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# The role of class actions in ensuring effective enforcement of competition law infringements in the European Union

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## ABSTRACT

This article analyses the European Union competition law enforcement system and its developments. Data shows that the current European Union competition law enforcement system is ineffective. The systematic analysis by the author of the United States competition law enforcement system shows that an opt-out class action mechanism for competition law enforcement established in the United States enables effective enforcement of competition law. Whereas, there is no uniform collective redress system across the European Union. The national regimes of European Union Member States regarding collective redress are diverse. These considerations implies the need for a uniform collective redress system across the European Union.

*“Two words describe the damages-actions landscape in Europe today: ineffective and uneven. Often the rules are so complex and uncertain that starting a damages action in court means embarking in an endless procedural battle. Insufficient, uneven and costly access to compensation is simply unacceptable in the Single Market; where the costs of an infringement should be borne by the infringers, not by the victims.”*

(Joaquin Almunia, Vice President of the European Commission responsible for Competition Policy, 2013).

## 1. Introduction

In times of mass production and marketing, economic subordination and global communications, frequently many consumers are harmed by unlawful corporate practices, which bring large unlawful profits for undertakings. Whish and Bailey notes that the goal of competition law is to protect the interests of consumers, not (or not only) by protecting the competitive process itself, but by taking direct action against offending undertakings (Whish & Bailey, 2015, p. 20).

Competition law enforcement pursues three interconnected objectives: injunctive, punitive (deterrent) and compensatory (Komninos, 2008, p. 7). Berg notes that the focus on the compensation objective helps to design the optimal enforcement system

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(Berg, 2013, p. 15).<sup>2</sup> Many scholars consider that public enforcement is insufficient and it needs to be complemented with private enforcement – a potential infringer, while evaluating whether to engage in an anti-competitive practice, should consider the threat not only to be detected by the competition authorities but also the threat of an action for damages as a real cost (Migani, 2014, p. 85).

Jones and Sufrin notes that an effective private enforcement system creates a culture of competition among European Union citizens and a relief of pressure on competition authorities, able to save their resources for more complex cases (Jones & Sufrin, 2014, p. 1090). Whish and Bailey also notes that the competition authorities in the European Union have limited resources and they are unable to investigate every alleged infringement of the competition rules; private enforcement is a very important complement to their activities (Whish & Bailey, 2015, p. 312). Moreover, an effective private enforcement of competition law infringements can have an overall macroeconomic positive impact. It has been estimated that an effective enforcement system could result in annual social benefits of more than 100 billion euros in the European Union (Migani, 2014, 92 p).

The direct applicability of Articles 101 and 102 TFEU and the right to damages in the European Union have been established by the Court of Justice of the European Union in the milestone judgments of *Courage*<sup>3</sup> (*Courage Ltd v Bernard Crehan*, 2001) and *Manfredi*<sup>4</sup> (*Vincenzo Manfredi v Lloyd Adriatico Assicurazioni*, 2006).

However, former European Commissioner for Competition Joaquin Almunia notes that access to compensation is insufficient and unevenly spread in European Union (Almunia, 2013, p. 2). For instance, only 25% of Commission's decisions finding a cartel or other competition law infringement over the period 2008–2012 were followed by damages actions (Almunia, 2013, p. 2). Furthermore, those actions were mainly concentrated in three Member States – the United Kingdom, Germany and the Netherlands – and nearly all of them have been brought by large companies (Almunia, 2013, p. 2).

One of the main problems for effective private enforcement of competition law infringements (in particular for private individuals, small and medium sized businesses) is that there is no effective uniform class action system across the European Union (Bovis and Clarke, p. 61). The harm of the competition law infringement to one person may be small, and insufficient to merit the risk and cost of bringing an action for damages, consequently, the right to damages may be more theoretical than real in the absence of a possibility for a class action, a procedural mechanism enabling many single claims to be bundled into a single court action (Whish & Bailey, 2015, p. 319).

