmina Model Agency Inc.*, 473 F 3d 423, 436 (2nd Cir. 2007).

parties cannot invoke cy-pres without making diligent efforts to locate class members whose settlement cheques remained un-cashed.⁹⁸

The ALI's report which was published in 2008 stated that any consideration of cy-pres must 'begin from the premise that funds generated through the aggregate prosecution of divisible claims are presumptively the property of the class members.'⁹⁹ Circumstances, however, may arise where having allowed an appropriate time frame, any distribution was always, and will necessarily be impracticable.¹⁰⁰ Therefore, in order for a cy-pres doctrine to be implemented in the case of EU cross-border collective redress for antitrust damages, the fund should only incorporate funds which are not claimed by a certain date.

4.6 How best to use the cy-pres doctrine

Instead of allocating the funds to a charity or foundation, a European cy-pres doctrine could ensure that unclaimed funds are distributed to the party representing the collective in order to finance future litigation. In 2007, an important Discussion paper published by the CMA, 'Private Actions in Competition: Effective Redress for Consumers and Business',¹⁰¹ proposed an enhanced representative action procedure for consumers and businesses seeking redress for breaches of competition law. This contained a proposal for a cy-pres doctrine within the ambit of possible reforms. The CMA mooted that residual funds could, for instance, be used for consumer education or finance other representative actions.¹⁰²

⁹⁸ *In re Paracelsus Corp Securities Litigation*, 2007 US Dist LEXIS 8316, 9-10 (SD Texas 2007).

⁹⁹ Principles of the Law of Aggregate Litigation: Tentative Draft No 1 (2008) 266.

¹⁰⁰ R. Mulheron (supra n.30), 329.

¹⁰¹ Office of Fair Trading, *Private actions in competition law: effective redress for consumers and business*, (Discussion Paper), available at http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.offt.gov.uk/shared_offt/reports/comp_policy/oft916.pdf (accessed 08.08.2016); OFT Press Release, *OFT announces consultation on private actions in competition law*, 18.04.2007, available at <http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.offt.gov.uk/news-and-updates/press/2007/63-07> (accessed (08.08.2016).

¹⁰² Discussion Paper (supra n.91), 4.36-4.37.

This idea has also been advocated by commentators such as Charlotte Leskinen.¹⁰³ Where possible, and first and foremost, the aggregate sum of damages should be used to compensate directly the harm suffered by the victims represented in the action. Only in exceptional cases (such as when individual victims do not come forward or where it is impossible to compensate each consumer directly) might it be necessary to consider awarding damages to the representative body, which would then make a so-called cy-pres distribution of the damages to related entities or use them for related purposes in order to achieve a result which would be as close as possible to compensating the victims. This idea of ‘related purposes’ could be used as leverage to argue that the funds could be used to fund future litigation.¹⁰⁴

A major drawback of collective actions is the limited financial resources of representative bodies. The financial risks involved would in all likelihood encourage representative bodies to bring only actions that they would be certain of winning, while they would avoid bringing complex cases.¹⁰⁵ If they lack adequate funding, then they will refrain from bringing representative actions for damages in cases of competition law infringements.

There has been the long running question as to who should pay for consumer associations to launch collective actions. Perhaps it should be the members of the collective action. If the budget of the consumer association must be financed out of membership fees paid in advance, enough funding will not be available if the members of the association prioritise other activities and are not willing to pay a higher fee to finance litigation expenditures.¹⁰⁶

¹⁰³ C. Leskinen, *Recent Developments on collective antitrust damages actions in the EU*, (2011) 4(2) G.C.L.R. 79, 83.

¹⁰⁴ Ibid.

¹⁰⁵ Office of Fair Trading, *Private actions in competition law: effective redress for consumers and business: recommendations from the Office of Fair Trading*, 23.

¹⁰⁶ R. Van Den Bergh (supra n.5), 31.

The membership can be seen as an insurance premium that end-consumers, who expect only small losses (for example, in the case of price-fixing agreements) are not willing to pay.¹⁰⁷

Apart from donations received from private sponsors, an obvious candidate to provide funding is the government.¹⁰⁸ Using taxpayers' money can be defended as a way to guarantee that cases are brought when this is in the interest of consumers as a whole. Germany offers an example of public funding. The national consumer association is almost entirely financed by the federal government.¹⁰⁹ In other countries, consumer organisations are not so well-funded. Government funding may go a long way to overcome lacking financial incentives to initiate litigation but it is not a miracle solution.¹¹⁰ Governments have limited budgets. In the wake of recent financial crises and austerity measures, governments may not be able to provide enough funding to consumer associations that would be sufficiently large to bring meritorious claims. In addition, financing by the government makes the consumer associations vulnerable to capture by politicians who may pursue an agenda that does not necessarily coincide with the economic interests of consumers.¹¹¹

If the consumer association's budget is too small and sufficient funding is not available, one could look at cost reduction. From a financial perspective, both court fees and the loser pays rule may impede the initiation of representative actions. A first step could be to exempt consumer associations entirely from paying court fees and attorney's fees and

¹⁰⁷ R. Van den Bergh and L. Visscher, *The preventative function of collective actions for damages in consumer law*, (2008) 1(2) Erasmus Law Review 24, 46.

¹⁰⁸ R. Van Den Bergh (supra n.5), 31.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Ibid.

finance these costs out of the state budget.¹¹² This approach has the disadvantage that state appointed lawyers may lack sufficient expertise in antitrust matters.¹¹³ The maintenance of the 'loser pays' rule seems to be the biggest hurdle to overcome. This rule requires claimants to be insured and commercial insurance can be very difficult to obtain or very costly. The loser pays rule is usually justified as a deterrent to unmeritorious suits but it may also discourage risk-averse claimants to bring meritorious claims. Reduction of court fees and moderation of the 'loser pays' rule reduces the costs and risks of litigation but does not make it financially attractive to bring lawsuits. Here, the German experience is telling. Section 10 of the Unfair Competition Law allows consumer associations to bring claims for skimming-off the illegal gain achieved by traders who deliberately violate rules of fair trade.¹¹⁴ This procedure for disgorgement of illegal profits has been characterised by German commentators as a 'paper tiger', since it has turned out to be a largely ineffective remedy.¹¹⁵ The reason for this seems to be that the disgorged profits do not accrue to the consumer organisation but flow to the state after deducting the costs of the claim.¹¹⁶ Recent proposals suggest enlarging the scope for the skimming-off procedure by including violations of German competition law and to allow consumer associations to keep a part of the obtained payments.¹¹⁷ Clearly, this option is nothing more than allowing contingency fees under another name.¹¹⁸

Given the difficulties of remedying the funding problem, it is submitted that the best way forward would be to make consumer associations the leading beneficiaries of the cy-pres regime. Instead of the residue being allocated to a charity, it could be reinvested by the

¹¹² *Ibid.*, 32.

¹¹³ *Ibid.*

¹¹⁴ Gesetz gegen den unlauteren Wettbewerb/UWG.

¹¹⁵ Roger Van Den Bergh (*supra* n.5), 32.

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

consumer association and used to launch future private enforcement actions against infringing undertakings. An opt-out system would automatically include every end-consumer who has fallen victim to the illegal conduct. It would then be up to each individual to claim from the fund if they felt strongly enough that their rights had been violated and that claiming from the fund would vindicate such rights. After a set period, the residue could then be allocated to financing future private antitrust actions led by the consumer association. Both the goals of compensation and deterrence (if it is confirmed that deterrence is a goal of EU private antitrust actions) would be satisfied. Compensation would be available for those who want it. Deterrence would flow from a stronger, better resourced consumer association and infringing undertakings would not benefit from the spoils of their illegal conduct.

Of course, the controversy surrounding opt-out actions and the prevalence of opt-in mechanisms in most jurisdictions remains as a fundamental barrier to effective private enforcement for this category of claimant. One would urge Member States to be more open minded in order to facilitate better access to justice. Without engaging in novel concepts, private end-consumer claims remain under-enforced and the only entities that benefit are the infringing undertakings which retain the illegal gains.

Such a proposal is not entirely 'off the wall.' In Greece, the Act of Consumer Protection (2251/1994) states that after a successful collective action, consumer organisations are entitled to receive a percentage of pecuniary compensation due to moral damage. The amount granted by court is directed for the purposes of education and the protection of consumers and after the subtraction of court expenses, it is given the following rules:

a) 35% to the plaintiff consumers' union,

b) 35% to the consumers' union of second decree,

c) 30% to the State budget.

Issues pertaining to the above and every relevant detail are settled by decision of the Minister of Development. Unfortunately, as the ministerial decree for the effect has not been adopted, the mechanism does not work in practice.¹¹⁹

In Portugal a specific fund was established as a result of the government decision to ban an overcharge on certain consumer bills by public services providers. As most providers had already charged the consumers, they were obliged to reimburse them. However, many affected consumers did not have the evidence required and so did not request the reimbursement. As a result, the government created a specific fund for the promotion of consumer rights to which the remainder of the amount was transferred. All NGOs can apply for money from this fund, providing the funding will be used for the promotion of consumer rights (including promotion of ADR, consumer education etc.).¹²⁰

¹¹⁹ The European Consumer Organization, BEUC, *Redirecting Justice - Competition fines as a source for funding consumer-related projects and organizations*, Ref: X/2012/069 17.09.2012, available at <http://www.beuc.eu/publications/2012-00561-01-e.pdf> (accessed 08.08.2016).

¹²⁰ Ibid.

4.7 Concluding remarks on consumer attitudes and the cy-pres doctrine

In many consumer competition law cases, there is limited feasibility of providing compensation of the very small amounts that indirect purchasers are overcharged. The cy-pres mechanism could play a part in European collective actions. As Kalajdzic observes,¹²¹ the nature of mass wrongs creates a number of obstacles to distributing settlement funds: class members may be unknown to the parties, and it may also be prohibitively expensive to distribute what are essentially nominal damages to a large class. In the case of *Tesluk*,¹²² the Ontario Superior Court of Justice found that distributing \$30-\$70 to 520,000 class members would not be economically feasible.

In Europe, an adapted cy-pres mechanism could make sure that a) compensation is made available for a period to those who want it and b) that unclaimed funds do not revert to defendants, deterring undertakings from future anticompetitive conduct.

The concern about cy-pres awards is that the residue is allocated to a charity which has no meaningful connection with the case at hand. A cautious approach is therefore warranted.¹²³ This could be overcome by instead allocating the funds to the consumer association which has acted on behalf of the class. It would bolster the effectiveness of private enforcement for end-consumers and would vindicate the rights of end-consumers, perhaps not individually, but in the much broader sense, acting in the public interest. End-consumers would be in the knowledge that the undertaking has paid the heavy price for its infringement and that they will benefit in the future from a more competitive market.

¹²¹ J. Kalajdzic, *Consumer (In)Justice: Reflections on Canadian consumer class actions*, (2010) 50 Canadian Business Law Journal 356, 369.

¹²² *Tesluk v Boots Pharmaceutical PLC* (2002), 21 CPC (5th) 196 (Ont. SCJ).

¹²³ J. MacLean, *Going down the Illinois Brick road (if the Hanover Shoe fits)? Economic complexity and judicial competence in the context of Canadian Competition Law's possible futures – Part 1*, (2013) 6(2) G.C.L.R. 85.

The bottom line is that consumer redress has to change to reflect trending attitudes.

Individual distribution of compensation simply is not viable. For this reason, Europe has to take a more open-minded, broader outlook in order to overhaul the effectiveness of end-consumer claims in the private enforcement of competition law.¹²⁴

¹²⁴ See also G.U Jois, *The cy-pres problem and the role of damages in tort law*, (2008) 16 Va. J. Soc. Pol'y & L. 258; M.H Redish, P. Julian, S. Zyontz, *Cy-pres relief and the pathologies of the modern class action: a normative and empirical analysis*, (2010) 62 Fla. L. Rev. 617; C.R. Leslie, *Antitrust damages and dead weight loss*, (2006) 51 Antitrust Bull. 521; R.H. Lande, *New options for state indirect purchaser legislation: protecting real victims of antitrust violations*, (2009) 61 Ala. L. Rev 447; R.R. Douglas, *What makes an antitrust class action remedy successful: a tale of two settlements*, (2005) 80 Tul. L. Rev. 621; D. van Horn, D. Clayton, *It all adds up: Class action residual funds support pro bono efforts*, (2009) 45 Tenn. B.J. 12; M.G, *Class dismissed: contemporary judicial hostility to small-claims consumer actions*, (2009) 59 DePaul L. Rev. 305; T. Reddy, B. McGrath, *Proposal for reform to private competition law claims under UK law: all change please?* (2012) 5(4) G.C.L.R. 138; R. Mulheron, *Building blocks and design points for an opt-out class action*, (2008) J.P.I. Law 4 308; B.T. Fitzpatrick, *Do class action lawyers make too little?* (2009) 158 U. Pa. L. Rev 2043; R. Gaudet, *Turning a blind eye: the Commission's rejection of opt-out class actions overlooks Swedish, Norwegian, Danish and Dutch experience*, (2009) 30(3) E.C.L.R. 107; D. Fairgrieve, G. Howells, *Collective redress procedures: European debates*, (2009) 58(2) I.C.L.Q. 379.

CHAPTER 5 THE INTERFACE BETWEEN PUBLIC AND PRIVATE ENFORCEMENT IN COMPENSATING END-CONSUMERS

5.1 Introduction

Some academics¹ have noted that compensation does not always have to be exclusive to private enforcement of competition law. Bourgeois, Strievi, Ioannidou and Ezrachi, for example, propose that, at the end of the public investigation, the competition authority should be able to impose not only a fine but also award a certain form of compensation to the injured parties, either individually identified or defined more broadly as an injured collective.²In essence, this means blurring the boundaries between the pillars of public and private enforcement.

The past chapters have identified that private enforcement of competition law and collective redress face many challenges. The diversity of EU Member State legal systems, forum shopping, consumer apathy and procedural obstacles (incentives to litigate and the financial risks associated with launching a claim) play to the detriment of end-consumer redress following a breach of EU competition law.

This chapter does not argue that public enforcement should replace private enforcement and the pursuit towards achieving a homogenous and effective EU-wide end-consumer redress mechanism. However, in situations where launching a collective action is difficult, and where it is clear that a certain category of victims has suffered loss as a result of an anticompetitive infringement, public enforcement could be used as one of a range of

¹ For example, J.H.J. Bourgeois, S. Strievi, A. Ezrachi and M. Ioannidou.

² A. Ezrachi and M. Ioannidou, *Public compensation as a complementary mechanism to damages actions: From policy justifications to formal implementation*, (2012) 3(6) *Journal of European Competition Law & Practice* 536.

methods to bolster effective redress. By being able to enforce compensation in this way, one may also be able to increase deterrence and encourage greater consumer involvement in competition law enforcement.

5.2 The public/private interface

EU competition law enforcement is traditionally viewed as consisting of two separate pillars, each with their own specific role. Public enforcement is in place to impose fines and deter undertakings from partaking in anticompetitive conduct. Private enforcement is concerned with compensating victims who have suffered harm. Consider Wils' outlook.³ He considers that public enforcement of competition law is the superior instrument to pursue the objectives of clarification and development of the law and of deterrence and punishment, whereas private actions for damages are superior for the pursuit of corrective justice through compensation.⁴ This approach corresponds to the classic, time-honoured conception of the different roles of public enforcement and private actions for damages, not just in the area of competition law but in the law more generally, as notably set out by John Locke in 1690 in his *Second Treatise on Civil Government*.⁵ Paragraph 3.1 of the *Commission Communication*⁶ continues this theme on the basis that:

‘There is a consensus among stakeholders that private and public enforcement are two different means that should normally pursue different objectives. Whereas it is the core task of public enforcement to apply EU law in the public interest and impose sanctions on infringers to punish them and to deter them from committing future infringements, private

³ W.P.J Wils, *The relationship between public antitrust enforcement and private actions for damages*, (2009) 32(1) W.C. 3.

⁴ *Ibid.*, 12.

⁵ J. Locke, *The Second Treatise on Civil Government* (1690), Chapter II.

⁶ *Commission Communication, Towards a European framework for collective redress*, COM (2013) 401.

collective redress is seen primarily as an instrument to provide those affected by infringements with access to justice and — as far as compensatory collective redress is concerned — the possibility to claim compensation for harm suffered. In this sense, public enforcement and private collective redress are seen as complementing each other.

Collective damages actions should aim to secure compensation of damage that is found to be caused by an infringement. The punishment and deterrence functions should be exercised by public enforcement. There is no need for EU initiatives on collective redress to go beyond the goal of compensation: punitive damages should not be part of a European collective redress system.’

Despite the clear preference for the separate roles of public and private enforcement, it is submitted that due to the paucity of cross-border collective proceedings, it is time to proceed with a more holistic approach. It is argued that viewing these enforcement prongs as two separate entities can stunt the overarching regime of EU competition law. Bourgeois and Strievi⁷ advocate the need to form a hybrid between the public and private regimes by enabling the public authorities to deliver compensation under certain circumstances.

Moreover, the UK Ministry of Justice has stated that, 'while regulatory aims and objectives are usually strategic and not specifically focused on compensatory objectives, this does not preclude their adaptation for this purpose.'⁸ Accordingly, so-called 'Public Compensation' may be seen as a positive extension of the role played by the public enforcer. In effect, it presents the middle ground between public and private enforcement; it employs public

⁷ J.H.J. Bourgeois and S. Strievi, *EU competition law remedies in consumer cases: Thinking out of the shopping bag*, (2010) 33(2) W.C. 241.

⁸ Ministry of Justice, *The Government's response to the Civil Justice Council's Report: Improving access to justice through collective actions*, available at <http://collections.europarchive.org/tna/20100208150045/http://www.justice.gov.uk/about/docs/government-response-cjc-collective-actions.pdf> (accessed 08.08.2016), 18.

enforcement mechanisms to deliver a goal which is primarily in the realm of private enforcement.⁹

Moreover, the interface between public and private enforcement has also been considered in a slightly different way by the European Consumer Organisation BEUC which advocates that the time has now come for the EU to consider redirecting portions of fines collected by the Commission in response to the infringement of EU competition law by allocating them to consumer organisations or consumer-related projects.¹⁰ It will be remembered that the last chapter advocated the use of the cy-pres doctrine to allocate the residue of unclaimed end-consumer damages to consumer organisations (lack of funding usually acting as a disincentive for these organisations to engage in litigation) who would then invest the funds in future litigation.¹¹

BEUC argues that this would enable, even if indirectly, activities aimed at enhancing consumer protection to be funded by those who infringe the laws.¹² Currently, the fines imposed by the Commission in instances of competition law infringements are fully deposited in the EU budget. From cartels alone, the EU collected more than €614 million in 2011.¹³

Consumer policy has long suffered from inadequate funding, whilst at the same time being promoted as key to the economic growth.¹⁴ In 2012, while voting on the 2014-2020

⁹ A. Ezrachi and M. Ioannidou (supra n.2), 539.

¹⁰ The European Consumer Organization, BEUC, *Redirecting justice - Competition fines as a source for funding consumer related projects and organizations*, available at <http://www.beuc.eu/publications/2012-00561-01-e.pdf> (accessed 08.08.2016).

¹¹ See Chapter 4.

¹² The European Consumer Organization, BEUC (supra n.10).

¹³ Ibid.

¹⁴ Ibid.

Consumer Programme Report,¹⁵ the European Parliament expressed concerns that the budget proposed for the Programme was 'not enough to meet the new challenges that will face EU Consumer Policy in 2020.'¹⁶ While competition infringements occur every day, very few competition cases are reported and it is estimated that the unrecovered damages of infringements of EU competition law amount to over €20 billion per year.¹⁷ BEUC argues that although the fines imposed on those who infringe competition laws today serve another purpose than compensating victims, a part of the funds collected from fines could be used for consumer-related projects or the activities of consumer organisations.¹⁸

In sum, two ideas are advocated by merging the roles of public and private enforcement. First, at the public enforcement stage, competition authorities would have the power to implement compensatory measures over and above the fines they have imposed. Second, portions of fines collected by public authorities could be used either to compensate victims directly or, where this is not possible or not practical, allocated to consumer-related projects or the activities of consumer organisations. These funds could be used to fund future litigation, thus bolstering the effectiveness of cross-border collective end-consumer redress.

¹⁵ The European Consumer Organisation, BEUC, *Consumer programme 2014-2020: Proposed Commission regulation, BEUC position paper*, available at <http://www.beuc.eu/publications/2012-00203-01-e.pdf> (accessed 05.09.2016).