Whereas, private enforcement of competition law infringements is at the forefront of competition law enforcement in the United States – 90 per cent of all competition law cases in the United States involve private rather than public action (Whish & Bailey, 2015, p. 312). For instance, a total number of 1094 antitrust class actions were filed in the United States only during the period of 2013–2014 (Searby, 2015, p. 47).

Alexander notes that effective class action mechanism requires: (i) procedural law to authorize class actions; (ii) a supply of experienced lawyers; (iii) a way to finance the litigation; (iv) substantive law that recognizes consumers claims and does so in such a way that it will be efficient to litigate hundreds, thousands or even millions of claims together (Alexander, 2000, p. 2). Whereas, there is no uniform class action system across the European Union and the national regimes of European Union Member States are diverse.<sup>5</sup>

## 2. Private competition infringements enforcement developments in the European Union

In 2001, the Court of Justice of the European Union judgment in *Courage* established that Member States have an obligation, as a matter of European Union law, to provide a remedy in damages where harm has been inflicted because of an infringement of the competition rules (*Courage Ltd v Bernard Crehan*, 2001).

The Court of Justice of the European Union held that:

The full effectiveness of Articles 101 TFEU and, in particular, the practical effect of the prohibition laid down in Article 101(1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.

Indeed the existence of such a right strengthens the working of the EU competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the EU.

In a later judgment *Manfredi* the Court of Justice of the European Union recognized the compensation function of private enforcement (*Vincenzo Manfredi v Lloyd Adriatico Assicurazioni*, 2006).

<sup>2</sup> For example, in cases of price-fixing, overcharges are usually passed on along the supply chain: from manufacturers to wholesalers, from wholesalers to retailers, and from retailers to end-consumers. If the consumers have no standing, the law breaking undertakings will not have to pay the total size of the damages caused.

<sup>3</sup> The Court of Justice of the European Union held that Articles 101 and 102 TFEU produce direct effects in relations between individuals and create rights for the individuals concerned which the national courts must safeguard.

<sup>4</sup> The Court of Justice of the European Union recognized the compensation function of private enforcement.

<sup>5</sup> For instance, no specific class action law exists in such significant European Union Member States as Germany and Austria.

The Court of Justice of the European Union held that:

Any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 101 TFEU.

Regulation 1/2003,<sup>6</sup> which was adopted by the Council of the European Union on 16 December 2002, entered into force on 1 May 2004. Wils notes that Regulation 1/2003 brought about a radical change in the way in which the European Union competition law prohibitions contained in Articles 81 and 82 EC (currently Articles 101 and 102 TFEU) are enforced (Wils, 2013, p. 295). Bovis and Clarke vividly notes that after the Regulation 1/2003 the consumer was given the power and the ability to strike back at the companies, which intended to cause harm (Bovis & Clarke, 2015, p. 49).

Regulation 1/2003 established the framework for private enforcement of competition law infringements in the European Union and the opportunity for the national courts to rule on private competition law cases. Victims of competition law infringements have a right to obtain compensation for damages (Regulation 1/2003, Recital 7). Regulation 1/2003 and the Co-operation notice<sup>7</sup> promote the decentralization of the enforcement of European Union competition law, emphasizing that national courts have an essential part to play in applying the European Union competition rules, which complements that of the competition authorities (Regulation 1/2003, Recital 7). Regulation 1/2003 provides that Articles 81 and 82 EC (currently Articles 101 and 102 TFEU) have a direct effect on undertakings in Member States in their entirety (Regulation 1/2003, Article 1) and national courts have power to apply them (Regulation 1/2003 Article 6), alongside national competition law, when the relevant agreements affect trade between Member States (Regulation 1/2003, Article 3(1)).