¹⁶ *Ibid.*

¹⁷ J. Almunia, Commissioner for competition policy, *Common standards for group claims across the EU, Speech at international conference on 'private enforcement of competition law,' University of Valladolid, School of Law, 15.10.2005*, in L.A.V. San Pedro *et al.*, *Private enforcement of competition law*, (Lex Nova, (2011)), 46.

¹⁸ The European Consumer Organization, BEUC (*supra* n.10).

5.3 Compensation as a mitigating factor

The relationship between public enforcement and compensation has been considered in the past. Compensation has been considered as a mitigating circumstance by public authorities when they come to impose a fine on an infringing undertaking.

In the UK, the *Independent Schools* case concerned fee-paying schools exchanging amongst competitors detailed information as to the fees they intended to charge.¹⁹ The UK Competition and Markets Authority (CMA) ended its investigation against 50 independent British schools after it reached an agreement with a group of representatives from the schools. Each school had to pay a fine of £10,000 to the CMA and had to set up a trust fund, to which they paid £3 million over a period of four years, intended to benefit the pupils who were directly concerned during the period of exchange of information.²⁰ Due to the settlement, the fine imposed on each school represented a great reduction. This was so, in particular, as the imposition of a fine could have led to an increase in tuition fees and resulted in further harm to the pupils' welfare.²¹ The CMA noted that this outcome-orientated solution was unique and specific to the circumstances at hand.²²

A similar situation occurred in the *Rover* case in connection with arrangements concluded between the company and its dealers which had unlawfully sought to dictate the levels of discount which dealers could offer to their customers. The arrangements were terminated

¹⁹ Office of Fair Trading, Competition Act Investigations, CA98 Public Register, *Schools: exchange of information on future fees*, CA98/05/2006, available at <http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.offt.gov.uk/OFTwork/competition-act-and-cartels/ca98/decisions/schools> (accessed 05.09.2016).

²⁰ N. Jalabert-Doury, L. Nouvel, I. Simic, *Competition policies*, (2006) 4 I.B.L.J. 535, 543.

²¹ J. Lawrence and M. Sansom, *The increasing use of administrative settlement procedures in UK and EC competition investigations*, (2007) 6 Comp Law 163, 168.

²² A. Ezrachi and M. Ioannidou (supra n.2), 540.

once they came to the awareness of the senior management and besides notifying the authorities, Rover:

- reimbursed the dealers for the discounts which had been withheld from them; and,
- contributed £1 million towards two projects designed to benefit UK car buyers (on the basis that it could not identify individual buyers who had suffered loss).

Announcing its decision not to open formal proceedings against Rover, the Commission stated that it 'welcomes the fact that companies which discover that their employees have broken competition laws disclose this fact to the Commission and to the relevant national authorities. Only by disclosure are companies able to avoid having contingent liabilities for fines for several years.'²³ The Commission stated, however, that the relevant donation does not affect the rights of individual consumers to claim compensation from Rover or its dealers.²⁴ This is an important point to be stressed, namely that the relevant donations should never replace private enforcement but merely facilitate restitution, particularly in scenarios where individual redress cannot be effectively carried out.

Instances involving compensation as a mitigating factor in the course of a public investigation were also reported in The Netherlands. The Nederlandse Mededingingsautoriteit (NMa) fined Interpay, a provider of network services for debit card transactions, and fined the eight banks which set up the network. The NMa found that Interpay abused its dominant position on the market for network services for debit card transactions by charging excessive rates for the provision of these services. The banks were fined for limiting the sale of network services to Interpay, thereby excluding the possibility

²³ K. Taylor and J. Pratt, *Antitrust compliance programmes*, (1994) 8 I.B.L.J. 981, 987.

²⁴ *Ibid.*

of providing these services in competition with each other.²⁵ The fines imposed on the participating banks were reduced following the setting up of a €10 million fund by the banks for an efficient payment system. In addition, a compensatory scheme was reached between the banks and retailers offering PIN payments to consumers.²⁶

The Dutch competition authority in the *Construction Cartel* also granted companies a 10 per cent fine reduction provided that they reached a compensation agreement with the Dutch government, the victim of the cartel agreement.²⁷

In Germany, the competition authority closed its abuse proceedings for excessive prices against gas suppliers after 29 of them committed to refund €127 million to affected customers through bonus payments and credits on future accounts.²⁸ In another case, *Stadtwerke Uelzen*, a local gas supplier which was found to charge abusive prices was ordered to reimburse its customers. The remedy was subsequently upheld by the German Supreme Court.²⁹

In *Nintendo*, following a complaint by Omega, the European Commission found that Nintendo's distribution system impeded parallel trade. However, following direct compensation made by Nintendo to the victims, the fine was reduced by a significant amount.³⁰ Similarly, in *General Motors* and the *Pre-Insulated Pipe Cartel*, the European Commission again treated the fact of paying compensation to the victims of the anticompetitive infringement as an extenuating circumstance in setting the appropriate

²⁵ P. Bos and J. Braaksma, *Netherlands: Bank payments system - review*, 2006 (27(2) E.C.L.R. N38, N38.

²⁶ *Ibid.*

²⁷ A. Ezrachi and M. Ioannidou (supra n.2), 540; V. Onno Brouwer, *Antitrust settlements in the Netherlands: A useful source of inspiration*, in C. Ehlermann and M. Marquis, *Antitrust settlements under EC competition law*, (Hart Publishing, (2010)), 492-3.

²⁸ A. Ezrachi and M. Ioannidou (supra n.2), 541.

²⁹ *Stadtwerke Uelzen* BGH, Decision of 10 December 2008—KVR 2/08—OLG Celle.

³⁰ 2003/675/EC: Commission decision: *Omega – Nintendo*, OJ L 255 8.10.2003 22, at paras. 440–441.

amount for the fine.³¹ The European Commission retains discretion to consider compensation to victims as a mitigating factor for fine reduction.³²

The decisions discussed above reveal the possibility to combine elements of compensation as part of the public enquiry. Under Article 23(2)(a) of Regulation 1/2003,³³ the power to impose fines on companies that have infringed Article 101 and 102 TFEU has been entrusted to the Commission. The Guidelines on the method of setting fines³⁴ provide further details about this public enforcement tool. They recall the case law of the CJEU granting the Commission a wide margin of discretion when setting fines.³⁵ They recognise that fines should have a significant deterrent effect.³⁶ The Guidelines state also that the fine may be reduced to reflect mitigating circumstances and list five examples including the termination of the infringement as soon as the Commission has intervened (not applicable to cartels) and the fact that the undertaking has effectively cooperated with the Commission outside the scope of the Leniency Notice and beyond its legal obligation to do so.³⁷ The compensation of victims would be entirely in line with these reasons underlying a milder sanction. By compensating victims voluntarily, a company would take an active part in the enforcement of competition law, beyond what is legally required, and would help render corrective justice. Moreover, while it cannot retroactively act competitively and limit the harm, the offender would at least be adopting a critical view on its past behaviour and act accordingly by repairing the harm.³⁸

³¹ 75/75/EEC: Commission Decision *General Motors Continental*, OJ L 29 3.2.1975 14, at para 18; 1990/60/EC: Commission Decision *Pre-Insulated Pipe Cartel* 127 OJ L 24 30.1.1999 1, at paras. 127 and 172.

³² Case T-59/02 *Archer Daniels Midland Co v Commission* [2006] E.C.R. II- 3627 at paras. 354 –355.

³³ Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1 4.1.2003 1.

³⁴ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003 OJ C 210 1.9.2006 2.

³⁵ *Ibid.*, para 2.

³⁶ J.H.J. Bourgeois and S. Strievi (*supra* n.7), 249.

³⁷ Guidelines on the methods of setting fines (*supra* n.34), para 29.

³⁸ J.H.J. Bourgeois and S. Strievi (*supra* n.7), 249.

According to Bourgeois and Strievi, this self-critical and proactive behaviour deserves to be rewarded by a fine reduction or in some exceptional cases by the absence of a fine, where, for instance, the infringement is involuntary.³⁹ The cases above show that the Commission and the NCAs have already granted or at least considered such a reward. To sum up, compensation paid to consumers could be taken into account as a mitigating factor when setting fines.

Ioannidou and Ezrachi use these cases as a way of building their own proposal for Public Compensation. Their proposal departs from the above cases in two distinct ways. First, their proposal views compensation as an *additional* remedy to be enforced by the public competition authority. They see it as a way of supplementing the fine imposed. Second, it elevates compensation from its current incidental position into an integral part of the enforcement toolbox.⁴⁰ In the cases above, compensation was used as an agreed substitute or mitigating factor to the imposed fine. By contrast, the proposed mechanism does not substitute the fine or necessarily represent an agreement between the parties and the competition authority. It is an additional and independent remedy, designed to foster positive transfer of wealth from the violators to the affected group or individuals.⁴¹

Compensation should be imposed on the undertaking by the authority rather than simply being offered by the undertaking. This leaves total discretion to the decision making of the authority rather than simply to the good will of the infringing undertaking. This is the real difference between Ioannidou/Ezrachi's and Bourgeois/Strievi's interpretation of Public Compensation. Bourgeois and Strievi highlight the need for Public Compensation to be voluntary in nature. This can make companies more inclined to offer this kind of

³⁹ Ibid.

⁴⁰ A. Ezrachi and M. Ioannidou (supra n.1), 541.

⁴¹ Ibid., 542.

compensation, as it gives them the possibility to win back some of the goodwill that they have lost as a result of their infringement. Companies value their reputation because it influences their business. The voluntary payment of compensation could be the price that they are willing to pay to maintain or re-establish their good reputation.⁴²

Ioannidou and Ezrachi believe that their proposed Public Compensation system is set to bridge the current gap in corrective justice in competition cases. They state that the mechanism will increase the nexus between the public remedy and the injured group.⁴³ The gap in corrective justice is most noticeable in cases involving a large number of injured parties, each sustaining a relatively small loss.⁴⁴ They argue that the proposed Public Compensation mechanism is ideally suited to facilitating compensation in these cases.

From the perspective of end-consumer redress, there would be a situation where the victims are compensated much earlier. Generally, in the enforcement of competition law the process begins with a public investigation. Only after the public investigation is complete, and the fines imposed do the follow-on actions (with the aim of compensation) take place. It is therefore, only towards the end of the process that end-consumers will have the opportunity to have their rights vindicated.

There are several different ways under which this could be achieved. There are procedures which currently exist which could be adapted in order to allow the inclusion of Public Compensation, i.e. through a fine, settlement or commitment procedure.

⁴² J.H.J. Bourgeois and S. Strievi (supra n.7), 245.

⁴³ A. Ezrachi and M. Ioannidou (supra n.2), 542.

⁴⁴ Ibid., 541.

5.4 Fines

Compensation could form part of the imposition of a fine following a finding of infringement. This is probably the most appealing option as the competition authority retains control over the process and determines the compensation. Ioannidou and Ezrachi argue that the quantification of damages in competition cases is an extremely difficult and complex process. The type of quantification in private enforcement cases, they argue, is not a suitable yardstick for their vision of Public Compensation.⁴⁵ For consumers in particular, harm may be difficult to establish. In many cases, for example, end-consumers will not have kept the relevant receipts showing how much they paid for a particular product. The experience in *JJB Sports* which was discussed in the last chapter⁴⁶ is particularly telling. Furthermore, disputes about the amount paid to each individual consumer would damage public enforcement by making it lengthy and complicated.⁴⁷

Instead Ioannidou and Ezrachi advocate that compensation would be based on a given percentage of the fine levied on the parties. When the fine imposed is below the maximum level set in the legislation, the compensation could be added to the fine, thus increasing the overall payment. This can be seen as giving added value, as bolstering deterrence and vindicating the rights of the victims of the infringement. Ioannidou and Ezrachi submit that in the majority of cases the fines are below the maximum permitted level. Therefore, they advocate that the 'top-up' with compensation or 'Fine Plus' should serve as the appropriate method of quantifying damage.⁴⁸

⁴⁵ A. Ezrachi and M. Ioannidou (supra n.2), 542.

⁴⁶ See chapter 4.

⁴⁷ J.H.J. Bourgeois and S. Strievi (supra n.7), 244.

⁴⁸ A. Ezrachi and M. Ioannidou (supra n.2), 542.

When the imposed fine is set at the maximum level permitted, compensation may form part of the overall fine. A portion of the overall fine may be set aside in order to compensate the victims. They call this 'Fine Minus'.⁴⁹

Ioannidou and Ezrachi's vision leaves discretion totally in the hands of the authority. Contrast this with Bourgeois and Strievi who state that, above all, the amount of compensation should not be determined by the competition authority but rather proposed by the infringer.⁵⁰ They believe it is up to the infringer to determine how much they are willing to pay. They would have to consider the alternative if the authority does not accept their proposal and fines them for infringement of competition rules.⁵¹ In any case, Ioannidou, Ezrachi, Bourgeois and Strievi seem to agree that the amount of compensation accepted by the competition authority should be capped at the level of the potential fine.⁵²

One would criticise this cap on the level of the potential fine. For example, an undertaking may consider that it may still be worthwhile to engage in anticompetitive conduct if it can foresee that the profit of its illegal practice outweighs the maximum level of fines and compensation that they will have to pay out. One considers the article by Riley⁵³ which considers that the financial penalties in many cases should be much heavier to recognise the scale of the gains made by undertakings.⁵⁴ His article makes a case for a more calibrated and focussed approach to sanction policy based upon, *inter alia*, actual profit gained.

⁴⁹ A. Ezrachi and M. Ioannidou (supra n.2), 542.

⁵⁰ J.H.J. Bourgeois and S. Strievi (supra n.7), 244.

⁵¹ Ibid.

⁵² Ibid.

⁵³ A. Riley, *Modernising cartel sanctions: effective sanctions for price-fixing in the European Union*, (2011) 32(11) E.C.L.R. 551.

⁵⁴ Ibid.

5.5 Settlement procedure

Another option proposed by Ioannidou and Ezrachi concerns cartel settlement procedures. This would provide the competition authority with overall control over the level of compensation accepted. The reduced fine imposed as part of the procedure, will result in reduced Public Compensation, since the latter is derived from the level of the fine. Subsequently, the incentives for undertakings to take the cartel settlement route will be retained, since they obtain a fine reduction and a reduction on the compensatory remedy.⁵⁵ Furthermore, the incorporation of Public Compensation in settlement procedures could counterbalance the alleged negative impact cartel settlements have on private enforcement. As such, the mechanism will reduce the externalities currently stemming from cartel settlements due to the use of oral submissions,⁵⁶ the limited rights of access to the Commission file,⁵⁷ and the short final settlement decisions.⁵⁸

5.6 Commitment procedure

The third option concerns commitment procedures. Article 9 of Regulation 1/2003 empowers the Commission to accept commitments offered by the undertakings after a preliminary assessment provided that these commitments meet the Commission's concerns. If the Commission accepts the commitments, it makes them binding on the undertakings and concludes that there are no longer grounds for action. The case is closed. The obvious difficulty stems from the inability to quantify compensation, since the procedure does not involve the finding of an infringement and the imposition of a fine. Compensation in such

⁵⁵ A. Ezrachi and M. Ioannidou (supra n.2), 543.

⁵⁶ Regulation 622/2008 amending Regulation 773/2004, as regards the conduct of settlement procedures in cartel cases OJ L 171 1.7.2008 3, Article 12.

⁵⁷ Ibid., Article 6.

⁵⁸ U. Soltesz and C. Von Kockritz, *EU cartel settlement in practice: The future of EU cartel law enforcement?* (2011) 32(5) E.C.L.R. 258, 263.

a case is bound to be subjected to agreement between the competition authority and the parties. Thus, compensation in the course of commitment procedures remains a voluntary mechanism and it cannot be regulated in an effective manner.⁵⁹

The forthcoming cases fell short of compensation but act as building blocks for more mainstream compensatory procedures in the course of commitment decisions. The Commission came close to applying the compensation of victims via commitment decisions in *Deutsche Telekom* and in the *Bank Charges Euro-zone* decisions. In *Deutsche Telekom*, the Commission found that Deutsche Telekom had charged excessive prices for access to its network, but it decided to terminate its proceedings when Deutsche Telekom committed to apply lower tariffs.⁶⁰ In the second case, several banks were accused of collectively fixing charges for exchanging Euro-zone banknotes.⁶¹ The Commission terminated proceedings against certain banks when they committed to reduce their charges. Two reasons were decisive: a particular circumstance existed (the introduction of euro notes and coins) and the reduction produced immediate beneficial effects for consumers.⁶²

The Commission simultaneously continued its investigations against the banks that contested the Commission's charges and fined them.⁶³ Thanks to the commitment some consumers paid less for the service and ultimately benefited from a kind of compensation

⁵⁹ A. Ezrachi and M. Ioannidou (supra n.2), 543.

⁶⁰ European Commission, XXVIIth Report on Competition Policy 1997, available at http://ec.europa.eu/competition/publications/annual_report/1997/broch97_en.pdf (accessed 08.08.2016), para 77.

⁶¹ Commission Press Release IP/01/1159, 31.07.2001 available at http://europa.eu/rapid/press-release_IP-01-1159_en.htm?locale=en (accessed 08.08.2016); Commission Press Release IP/01/635, 3.05.2001 available at http://europa.eu/rapid/press-release_IP-01-635_en.htm (accessed 08.08.2016); Commission Press Release IP/01/650, 7.05.2001 available at http://europa.eu/rapid/press-release_IP-01-650_en.htm (accessed 08.08.2016); Commission Press Release IP/01/690, 14.05.2001 available at http://europa.eu/rapid/press-release_IP-01-690_en.htm (accessed 08.08.2016); European Commission, XXXIth Report on Competition Policy 2001, available at http://ec.europa.eu/competition/publications/annual_report/2001/en.pdf (accessed 08.08.2016), para 64.

⁶² J.H.J. Bourgeois and S. Strievi (supra n.7), 247.

⁶³ Commission Press Release IP/01/1796, 11.12.2001 available at http://europa.eu/rapid/press-release_IP-01-1796_en.htm?locale=en (accessed 08.08.2016).

whereas clients of the banks that were not part of the commitment decision continued to pay higher charges.⁶⁴

In Belgium, in the *Banksys* case,⁶⁵ the competition authority agreed to commitments offered by Banksys, which put to an end discriminatory prices and led to lower prices for small businesses. The commitments followed a private settlement between Banksys and the complainants, which was said to correspond to possible remedies suggested by the competition authority.⁶⁶ In addition, these commitments met the competition authority's concerns.⁶⁷

Bourgeois and Strievi state that there is no reason to limit the commitment to the reduction of fines in the future. They argue that in the abovementioned cases, the commitments could easily⁶⁸ have gone further and could have involved the reimbursement of the surcharge paid by consumers/customers in the past.

The Commission took such a step two years later after *Bank Charges Euro-zone* when it terminated its investigation in the *Phillips/Sony CD Licensing Program* case.⁶⁹ Amongst the commitments was the retroactive application of a reduced royalty rate. However, the Commission settled/terminated the case informally when 'after discussing the preliminary

⁶⁴ J.H.J. Bourgeois and S. Strievi (supra n.7), 247.

⁶⁵ Case CONC-I/O-00/0049: *Banksys SA and others*, available at http://economic.fgov.be/organization_market/competition/jurisprudence/jurisprudence_12006Io12.pdf (accessed 08.08.2016).

⁶⁶ Ibid., footnote 14 of the decision.

⁶⁷ J.H.J. Bourgeois and S. Strievi (supra n.7), 258.

⁶⁸ Ibid.