Moreover, Regulation 1/2003 established that national courts and the Commission work in close cooperation by a variety of means. The Commission transmits relevant information, opinions and written and oral observations on the application of European Union competition law to national courts and Member States forward copies of relevant judgments to the Commission (Regulation 1/2003, Article 15). Furthermore, in order that the application of European Union competition law would be uniform, national courts cannot rule in contrast with a decision adopted by the Commission on the same matter and should consider suspending their proceedings to avoid making decisions in conflict with a decision by the Commission (Regulation 1/2003, Article 16).

However, a study on the condition on claim for damages undertaken by the law firm Ashurst (Ashurst Report), ordered by the Commission, found that levels of private competition law enforcement through damages claims in European Union are very low (Ashurst, 2004). The Ashurst Report has found that not only there is total underdevelopment of claims for damages for breach of European Union competition law, but there is also astonishing diversity in the approaches taken by the Member States (Ashurst, 2004).

The Ashurst Report led the Commission to publish a Green Paper,<sup>8</sup> accompanied by a Staff Working Paper.<sup>9</sup> The Green paper noted that private enforcement should guarantee the full compensation of victims, identified the aim of both public and private enforcement as being to deter anticompetitive practices forbidden by competition law and to protect undertakings and consumers from these practices and any damages caused by them (Green Paper, 2005, Paragraph 1.1).

In 2008, the Commission published a White Paper on damages actions for the breach of European Union antitrust rules.<sup>10</sup> The White Paper outlined a parallel system of public and private enforcement of antitrust rules, suggested the grounds for compensation and raised the need of achieving collective redress in competition law infringement cases (White Paper, 2008, Paragraph 2.1.). Moreover, the Commission proposed to stimulate individual direct and indirect purchaser damages actions, while strengthening collective redress mechanisms for consumers, including opt-in class actions brought by representative organizations on behalf of claimants (White Paper, 2008, Paragraph 2.1.). The White Paper declared that full compensation of victims would be the first and foremost guiding principle of private enforcement throughout European Union (White Paper, 2008, Paragraph 2.5.). The Commission further identified the issue of finance barriers for access to justice, stating that it would be useful for Member States to reflect on their cost rules and to examine the practices existing across the EU, in order to allow meritorious actions where costs would otherwise prevent claims being brought, particularly by claimants whose financial situation is significantly weaker than that of the defendant (White Paper, 2008, Paragraph 2.8.). However, the White Paper remained silent on the procedural aspects of private enforcement of competition law, *inter alia* procedural rules of a uniform collective redress system across the European Union.

In conclusion, the adoption of the Regulation 1/2003 has not been enough to achieve effective competition law enforcement system in the European Union.

### 3. Commission recommendation on common principles for collective redress mechanisms in the Member States

In June 2013 the European Commission published its new documents on collective redress. The main document was a

<sup>6</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1–25.

<sup>7</sup> Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC (2004/C 101/04), OJ C 101, 27.4.2004, p. 54–64.

<sup>8</sup> Green Paper - Damages actions for breach of the EC antitrust rules, COM (2005) 672 final,

<sup>9</sup> Commission Staff Working Paper, SEC (2005) 1732.

<sup>10</sup> White Paper on damages actions for breach of the EC antitrust rules, COM (2008) 165 final.

Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law<sup>11</sup> (Recommendation 2013/396/EU), which was accompanied by a Communication to the European Parliament and the Council – Towards a European Horizontal Framework for Collective Redress.<sup>12</sup> It should be noted that pursuant to Article 288 TFEU a Recommendation does not have any binding force.

The Recommendation 2013/396/EU presents principles common to injunctive and compensatory collective actions, followed by more principles applicable only to injunctive or compensatory collective actions (Silvestri, 2013, p. 49). According to the European Commission, these principles are supposed to represent the minimum standards that Member States are encouraged to apply in the domestic regulation of collective redress, since compliance with these standards would improve the judicial protection offered to group rights by means of procedures that are fair, equitable, timely and not prohibitively expensive (Recommendation 2013/396/EU, 2013, Section I Paragraph 2).

Firstly, the principles common to injunctive and compensatory collective redress deal with issues such as standing, admissibility of actions, adequate information to potential claimants, funding of collective actions and application of the loser pays principle to the costs of claims (Silvestri, 2013, p. 49). As regards the admissibility of actions, the Member States should provide for verification at the earliest possible stage of litigation that cases in which conditions for collective actions are not met, and manifestly unfounded cases, are not continued (Recommendation 2013/396/EU, 2013, Section III Paragraph 8). Also, the courts of the Member States should carry out the necessary examination of their own motion (Recommendation 2013/396/EU, 2013, Section III Paragraph 9). The European Commission notes the importance to adequate information about prospective collective actions – Member States should ensure that it is possible for the representative entity or for the group of claimants to disseminate information about a claimed violation of rights granted under Union law and their intention to seek an injunction to stop it as well as about a mass harm situation and their intention to pursue an action for damages in the form of collective redress; The same possibilities for the representative entity, *ad hoc* certified entity, a public authority or for the group of claimants should be ensured as regards the information on the ongoing compensatory actions (Recommendation 2013/396/EU, 2013, Section III Paragraph 10). As regards the costs of collective action, it is recommended to the Member States that in the regulation of this matter the so-called loser pays principle would be followed – the costs incurred by the winning party should be reimbursed by the losing party (Recommendation 2013/396/EU, 2013, Section III Paragraph 13).

Secondly, for injunctive collective redress the Recommendation 2013/396/EU lays down two specific principles: (i) The courts and the competent public authorities should treat claims for injunctive orders requiring cessation of or prohibiting a violation of rights granted under Union law with all due expediency, where appropriate by way of summary proceedings, in order to prevent any or further harm causing damage because of such violation (Recommendation 2013/396/EU, 2013, Section IV Paragraph 19); (ii) The Member States should establish appropriate sanctions against the losing defendant with a view to ensuring the effective compliance with the injunctive order, including the payments of a fixed amount for each day's delay or any other amount provided for in national legislation (Recommendation 2013/396/EU, 2013, Section IV Paragraph 20).

Thirdly, the most important principle in the Recommendation 2013/396/EU is regarding the collective actions for damages (according to the Recommendation 2013/396/EU language – compensatory collective redress actions). The Recommendation 2013/396/EU suggests the application of an opt-in principle in national collective redress procedures stating that the claimant party should be formed on the basis of express consent of the natural or legal persons claiming to have been harmed (Recommendation 2013/396/EU, 2013, Section V Paragraph 21). Benohr notes that as demonstrated by several case studies, the Commission's approach risks being ineffective in low damages claims, because consumers are unlikely to file a claim individually or in an opt-in procedure, as the litigation cost risk being higher than the expected financial benefit of a successful case (Benohr, 2014, p. 255).

In conclusion, the Recommendation 2013/396/EU is a very tenuous step by the European Commission to achieve effective collective redress system across the European Union, *inter alia* for competition law infringements, as it is not binding and suggests the application of an opt-in principle.

#### 4. Directive 2014/104/EU

The new Directive 2014/104/EU<sup>13</sup> was signed on 26 November 2014. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 27 December 2016. The Directive 2014/104/EU builds upon the 2005 Green Paper and 2008 White Paper. The Directive 2014/104/EU seeks a balance between the need for a public repression and the right of private individuals and companies to be compensated for the damages they suffered (Migani, 2014, p. 81).

Firstly, the Directive 2014/104/EU facilitates access to evidence through disclosure. Article 5 of the Directive 2014/104/EU requires the disclosure of documents in national proceedings from the opposing party or any third party subject to a reasoned request and court control. The Directive 2014/104/EU incorporates the recent jurisprudence of the Court of Justice of the European Union, allowing claimants to specify categories of documents to facilitate the disclosure procedure (Commission v EnBW Energie Baden-Württemberg AG, 2014).