⁶⁹ Cases COMP/C-3/37.228 *Ingman Disc and VD v Philips and Sony*; COMP/C-3/37.561 *Pollydisc v Philips and Sony*; COMP/C-3/37.707 *Broadcrest and Others v Philips and Sony*; COMP/C-3/38.787 *Philips and Sony: notification of the standard license agreement*. European Commission XXXIIIrd Report on Competition Policy, 2003, available at http://ec.europa.eu/competition/publications/annual_report/2003/en.pdf (accessed 08.08.2016) 197; Commission Press Release IP/03/1152, 7.08.2003 available at http://europa.eu/rapid/press-release_IP-03-1152_en.htm?locale=en (accessed 08.08.2016).

analysis with the parties, in view of the alleged abusive behaviour and the cooperative attitude of all the parties involved, a two-step solution was envisaged, the result of which turned out to be equivalent to the one that could have been obtained through more formal proceedings.⁷⁰ The first step consisted of allowing time for complainants and alleged infringers to reach a settlement. This led to almost all complainants withdrawing their complaints. The second step consisted of Sony and Phillips notifying new agreements, that is, improved versions of the agreements that were under scrutiny. The retroactive application of the reduced royalty rate was one of the improvements. In addition, Philips and Sony undertook to grant a one-time credit of \$10000 on royalties to each EEA licensee, which amounted to about \$800000.⁷¹ Bourgeois and Strievi believe that the voluntary nature of this type of compensation would be an efficient and speedy way of contributing both to remedying possible anticompetitive behaviour and indemnification of victims.⁷²

Following cases such as *Alrosa*,⁷³ the main criticism of commitment decisions is that the severely limited judicial review may result in a vicious circle: legal uncertainty about outcomes in the infringement procedure makes commitment decisions attractive for undertakings.⁷⁴ The resulting decrease in the number of infringement decisions would breed further legal uncertainty about what the law demands.⁷⁵ This leads to even greater demand for commitment decisions and accordingly fewer infringement decisions. Lacking authoritative statements of the law, undertakings look to previous commitment decisions

⁷⁰ European Commission, XXXIIIrd Report on Competition Policy, 2003, available at http://ec.europa.eu/competition/publications/annual_report/2003/en.pdf (accessed 05.09.2015), 199.

⁷¹ J.H.J. Bourgeois and S. Strievi (supra n.7), 248.

⁷² Ibid.

⁷³ Case 441/07 *European Commission v Alrosa Co. Ltd.*, [2010] 5 C.M.L.R. 11.

⁷⁴ F. Wagner-Von Papp, *Best and even better practices in commitment procedures after Alrosa: The dangers of abandoning the 'struggle for competition law,'* (2012) 49(3) C.M.L.R. 929, 931.

⁷⁵ Ibid.

and non-binding guidelines to estimate the threat points in the bargaining process.⁷⁶ This reliance on 'quasi-case law' increases the Commission's discretion in future negotiations. The Commission, in turn, accommodates increased demand for commitment decisions so as to profit from the increased discretion it enjoys, for example in framing proactive remedies.⁷⁷ The incentives for the Commission to resort to the commitment procedure are especially strong in those cases in which the benefit of legal certainty provided by an infringement decision would be particularly great, namely involving cases with novel legal issues. There is the danger that the struggle for law is abandoned in favour of discretionary case-to-case negotiations.⁷⁸

Commitment procedures are a good way of transforming third parties' claims into additional concessions from the undertakings. One of the incentives for undertakings to offer commitments is the potential to avoid private litigation in the form of follow-on actions in the wake of an infringement decision. The Commission is able to transform any deterrent effect of future private litigation into a bargaining chip for exacting further reaching commitments in the public enforcement sphere.⁷⁹ Wagner Von Papp argues that this gives a curious twist to the Commission's efforts to strengthen private litigation, which ostensibly has the sole purpose of ensuring 'compensation', and not the purpose to deter.⁸⁰ Once private enforcement is strengthened, the Commission can transform the (strengthened) claims of parties seeking compensation into an additional bargaining chip to extract commitments, which furthers mostly the goal of deterrence, and will at best have an

⁷⁶ Ibid.

⁷⁷ In the infringement procedure, the case law of the Court restricts the Commission to imposing obligations that 'restore compliance with the rules infringed,' see e.g. Joined Cases 241 & 242/91 P, *RTE and ITP v Commission* [1995] E.C.R. I-743, at para 93.

⁷⁸ F. Wagner-Von Papp (supra n.75), 931.

⁷⁹ Ibid., 949.

⁸⁰ Ibid., Footnote 75.

indirect compensatory effect (unless the commitment procedure is used to compensate direct victims).⁸¹

Another issue with the commitment procedure is whether commitments are adequate to deal with third party competition concerns. Competition law inherently deals with externalities imposed on third parties and on the public interest. The offer of commitments does not in any way guarantee that third-party interests are well served. In the Commitment procedure, third party interests are to some degree represented by the Commission, aided by third-party comments in the Article 27(4) market test procedure.⁸² Nevertheless, the Commission may not be the best advocate for the public interest for several reasons when it proceeds along the line of commitment rather than infringement decisions. First, the Commission does not have the benefit of a full investigation into the facts, as it would have during an infringement procedure. Second, without this investigation, the assessment of proportionality of the remedies can only be assessed tentatively. Third, comments by third parties in the market test procedure may not reflect the full extent of the public interest at stake, especially if the negative externalities from any remaining competitive constraints are dispersed among many stakeholders with a low degree of consolidation. These reasons show that the Commission may well be a less reliable agent for third party interests and the public interests in the commitment procedure than it is during the infringement procedure.⁸³

The mere fact that certain sacrifices need to be made when substituting a commitment decision for an infringement decision is, of course, not decisive. The benefits of commitment decisions as a form of consensual dispute resolution are well known.

⁸¹ Ibid.

⁸² Ibid., 950.

⁸³ Ibid.

Commitment decisions are speedier and less costly. Speedier, because the Commission need not engage in time consuming fact finding missions for evidence that would hold up in court. Moreover, the negotiated remedies are more acceptable to all parties concerned, thus avoiding protracted litigation. This means that the authorities can concentrate their limited resources on serious infringements. There are also added benefits for the public, in that a lengthy investigation and drawn out court battle would render any remedy meaningless because competition would be choked off in the meantime, perhaps irrevocably.⁸⁴

The EU legislature chose not to implement any *ex ante* mandatory court supervision of commitment agreements. This can be contrasted with the US Tunney Act.⁸⁵ Even though the US procedure may often not be much more than a rubber-stamping of the negotiated solution, it may well have a disciplining effect on the negotiations and the transparency of the procedure.⁸⁶ The possibility of appealing commitment decisions in Europe is a very deficient substitute for *ex ante* substitution. First, there will usually be no appellant, because the addressees have no interest in, and possibly not even the opportunity of appealing the decision. Second, third parties will not necessarily have *locus standi*.⁸⁷

It is equally important to clarify the limitations that commitment decisions have put on private parties and the NCAs. Recital 13 of Regulation 1/2003 states that:

'Where, in the course of proceedings which might lead to an agreement or practice being prohibited, undertakings offer the Commission commitments such as to meet its concerns, the Commission should be able to adopt decisions which make those commitments binding

⁸⁴ Ibid., 959.

⁸⁵ 15 US Code § 16.

⁸⁶ F. Wagner-Von Papp (supra n.74), 967.

⁸⁷ Ibid.

on the undertakings concerned. Commitment decisions should find that there are no longer grounds for action by the Commission without concluding whether or not there has been or is still an infringement. Commitment decisions are without prejudice to the powers of competition authorities and courts of the Member States to make such a finding and decide upon the case. Commitment decisions are not appropriate in cases where the Commission intends to impose a fine.⁸⁸

Article 22 states that:

'In order to ensure compliance with the principles of legal certainty and the uniform application of the Community competition rules in a system of parallel powers, conflicting decisions must be avoided. It is therefore necessary to clarify, in accordance with the case-law of the Court of Justice, the effects of Commission decisions and proceedings on courts and competition authorities of the Member States. Commitment decisions adopted by the Commission do not affect the power of the courts and the competition authorities of the Member States to apply Articles [101] and [102] of the Treaty.'

The supposedly unaffected opportunities for control by NCAs and private parties result in the misleading assumption that commitment decisions are little more than a qualified closing of the file.⁸⁹ *De facto*, however, it appears unlikely that private enforcement and enforcement by the NCAs will act as a sufficient check on infringements that escape the Commission's attention in the commitment procedure; and where it is the commitments themselves that have anticompetitive effects, this safety valve does not even exist *de iure*.⁹⁰

The practical effect of a commitment decision is therefore akin to a negative clearance or

⁸⁸ Regulation 1/2003 on the implementation of the rules on competition laid down in Articles [101 and 102 TFEU] OJ L 1 4.1.2003 1.

⁸⁹ F. Wagner-Von Papp, 967.

⁹⁰ *Ibid.*

an individual exemption under the notification system than to a closing of the file, because third-party actions are largely forestalled by the commitment procedure.⁹¹ The Commission should realise the responsibility that comes with this *de facto* monopoly, a responsibility that is obscured by the misleading pronouncements in Recitals 13 and 22.⁹²

It is submitted that the most favourable method of achieving Public Compensation is through an adaptation of the Commission's fining procedure. A straightforward set of guidelines without the rigmarole associated with the quantification of damage in private actions would mean a speedier and more efficient mode of delivering compensation to injured parties, whether direct or indirectly. Under the commitment procedure, there would be a greater level of legal uncertainty and a depleting number of formal decisions which would lead to a coherent body of law. Moreover, the limited review of commitment would hamper transparency. In addition, without the benefit of a full infringement investigation, the authorities may fail to gauge the actual level of harm caused by the anticompetitive conduct.

5.7 Compensation

Regarding the actual compensation itself, there are practical issues which need further consideration: to whom should compensation be paid and how should it be paid.

One questions whether only the victims of an infringement that can prove their loss should benefit from this remedy. Bourgeois and Strievi submit two reasons why compensation should be granted to victims in a wider sense, i.e. to past and even future consumers.⁹³

⁹¹ Ibid.

⁹² Ibid.

⁹³ J.H.J. Bourgeois and S. Strievi (supra n.7), 244.

First, this measure is not a substitute for private damages actions but part of the public enforcement of competition rules. As such it is intended to have a wider scope than individual interests. Second, a requirement of individual proof of harm would render the procedure too burdensome, ultimately putting at risk the effectiveness of the entire public action. Bourgeois and Strievi state that Public Compensation, particularly in terms of its form, should be flexible and adapted to the particular circumstances of each case. One can imagine for instance that the infringer might wish to offer to grant discounts to consumers adding up a total predefined amount, or to reduce prices, or even to offer goods or services for free up to a certain amount.⁹⁴ Referring back to previous chapters, one can see the difficulties associated with mass consumer claims in the private sense. The problems with consumer apathy, proof of purchase and consumer willingness to take active steps to claim their individual compensation reveal the need for a wider interpretation and application of compensation. With reference to the past chapter on the appropriate remedy for consumers, where Public Compensation is unlikely to be claimed by each individual member of the class, the *cy-pres* doctrine could be applied to the residue. This money could, *inter alia*, be reinvested to help finance private litigation by consumer associations. This should be welcomed given the limitations on litigation funding in the EU.

5.8 Concluding remarks on damages claims and public compensation

Public compensation should never be a replacement for private enforcement. It merely forms a reactive tool addressing current shortfalls in access to compensation. Accordingly, injured parties should not be barred from launching damages actions in court. When Public Compensation is channelled to a collective, it would often be the case that it does not

⁹⁴ A class action against some department stores in the US accused of price fixing was settled in the US after the stores agreed to give away free cosmetics amounting up to \$175 million. Only one free product per person, cited by J.H.J. Bourgeois and S. Strievi (*supra* n.7), Footnote 13.

directly compensate the injured party for its damages. This is because Public Compensation serves as a vehicle for corrective justice in the wider sense, compensating a collective with a sufficient nexus to the violation, rather than compensating the individual. In those cases, the injured parties may still be incentivised to claim damages in courts. Where part of the Public Compensation is directly paid to these parties, that sum could be deducted from any future compensation they obtain through the court.

One should accept that in some cases, the availability of Public Compensation may curtail the incentive to launch a follow-on damages claim. Recall, however, that the proposed mechanism is reactive in nature and stems from limited access to judicial remedies in competition cases. Accordingly, the possible limited adverse effect on some claims should be balanced against the clear benefit flowing from Public Compensation.

CHAPTER 6 THE APPROPRIATENESS OF AN EU COMPETITION COURT

6.1 Introduction

The diversity of the EU Member States' approach towards collective redress leads to the potential for forum shopping and irreconcilable judgments. Consumers from different Member States who have suffered harm from the same anticompetitive behaviour may be treated in a dissimilar manner depending on the willingness of national courts to hear and recognise foreign collective claims. One solution could be to have all of the cross-border collective claims for damages suffered as a result of anticompetitive behaviour heard in a centralised supranational EU Competition Court.

It is acknowledged from the outset that this proposal poses many challenges. First, it presents a radical change in the way private claims are heard. Traditionally, private enforcement of competition law is a matter for the national courts. EU Courts do not adjudicate private actions. Second, it may be difficult to gather the support of the Member States for such a forum when the Commission has firmly underlined a preference to try to harmonise as much as possible the national regimes. Third, while there are examples of specialist supranational EU courts which may act as a precedent for the formation of an EU Competition Court, they are not without their limitations. Recently the EU Civil Service Tribunal has been abolished and its judges returned to the General Court in order to tackle the mounting pressure of the EU judiciary's workload. Meanwhile, the creation of a supranational patent court has been a project which has spanned decades due to numerous failures to reach a consensus. The latest offering in the form of the Unitary Patent Court has faced staunch opposition from certain Member States and remains heavily criticised by stakeholders. The development of these courts and the challenges that they have faced shall

be examined in order to provide an insight into the potential difficulties that the creation of an EU Competition Court may encounter. Lastly, one would need to resolve the issue of the type of cases before a new Competition Court. Construed narrowly, the Competition Court would solely be responsible for competition matters involving cross-border collective redress. Interpreted in a broader sense, a Competition Court may have the power to adjudicate over all cross-border private competition cases. The final option would be to have a Competition Court which entertains both public and private matters.

Notwithstanding these challenges, it is argued that an EU Competition Court would be the most effective way of establishing consistent decision making and equal treatment of victims from different Member States in mass harm situations. It has been seen that cross-border litigation becomes much more complicated when a cross-border element is introduced. This is particularly the case from the perspective of the conflicts-of-laws. These rules were originally designed on the basis that litigation takes place between one specific defendant and one specific claimant. It is arguable that they do not naturally 'fit' with cross-border mass harm situations. Even if these rules were overhauled to take greater account of cross-border collective redress, it is difficult to design rules which are fair and equal to every party to the litigation in every situation. The Brussels I Recast Regulation, the Rome II Regulation, the Directive on Damages Actions and the Recommendation on collective redress provide limited guidance, if any. The current situation is that cross-border collective redress is subject to a regime which is based on the 'first-in-time' rule. The issue of forum shopping becomes inflamed with a race to the court in order to 'win' the right to proceed litigation in the claimant's (or indeed the natural defendant's) forum of choice. In some cases, jurisdiction can be founded exorbitantly. The first claimant collective to file in a suitable forum will be rewarded by being able to define the scope of the action based on the claims in their pleadings. This may prejudice the collective

members who have not decided to opt-in, members who have opted-out, members who have failed to opt-out, and other group claimants in parallel or future collective proceedings.¹ A single forum could help to address this issue. It would enhance legal certainty. Claimants would be certain of where they can bring an action. Defendants would have foresight of where they can be sued.

Moreover, even with the advent of ADR and more specifically collective arbitration, there are still significant shortfalls in providing effective end-consumer redress. The US experience of commerce's reluctance to refer cases to class arbitration in their contracts and the US Supreme Court's steadfast preference to enforce class action waivers paint a dismal picture of how cross-border collective arbitration may operate in the EU.

In addition, while public enforcement is the default mode of enforcement in the EU to which private enforcement is somewhat the poor relation, the US experience shows the benefits that private enforcement can have as a complementary mechanism in terms of deterrence as well as compensating victims. An EU Competition Court facilitating cross-border collective redress could elevate the role of private enforcement in the EU.

It would appear that there are several ways in which to create an EU Competition Court. The first option would be to integrate a specialist panel within the existing framework of the General Court. This could be performed by way of a specialist tribunal under Article 257 TFEU or, alternatively by forming a specialist chamber within the General Court.

Another option would be to create a new EU Competition Court. The final option would be

¹ J. Stefanelli, *Parallel litigation and cross-border collective actions under the Brussels I framework: Lessons from abroad*, in D. Fairgrieve and E. Lein, *Extraterritoriality and collective redress*, (OUP (2012)), 9.15.

to create a ‘World Competition Court’ of which the EU is a Member. Each option shall be considered in turn.

It will be argued that a new EU Competition Court would be the most desirable option given the fact that a specialist tribunal or chamber attached to the General Court would be at odds with the basic principle that the General Court and CJEU are administrative courts. Moreover, the EU Courts have been under increasing pressure to tackle a growing workload.

6.2 A specialist tribunal under Article 257 TFEU

The first option is to create an EU Competition Court as a specialist court within the General Court. The legal basis for this would be Article 257 TFEU which enables the establishment of specialist tribunals attached to the General Court to hear and determine at first instance classes of action or proceedings in specific areas. Article 257 TFEU gives the General Court jurisdiction to hear and determine actions or proceedings brought against decisions of such specialist courts.

The concept of specialist courts annexed to the General Court was established following the Nice Intergovernmental Conference.² There, a consensus was reached that the existing court structure of the European Union had become increasingly overloaded.³ The creation of the General Court in 1989 aimed to alleviate the overloading of the CJEU by concentrating on judicial review of competition cases and employment disputes between

² The Intergovernmental Conference of 2000 reached agreement on the institutional questions and on a range of other points, namely a new distribution of seats in the European Parliament, more flexible arrangements for enhanced cooperation, the monitoring of fundamental rights and values in the EU, and a strengthening of the EU judicial system.

³ H. Cameron, *Establishment of the European Union Civil Service Tribunal*, (2006) 5 Law & Prac. Int'l Cts. & Tribunals 273, 273.

European civil servants and the European Institutions that employed them, i.e. staff cases. However, despite this, the Report by the Working Party on the Future of the Economic Communities' Court System (Due Report) of January 2000,⁴ found evidence of a serious crisis in the Union courts.⁵ The Due Report found, *inter alia* a steady rise in the number of cases brought before the Union Courts and a lengthening of time to deal with cases. The Due Report considered that these problems would only get worse in the future. A major reason for this was the enlargement of the Union. One of the solutions proposed by the Due Report was that certain categories of cases should be dealt with according to special rules. The first of the possible categories of cases set out was staff cases, for which an 'internal institutional complaints tribunal' should be set up.⁶ The Due Report also recommended four other categories. These were cases of intellectual property, judicial cooperation in civil matters, competition, and justice and home affairs. At this point, we see a brief mention of a potential competition tribunal attached to the General Court.

Staff cases were probably given preferential treatment on account of the fact that they were deemed to be of a relatively uncontroversial (politically, at least) nature. They are brought against the EU institutions without generally involving the Member States themselves. The other most obvious reason was the increasing volume of staff cases before the General Court. Figures available from the Court showed that by the end of 1990, of the 143 cases pending before the General Court, 63 were staff cases. In 1997, after the accession of Austria, Finland and Sweden, the figure for the year increased to 136 of 481 cases. In 2004, the number of staff cases pending was 237 of 1174 cases. To be able to section off that number of cases would be a significant step in reducing the case-load of the General

⁴ Report by the Working Party on the future of the European Communities' Court System, (Due Report), January 2000, available at http://ec.europa.eu/dgs/legal_service/pdf/due_en.pdf (accessed 22/4/2016).

⁵ *Ibid.*, 2.

⁶ H. Cameron (*supra* n.3), 273.

Court.⁷ The increase in the jurisdiction of the General Court under aspects of the Nice Reforms made it all the more imperative that it lose some of its existing caseload.⁸

In 2004, the Council adopted Council Decision 2004/752⁹ approving the establishment of the EU Civil Service Tribunal. The General Court would take over the role of being the court of appeal in those cases from the CJEU, so that the CJEU was essentially freed from dealing with staff cases.¹⁰ Unfortunately, the Civil Service Tribunal was short-lived. Just over a decade following the inception of the Tribunal, the EU's judiciary began to buckle under growing pressure. The General Court continued to face a growing tide of new cases every year, and the backlog continued to swell.¹¹ The number of new cases per year before the General Court increased from fewer than 600 prior to 2010 to 912 in 2014, resulting in an unprecedented 1270 pending cases at the end of 2015.¹²

By the end of 2015, the Council adopted a Regulation reforming the General Court.¹³ The aim of this reform is to enable the General Court to face an ever-increasing workload and ensure that legal redress in the EU is guaranteed within a reasonable time. 'The reform of the General Court reinforces an institution that has provided significant impetus to European integration,' commented Felix Braz, Minister for Justice of Luxembourg and President of the Council.¹⁴

⁷ Ibid., 274.

⁸ Ibid.