<sup>11</sup> Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, (2013/396/EU), OJEU, L.

<sup>12</sup> COM (2013) 401/2.

<sup>13</sup> Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, p. 1–19.

Secondly, Article 11(1) of the Directive 2014/104/EU holds co-infringers jointly and severally liable. The potential claimant is given a choice to sue one, some, or all infringers for the total amount of the loss that he has suffered from joint infringement. However, the Directive 2014/104/EU creates a number of exceptions from the rule of joint and several liability. Article 11(2) of the Directive 2014/104/EU holds that small or medium sized companies are liable only for the damage done to their direct and indirect purchasers. Article 11(2)(b) of the Directive 2014/104/EU holds that this exception also applies if the firm has a market share of less than 5% and if the application of the normal rules of joint and several liability would irretrievably jeopardize economic viability and cause its assets to lose all their value. Further, Article 11(4) of the Directive 2014/104/EU holds that joint and several liability is further restricted in instances where the defendant has received full immunity from fines for cooperating with a competition authority. Moreover, the rule in Article 19 of the Directive 2014/104/EU sets that settling defendants will benefit. Specifically, the claimant's damages claim will be reduced by the full amount of the defendant's share in the claimant's overall loss.

Thirdly, Article 12 of the Directive 2014/104/EU grants both direct and indirect purchasers the right to sue for damages. Article 14(2) of the Directive 2014/104/EU, in order to help indirect purchasers to prove standing, creates a rebuttable presumption that harm was passed on to indirect purchasers if: (i) the defendant has committed an infringement, (ii) the infringement resulted in an overcharge for the direct purchaser, (iii) the claimant shows that he has purchased affected goods or services. Article 13 of the Directive 2014/104/EU holds that the defending company is allowed to invoke the passing-on defense but it bears the burden of proof. Article 14(1) of the Directive 2014/104/EU establishes that in order to facilitate the defendant's burden of proof, the defendant may request disclosure from the claimant.

In addition to these three large blocks, the Directive 2014/104/EU includes, in particular in Article 9 that the final infringement decision of the Commission or national competition authority is binding. The binding effect precludes a national court from adopting decisions in private litigation that would run counter to such a decision. However, the Directive 2014/104/EU has no rules of a uniform collective redress system across the European Union.

In conclusion, the Directive 2014/104/EU brings improvements to the current competition law enforcement system in the European Union. However, the improvements are insufficient, whereas the Directive is silent on procedural rules of a uniform collective redress system across the European Union.

## 5. Benefits of class action

Use of the courts to assert rights is practicable only if the potential benefits exceed the cost and the costs of litigation is economically feasible (Alexander, 2000, p. 1). Alexander notes that claims that are too small to cover the cost of litigation will not be pursued; No matter what rights may be written in the substantive law, if there is no means by which those rights can be enforced the law might as well not exist, for it can be violated with impunity (Alexander, 2000, p. 1).

As it was indicated above, harm by unlawful corporate practices to a specific individual is typically small. Thus, although the individual claims may be small, they are not trivial from the social point of view and class actions provide a solution to this economic obstacle by gathering many individual claims together into a single lawsuit that can support the cost of litigation (Alexander, 2000, p. 1).

Alexander notes that class action is among the most powerful legal tools as it enables the vindication of claims that otherwise could never be litigated (Alexander, 2000, p. 2). The basic notion underlying class actions is that one or more class representatives sue on behalf of all similarly situated persons (Waller & Popal, 2015, p. 2). Duval, who analyzed class and non-class actions within a six-year period in the Northern District of Illinois, notes that class actions are a useful enforcement tool to enable cases that otherwise would not have been brought, due to small size of the claims (Duval, 1976, p. 1303).

Class actions can also be a way of levelling the field for poor or economically less powerful individuals<sup>14</sup> – when claims are brought together in class action form, the aggregate amount may be large enough to make it possible to engage the services of equally skilled attorney (Alexander, 2000, p. 2).

Class actions can make it possible to litigate small claims, thereby serving the goals of compensation and deterrence – by enabling claims, the class action device can provide appropriate incentives for corporations, assuring that they pay the true costs of their own conduct, rather than passing the costs on to consumers while retaining the benefits as profit (Alexander, 2000, p. 2).

Furthermore, class action mechanism, in order to be effective, should be based on an opt-out option. For instance, an opt-in class action mechanism for competition law claims has been available in the United Kingdom since 2003, pursuant to section 47B of the Competition Act. The opt-in model requires that individual claimants actively choose to join the collective action by giving permission for the representative body to litigate on their behalf (Vanikiotis, 2014, p. 1659). The Consumer Association brought a claim against JJB Sport plc seeking damages in relation to price fixing of England and Manchester United football shirts. However, despite the claim being well publicized, only around 550 individuals joined the claim, representing less than 0.1% of the estimated 1.2 – 1.5 million shirts purchased (The Guardian, 2008).

The opt-out model automatically litigates on behalf of all eligible claimants and allows individuals to withdraw from the claim (Vanikiotis, 2014, p. 1659). Several authors found that opt-out class actions are significantly more effective (Eisenberg & Miller, 2004, p. 1541). Eisenberg and Miller notes that it is because actual opt-out rates are extremely low, an average opt-out rate in the United States (United States has an opt-out model) is less than 0.2% (Eisenberg & Miller, 2004, p. 1541).

<sup>14</sup> Normally an individual, especially a poor person, is at a great disadvantage in a court case against a well-financed corporate opponent who can afford high priced lawyers.

In conclusion, class actions create incentives for attorneys to bring private enforcement claims. Though individual damages are too small to make a claim economically feasible, a class action can assemble many claims so that there is a significant total amount of money – enough to make litigation economically feasible. This makes the potential class recovery large enough to cover attorney's fee. Thus, it becomes profitable for attorneys to specialize in class action litigation. Moreover, the existence of the class action creates a market for private enforcement of the law. It is obvious, that greater numbers of enforcement of the law, in turn, creates improved incentives for undertakings to respect the law.

## 6. Class action in the United States

The competition law enforcement in the United States is based on the Sherman Antitrust Act of 1890 and the amending Clayton Act of 1914. Together these federal statutes prohibit activities that restrict competition and provide remedies for competition infringements. Waller and Popal notes that class actions played a vital role in the United States private enforcement of antitrust claims due to their role in aggregating large numbers of small claims, which otherwise would have been nearly impossible to litigate on an individual basis (Waller & Popal, 2015, p. 1).

In the United States class actions are governed by Rule 23 of the Federal rules of civil procedure. Almost all states of the United States have some form of class action, which are modelled after Rule 23 of the Federal rules of civil procedure (Waller & Popal, 2015, p. 2). Waller and Popal notes that after the amendments to Rule 23 of the Federal rules of civil procedure in 1966, which established an opt-out class action system, class actions expanded rapidly in antitrust and many other areas of the law (Waller & Popal, 2015, p. 2). The types of class actions: (i) Securities and antitrust; (ii) Consumer rights; (iii) Environmental; (iv) Mass torts; (v) Civil rights (Alexander, 2000, p. 3).

Rule 23(a) of the Federal rules of civil procedure provides the basic requirements for all types of class actions. Rule 23(a) of the Federal rules of civil procedure sets out four prerequisites to any class action. Firstly, the class should be so numerous that joinder of all members is impracticable. Secondly, there should be questions of law or fact common to the class. Thirdly, the claims or defenses of the representative parties should be typical of the claims or defenses of the class. Fourthly, the representative parties should fairly and adequately protect the interests of the class.