⁹ 2004/752/EC Decision establishing the European Union Civil Service Tribunal, OJ L 333 9.11.2004 7

¹⁰ N. Lavranos, *The new specialised courts within the European judicial system*, (2005) 30 E.L. Rev. 261, 265.

¹¹ D. Hadroušek and M. Smolek, *Solving the European Union's General Court*, (2015) 40 E.L. Rev. 188, 188.

¹² Press Release, *Council of the EU, Court of Justice of the EU: Council adopts reform of the General Court*, 03.12.2015, available at <http://www.consilium.europa.eu/en/press/press-releases/2015/12/03-eu-court-of-justice-general-court-reform/> (accessed 11.07.2016).

¹³ Regulation 2015/2422 amending Protocol No 3 on the Statute of the Court of Justice of the European Union, OJ L 341 24.12.2015 14.

¹⁴ Press Release (supra n.12).

The reform provides for a progressive increase in the number of judges at the General Court and for the merging of the EU Civil Service Tribunal with the General Court. At the entry into force of the reform, the number of judges will increase by 12. In 2016, the seven posts of judges at the Civil Service Tribunal are being transferred to the General Court, to which nine further judges will be attributed three years later. In total, this means 21 additional judges at the end of the process.

The increase in the number of judges will allow the General Court to deliver judgments within a reasonable time, in conformity with Article 47 of the Charter of Fundamental Rights. It will also allow the General Court to deliver more cases in chambers of five judges or in a grand chamber which will enable a more in-depth deliberation on important cases. Increasing the number of judges by 21 and merging the Civil Service Tribunal with the General Court would cost €13.5 million per year. These costs compare favourably with the €26.8 million claimed in several actions for damages due to the delay in judgment and will allow the EU's first instance jurisdiction to fulfil its functions within the time limits and the quality standards which European citizens and companies are entitled to expect in a Union based on the rule of law.¹⁵

The creation and abolition of the EU Civil Service Tribunal is relevant on the basis that a Competition Court under Article 257 TFEU would now seem an unlikely prospect. It sends a message that Article 257 TFEU, i.e. the idea enshrined therein, that the EU's judiciary should be further developed in particular through the creation of specialist courts, is dead and that the wish of the authors of the Treaties to remain unfulfilled.¹⁶

¹⁵Ibid. See also M. Abenhaim, *Epilogue, at last, on the reform of the General Court*, Kluwer Competition Law Blog, 26.01.2016, <http://kluwercompetitionlawblog.com/2016/01/26/epilogue-at-last-on-the-reform-of-the-general-court/> (accessed 06.09.2016).

¹⁶ D. Hadroušek and M. Smolek (supra n.11), 199: In the run-up to the Treaty of Nice, *Presidency report to the Feira European Council*, 15.06.2000, CONFER 4750/00, paras 8 and 9: 'Delegations were in favour of creating specialised judicial boards of appeal, particularly for staff matters and for actions arising from the

Nice was not the only time a specialist tribunal under Article 257 TFEU was considered. Last decade, the Confederation of Business Industry (CBI) suggested the creation of an EU Competition Court following concerns about judicial review of merger control cases.¹⁷ This was considered in the UK Parliament's Select Committee on the European Union Fifteenth Report.¹⁸ The CBI argued that one way to create an EU Competition Court would be through the creation of a specialist tribunal under Article 257 TFEU. The new court would have nine full time judges and would hear cases in chambers of three. It was proposed that the Court's jurisdiction would not be limited to merger cases as there would not be enough business from merger cases to justify a brand new court. It was submitted that the Court would therefore welcome all kinds of competition cases and the CBI believed that with the increased emphasis on private enforcement of competition law, it would perform an important function in assisting this development in the Member States.¹⁹ These comments could provide the basis upon which to argue that an Article 257 TFEU Competition Court could assist in the development of EU cross-border collective redress.

The CBI's proposals on the basis of Article 257 TFEU were struck down. Moreover, the need for a new court more generally (at least within the merger setting) was contested

Office for Harmonisation in the Internal Market in Alicante. There was a consensus on making provision for appeals to the [General Court] against decisions taken by these boards of appeal. The Council should also be given the power to provide for such appeals by means of the procedure for amending the Protocol on the Statute of the Court of Justice.' In this light, the abolition of the Civil Service Tribunal, which 'is a success story and [raises] no concerns regarding its ability to manage its cases load' (see European Union Committee, House of Lords, *The Workload of the Court of Justice of the European Union* (2011), para 56), would clearly be a step back in itself.'

¹⁷ Significant doubts as regards the effectiveness of the mechanism of judicial control of merger decisions emerged with the prominent *Airtours* (Case T-342/99, *Airtours plc v Commission*, [2002] E.C.R. II-2285) and *Tetra Laval* (Case T-80/02, *Tetra Laval v Commission*, [2002] E.C.R. II-4519; Case 12/03 P, [2005] E.C.R. I-1113) judgments. The length of time that the General Court took to rule over the validity of the Commission's decision prohibiting the merger between First Choice and Airtours and the fact that the concentration was subsequently abandoned supported the argument that there was no such thing as an 'effective judicial remedy' against decisions prohibiting concentrations.

¹⁸ Great Britain, Parliament, House of Lords, *An EU Competition Court: report with evidence, 15th report of session 2006-07*, The Stationery Office, 23.04.2007.

¹⁹ CBI Brief, *The need for an EU Competition Court*, 15.6.2006.

greatly. Neither the Commission nor the General Court saw the need for a new court. M. Michel Petite, EU Commission Legal Service commented, ‘we believe the CBI’s case to be thin.’²⁰ The Select Committee understood that Merger Control brought with it many problems which needed to be addressed but disagreed that a new Court was the best way forward, instead opting to look for less institutionally radical solutions.²¹

It was also felt that the CBI’s proposal for a specialist court with responsibility for all competition cases except for state aid would risk negating the very cornerstone of the CBI’s arguments, in that the Court’s resources would be taken up with more numerous non-merger cases that it could not provide the desired speedy process. If, however, the Court only dealt with merger cases, it would risk the accusation of being an inefficient use of resources at times when fewer merger appeals were brought.²² This raises an interesting question for the purposes of this thesis regarding the types of cases before the proposed Competition Court. The Court could hear only collective cases (which may, at least in the formative years be quite small in numbers and thus be seen as an insufficient justification for allocating resources) or a broad range of competition cases.

The CBI’s proposal for an EU Competition Court also considered the fact that the UK already had a specialist competition tribunal. However, in the EU Select Committee’s Report the extent to which the parallel between the proposed judicial panel and the UK Competition Appeal Tribunal (CAT) could be justified was doubted. The Committee recognised significant differences between the enforcement frameworks laid down by the TFEU and the UK Competition Act. Sir Christopher Bellamy, former Chair of the CAT, considered that the CAT enjoyed three advantages vis-à-vis the General Court.

²⁰ House of Lords, *An EU Competition Court* (supra n.18) para. 46.

²¹ *Ibid.*, para. 4.

²² M. Israel, *Jury out on EU Competition Court*, (2006) 64 *Euro. Law*. 3.

First, the CAT had started with a ‘completely clean sheet’ and functioned according to tailor-made procedural rules. Second, unlike the General Court, it only had one working language. Third, in numerical terms the case law did not remotely equate to that pending before the General Court.²³ The major difference was, however, found in the scope of the power of judicial control exercised by the CAT, whereas the General Court’s scrutiny is limited to a ‘judicial review-type’ control in accordance with Article 263 TFEU.²⁴ The inquiry conducted by the EU Select Committee raised significant doubts as regard the scope of jurisdiction of the proposed Competition Court, its potentially far-reaching implications for judicial and overall institutional structure of the EU and, more generally, its viability in terms of workload and resources.²⁵

In theory, an EU Competition Court is possible by way of Article 257 TFEU. However, in reality it is an unlikely proposition. While the Nice Intergovernmental Conference envisaged Article 257 TFEU as a vehicle for creating a tribunal for *inter alia* competition matters, the increasing workload and the abolition of the only existing specialist tribunal sends a clear signal not to expect any further use of Article 257 TFEU in the foreseeable future. Moreover, the idea that a specialist court attached to the General Court for these types of cases would not fit well with the administrative characteristics of these courts. The EU Courts have never been involved in the direct enforcement of private rights. While a Competition Court with collective redress powers is desirable in order to provide coherent and equal treatment of victims of mass harm, this is not the preferred method.

²³ House of Lords (supra n.18) para. 135.

²⁴ Ibid.

²⁵ Ibid.

6.3 A specialist chamber within the General Court

The second option is to create an EU Competition Court as a specialist chamber within the General Court. The General Court's Rules of Procedure allows the Court to lay down certain criteria by which cases are to be allocated to each of its chambers.²⁶ This was also considered following the CBI's request for an inquiry by the House of Lords Select Committee on the EU on the possibility of establishing an EU Competition Court. It was suggested that competition cases could be heard by a specialised chamber within the General Court to ensure 'expertise' and 'continuity' in the adjudication of these cases.²⁷ It is argued that expertise and continuity would benefit matters involving end-consumer collective redress.

This proposal was initially welcomed by some stakeholders: it was suggested that competition law had reached a sufficiently 'mature' stage in its development as to constitute a relatively unitary, albeit still integral, aspect of EU law and could therefore be feasibly and efficiently applied by the same group of judges to maintain its inner consistency.²⁸

Establishment of a specialist chamber within the General Court received support from industry and legal practitioners. For example, the International Business Association submitted that this solution would be 'comparatively simple, and carries both legal and practical advantages over the creation of a separate Competition Court.'²⁹ The proposal also received support from those favouring a new court. The International Chamber of

²⁶ *Rules of Procedure of the General Court*, OJ L 105 23.4.2015 1.

²⁷ A. Andreangeli, *Private claims as a 'special case'* in M. Danov, F. Becker, P. Beaumont, *Cross-border EU competition law*, (Hart Publishing, (2013)), 119.

²⁸ *Ibid.*

²⁹ House of Lords (supra n.18), para. 113.

Commerce (ICC) considered the specialist chamber to be ‘a sensible interim solution’ having regard to the time which would be needed to set up a Competition Court.³⁰ The CLA thought that the creation of a specialist chamber ‘would be a step in the right direction and should be instigated immediately.’³¹

Others, however, were more critical of the idea. Sir Christopher Bellamy pointed to possible negative consequences:

‘Effectively, that means you have got to take six judges out of the life of the [General Court] and tell them to get on with competition cases. It is probably the case that among those six would be at least two judges from major Member States who would, as it were, peel off and do competition. Now if you assume one of those judges might be the United Kingdom judge, for example, what you have effectively achieved is to take the United Kingdom judge out of the [General Court], i.e. he is not participating, or hardly participating, in the other 900 cases the Court is doing because he has been told to specialise in competition. Whether or not that is an entirely desirable development, I am not at all sure.’³²

The Commission doubted whether the Court would favour the idea. M. Petite stated:

‘The more specialised chamber you have the less flexibility you have in turning the cases to a chamber or to another. Would the judges easily accept not to be in the chamber dealing with competition cases? I do not know. Most of them want to remain in a wide panel of types of cases, so that will be an internal problem for the General Court.’³³

³⁰ Ibid.

³¹ Ibid., para. 114.

³² Ibid., para. 118.

³³ Ibid., para. 119.

Temple Lang and O'Donoghue were more positive:

'[C]ourt specialisation might possibly have disadvantages, such as specialised judges' loss of perspective, and issues of status as between judges in different chambers. But we believe that these risks are not significant or likely to outweigh the gains in efficiency and consistency of decision-making that can be expected to result from having a specialised chamber and specialised judges.'³⁴

At the time of the House of Lords EU Select Committee consultation on the CBI's proposals for a Competition Court, there were also significant doubts with regards to the level of work and the number of judges. One answer was to appoint more judges. On the face of it this would seem a simple and straightforward way of addressing the issue but history does not provide a helpful precedent. In the past, the appointment of extra judges has resulted in serious political difficulty. In 1999, the General Court requested an additional six judges, allowing for two extra chambers to be set up in order to deal with trade mark cases. The Council of Ministers agreed in principle to the increase. However, as Sir Christopher Bellamy noted, 'The proposal got nowhere because no-one could agree on who the other six would be and which privileged states would have a second judge.'³⁵ Judge Vesterdorf commented that, 'the case died an undignified death before the Council.'³⁶

However, at the end of 2015, the Council decided to reform the General Court. The aim of this reform was to enable the General Court to face an increasing workload and to ensure

³⁴ Ibid., para. 120.

³⁵ Ibid., para. 140.

³⁶ Ibid.

that legal redress in the EU is guaranteed within a reasonable time.³⁷ The latest increase in the number of judges involved more than four years of debate. The President of the CJEU initially proposed to increase the total number of judges by 12 at the General Court, a figure which he later changed to 9, in response to cost concerns. When Member States could not agree that there be a departure from the pre-existing equality in numbers of judges from each Member State, the President simply adapted the proposal to provide for a doubling (to 56) of the number of judges. In June 2015, realising the urgency of the situation, and perhaps more conscious of the delays at the General Court, the Council accepted the revised proposal and sent it to the European Parliament.

This proposal was met with some fierce opposition largely by the *Rapporteur* on the dossier, Antonio Marinho e Pinto. He criticised a ‘deep contempt for European taxpayers’ money’ and argued that the proposed reforms amounted to an unnecessary increase in spending, ‘at a time when the EU is imposing severe austerity measures to balance the Member States’ budgets.’³⁸ There was also great criticism of the lack of a proper impact assessment and questioning of the figures provided by the CJEU on the number of outstanding cases before the General Court and their average duration.³⁹ Ultimately, despite Marinho e Pinto’s opposition, the proposal to double the number of judges was supported and passed by the European Parliament and the Council.

The fact that extra judges are coming to the General Court could weigh in favour of allocating some of them to a specialist competition chamber. However, even this addition may still not be enough for some to be persuaded. It may be pointed out that routinely the General Court already tends to concentrate, thanks to its informal organisation practice

³⁷ Press Release (supra n.12).

³⁸ M. Abenhaim (supra n.15).

³⁹ Ibid.

arrangements, competition cases in certain chambers. It also seeks to ensure that at least one judge would be an expert in dealing with these questions.⁴⁰ Thus it has been argued that entrenching these arrangements and thereby instituting officially specialised chambers would not significantly contribute to the swift adjudication of competition cases and could even jeopardise the Court's efficiency by making case allocation excessively rigid.⁴¹ Similar concerns have been raised by one of the members of the General Court. Judge Irena Pelikanova observed that the Court in recent years has seen itself responding effectively to the challenges posed by the technical and fact-intensive nature of competition and merger cases, by adopting a range of practices designed to provide sufficient expertise on the bench for each of these cases. Therefore, she doubted that institutionalising these arrangements would bear significant benefits for the Court's workload and suggested that adopting this option could result in dampening the efficiency of adjudication.⁴² More generally, she suggested that any reform impacting on the normal rotation of judges across the chambers and on the way cases were assigned to each of them should be treated with caution to avoid taking away limited resources from the functioning of the already stretched General Court.⁴³

Moreover, while this chapter talks of creating a Competition Court, it is submitted that the General Court was in itself, essentially established as a 'Competition Court' and, even taking into account the pressure stemming from having to be a 'general' court of first instance, has been able to discharge the function thoroughly.⁴⁴ From its inception, many of the Members of the General Court have been 'competition lawyers' with a high degree of

⁴⁰ A. Andreangeli (supra n.27), 119.

⁴¹ H. Gilliams, *Modernisation: from policy to practice*, (2003) 28(4) E.L. Rev 451, 453.

⁴² A. Andreangeli (supra n.27), 119.

⁴³ Ibid.

⁴⁴ Written evidence submitted by Sir David Edward to the House of Lords Select Committee on the EU, Subcommittee E, 7-8.

expertise in the field. Of particular note are José Luis da Cruz Vilaça,⁴⁵ Christopher William Bellamy,⁴⁶ Virpi Tiili,⁴⁷ Enzo Moavero Milanesi,⁴⁸ Nils Wahl,⁴⁹ and Laurent Truchot.⁵⁰ Current members continue that trend including Irena Wiszniewska-Bialecka,⁵¹ Alfred Dittrich,⁵² Marc van der Woude,⁵³ Eugène Buttigieg,⁵⁴ Carl Wetter,⁵⁵ Constantinos Ilipoulos,⁵⁶ and Ian Stewart Forrester.⁵⁷ There is an argument in favour of allowing novel, underdeveloped fields (such as cross-border collective redress) to be heard before specialist judges of this standing in order to grow and develop a consistent, well-reasoned body of law. Given the paucity of cross-border collective claims, there is no guarantee that under the current decentralised model, the judge in the national court seised of the case will have experience of dealing with complex competition cases (let alone those involving mass harm). In an area that lacks homogeneity, there is a strong case for

⁴⁵ Competition experience includes: lawyer at the Lisbon bar, specialising in European and competition law (1996-2012).

⁴⁶ Competition experience includes: barrister, Middle Temple; Queen's Counsel, specialising in commercial law, European law and public law; co-author of the three first editions of Bellamy & Child, *Common market law of competition*.

⁴⁷ Competition experience includes: member of the Competition Council (1991-94).

⁴⁸ Competition experience includes: Head of Cabinet of the Commissioner responsible for the internal market (1995-99) and competition (1999), Director, Directorate-General for Competition (2000-02).

⁴⁹ Competition experience includes: member of the Rådet för konkurrensfrågor (Council for Competition Law Matters) (2001-06).

⁵⁰ Competition experience includes: Deputy Section Head, then Section Head, in the Directorate-General for Competition, Consumption and the Combating of Fraud at the Ministry of Economic Affairs, Finance and Industry (June 1992 to September 1994).

⁵¹ Competition experience includes: Assistant Researcher at the Max Planck Institute for Foreign and International Patent, Copyright and Competition Law, Munich (award from the Alexander von Humboldt Foundation, 1985-86).

⁵² Competition experience includes: Adviser at the Federal Ministry of Economic Affairs, responsible for Community law and competition issues (1983-92).

⁵³ Competition experience includes: Rapporteur in the Directorate-General for Competition of the Commission of the European Communities (1987-89); Policy Coordinator in the Directorate-General for Competition of the Commission of the European Communities (1992-93).

⁵⁴ Competition experience includes: Ph.D. in Competition Law, University of London; Legal Advisor to the Ministry of Finance, the Economy and Investment on consumer and competition law (2000-2010), Legal Advisor to the Office of the Prime Minister on consumer affairs and competition (2010-2011), Legal Consultant with the Malta Competition and Consumer Affairs Authority (2012); author of numerous publications in the fields of competition law, consumer law, intellectual property and EU law.

⁵⁵ Competition experience includes: member of the competition law working group of ICC (International Chamber of Commerce) Sweden; Lecturer in competition law at Lund University and Stockholm University.

⁵⁶ Competition experience includes: member of the Hellenic Competition Commission (1992-2006).

⁵⁷ Competition experience includes: He has been involved in a number of leading cases including Case 241/9 *Magill* [1995] E.C.R. I-7791; Case 418/01 *IMS* [2004] E.C.R. I-5039, Case T-201/04, *Microsoft (compulsory licensing)*, [2007] E.C.R. II-3601, and Case 53/03, *Syfait v GlaxoSmithKline*, [2005] E.C.R. I-4609.

concentrating a specific area of law in the hands of a few, at the very least until it becomes developed and there is a culture of enforcement.

There are, however some issues associated with having a specialist chamber. For example, there may be considerable difficulties in identifying ‘pure’ competition cases to be assigned to the specialist court, not only due to the often complex nature of the facts, but also because this exercise could undermine the central role of competition law and the policy within the structure of the Treaties.⁵⁸

Another argument against the establishment of a specialist court chamber generally is based on its actual ability to relieve the General Court of a significant part of its workload. For instance, in 2009 the General Court completed 31 competition cases against a total of 439 cases. These figures may be compared with the case law in the field of intellectual property, which constitutes by far the ‘bulk’ of the General Court’s activity, with 169 closed files.⁵⁹

These trends seem to have remained unaltered in 2010 and 2011. According to the 2011 Report on the activity of the General Court respectively 79 and 39 new cases were launched in the field of competition law. These figures may be contrasted against, respectively, 207 and 219 new proceedings instituted in the area of intellectual property law. Thus, competition filings made about 15% of the 636 new cases lodged with the General Court in 2010, and in 2011 this percentage decreased to close to 8% of the total 722 new actions brought before the same court. By contrast, intellectual property remained

⁵⁸ Written evidence submitted by Sir Christopher Bellamy to the House of Lords Select Committee on the EU, Subcommittee E (supra n.18), 44.