Moreover, if the requirements of Rule 23(a) of the Federal rules of civil procedure are met, the action must fit into one of three categories set out in Rule 23(b) of the Federal rules of civil procedure. Firstly, filing separate claims by or against individual class members would create a risk of: (i) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or (ii) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests. Secondly, the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole. Thirdly, the court finds that questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. Waller and Popal notes that in antitrust class actions mostly used is the third category of Rule 23(b) of the Federal rules of civil procedure (Waller & Popal, 2015, p. 6).

One of the most important stages in United States class actions is the motion and hearing to certify the class – the class action is certified if it fulfills the above described requirements of Rule 23(a) and Rule 23(b) of the Federal rules of civil procedure. Rule 23(c) of the Federal rules of civil procedure sets that the court should determine as soon as possible whether the case could be maintained as a class action. The recent trend has been to use class certification hearings as a type of mini-trial of the merits of the litigation (Waller & Popal, 2015, p. 7). When the case is certified, it can proceed to discovery and resolution on the merits.

Furthermore, Rule 23(c) of the Federal rules of civil procedure sets that a notice must be given to the members of the class that a class action on their behalf has been certified. The members should also be informed that if they do not opt out, they will be included in the class. Alexander notes that in small claim actions there are rarely many opt-outs (Alexander, 2000, p. 9).

The representative attorney takes on serious obligations to the absent class members by proposing to represent the class. Alexander notes that these obligations are fiduciary obligations and leading attorney takes on fiduciary obligations to the class (Alexander, 2000, p. 7). It should be also noted that class action is a litigation financing device. The representative attorney pay all the expenses for the class out of his own funds until the case is resolved. If the case is resolved with a monetary recovery for the class, the representative attorney for the class submit a request to the court to be awarded reasonable attorney's fee, which are paid out of the class recovery (Alexander, 2000, p. 11).

The competition law enforcement using class action leads to approximately 1000 cases throughout the year in the United States (Searby, 2015, p. 47). The history shows that litigation using class action brought significant compensations to the consumers for competition law infringements. For instance, in NASDAQ Market-Makers Antitrust Litigation (1998) claimants were compensated a total of 1,027 billion USD. Moreover, in Visa Check/Mastermoney Antitrust Litigation (2003) claimants were compensated for a total of 3,05 billion USD.

In conclusion, US style class action is a powerful legal tool for private competition law enforcement.

## 7. Drawbacks of US style class action

Class action criticism can be aligned according to two fundamental threads: (i) potential conflicts of interest; (ii) overlitigation (Vanikiotis, 2014, p. 1652).

Firstly, no one in the class has large enough stake to justify the costs in time and money needed to be informed about the case, to monitor the conduct of the attorney, and to make litigation strategy decisions as clients do in ordinary cases (Alexander, 2000, p. 17). Class attorneys may make decisions on behalf of the clients based on self-interest rather than the interest of the class (Vanikiotis, 2014, p. 1654). Alexander explains that the class's interest is to maximize the net recovery, whereas the class attorney's interest is maximizing his effective hourly fee – the fee that is eventually obtained divided by the number of hours worked on the case, and also appropriately discounted for the time elapsed before the fee is collected (Alexander, 2000, p. 17). Opponents of the class action try to fear that class attorneys sometimes might settle too quickly and too cheaply (Vanikiotis, 2014, p. 1653).

Secondly, Alexander explains that in the United States, liberal pleading standards make it relatively easy to file a complaint that cannot be dismissed before trial (Alexander, 2000, p. 20). If a case is certified as a class action, defendants, taking into account a huge amount of money at stake, may settle by paying some money to the class and the class attorney (Alexander, 2000, p. 20). This might cause overlitigation.

In conclusion, class action has a few possible drawbacks. However, class action is the only way to enable the vindication of claims that otherwise could never be litigated and thereat create improved incentives for undertakings to respect the law. In authors view, the essential advantages of the class action prevails over the possible disadvantages of the class action.