⁵⁹ Annual Report of the General Court (2009), http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-05/ra09_stat_tribunal_final_en.pdf (accessed 13.7.2016), 169.

a prominent portion of the General Court's workload, making around 40% of the total new filings in both years.

Similar figures characterise the 'split' between competition and intellectual property completed proceedings. 38 competition cases were closed, compared with 180 intellectual property actions. In 2011, 100 competition actions were completed, higher than in the past few years, but still significantly lower than the 240 cases closed in the field of intellectual property. This difference appears even more marked if these figures are seen against the background of the total number of proceedings closed each year. In 2010 the General Court terminated a total of 527 cases, of which competition actions represented less than 10% and intellectual property cases numbered almost a third. In 2011, although the number of Article 101 and 102 TFEU decisions rose significantly, it was still in the region of 14%, whereas intellectual property decisions represented, once again, a third of the Court's decisions.⁶⁰ Recent figures confirm that with regards to intellectual property, there are around 100 to 300 cases per year. This is in contrast to 20 to 80 new cases per year in the field of competition law.⁶¹

The foregoing commentary shows that a specialist chamber presents a number of significant problems. First, it may risk insulating a key area of EU law from the overall legal system centred on the EU Treaties. Second, it has been shown that due to the make-up of the workload of the General Court, creating a specialist tribunal and thereby committing resources to this area of law that may be used across the board to deal with the whole array of appeals may not be sustainable. The analysis of the General Court's activity has indicated that it is not competition law, but rather intellectual property cases that

⁶⁰ Annual Report of the General Court (2011) http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-06/ra2011_activite_tribunal_en.pdf (accessed 13.7.2016).

⁶¹ D. Hadroušek and D. Smolek (supra n.11), 201.

generate the significant portion of the Court's case load. Consequently, it is suggested that the Member States' move towards the negotiation of the UPC and the unitary patent is not entirely surprising. It is possible to argue that this move can be read as evidence of a concern for efficient decision-making in these cases and for lightening the load pending before the EU judiciary, an issue which does not, however, seem to arise in relation to competition actions.⁶²

To establish a Competition Court as an integrated component of the EU General Court seems appealing at first glance. In practice, however, it poses many issues. The only specialist tribunal has been abolished and its judges transferred to the General Court in order to account for the latter's increasing case load. It seems unlikely that the same General Court would want to establish another specialist tribunal in the near future. Moreover, the likelihood is that most members of the General Court would prefer to have a more varied portfolio of cases rather than one involving matters of 'pure competition.' The General Court already allocates certain cases to specific chambers where at least one judge is an expert in a given field. There seems to be a feeling that anything more than this, i.e. chambers which exclusively preside over competition law matters could result in enforcement becoming unnecessarily inflexible and rigid. The General Court also considers itself very much, ever since its inception, as 'The Competition Court' and would appear to believe that while it exists as a 'general' court of first instance, it already deals with competition matters in an efficient and competent manner.

One also has to remember the scope of the current analysis. It considers the formation of an EU Competition Court with specific powers to hear cases involving cross-border

⁶² A. Andreangeli (supra n.27), 118; T. Lock, *Taking national courts more seriously? A comment on Opinion 1/09*, (2011) 36(6) E.L. Rev. 576, 578.

collective redress. This is a matter of private enforcement. Horizontal private rights are adjudicated by the national courts. It seems unlikely that the EU Judiciary, which follows a supranational administrative structure, would be willing to expand its jurisdiction to a court of first instance in private damages claims.

Aside from acknowledging that this is unlikely ever to happen, one recognises the positives of allowing the General Court to hear cross-border collective cases at first instance. The centralised nature of the proceedings would eradicate the possibility of forum shopping and irreconcilable judgments which exist at national level. Every EU consumer who has suffered from the same anticompetitive conduct would benefit from equal treatment regardless of their location in the EU. Cross-border collective cases would benefit from a central panel of experienced competition judges and a consistent body of case law.

6.4 A new EU Competition Court

A third option would be to create a new EU Competition Court which is not attached to the General Court. This would be most desirable as a new court would begin with a completely clean sheet rather than attempting to shoehorn private enforcement concerns into an administrative court system.

The first major issue would be whether the Union would have the power to create such an institution within the existing powers provided under the Treaties. The Union shall have exclusive competence in establishing the competition rules necessary for the functioning of the internal market.⁶³ It may be possible to argue that the Union could, in theory, create an

⁶³ Article 3(1)(b) TFEU.

EU Competition Court if it was ‘necessary for the functioning of the internal market.’

Securing agreement between the Member States may be difficult.

Moreover, it may be difficult to legislate for a Competition Court which has powers to adjudicate over cross-border collective redress. There is no explicit power for the EU to legislate on collective redress matters. That is why there was a non-binding Recommendation on collective redress rather than a Regulation or Directive. The Commission has been very reserved in its latest vision of collective redress. This is as a result of the very hostile view shared by some Member States and stakeholders towards the subject. There are fears of US-style class actions which have the potential to encourage abusive and vexatious litigation. There are concerns that the nature of the opt-out class action model is unconstitutional given that many Member State laws require putative claimants to be individually identified and consent to being part of the litigation. The Commission has previously received serious opposition in the European Parliament on the basis *inter alia* that it required mandatory ‘opt-out’ collective action procedures at national level.⁶⁴ It seems very unlikely that the same European Parliament would be in favour of supporting a centralised supranational forum with extensive powers of collective redress. Moreover, one could argue that the path towards harmonisation at Member State level has already been firmly laid. In the Communication from the Commission ‘Towards a European Horizontal Framework for Collective Redress,’⁶⁵ it was mentioned that several stakeholders recommended the creation of a specialist judicial panel for cross-border collective actions.⁶⁶ This has not been pursued. Instead, the Commission considers that the existing conflicts-of-laws rules should be fully exploited.⁶⁷ The EU advocates

⁶⁴ P. Boylan, *Draft Damages Directive: Off the Agenda for Now*, Practical Law, (2009) available at <http://uk.practicallaw.com/8-500-5687?service=competition> (Accessed 6.7.2015).

⁶⁵ Commission Communication, *Towards a European horizontal framework for collective redress*, 11.6.2013 COM (2013) 401 final.

⁶⁶ *Ibid.*, 3.7.

⁶⁷ *Ibid.*

harmonisation at EU Member State level. It is difficult to envisage a Union-wide desire for an EU Competition Court with powers of collective redress.

In the absence of unanimous support, there may be scope to create such a forum through the process of ‘enhanced cooperation’ under Title IV of the TEU. Member States which wish to establish enhanced cooperation between themselves within the framework of the Union’s non-exclusive competences may make use of its institutions and exercise those competences by applying the relevant provisions of the Treaties. Enhanced cooperation shall aim to further the objectives of the Union, protect its interests and reinforce its integration process. Such cooperation shall be open at any time to all Member States, in accordance with Article 328 TFEU.⁶⁸

The decision authorising enhanced cooperation shall be adopted by the Council as a last resort, when it has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole, and provided that at least nine Member States participate in it. The Council shall act in accordance with the procedure laid down in Article 329 of the TFEU.⁶⁹

Enhanced cooperation was used for the first time by the EU in 2010 to authorise a group of Member States to adopt rules on conflicts-of-laws in divorce proceedings, known in practice as the ‘Rome III Regulation.’⁷⁰ The following year, enhanced cooperation was authorised for the second time with respect to the creation of unitary patent protection to

⁶⁸ Article 20(1) TEU.

⁶⁹ Article 20(2) TEU.

⁷⁰ Regulation 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ L 343 29.12.2010 10; S. Peers, *Legislative comment: Divorce, European style: the first authorisation of enhanced cooperation* (2010) 6(3) E.L. Rev. 339; A. Fiorini, *Harmonising the law applicable to divorce and legal separation: enhanced cooperation as the way forward?* (2010) 54(9) I.C.L.Q. 1143.

achieve the Union's internal market objectives regarding the establishment of EU intellectual property rights under 118 TFEU.⁷¹ It was subsequently authorised in relation to the financial transaction tax (FTT), with a similar aim to achieve the Union's internal market objectives concerning the harmonisation of indirect taxation under Article 113 TFEU.⁷² The main concern with regards to enhanced cooperation is that the framework created through such a mechanism is only applicable to those States participating within the regime. In theory, if the minimum number of States (9) participated, the end result would be that 19 States would remain outside the enhanced cooperation. This could result in all kinds of enforcement problems with non-participating States refusing to enforce judgments decided within the enhanced cooperation. It could also result in a two-speed regime with participating States developing the law far beyond the rest of Europe.

From the perspective of an EU Competition Court, the main problem is that competition law is an exclusive competence and this is not eligible for enhanced cooperation. It seems likely that there would need to be a Treaty change. However, shared competence between the Union and the Member States applies *inter alia* consumer protection.⁷³ Instead of an EU Competition Court, one could consider creating an EU Consumer Court which happens to have collective redress powers over competition law infringements. In essence, this would mean trying to create an EU Competition Court through the 'back door.' However, one foresees this making matters even more complicated.

⁷¹ Regulation 1257/2012 implementing enhanced cooperation in the area of the creation of unitary patent protection OJ L 361 31.12.2012 1.

⁷² Council Decision 2013/52/EU authorising enhanced cooperation in the area of financial transaction tax OJ L 22 25.1.2013 11; See K. Gutman, *The constitutional foundations of European contract law: A comparative analysis*, (OUP, (2014)).

⁷³ Article 4(2)(f) TFEU.

As stated above, the Unified Patent Court (UPC) was created under the process of enhanced cooperation. Its creation and the challenges faced by it may provide us with an insight into the difficulties of creating an EU Competition Court.

Intellectual property falls within the shared competences.⁷⁴ Competition law does not. This is interesting given the interplay between patent protection and competition law. It seems very likely that strengthening the patent protection system might bring some new challenges to the application of competition law, particularly the prohibition to abuse a dominant position in Article 102 TFEU.⁷⁵

The Agreement on a Unified Patent Court was signed as an intergovernmental treaty in 2013 by 25 States (all EU Member States except Spain, Poland and Croatia).⁷⁶ Currently, there is no such thing as a single European patent and with the coming into force of the UPC this will remain the case as not all EU Member States are participating. Instead, inventors must maintain individual patents in each country in which they wish to do business. These patents must also be litigated separately in the national courts of each country. In addition, the ultimate outcome in each Member State may very well vary, further discouraging an investment in patent enforcement. Some national courts are more likely to provide fast results, while others move more slowly. The risk of conflicting decisions creates great legal uncertainty and decreases the value of EU patent rights. Additionally, the difference in enforcement outcomes increases the incidence of forum shopping⁷⁷ with patent owners more likely to litigate in states perceived as pro-

⁷⁴ Article 4(2)(a) TFEU.

⁷⁵ M. Malaga, *The European patent with unitary effect: incentive to dominate? A look from the EU competition law viewpoint*. (2014) 45(6) I.I.C. 621, 621.

⁷⁶ Agreement on a Unified Patent Court OJ C 175 20.6.2013 1.

⁷⁷ See R. D. Swanson, *Implementing the EU Unified Patent Court: Lessons from the Federal Circuit*, (2013) 9 BYU Int'l L. & Mgmt. R. 169.

patentee.⁷⁸ These challenges mirror those faced by cross-border collective redress in terms of national division, differences in enforcement outcome and lack of certainty.

An empirical study carried out by Harhoff⁷⁹ provided an insight into the current and forecasted levels of litigation duplication in patent disputes in European countries.⁸⁰ Focussing on institutional matters, Harhoff calculated that having a UPC could save between 146 and 431 duplicated litigation proceedings (both infringements and invalidation) per year. This would amount to a total private saving of between €148 and €289 million.⁸¹ The perspective of eliminating such duplication by the establishment of the UPC provided Harhoff with a basis to recommend⁸² that the Presidency of the European Council continued efforts in establishing such a court.⁸³ In future, there will be the choice of protecting your invention in up to 25 EU countries with a single unitary patent. One will be able to challenge and defend unitary patents in a single court action through the UPC. The goals of the UPC are to reduce costs, increase legal certainty, and reduce forum shopping in connection with patent litigation.⁸⁴ These developments have been said to take their lead from the example set by the US.⁸⁵ The UPC resembles the creation of the Court of Appeals by US Congress in the 1980s which has exclusive jurisdiction over all US

⁷⁸ See generally C.J. Harnett and A. Wieker, *The EU Unitary Patent Court and Unified Patent Court: Simplicity and standardisation, challenge, and opportunity*, (2013) I.P.&T L.J.

⁷⁹ D. Harhoff, *Economic cost-benefit analysis of a unified and integrated European patent litigation system*, available at http://ec.europa.eu/internal_market/indprop/docs/patent/studies/litigation_system_en.pdf (accessed 13.7.2016).

⁸⁰ *Ibid.*, 53.

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ A. Kupzok, *Law and economics of the unitary patent protection in the European Union: the rebels' viewpoint*, (2014) 36(7) E.I.P.R. 418.

⁸⁴ *Ibid.*; See also A.A. Betancourt, *Cross-border patent disputes: Unified Patent Court or International Commercial Arbitration?* (2016) 32 Utrecht J. Int'l & Eur. L. 44; G. Greaney, *New European Patent with Unitary Effect*, (2015) 36 Bus. L. Rev. 111; S. Soltysinkski, *Importance of the principles of equality of the EU Member States and economic actors in EU Law*, (2014) ELTE L.J. 73; N. Zeebroeck, *Comparing patent litigation across Europe: A first look*, (2013) 17 Stan. Tech. L. Rev. 655; P. Philip, *Enforcing a Unitary Patent in Europe: What the US Federal Courts and Community Design Courts teach us*, (2012) 35 Loy. L.A. Int'l & Comp. L. Rev. 55; M. Parker, *Giving teeth to European patent reform: Overcoming recent legal challenges*, (2013) 26 Emory Int'l L. Rev. 1079; T. Jaeger, *EU patent: cui bono et quo vadit*, (2010) 47 C.M.L.R. 63.

⁸⁵ A. Kupzok (supra n.93), 418.

patent appeals. Regional disparity in patent law produced forum shopping in the US, as both patent owners and potential infringers raced to file suit in circuits believed to offer an advantage in litigation. The regional disparity in US patent law, and resultant forum shopping, made it difficult to counsel clients, as the value of a patent often depended on the ultimate location of an infringement suit (an unpredictable factor). The existence of the Federal Circuit in the US has eliminated forum shopping, at least at appellate level. While forum shopping does continue to exist at district level, consistent appeal decisions improve uniformity among the trial courts.

The UPC, through its central Court of Appeals, is expected to develop a consistent body of case law, applying the substantive patent law of the EU. While there remain many courts of first instance, the channelling of all appeals to a single appeals court is believed to clarify the existing and future inconsistencies. In addition, the common training provided to all UPC judges, as well as the technical expertise available to the courts, should lead to more consistent decisions.

The UPC will establish a completely new system for civil law proceedings. It will be the first supranational court on a European level that decides claims between private parties. Therefore, it will not only harmonise national procedural rules, but also completely different legal traditions.⁸⁶ While there are obstacles to an EU Competition Court, the creation of the UPC suggests that a supranational court adjudicating private rights is possible.

⁸⁶ C. Augenstein, *UPC, The error in the UPC system*, available at <http://www.eplawpatentblog.com/2015/September/77994%20-%202015-09-15%20The%20error%20in%20the%20new%20UPC%20System.pdf> (accessed 13.7.2016).

Stakeholder criticism may stand in the way of an EU Competition Court. Stakeholder criticism has been prevalent with regards to the UPC. For example, the Max Planck Institute for Intellectual Property and Competition Law has published a list of reasons why the unitary patent and UPC pose a concern. A letter from the Institute has stated that:

‘While a superficial glance may create the false impression of a patent law advancement through the proposal, it instead actually threatens to forestall the necessary legal progress and innovation capacities for the foreseeable future. The concerns of the Max-Planck Institute are shared by experts throughout Europe. Likewise, considerable parts of the industry harbour doubt as to the proposed system’s efficiency. Large undertakings might need to benefit from a reinforcement of their patent portfolios through the proposed system. Particularly small and medium-sized enterprises are however likely to experience significant obstacles to their innovation activities.’⁸⁷

One concern centres on the fragmentation of patent protection in the EU. Instead of consolidating patent law in Europe, the Unitary Patent Package would add to its fragmentation on both the territorial and substantive level. Territorial on the basis that the unitary patent would not cover the full territory of the Internal Market. It is restricted to the EU Member States participating in the enhanced cooperation. In addition, it will become operable only for those Member States which ratify the Unitary Patent Agreement.⁸⁸ Substantive fragmentation will also exist in the sense that the Unitary Patent Package would create four overlapping levels of patent protection in Europe: national patents granted nationally, national patents granted by the EPO (European patents) within the system of the Unitary Patent Agreement, national patents granted by the EPO, but without

⁸⁷ R.M. Hilty, T. Jaeger, M. Lamping, H. Ullrich, *The Unitary Patent Package: Twelve reasons for concern*, Max Planck Institute for Intellectual Property & Competition Law Research Paper No. 12-12, available at <http://dx.doi.org/10.2139/ssrn.216925> (accessed 13.7.2016).

⁸⁸ *Ibid.*, 1.

subjection to the Unitary Patent Agreement (due to transitional opt-out, non-ratification by Member States, or for non-EU States) and, European patents with unitary effect.⁸⁹ There would be fragmentation if the decisions of an EU Competition Court did not apply to every Member State.

The fragmentation on the level of the substantive law is mirrored by a large number of courts which would be competent to interpret and apply patent law in Europe under the new court system. Jurisdictional competences would lie with: The UPC in respect of infringements and validity of European and unitary patents for those Member States which have ratified the Unitary Patent Agreement, the CJEU in respect of preliminary references from the UPC regarding infringements of Unitary Patents, national courts of EU Member States not ratifying the Unitary Patent Agreement or not participating in the enhanced cooperation and those of all non-EU EPO Contracting States regarding infringements and validity of national and European patents, the EPO's Boards of Appeal in administrative appeals for European patents and, national courts or administrative bodies in proceedings regarding nationally granted patents.⁹⁰

Under each of these jurisdictions, similar principles of patent law might be elaborated differently, and different layers of substantive rules applied. The Unitary Patent Agreement does not provide for any method of consolidation. The Agreement simply adds an additional enforcement layer alongside the pre-existing.⁹¹ A similar issue could arise if an EU Competition Court's decisions did not apply to every Member State.

⁸⁹ Ibid., 2.

⁹⁰ Ibid., 3.

⁹¹ Ibid.

The Max Planck Institute was of the opinion that the UPC and the Unitary Patent Regime would likely impair the development of a homogenous body of patent law in Europe, fail to establish a fair balance in the rights and remedies available to patent holders and third parties respectively, and open the system to continued forum shopping by claimants.⁹² An EU Competition Court which does not preside over the whole EU could face similar criticism.

Aside from the concerns of the Max Planck Institute, one must also note that the Unitary Patent Regime faced tough opposition from EU Member States such as Spain and Italy.⁹³ An EU Competition Court may face similar opposition. By taking legal action, Spain and Italy used a broad range of arguments, such as that the Council did not have the competence to establish enhanced cooperation. The CJEU rejected these arguments.⁹⁴ Spain then sought the annulment of the two regulations forming part of the unitary patent protection and the regulation governing the applicable translation arrangements. The CJEU dismissed both of Spain's actions.⁹⁵

The legitimacy of this patent system seems dubious, and instead of leading to the unification of protection and strengthening of the internal market, it will deepen already existing divisions.⁹⁶ The areas of difficulty pertain to the degree of unification achieved in the substantive material laws, and the continuing fractured legal architecture and lack of

⁹² *Ibid.*, 4.

⁹³ Joined Cases 274-295/11, *Kingdom of Spain v Council and Italian Republic v Council* [2013] 3 C.M.L.R. 24.

⁹⁴ *Ibid.*, at 89–94.

⁹⁵ Press Release, CJEU No 49/15. 5.5.2015, *The Court dismisses both of Spain's actions against the regulations implementing enhanced cooperation in the area of the creation of unitary patent protection*, available at <http://curia.europa.eu/jcms/upload/docs/application/pdf/2015-05/cp150049en.pdf> accessed 13/7/2016.

⁹⁶ Z. Zawadska, *The unitary patent protection - a voice in the discussion from the Polish perspective*, (2014) 45(4) I.I.C. 383, 397.

integration of the UPC and EU systems.⁹⁷ The new legal structure is a complex and disjointed legal mosaic with only 25 out of 28 EU participating States conferring exclusive jurisdiction on a Court created by an international agreement whose decisions are not binding on the EPO. At a time when the EU's economic policies and its democratic legitimacy are under unprecedented pressure, the EU patent package looks much like the addition of epicycles to the cycles of times past, building up a fractured and uncertain legal structure on the back of an autonomous organization which is the leading engine for patent policy in Europe but is not itself subject to judicial or meaningful political scrutiny.⁹⁸ The UPC is not the best example to justify the creation of a Competition Court which entertains cases concerning horizontal private rights but it is the only one there is.

⁹⁷ A. Plomer, *A Unitary Patent for a (Dis)United Europe: The long shadow of history*, (2015) 46(5) I.I.C. 508, 525.

⁹⁸ *Ibid.*, 532.

6.5 A World Competition Court

The fourth option would be to create a World Competition Court of which the EU is a member. This would take us beyond the scope of the analysis as focus is specifically on the EU. However, this may be a consideration for the future especially given the trend towards globalised markets. This is forcing the world's largest corporations to engage in ever greater and further reaching transactions.⁹⁹ Eventually, one envisages a uniform code of international competition rules, and specifically, for our purpose, a uniform code of collective redress powers. This could lead to the creation of a World Competition to monitor the uniformity of international competition law. This could ensure the unification of law and prevent the problem of forum shopping, at least in extreme forms.

However, as the debate over the European Commission's White Paper on Articles [101] and [102] [TFEU] has shown, a far-reaching reform of competition law is not easy to achieve, even in a legal community such as the European Union. This is the point which will make the creation of a World Competition Law difficult. It appears improbable that the various countries will agree in the foreseeable future to cede such a large portion of national sovereignty as would be required for World Competition Law and Court. Even if the example of the European Union shows us that it is not impossible for nation states to relinquish sovereignty in pursuit of a common goal, such an undertaking will be much more difficult on a global scale. Recalling past negotiations of the WTO makes it clear that such an ambitious project will not be accomplished in the near future.¹⁰⁰ Note also the results of the UK Referendum on membership of the EU and the uncertainty over the UK's future relationship with Europe. This thesis is written at a time when the 'mood music' of

⁹⁹ See W. Von Meibom and A. Geiger, *A world competition law as an ultima ratio*, (2002) E.C.L.R. 445.

¹⁰⁰ See P. Marsden, *Tune in to the International Competition Network – not the WTO – for practical advances in international antitrust*, in *Competition*, (Brussels (2001)).

international relations is dominated by the idea of national sovereignty and reflected in the conversation about ‘taking back control.’

6.6 The preferred option for an EU Competition Court

Each of the four options presented for the creation of an EU Competition Court come with their difficulties. A specialist tribunal under Article 257 TFEU is unlikely given the recent dissolution of the EU Civil Service Tribunal and the requirement for the increase of judges in the General Court in order to tackle an increasing workload. A specialist chamber within the General Court may also face a degree of hostility from the Members of the Court given their desire to maintain a varied case load and the common view that the General Court is very much a ‘Competition Court’ in its own right with specialist judges and existing flexible case management. One also has to remember that allocating cross-border collective actions to the General Court marks a significant shift in the way private enforcement of competition law is adjudicated in the EU. There is no private competition litigation at EU level. Private litigation is primarily a matter subject to the competence of the Member States, and thus, victims of EU competition law infringements must assert their claims before the national courts.

Creating a new EU Competition Court may be a more viable concern. The main issue is whether there would be a desire amongst Member States to support such a forum. It has taken decades to arrive at an agreement establishing the UPC. The first attempt goes back to the 1970s and over the next few decades, the Member States repeatedly failed to reach an agreement. One must also remember that the UPC falls short of a Union-wide consensus. It was deemed to be last resort and created through the method of enhanced cooperation which means that some Member States will remain outside the jurisdiction of

the UPC and free to develop their own (potentially inconsistent) body of case law.

Moreover, as it stands, competition law does not present itself as a possibility for enhanced cooperation as it is an exclusive competence.

6.7 A challenging but worthwhile step

Even though there are clear obstacles, the creation of an EU Competition Court comes with many advantages. Sir Peter Roth considers what may be said to qualify competition law for specialist treatment.¹⁰¹ First, competition law involves a form of conceptual analysis that is very different from the main body of law. Whether an agreement is to be condemned as having an adverse effect on competition in the market is an approach far removed from the traditional legal view that agreements honestly undertaken should be kept, absent proof of breach or frustration.¹⁰² Second, the fact that the theory of competition law rests on economic foundations means that the courts may have to make economic judgments, and thus digest sophisticated economic evidence of a kind with which most judges are unfamiliar.¹⁰³ There is no doubt that the reliance upon economic analysis in fashioning the competition rules has significantly increased over the past couple of decades. In Europe, this was highlighted by the adoption of the Commission's guidelines on vertical restraints and on agreements for horizontal cooperation in 2000.¹⁰⁴ This has continued ever since.

The intricate nature of competition law leads one to consider whether certain elements should be dealt with by a specialist court, namely cross-border collective cases. A

¹⁰¹ P. Roth, *Specialised antitrust courts*, in B. E. Hawk, *International Antitrust Law & Policy: Fordham Competition Law*, (Juris Publishing, (2013)), 100.

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ Commission Notice: Guidelines on Vertical Restraints, OJ C 291 13.10.2000 1; Commission Notice: Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, OJ C 3 6.1.2001 2. Both these guidelines have since been superseded.

specialist court can bring a high level of knowledge and expertise.¹⁰⁵ Even if not held by the judges on appointment, they should acquire it over time by contrast with a judge for whom hearing a competition case (let alone a cross-border collective competition claim) would be very exceptional. Whether this results in better quality decision-making probably depends as much on the quality of individual judges. However, a specialist court should at least provide a safeguard against poor decisions. Moreover, it should lead to more efficient hearings. Specialist judges should be familiar with the specific case law, and more likely to have the confidence to make robust decisions. Private competition actions are notoriously complex. The experience in the UK, where antitrust cases have been heard by both the CAT and ordinary courts, is that ordinary courts are likely to take longer.¹⁰⁶

Specialism is a major reason cited in support for the creation of courts such as the UPC. It is well-argued that since patent cases often involve consideration of legal rules together with complex technical matters, a high level of expertise is often required.¹⁰⁷ The main arguments in favour of the UPC are quality and effectiveness.¹⁰⁸ In the absence of the UPC, a large number of national courts located in different jurisdictions would have the jurisdiction to hear patent cases. Some of the smaller courts rarely have the opportunity to consider patent issues and as such have developed little expertise in the field. This may affect the quality of judgments. Thus, it has been argued that a central court would limit the risk of bad decisions by a variety of ‘smaller’ courts. Moreover, as regards effectiveness, the establishment of a central court would eliminate the risk of parallel proceedings and forum shopping as a uniform body of substantive and procedural doctrine would exist.

¹⁰⁵ P. Roth, *Specialised antitrust courts* (supra n.1), 105.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ See for example, C.S. Peterson and J. Schovsbo, *On law and policy in a European and European Union Patent Court: What will it do to patent law and what patent law will do it?* Available at <http://dx.doi.org/10.2139/ssrn.1572521> (accessed 14.7.2016).

Frederica Baldan and Esther Van Zimmerman consider the need for judicial coherence in European patent cases.¹⁰⁹ Coherence in patent cases has traditionally been pursued through several harmonising legislative measures, and most importantly, by national judges. Notwithstanding such efforts, the European patent system has been renowned for the risk of divergent decisions, high costs and ultimately ‘judicial incoherence.’¹¹⁰ For decades, the answer to this problem has been identified in the creation of a centralised specialised patent court. Centralisation and specialisation should lead to a coherent body of patent doctrine and high quality decisions in a legally and complex subject matter. The UPC in its current form is not altogether perfect in the sense that it does not include all EU Member States and may present many operational challenges including those discussed above. However, it marks the first time that private rights will be adjudicated by a supranational court. It is submitted that such a Competition Court with the scope to preside over cross-border collective redress cases is likely to encourage greater uniformity of case law. Identifying a central forum to hear cross-border competition claims may overcome the hurdles caused by the diversity of national legal systems. Where there is widespread cross-border harm, it is prudent to consolidate all claims of the same nature in one action to ensure equal and effective remedies. The current diversity allowed by a decentralised private enforcement regime and the lack of mandatory collective procedures act as a disincentive towards cross-border collective actions. Without effective private enforcement procedures, infringing undertakings retain the spoils of their illegal conduct.

A centralised mechanism already exists in the public enforcement of EU competition law. It is recognised that where a case has far-wide implications for EU competition law, the proper case-handler should be the Commission instead of the national competition

¹⁰⁹ F. Baldan and E. Van Zimmeren, *The future of the Unified Patent Court in safeguarding coherence in the European patent system*, (2015) 52 C.M.L.R. 1529, 1529.

¹¹⁰ *Ibid.*

authorities. According to the Commission Notice on cooperation within the Network of Competition Authorities,¹¹¹ the Commission is considered particularly well-placed to deal with a case if one or several agreement(s) or practice(s), including networks of similar agreements or practices, have effects on competition in more than three Member States (cross-border markets covering more than three Member States or several national markets).¹¹²

Moreover, the Commission is particularly well-placed to deal with a case in several circumstances: if it is closely linked to other EU rules which may be exclusively or more effectively applied by the Commission, if the Community interest requires the adoption of a Commission decision to develop EU competition policy when a new competition issue arises, or to ensure effective enforcement.¹¹³ On this basis, it may not be such a big step to justify a similar centralised mechanism in the private setting. The basic principle of the Notice on cooperation is to identify the public authority best placed to conduct the investigation, thereby taking into account the territory affected by the alleged infringement, the means of gathering evidence, the possibility to bring effectively to an end the entire infringement, or to sanction adequately the infringement, and, possibly the need to develop EU competition policy or to ensure effective and coherent enforcement.¹¹⁴ The motivations for creating a Competition Court (at least from a collective redress standpoint) are largely the same.

¹¹¹ Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101 27.4.2004 43.

¹¹² *Ibid.*, para 14.

¹¹³ *Ibid.*, para 15.

¹¹⁴ *Ibid.*, para 8.

6.8 Designing the EU Competition Court

After having discussed how an EU Competition Court with powers of collective cross-border redress could be created and why it is important, the following section shall consider the structure of such a forum. Factors such as the appointment of judges, jurisdiction and standing shall be examined. The format of the UPC and the European Civil Service Tribunal shall be drawn upon as examples.

6.9 Jurisdiction

In terms of the jurisdiction of a Competition Court, one could consider that the Council has adopted a regulation amending the Brussels 1 Recast Regulation with the aim of allowing the rules of the Brussels Regime to be applied by *inter alia*, the UPC.¹¹⁵ The Regulation clarifies that the UPC replaces national courts for certain disputes.¹¹⁶ It also clarifies that the *lis pendens* system shall operate with respect to proceedings brought in the UPC and in a court of a Member State which is not a party to the instrument establishing the UPC. It shall also apply during the transitional period referred to in Article 83 of the UPC Agreement to proceedings which are brought in the UPC and in a court of a Member State party to the UPC Agreement. A similar regulation could be created for the purposes of a Competition Court with powers of collective redress. The Regulation amending the Brussels 1 Recast Regulation does not come without its criticism¹¹⁷ however it sets a precedent for a specialist court being recognised by the Brussels Regime.

¹¹⁵ Regulation 542/2014 amending Regulation 1215/2012 as regards the rules to be applied with respect to the Unified Patent Court and the Benelux Court of Justice, OJ L 163 29.5.2014 1.

¹¹⁶ *Ibid.*, Article 1 inserting Article 71(a) into Regulation 1215/2012.

¹¹⁷ For a critique of the UPC and the new jurisdictional rules, see P. A. De Miguel Asensio, *Regulation 542/2014 and the international jurisdiction of the Unified Patent Court*, (2014) 45(8) IIC 868; See also F.M. Buonaiuti, *The Agreement establishing a Unified Patent Court and its impact on the Brussels I Regulation. The new rules introduced under Regulation 542/2014 in respect of the Unified Patent Court and the Benelux Court of Justice*, Cuadernos de Derecho Transnacional (2016) 8(1) 208.

6.10 Structure

If an EU Competition Court was created as a tribunal attached to the General Court, one could look at the structure of the (now abolished) EU Civil Service Tribunal for guidance. The Tribunal was a court of first instance for disputes between the EU institutions and their members of staff. In accordance with Article 257 TFEU, appeals may be lodged at the General Court against decisions of the judicial panel on points of law only in the same conditions as those appeals lodged at the CJEU against decisions of the General Court.¹¹⁸Based on this model, an EU Competition Court could act as a court of first instance for competition cases involving cross-border end-consumer harm. All end-consumer claims arising from the same anticompetitive conduct would be consolidated and heard by this centralised forum. An appeal to the General Court would be limited to points of law. It would lie on the grounds of lack of jurisdiction of the Tribunal, a breach of procedure before it which adversely affects the interests of the appellant as well as the infringement of Union law by the Tribunal.¹¹⁹No appeal would lie regarding the amount of costs or the party ordered to pay them.¹²⁰

Alternatively, if a new EU Competition Court was to be created as a forum separate from the General Court, one could consider the formation of the UPC as a potential framework upon which to model such a forum. Article 6 of the Agreement on A UPC states that the

¹¹⁸2004/752/EC, Council Decision establishing the European Union Civil Service Tribunal OJ L 333 9.11.2004 7, Recital 8; An appeal may be brought before the General Court, within two months of notification of the decision appealed against, against final decisions of the Civil Service Tribunal and decisions of the Tribunal disposing of the substantive issues in part only or disposing of a procedural issue concerning a plea of lack of jurisdiction or inadmissibility, Article 9(1).

¹¹⁹ Ibid., Article 11(1).

¹²⁰ Ibid., Article 11(2).

Court shall comprise of a Court of First Instance, a Court of Appeal and a Registry.¹²¹The Court of First Instance shall comprise a central division as well as local and regional divisions.¹²² Preliminary rulings of the CJEU shall be available by way of Article 267 TFEU.

At this juncture, one would wish to consider the categories of cases over which a new Competition Court separate from the General Court would preside. It is submitted that there are three options:

1. To have all EU competition cases (both public and private) before the Competition Court;
2. To have all private enforcement of EU competition law cases before the Competition Court; or
3. To have solely cross-border collective cases before the Competition Court.

The first option would be to have all competition cases, both public and private, heard by the new Competition Court. This would require a transfer of public enforcement cases from the General Court. This would also require either the transfer of existing judges from the General Court or the appointment of new judges. Both are problematic. Transferring judges will take judges away from the busy caseload of the General Court. Judges have just been transferred from the recently abolished Civil Service Tribunal and new judges are being appointed in stages. The General Court will most likely not wish to lose judges that they have just gained. Alternatively, the appointment of new judges will have cost

¹²¹ Agreement on a Unified Patent Court OJ C 175 20.6.2013 1, Article 6(1); The Court of Appeal shall have its seat in Luxembourg, Article 9(5); The Registry shall keep records of all cases before the Court, Article 10(3).

¹²² Ibid., Article 7(1); The central division shall have its seat in Paris, with sections in London and Munich, Article 7(2).

implications. It has already been mentioned that the appointment of new judges to the General Court received staunch criticism against the backdrop of the economic climate.

A Competition Court presiding over all cases presents three other connected issues. First, it has been considered in this chapter that existing judges of the General Court would likely prefer a more varied workload than a portfolio exclusively confined to competition issues. Second, it has been mentioned in this chapter that members of the General Court already consider public competition cases to be managed effectively. On that basis, it may be more desirable to leave the status quo intact. Bert Lance's phrase 'if it ain't broke, don't fix it' seems apt. Third, the removal of all competition cases from the General Court may unnecessarily isolate EU competition law from other areas of EU law and policy.

Another option may be to restrict the caseload of the new Competition Court exclusively to matters of private enforcement. This would include *all* competition cases of a private nature. The major issue is that it goes against the EU's policy of decentralisation and the role of the national courts in private damages actions. One way to resolve this may be to design the Competition Court in a way that resembles the structure of the UPC. The court of first instance has a central division as well as regional and local divisions. The national courts could act as local and regional divisions of the Competition Court which feed into a central division. This may assuage the Member States, leaving their role in private enforcement intact, whilst the central division would ensure coherent decision making and a consistent body of law. Having said that, there remain concerns that more than one court dealing with cross-border collective redress issues at local and regional levels may still encounter some form of diversity and fragmentation. One way to resolve this may be to ensure that all cases involving cross-border collective redress are exclusively dealt with by the central division whilst other matters of private enforcement are allocated at first

instance by the national courts. Particularly contentious cases at national level could then be referred to the central division.

The final option would be to create a Competition Court which deals solely with cross-border collective cases. With regards to the final option, one questions whether there would be enough cases to justify the operation of a full time court (at least within the formative years). Regarding this option, there are a number of international tribunals that do have part-time judges so having a part-time court would not be such an extraordinary thing to propose should this option prevail.¹²³ To ensure consistency and the consolidation of cross-border collective claims, it is submitted that under the third option, only a central division would be required in the EU Competition Court of first instance. Unless there was a substantial influx of collective cases and it could be shown that there were marked benefits of having local and/or regional divisions, it is submitted that only a central division would be needed.

It is submitted that the second option is most desirable. It is argued that presiding over all private matters (individual claims (i.e. between one specific claimant and one specific defendant) and collective claims) would ensure that private enforcement is dealt with in a coherent fashion.

As with the UPC, a new Competition Court could request preliminary rulings before the CJEU by way of Article 267 TFEU. The reference to the CJEU from both the General

¹²³ G. Sacerdoti, *The dispute settlement system of the WTO: Structure and function in the perspective of the first 10 years*, in A. Del Vecchio, *New international tribunals and new international proceedings*, (Giuffrè Editore, (2006)), 168; G. Sacerdoti, *The dispute settlement system of the WTO in action: A perspective on the first 10 years*, in G. Sacerdoti, A. Yanovich, J. Bohanes, *The WTO at ten: The contribution of the dispute settlement system*, (Cambridge University Press, (2006)), 43; W. Schabas, *An introduction to the International Criminal Court*, (Cambridge University Press, (2007)), 350; A. Zimmerman, K. Oellers-Frahm, C. Tomuschat, C.J. Tams, *The Statute of the International Court of Justice: A Commentary*, (OUP, (2012)), 369.

Court (dealing with public cases) and the new Competition Court (dealing with private cases) would provide a central point at which to ensure a consistent and coherent EU competition law enforcement policy.

6.11 Appointment of judges and their organisation

The appointment of judges to an EU Competition Court could resemble the process adopted by the EU Civil Service Tribunal. During the establishment of the Tribunal, the Member States were prepared to adopt a radically different system of judicial appointments based on open applications, expert assessment on the basis of technical merit, and Council appointments based on enumerated criteria. For the first time, the judicial architecture introduced a direct applications system. Any person who is a Union citizen, whose independence is beyond doubt and who possesses the ability required for appointment to judicial office¹²⁴ may submit an application for the post of judge.¹²⁵ This was an open and subjective test: any person who feels that he fulfils the relevant criteria is able to apply. The Council was in charge of determining the conditions and arrangements for processing such applications. Then a Selection Committee would be consulted by the Council to give an opinion on the candidates' suitability to perform the duties of judge at the Tribunal. This committee would comprise seven individuals from among former members of the CJEU and General Court and lawyers of recognised competence. The Committee would append to its opinion a list of candidates having the most suitable high-level experience. Such a list would contain the names of at least twice as many candidates as there were judges to be appointed by the Council.¹²⁶ When appointing judges, the Council was to ensure a balanced composition of the Tribunal on as broad a geographical basis as possible from among nationals of the Member States and with respect to the national legal systems represented.¹²⁷

¹²⁴ Article 257(4) TEU.

¹²⁵ 2005/150/EC, Council Decision concerning the conditions and arrangements governing the submission and processing of applications for appointment as a judge of the European Union Civil Service Tribunal OJ L 50 23.2.2005 7, Annex para 5.

¹²⁶ *Ibid.*, para 2.

¹²⁷ *Ibid.*

This method was attractive for several reasons. First it was clear that it was in the Council that the political and geographical balance would be ensured between different Member States and different legal systems. Second, the alternative, rotating the rights to present candidates among Member States would have meant that some Member States would have to wait up to 21 years for their turn to nominate a judge. The system would not necessarily ensure the highest level of technical expertise in appointees unless the Selection Committee took the politically bold stance of declaring that the candidate put forward by a Member State did not fulfil the criteria for appointment.¹²⁸ A similar model could be used in order to make sure that representation in the EU Competition Court is as politically and geographically balanced as possible.

With regards to the UPC, Article 15 of the Agreement considers the eligibility criteria for the appointment of judges. The Court shall comprise both legally qualified judges and technically qualified judges.¹²⁹ Legally qualified judges shall possess the qualifications required for appointment to judicial offices in a Contracting Member State.¹³⁰ Technically qualified judges shall have a university degree and proven expertise in a field of technology. They shall also have proven knowledge of civil law and procedure relevant in patent litigation. Judges shall have a good command of at least one language of the European Patent Office.¹³¹

In terms of the appointment procedure, it shall be the responsibility of the Advisory Committee to establish a list of the most suitable candidates to be appointed as judges of the Court.¹³² The Committee shall appoint as many judges as are needed for the proper

¹²⁸ H. Cameron (supra n.3), 281.

¹²⁹ Agreement on a Unified Patent Court (supra n.121), Article 15(1).

¹³⁰ Ibid., Article 15(2).

¹³¹ Ibid., Annex 1 Statute of the Unified Patent Court, Article 2(2).

¹³² Ibid., Annex 1 Article 16(1).

functioning of the Court.¹³³ Judges shall be appointed for a term of six years.¹³⁴ Legally qualified judges, as well as technically qualified judges who are full-time judges of the Court, may not engage in any other occupation unless an exception is granted by the Administrative Committee.¹³⁵ The exercise of the office of technically qualified judges who are part-time judges of the Court shall not exclude the exercise of other functions provided there is no conflict of interest.¹³⁶

The UPC shall consist of a Pool of Judges which shall be composed of all legally qualified judges and technically qualified judges from the Court of First Instance who are full-time or part-time judges of the Court. The Pool of Judges shall include at least one technically qualified judge per field of technology with the relevant qualifications and experience. The technically qualified judges from the Pool of Judges shall also be available to the Court of Appeal.¹³⁷

Article 19(1) promotes a training framework for judges in order to improve and increase available patent litigation expertise and to ensure a broad geographic distribution of such knowledge and expertise. This training framework shall be continuous.¹³⁸ This shall be financed by the budget of the Court.¹³⁹

With regards to the number of judges, Recital 6 to the Preamble of the Council Decision establishing the EU Civil Service Tribunal states that the number of judges of the judicial panel should match its caseload. However, Article 2 to Annex I states that the Tribunal

¹³³ Ibid., Annex 1, Article 3.

¹³⁴ Ibid., Annex 1, Article 4.

¹³⁵ Ibid., Article 17(2).

¹³⁶ Ibid.

¹³⁷ Ibid., Article 18(2).

¹³⁸ Ibid., Article 19(3).

¹³⁹ Ibid., Article 38.

would consist of seven judges. Should the CJEU so request, the Council may increase the number of judges. The judges would be appointed for a period of six years and retiring judges may be appointed.¹⁴⁰The Tribunal was organised to sit in chambers of three. In certain circumstances, determined by its rules of procedure, it could sit in full court or in a chamber of five judges or of a single judge.¹⁴¹A President of the Tribunal would be elected by the judges for a term of three years. There was a possibility to re-elect.¹⁴²A similar appointment and organisation of judges could be adopted by an EU Competition Court integrated within the General Court.

With regards to the UPC, Article 8(1) of the Agreement on a UPC states that any panel of the Court of First Instance shall have a multinational composition. It shall sit in a composition of three judges. Under Article 9, any panel of the Court of Appeal shall sit in a multinational composition of five judges. It shall sit in a composition of three legally qualified judges who are nationals of different Contracting Member States and two technically qualified judges with qualifications and experience in the field of technology concerned. Those technically qualified judges shall be assigned to the panel by the President of the Court of Appeal from the pool of judges in accordance with Article 18.

In both the UPC and the EU Civil Service Tribunal, there are strong key themes. These are largely based on ensuring a political and geographical balance and that the best candidates are selected to perform the role. Depending on which model is adopted, an EU Competition Court could follow the processes for appointing judges outlined above.

¹⁴⁰ 2004/752/ EC, Council Decision establishing the European Union Civil Service Tribunal, OJ L 333 9.11.2004 7, Annex 1, Article 2.

¹⁴¹ Ibid., Article 4(2).

¹⁴² Ibid., Article 4(1).

6.12 Designing a Competition Court appropriate for the EU

In designing a Competition Court with powers to adjudicate cross-border collective claims, EU Member States may request safeguards against the kind of US-style litigation which has a reputation for being vexatious and abusive in some circumstances. However, one cannot ignore the prominence of private enforcement in the US when measured against the paucity of claims in the EU. Perhaps one could learn (albeit cautiously) from the experience across the Atlantic. Slowly, the EU could import ideas such as punitive damages in order to encourage collective cases. A centralised forum could monitor this in a controlled environment. A single forum would ensure consistency in interpretation and a coherent body of law. There would be no opportunity for forum shopping given that only one forum in the EU would have full jurisdiction, and expert judges could develop their own methods of striking down claims which are abusive and have little merit.

Last decade, Beisner and Borden argued that Europe stood at the same policy crossroads where America stood forty years ago.¹⁴³ They commented that:

‘Much like European policy-makers today, the American policy-makers of that era were motivated by the best of intentions – they wished to create a more efficient legal system that would make it easier for individuals with meritorious claims to have their day in court. But in their zeal to expand opportunities for private individual and group litigation, these policy-makers failed to see how their procedural reforms were opening the door to widespread litigation abuse. Plaintiffs’ attorneys quickly realised that they could use newly-enacted procedural devices, such as the modern American class action device, to

¹⁴³ J. H. Beisner and C. E. Borden, *On the road to litigation abuse: The continuing exportation of US class action and antitrust law*, (2006) US Chamber Institute for Legal Reform, 1.

exert substantial settlement pressure against defendants independent of the merits of their case. As a result, within a short time, America descended into a litigation morass from which it has only recently begun to extricate itself. Our concern is that European policy makers would make the same mistake.’¹⁴⁴

Despite these concerns, it is argued that the image of oppressive litigation in the US is sometimes overplayed. There are safeguards in place to counter oppressive and vexatious litigation and a central forum in the EU could build on these to ensure the legitimacy of cases.

Antitrust law in the US plays a special role in the US legal system. As the Supreme Court has repeatedly stressed, every antitrust violation strikes at the very heart of the US economy—the free enterprise system.¹⁴⁵ Unlike most types of commercial wrongdoing, an antitrust violation has consequences that extend well beyond the party bringing the lawsuit. It can adversely impact on entire industries with wide-scale consumer consequences.¹⁴⁶ For these reasons, the antitrust laws are treated with special concern in the US and their active enforcement is highly encouraged. The US recognised that the government would not have the resources to handle this task alone to an effective extent. Therefore, it enlisted the support of the public to serve as ‘private attorneys general’ to assist in the enforcement.¹⁴⁷ Congress encouraged these actions through a package of treble damages, attorneys’ fees and costs awarded to successful claimants. In light of these incentives, private actions have become an integral part of US antitrust enforcement. The number of

¹⁴⁴ Ibid., 2.

¹⁴⁵ *Hawaii v Standard Oil*, 405 US 251, 262 (1972).

¹⁴⁶ G. Schnell, *Class action madness in Europe: a call for a more balanced debate*, (2007) 28(11) E.C.L.R. 617, 617.

¹⁴⁷ *Cargill v Monfort of Colorado*, 479 US 104, 129 (1986).

private actions for any given year eclipses the number of government actions, in some years by as much as a factor of 20.¹⁴⁸

There are clear benefits to the US regime. An obvious factor is that it provides a much needed supplement to the significant resource constraints of the government. Governments can only devote so much of their budget to antitrust enforcement. It is also likely that they will resist launching difficult cases. Governments would usually choose to allocate their limited budgets to cases which are clearly winnable.¹⁴⁹ Private actions also provide antitrust victims with a vehicle for obtaining compensation for their harm, and serve as an additional level of deterrence by exposing violators to significantly increased monetary risk.¹⁵⁰

EU hostility lies mostly with the image of the self-serving lawyer who brings cases with questionable intentions, with no meaningful goal other than to make money by ‘blackmailing’ defendants with the threat of large damages awards. Neelie Kroes has remarked: ‘how can we foster a *competition* culture, not a *litigation* culture.’¹⁵¹

However, the reality is that class action abuse in the US is largely driven by non-antitrust cases. Securities actions and business tort cases have traditionally been more susceptible to this kind of abuse. Defendants generally will not even consider an antitrust class action until they have fully explored the three opportunities they have to strike down the case: a motion to dismiss, an opposition to class certification, and a motion to summary judgment. These are three distinct hurdles antitrust class claimants must overcome before defendants

¹⁴⁸ G. Schnell (supra n.145), 617.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ N. Kroes, *Enhancing actions for damages for breach of competition rules in Europe*, (2005) available at http://europa.eu/rapid/press-release_SPEECH-05-533_en.htm?locale=en (accessed 14.7.2016).

concern themselves over the potential for treble damages. In the antitrust context, it is extremely difficult for a frivolous case to overcome these hurdles. With the Supreme Court's whittling away of per se antitrust liability, its introduction of a heightened pleading requirement for antitrust conspiracy cases, and its revitalised aversion to condemning conduct within regulated industries, these hurdles become considerably higher.¹⁵² This is particularly true in light of the increased rigour with which more and more courts are evaluating the propriety of class certification.¹⁵³

Serving as a further bulwark against a self-serving lawyer, the Class Action Fairness Act of 2005,¹⁵⁴ for example, has made it significantly more difficult to bring class actions in state courts which is the traditional hotbed of abusive cases and illicit attorney recoveries. The Foreign Trade Antitrust Improvements Act¹⁵⁵ similarly hampers class action malfeasance by barring from US courts most kinds of foreign purchaser actions.¹⁵⁶ Finally, there is the r.11 sanction against parties and their counsel for bringing frivolous cases.¹⁵⁷ While not often used, r.11 offers what could be an extremely potent safeguard against the lawyer with ulterior motives.

The point to make is that while many Member States fear US-style collective redress, it is possible to put safeguards in place to strike down cases which have no or little merit. An EU Competition Court with safeguards could provide that controlled environment within which to prevent claims being launched with ulterior motives. One needs to move past this predetermination that the US-model is beyond reproach and recognise the vital role that

¹⁵² See *Leegin Creative Leather Products, Inc. v PSKS, Inc.*, 127 S. Ct. 2705 (2007); *Bell Atlantic Corp v Twombly*, 127 S. Ct. 1955 (2007); *Credit Suisse Securities (USA) LLC v Billing*, 127 S. Ct. 2383 (2007).

¹⁵³ G. Schnell (supra n.145), 618.

¹⁵⁴ Pub. L. No.109-2 (2005).

¹⁵⁵ 15 U.S.C. § 6a (1982).

¹⁵⁶ See *F. Hoffman-La Roche Ltd v Empagran SA*, 542 US 155 (2004); *Empagran II*, 417 F.3d 1267 (D.C. Cir. 2005); *Inquivosa v Ajinomoto Co*, 477 F.3d 535 (8th Cir. 2007).

¹⁵⁷ 28 U.S.C. §11(c).

collective redress could play in the private enforcement of EU competition law. In the US, collective redress has actually been successful in remedying serious deficiencies and bringing about wide-scale consumer relief. One case, for example, is the action brought on behalf of five million merchants against Visa and MasterCard, challenging their exclusionary conduct in the debit market. Over the six-year life of the case, the claimants spent around \$18 million in costs and 250,000 hours of attorney time. The results were staggering with \$3.4 billion in monetary damages and tens of billions of dollars more in reduced pricing. In the words of the District Court, the case resulted in ‘significant and lasting benefits for America’s merchants and consumers.’¹⁵⁸ Yet, not many are willing to include these important class action triumphs as part of the debate. They are either brushed aside as aberrations, or ignored altogether. This does not permit a fair assessment of the US system. Nor does it provide a reliable direction to those in Europe looking to learn from the American experience.

One way to assuage those who fear US-style class actions may be to consider *who* has the standing to bring an action before the Competition Court. Instead of allowing anyone to bring an action before the Court, it is submitted that only named and pre-approved representative entities may have standing. This could include entities such as Which?, the largest consumer body in the UK which is completely independent with no owners, shareholders or Government departments influencing its decision making.¹⁵⁹

The Consumer Rights Act 2015¹⁶⁰ in the UK implemented a number of a number of sweeping reforms of the private competition litigation regime.¹⁶¹ Sections 47B and 47C of

¹⁵⁸ *Re Visa Check/MasterMoney Antitrust Litig.*, 297 F. Supp.2d 503, 524 (E.D.N.Y. 2003).

¹⁵⁹ Which? Available at <http://www.which.co.uk/about-which/who-we-are/overview/> (accessed 14.7.2016).

¹⁶⁰ C.15 Consumer Rights Act 2015.

¹⁶¹ B. McGrath and T. Reddy, *The Consumer Rights Act: full steam ahead for collective proceedings?* (2016) 9(1) G.C.L.R. 15, 15.

the Competition Act 1998¹⁶² (implemented by the Consumer Rights Act 2015) create a new ‘collective proceedings regime’ under which claims may be brought on behalf of a collective by nominated representatives, either on an opt-in or opt-out basis. A similar rule could be adopted for the jurisdiction of the EU Competition Court. In France, it is largely consumer associations that have a monopoly for legal standing with regards to collective redress mechanisms.¹⁶³ Moreover, in Spain, in order to avoid abusive claims on behalf of user groups, only those affected by the infringement will be allowed to file a claim (e.g. a consumer group for food products would not be allowed to file a claim against a prohibited practice in the automotive sector).¹⁶⁴

Under the Consumer Rights Act, the identity of the class representative is of central importance to the new regime. It is self-evident that there will be no collective proceedings unless representatives come forward to bring claims on behalf of classes of persons who are alleged to have suffered as a result of a competition infringement. For this to happen, the representative must also be significantly incentivised to bring the claim. As with any complex litigation, bringing a competition claim is typically expensive, time-consuming and a risky undertaking. The new ‘Guide to Proceedings’ warns sternly that being a class representative ‘involves significant and serious obligations and is not a responsibility to be taken on lightly.’¹⁶⁵ A putative representative will take on such a heavy responsibility when the benefits are correspondingly large. Conversely, if incentives are slanted too far in favour of claimant representatives, there is the risk that this will lead to excessive and

¹⁶² C.41 Competition Act 1998.

¹⁶³ D. Fairgrieve and A. Baird, *France*, <http://www.collectiveredress.org/collective-redress/reports/france/overview> (accessed 14.07.2016).

¹⁶⁴ S. Turnbull, L. Freeman, E. Whiteford, T. Siebert, Mark Levy and R. Croce, *Legislating to incentivise competition class actions: recent EU developments*, <http://www.lexology.com/library/detail.aspx?g=1ba5d77b-f83b-4ea3-8409-592e88abe28c> (accessed 14.7.2016).

¹⁶⁵ Competition Appeal Tribunal, *Guide to Proceedings*, 2015, para. 6.29, available at <http://www.catribunal.org.uk/files/Guide%20to%20Proceedings%20-%202015.pdf> (accessed 14.7.2016).

overly-burdensome levels of litigation, to the ultimate detriment of law-abiding as well as infringing businesses.

In recognition of this, the UK government included a number of safeguards in the new regime. In particular, collective proceedings will be subject to normal cost-shifting principles, under which the loser generally pays the winner's costs, albeit with the important caveat that the direct costs risk will be met by the class representative, rather than by individual class members.¹⁶⁶In addition, the CAT is prevented by statute from awarding exemplary damages in collective proceedings¹⁶⁷ and damages-based agreements (under which the fees payable to the claimant's legal representative are determined as a percentage of the damages awarded) are expressly prohibited for opt-out collective proceedings.¹⁶⁸

Under the new rules, the CAT has wide discretion to approve a person as a representative for collective proceedings, with the only statutory requirement being that it must consider that it is 'just and reasonable' for it to do so.¹⁶⁹The 2015 Rules state that, in reaching this decision, the CAT must be satisfied that the person concerned: would fairly and adequately act in the interests of the collective members; does not have a material conflict of interest with collective members; is the most sensible representative (if there is more than one applicant); and would be able to pay the defendant's recoverable costs, if ordered to do so, or satisfy any undertakings as to damages in the event of an interim injunction being sought.¹⁷⁰

¹⁶⁶ The Competition Appeal Tribunal Rules 2015 (SI 2015 No.1648), Rule 98.

¹⁶⁷ Competition Act 1998 section 47C(1).

¹⁶⁸ *Ibid.*, section 47C(8).

¹⁶⁹ The Competition Appeal Tribunal Rules 2015 Rule 78(1), applying Competition Act 1998 section 47B(8)(b).

¹⁷⁰ The Competition Appeal Tribunal Rules Rule 78(2).

In determining whether the representative would act ‘fairly and adequately,’ the CAT will take into account whether it is a member of the collective, the nature of the body generally and whether it has a satisfactory plan for the proceedings, including any estimate and details of costs and fees.’¹⁷¹

The government’s consultation on the draft 2015 Rules¹⁷² indicated that, in order to address concerns that overly-aggressive claimant lawyers would trigger a flood of litigation, it was minded to introduce a presumption that organisations that offer legal services, special purpose vehicles and third party funders should not be able to act as representatives. This position was softened somewhat in the government’s subsequent policy document,¹⁷³ in which it was noted that a presumption against these potential representatives would be too prohibitive and could, for instance, prevent a special purpose vehicle that had been established in a genuine manner to represent the class from being able to bring a case.

The new Guide to Procedures reflects this more open approach, stating that ‘there is no blanket prohibition against certain types of organisation taking on the role of class representative. It nevertheless goes on to adopt a cautious outlook, noting that the potential for:

‘Conflict between the interests of a law firm or third party funder and the interests of the class member may mean that such a body is unsuitable to act as a class representative.’¹⁷⁴

¹⁷¹ Ibid., Rule 78(3).

¹⁷² Department for Business Innovation & Skills, *Competition Appeal Tribunal (CAT) Rules of Procedure: review by the Rt. Honourable Sir John Mummery - Consultation*, (2015), section 7, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/401678/bis-15-75-competiiton-appeal-tribunal-cat-rules-of-procedure-consultation.pdf (accessed 14.7.2016).

¹⁷³ Department for Business Innovation & Skills, *Competition Appeal Tribunal (CAT) Rules of Procedure: Government response*, 2015, section 3, accessed https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/460442/BIS-15-357-competition-appeal-tribunal-rules-of-procedure-government-response.pdf (accessed 14.7.2016).

¹⁷⁴ Competition Appeal Tribunal, *Guide to Proceedings*, para.6.30.

Where the CAT will draw the line remains to be seen, though no doubt claimant law firms and third party funders will be very keen to demonstrate why any such concerns of interests are misguided in a particular case.¹⁷⁵

It is submitted that in order to make cross-border collective redress a success in the EU, there have to be incentives. Incentives drive class actions in the US. On the other hand, collective redress has to be protected from abuse. Regardless of whether the US' reputation for harbouring vexatious claims is well-justified, it is clear that collective redress is far more advanced than the EU and returns much more compensation from the pockets of wrongdoers.

An EU Competition Court could experiment with the further-reaching elements of US-style collective redress in a controlled environment. One court would mean a single set of substantive and procedural rules. It would eliminate the risks of irreconcilable judgments and forum shopping which come with a decentralised model. Moreover, in order to prevent the self-serving lawyer from accessing the court, only representative entities which can demonstrate that they represent a legitimate consumer interest should be allowed standing.

¹⁷⁵ B. McGrath and T. Reddy (supra n.160), 20.

6.13 Concluding remarks on the need for a Competition Court

Creating an EU Competition Court poses many difficulties. However, it has been argued that cross-border collective redress requires a centralised forum in order to grow and develop a body of law and overcome the problems caused by the diversity of national systems. Failure to create an effective cross-border collective mechanism means that undertakings are not held to account. This means that they retain the profit from their wrongdoing. In the Report on making antitrust actions more effective in the EU: welfare impact and potential scenarios¹⁷⁶ it was estimated that if private antitrust actions did not become more effective in the years to come, foregone benefits of antitrust infringement would range between €5.7 billion and €23.3 billion.¹⁷⁷ It was expected that overall, more effective enforcement of competition law in Europe (with public and private enforcement) could bring about yearly social benefits as high as 1% of GDP, or €113 billion alone in 2006.¹⁷⁸ The contribution of private enforcement to this impact was expected to be substantial.¹⁷⁹ The EU Competition Court may be a radical solution but a radical solution is required.

¹⁷⁶ A Renda, J. Peysner, A.J. Riley, B.J. Rodger, R.J. Van Den Bergh, S. Keske, R. Pardolesi, E.L. Camilli, P. Caprile, *Report for the European Commission*, DG COMP/2006/A3/012, available at http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf (accessed 14.7.2016).

¹⁷⁷ *Ibid.*, 11.

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*

CONCLUSION

7.1 Research questions

This thesis set out to examine the relationship between the private enforcement of EU competition law and forum shopping with a particular focus on cross-border end-consumer collective redress.

This is an important topic because mass harm situations will often have a cross-border element. Goods and services of all types are distributed throughout the Member States of the EU. Breach of EU competition rules may therefore entitle end-consumers domiciled in different Member States to claim compensation from the infringing undertaking(s). Cross-border collective redress offers claimants the opportunity to consolidate all claims stemming from that conduct. However, cross-border cases have the potential to raise complex issues of private international law. If all claims are not pooled together then this opens up the risk of parallel proceedings, irreconcilable judgements and unequal treatment of end-consumers.

There is no coherent framework for cross-border collective redress in the EU. Instead, there are significant differences in the approaches of Member States towards collective redress. The Commission Recommendation on collective redress was the latest attempt to level the playing field. However, the ‘soft’ approach adopted by the Recommendation does not generate an obligation for the Member States to align their procedures to tackle cross-border inequality in mass harm situations. It simply *invites* Member States to establish minimum standards.

Against this background, the motivation for this thesis stemmed from the idea that in the absence of uniformity, litigants may have an incentive to bring their case to a court that is considered to be the most convenient for their action, i.e. where they will be most likely to obtain a favourable judgment. This in turn can provide Member States with incentives to amend their laws to attract collective proceedings and create competition between national judicial systems.

However, as the research developed, other fundamental issues came to the fore. For example, there are concerns regarding the scarcity of claims and the lack of motivation for end-consumers to seek a remedy, particularly if they have to seek redress outside of their own legal regime. While the loss suffered by an individual end-consumer following a breach of EU competition law may be *de minimis*, the aggregate harm can amount to a significant sum. In the absence of effective private enforcement, infringing undertakings will retain the profit from their conduct.¹

With these concerns in mind, two research questions were identified. First, the extent to which the conflicts-of-laws encourage forum shopping in the context of cross-border end-consumer collective redress. Second, the identification of the appropriate forum for this type of case and the procedural measures required to be adopted in order to facilitate equal and effective access to justice for victims of EU competition law violations.

¹ For background, see Chapter 1.

7.2 Developing the research questions

When researching the extent to which the conflicts-of-laws encourage forum shopping within the context of cross-border end-consumer redress, this thesis assessed the rules on jurisdiction and the applicable law together with the various options which these presented to the litigant.²

The research then turned to where, under the current conflict-of-laws regime, should be the most appropriate forum to bring a cross-border collective case. Member State cooperation in order to facilitate the proper forum was also considered.³

This thesis also looked at whether the most suitable forum for cross-border end-consumer collective cases may exist outside of the traditional court setting. This was considered in response to the advent of alternative dispute resolution practices. More specifically, collective arbitration was considered. The experience of class arbitration in the US was drawn upon in order to evaluate whether such an approach would be suitable in a European setting.⁴

Moreover, as this thesis developed, it was important to incorporate an examination of the attitudes of the primary stakeholders and beneficiaries of collective redress: i.e. end-consumers. Their expectations should be taken into account in order to refine collective redress and develop it as a more responsive and tailored enforcement tool.⁵

² See Chapter 2.

³ Ibid.

⁴ See Chapter 3.

⁵ See Chapter 4.

Flexibility was also considered as a factor which may influence the success of cross-border collective redress. The two pillars of competition enforcement have very distinct roles. The public element focusses on deterrence while the private role is in place to compensate. However, it was questioned whether, in the face of the paucity of cross-border end-consumer claims, the separation of these roles is excessively rigid. Therefore, this thesis analysed whether it would be appropriate for modes of public enforcement to be interlinked with the private sphere in order to facilitate the redress of victims.⁶

Finally, in the light of a heterogeneous landscape of cross-border collective redress, it was considered whether the decentralised model of private enforcement is the most appropriate. An alternative could be to have all cross-border end-consumer damages claims following a breach of EU competition law heard in a centralised supranational EU Competition Court.⁷

7.3 The extent to which the conflicts-of-laws encourage forum shopping

From the jurisdictional perspective, it was considered that the Brussels 1 Recast Regulation (the instrument used to allocate jurisdiction in civil and commercial matters) can present the litigant with the opportunity to choose between more than one forum.⁸

There are several Articles of the Regulation which appear to be relevant. First, Article 4 underlines the general rule and allocates jurisdiction to the courts of the defendant's domicile.⁹ For a claimant, this Article in itself has the potential to encourage forum shopping. The definition of the 'domicile' of companies or other legal persons in the Regulation may prove in a collective redress setting to favour a claimant. Article 63(1)

⁶ See Chapter 5.

⁷ See Chapter 6.

⁸ See Chapter 2, sections 2.0 – 2.5.

⁹ *Ibid.*, Section 2.2.

provides that the domicile of legal persons is linked to the statutory seat, central administration, or principal place of business. These criteria do not follow any hierarchical order and leave the claimant free to choose upon which to found jurisdiction. From a forum shopping perspective, claimants may potentially launch a collective suit in a certain Member State for the simple reason that the company has a registered office there. This raises questions of appropriateness when the selected forum is only tenuously linked to the dispute while the major focus of the case rests elsewhere.¹⁰ Alternatively, an undertaking seeking to engage in anticompetitive conduct could establish a domicile in a Member State which has a limited or no collective regime. Consumers would face having to litigate on an individual basis. The obligation to pursue an action on an individual basis acts as a significant barrier to end-consumer redress. In sum, Article 4 presents tactical opportunities for both parties to the dispute.

Second, Article 8 provides that jurisdiction over one defendant on the basis of their domicile may be extended to other defendants on the justification of procedural efficiency. According to Article 8(1), several co-defendants can be sued at the domicile of one co-defendant ('the anchor defendant'). It presupposes a close connection between the causes of action. Hence, if several undertakings with headquarters in different Member States are sued for the same cause of action, the claimant may freely select among the courts of different Member States. The claims brought by the same claimant against different defendants must be so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings. This permits a centralisation of collective litigation by bundling parallel lawsuits against several defendants domiciled in different EU Member States. Accordingly, this head of

¹⁰ Ibid., section 2.2, page 43.

jurisdiction potentially opens up a gate way for forum shopping in different EU Member States.¹¹

Third, under Article 7(2) a case may be heard before the courts of the place where the harmful event occurred or may occur.¹² The place where the harmful event occurred or may occur is to be understood as twofold: it will either be at the place where the harmful event giving rise to the damage occurred (place of acting) or the place where the actual damage occurred (the place where the harm was felt). The choice between these two places is left to the claimant. To place reliance exclusively on the place of acting could make Article 7(2) lose most of its effectiveness since ordinarily a person would act where they have their domicile and thus Article 4 would come in to play to the detriment of Article 7(2). This so-called principle of ubiquity avoids choosing between the alleged tortfeasor's activity and its results by attributing the same weight to both, and thereby favours the claimant, the alleged victim.¹³

The principle of ubiquity is restricted. At the place where the damage was sustained, a claim can only be brought for the damage sustained in the forum state, and not for world-wide damage. The advantage of having a *forum actoris* is combined with a limitation. This should be seen as an obstacle to forum shopping. To favour the claimant overly would constitute a windfall profit for the claimant and would deny, or at least neglect, the defendant's legitimate interests.¹⁴

Fourth, a defendant may be sued in another Member State as regards a dispute arising out of a branch, agency or other establishment, in the courts for the place where the branch,

¹¹ Ibid., section 2.4.

¹² Ibid., section 2.3.

¹³ Ibid., page 45.

¹⁴ Ibid.

agency or other establishment is situated. While this comes with certain restrictions, it opens up the potential for the claimant to choose an alternative forum.¹⁵

The current jurisdictional provisions create the possibility to choose between a wide range of fora. Cases such as *Cooper Tire*¹⁶ provide a practical example of how an infringement of the EU competition rules may provide choice to a putative claimant. In this case there was the potential choice to sue, *inter alia* in the courts of Milan, Vienna, Amsterdam, Brussels, Richmond-on-Thames, Frankfurt and Prague.¹⁷

The inability to tie a collective redress case to a single forum, especially given the ongoing proliferation of divergent national regimes for dealing with such claims in EU Member States, has the potential to entail parallel proceedings. Parallel proceedings in a collective case not only go against the very notion of consolidating such claims but might also foster forum shopping to such an extent as Member States make themselves more or less attractive to foreign collective claimants. For example, cases such as *Deutsche Bahn* gives more options to try to establish jurisdiction in the UK, in turn allowing them to take advantage of the perceived ‘claimant-friendly’ nature of the English judicial system.¹⁸ The importance of the law of the forum could be further strengthened by making reference to Article 6(3)(b) of the Rome II Regulation, which allows private antitrust claimants to base their claim on the *lex fori* where the market is, or is likely to be, affected in more than one country provided that the market in that Member State is amongst those directly and substantially affected by the anticompetitive conduct.¹⁹

¹⁵ Chapter 2, section 2.5.

¹⁶ *Cooper Tire* [2010] EWCA Civ 846.

¹⁷ Chapter 2, section 2.3.

¹⁸ *Ibid.*

¹⁹ Chapter 2, section 2.9.

7.4 The appropriate forum for cross-border end-consumer cases and the procedural measures required to be adopted in order to facilitate effective and equal access to justice for victims

Where there is an opportunity to sue in alternative fora, the research turned to assess the most appropriate forum for cross-border end-consumer cases. An analysis of the jurisdictional rules considered that the domicile of the defendant (or one of the defendants) would in theory provide the most appropriate jurisdiction.²⁰ By definition, the cross-border conduct causes damage in the territories or in the markets of more than one State. The victims who are harmed by this activity are based in different States. In theory, the defendant's domicile would seem to provide the only central point where all claims and interests can be consolidated and taken into account by a single court. It would also enable the application of one single law to the entire action, thus alleviating the claimants of the burden of pleading and proving several foreign laws. It would greatly simplify the creation of mixed classes consisting of both domestic and foreign victims.

Allocating jurisdiction to any other court would require that a choice be made amongst potentially a large number of fora. This has the potential to create several problems. It could discriminate between end-consumers. The action could be brought in a Member State where some of the end-consumers are domiciled, but not others. Moreover, allocating jurisdiction to more than one court could mean that collective redress proceedings may potentially be initiated concurrently in different Member States raising the issue of parallel proceedings and irreconcilable judgments.

²⁰ Chapter 2, section 2.2, page 45.

The arguments in favour of the domicile of the defendant are not entirely robust. The rule clearly favours the defendant. This was intentional in the structuring of the Brussels Regime, having taken the *actor sequitur forum rei* as its foundation. The Brussels Regime operates on the basis that the defendant should have a reasonable expectation of where they are likely to be sued. However, it has the potential to put claimants at a tactical disadvantage. The defendant will generally be left in an economically strong position and would benefit from the practicality of their home jurisdiction. Meanwhile, foreign class members suffer from high costs and the many risks associated with litigation abroad. Moreover, jurisdiction at the domicile of the defendant may give the wrong incentives. Even though it is unlikely, undertakings may deliberately choose to incorporate or take their seat in countries which do not provide for any collective redress mechanisms.

An exclusive jurisdiction was also considered. However, in trying to create a jurisdictional rule exclusive to cross-border collective redress, it is difficult to locate a forum (other than at the domicile of the defendant) which effectively concentrates and consolidates all claims. One suggestion was to create a rule based on the Member State or market which is most affected by the anticompetitive conduct. However, such a concentrating rule may risk attributing jurisdiction only to Member States which have large markets, where harmful activities are felt on a wider basis. Injured parties from smaller markets would never enjoy the benefit of bringing collective proceedings in their home Member State.²¹

Therefore, under the current regime, the most appropriate forum is the domicile of the defendant.

²¹ Chapter 2, section 2.3, page 55.

In the light of private international law principles which lend themselves to the choice of more than one forum, it was considered that greater guidance, communication and interaction between the Member States should be considered in order to ensure that the most legitimate venue is seised.²² This kind of cooperation has been recognised as beneficial in both the US and Canada. In the US, for example, the Manual for Complex Litigation provides guidance for judges when related proceedings are lodged within different courts. When consolidation is unavailable, judges should coordinate their proceedings in order to avoid duplication and conflicts. The Manual stresses that the need to coordinate is especially acute where overlapping or multiple identical class actions are filed in more than one court. It goes on to suggest that as a minimum, judges should exchange case materials such as master pleadings, questionnaires, and discovery protocols. In Canada, procedures are in place to encourage informal cooperation between class counsel.

Coordination and communication could further be reinforced by a central registry of collective actions in the EU. The creation of a registry in Canada acts as a clearing house for lawyers to consult in order to determine the existence of collective proceedings and avoid the filing of parallel cross-border proceedings. In the context of the EU, a registry could be established and managed by a pre-existing EU body such as the European Judicial Network [EJN]. Note that the Recommendation already suggests that the Member States should establish a national registry of collective redress actions.

The EU may also consider the possibility of assigning to one body the role of managing cross-border collective actions. The US has a Judicial Panel on Multidistrict Litigation [MDL Panel]. There may be scope for the EJN to operate in a similar way to the MDL

²² Chapter 2, section 2.7.

Panel and to make decisions regarding the transfer and consolidation of proceedings.

Coupled with management of a central registry, the EJR would have an ability to assess fully the appropriateness of consolidating a case in an attempt to reduce parallel litigation.

Outside of the Brussels Regime, this thesis considered a range of different options in order to facilitate the most appropriate forum to remedy cross-border mass harm situations.

The first option concerned the operation of collective redress outside of the traditional court setting. More specifically, collective arbitration was considered. In the US, class arbitration is a well-known device. The advantage of collective arbitration over the traditional court process is that a procedure could be designed free from interference from Member States. It was also considered that the supranational element of international collective arbitration would, *prima facie*, alleviate concerns associated with forum shopping and the potential diversity associated with private enforcement of competition law by the national courts.²³

However, the whole point of arbitration is that it is a consensual practice. One wonders whether a well-informed undertaking would elect to proceed to arbitration at all if it knew that it would have to do so on a collective basis. The answer is probably not. Apathy most likely prevails. Collective arbitration is a high cost and high stakes process with an uncertain preclusive effect on collective members. Businesses would likely oppose collective arbitration. The US Supreme Court has supported class action waivers in spite of there being no practical alternative to seek a remedy. Should the EU take a similar approach, it is submitted that collective arbitration would not be appropriate.²⁴

²³ Chapter 3, section 3.1.

²⁴ Chapter 3, section 3.7.

When researching the appropriate forum and the necessary procedures to ensure a suitable remedy, it was important to consider consumer attitudes and expectations. In many cases end-consumers would be of the opinion that the effort of taking steps to claim their share of compensation would far outweigh and be disproportionate to the amount that they would actually receive.²⁵ It may sometimes be difficult to identify every collective member and it could be prohibitively expensive to distribute what are essentially nominal damages to a large collective. The question then remains as to what happens to the large residue of unclaimed funds. The remedy put forward was the cy-pres doctrine.²⁶ In Europe, an adapted cy-pres mechanism could make sure that a) compensation is made available for a period to those who want to claim it and b) that unclaimed funds do not revert to defendants, deterring undertakings from future anticompetitive conduct. The concern about cy-pres awards is that the residue is allocated to a charity which has no meaningful connection to the case at hand. A cautious approach is therefore warranted. This could be overcome by instead allocating the funds to the consumer association which has acted on behalf of the collective. This would provide consumer associations with the incentive to reinvest the funds into future litigation. It would bolster the effectiveness of private enforcement and would vindicate the rights of end-consumers, perhaps not individually, but in the much broader sense, acting in the public interest.

This thesis also considered that compensation does not always have to be exclusive to private enforcement of competition law. It was considered that at the end of the public investigation, the competition authority should be able to impose not only a fine but also award a certain form of compensation to the injured parties.²⁷ In essence, this means

²⁵ Chapter 4, sections 4.2 to 4.4.

²⁶ Chapter 4, sections 4.5 to 4.6.

²⁷ Chapter 5, section 5.2.

blurring the boundaries between public and private enforcement. However, in a situation which faces diversity across different legal systems, forum shopping, end-consumer apathy and procedural obstacles (incentives to litigate and the financial risk associated with losing a claim) public compensatory measures could be one of a range of methods used to bolster effective redress.

Finally, it was considered that given the diversity of the EU Member States' approach towards collective redress, it may be desirable to have all of the cross-border collective claims for damages suffered as a result of anticompetitive behaviour heard in a centralised supranational EU Competition Court.²⁸ In designing a Competition Court with powers to adjudicate cross-border collective claims, EU Member States may request safeguards against the kind of US-style litigation which can sometimes be viewed as vexatious and abusive. However, one cannot ignore the success of private enforcement in the US against the paucity of claims in the EU. Perhaps one could learn (albeit cautiously) from the experience across the Atlantic. Slowly, the EU could import ideas such as punitive damages in order to encourage collective cases.²⁹ A centralised forum could monitor this in a controlled environment. A single forum would ensure consistency in interpretation and a coherent body of law. There would be no opportunity for forum shopping given that only one forum in the EU would have full jurisdiction and expert judges could develop their own methods of striking down claims which are abusive and have little merit.

It is acknowledged that an EU Competition Court poses many difficulties. The UPC and the EU Civil Service Tribunal which have been used as ideas for the creation of an EU Competition Court are not perfect examples. The former has faced strong criticism from

²⁸ Chapter 6.

²⁹ Chapter 6, section 6.12.

stakeholders while the latter has been abolished. An in depth analysis of these courts has shown the types of trials and tribulations such a proposed forum may face. However, given the potential for forum shopping, the diversity of Member States and the paucity of claims, it is submitted that a centralised forum would be the ideal solution.

7.5 Ranking of ideas developed in this thesis

A Competition Court would be the ideal solution. If forum shopping is to be overcome, then a single forum dealing with cross-border collective redress would be the ultimate remedy. Expert judges, a coherent body of case law and one set of substantive and procedural rules would transform cross-border collective redress into an effective vindicator of end-consumer harm.

If this is not possible, then several developments must happen. First, greater cooperation between the Member State courts must be engaged and, where possible, collective claims must be consolidated and allocated to the most appropriate forum. Where consolidation is not possible, the Member State courts must engage in close communication to avoid irreconcilable disputes. One way to ensure this would be to have an appointed case-handler to ensure that similar claims arising out of the same infringement are allocated to appropriate fora and orchestrated in a consistent manner.

Finally, this thesis advocates greater flexibility. Whether a Competition Court is developed or Member States continue to be able to adjudicate collective claims, measures must be adopted in order to facilitate more effective redress. The investment of unclaimed damages in the financing of litigation led by authorised consumer bodies would help to alleviate the financial strain on these entities and encourage them to come forward with more claims on

behalf of consumers. Moreover, the provision of compensatory powers to competition authorities could bolster private enforcement and be an effective ancillary mechanism towards the vindication end-consumer rights.

7.6 Final remarks

The conflicts-of-laws have the potential encourage forum shopping. Whether they actually do is a different story given the paucity of claims. The potential to eliminate forum shopping could be ensured by allocating the case to the appropriate forum. A Competition Court is the ideal solution. The EU has a single market. However, it does not have a single legal market. It could grow a body of coherent law in a controlled, expert environment.

Aside from the appropriate forum, one needs to consider the appropriate procedures. The reality is that end-consumers will not come forward for a minimal sum of compensation. Therefore, a next-best scenario has to be considered. A cy-pres doctrine which distributes the residue to consumer associations so that they can reinvest the funds into future litigation would bolster private enforcement. Moreover, greater interaction and flexibility between public and private enforcement could provide more effective means of vindicating the rights of collective victims.

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