## 8. Class action reform in the United Kingdom

The competition law enforcement in the United Kingdom is based on the Competition Act of 1998. It is a legislative equivalent to the United States Sherman Antitrust Act of 1890 and the amending Clayton Act of 1914. As it was indicated above the United Kingdom collective redress system for competition cases was based on the opt-in model and was ineffective.

The Consumer Rights Act of 2015 introduced a new collective redress mechanism in competition infringements damages claims in the United Kingdom. In particular, Schedule 8 of the Consumer Rights Act permits qualifying claims to be aggregated on an opt-out model. The details are developed in Competition Appeals Tribunal procedural rules.

Firstly, Rule 78(1) of the Competition Appeals Tribunal Rules provides that the Competition Appeals Tribunal may certify a claim as eligible for collective proceedings where the proceedings: (i) are brought on behalf of an identifiable class persons; (ii) raise common issues; (iii) are suitable to be brought in collective proceedings. Rule 78(2) of the Competition Appeals Tribunal Rules provides that Competition Appeals Tribunal should also consider the factors such as: (i) the costs and benefits of continuing the collective proceedings; (ii) the size and nature of the class; (iii) whether it is possible to determine for any person whether he is or not a member of the class.

Secondly, Rule 78(3) of the Competition Appeals Tribunal Rules provides that in determining whether collective proceedings should proceed on an opt-in or an opt-out basis, the Competition Appeals Tribunal will take into account all matters it thinks fit, including the strength of the claims and whether it is practicable for the proceedings to be brought as opt-in collective proceedings, having regard to all circumstances, including the estimated amount of damages that individual class members may recover. In authors view, the legislation rules suggests that the claimants attorney will have to prove that there is insufficient financial incentive for individual class members to proactively opt-in and a claim should proceed on an opt-out basis.

In conclusion, the Consumer Rights Act of 2015 increases access to justice for claimants and strengthens the deterrence effect that collective litigation can have on future breaches of competition law (Vanikiotis, 2014, p. 1678).

## 9. Class action developments in other European Union Member States

The United Kingdom is not the only European Union jurisdiction to introduce an opt-out model. In Portugal and Belgium opt-out claims are also possible.

Opt-out claims have been possible since the Law 83/1995 of 31 August 1995 in Portugal. A class action may be filed by any individual (citizen, association, or foundation), whenever the litigation affects all persons in the group. A class action should promote the protection of the general interests described in the Portuguese Constitution to claim compensation for the infringement of those interests. As the list of protected interests is not exhaustive, this means that class actions for the breaches of competition law are also possible. An opt-out mechanism is default for such class actions. After the admission of the class action, individuals who are potentially affected by the litigation are informed publicly.

In September 2014, Belgium has amended the Code of Economic Law and enabled opt-out class actions for competition law infringements (Code of Economic Law, Book XVII, Title II). However, the opt-out class action is only available to Belgian domiciled claimants and is not default. Each time the court must decide whether a class action as an opt-in or an opt-out is more appropriate. Moreover, the Belgian law has a restriction for the representatives of the group. The Belgian law indicates that only specific representatives, such as consumer organizations or ombudsman, can act as the representative of the group. Furthermore, the Belgian law sets a specific three-part procedure for each class action: firstly, the court must rule on the admissibility of the class action; secondly, there is a compulsory negotiation procedure; thirdly, if the negotiations are not successful, the court will rule on the merits.

In recent years, other important European Union jurisdictions (Italy and the Netherlands) also introduced class action mechanisms. The new Italian law took effect on 1 January 2010. It allows consumers or consumer organizations to file class actions. However, claims in Italy can be brought only on the opt-in basis. The Dutch Act on Collective Action took effect on 2005. The Dutch law allows foundations and consumer organizations to file class actions.

In conclusion, a few European Union jurisdictions introduced an opt-out model for competition law infringements without the intervention of the European Union legislator. However, there are no presumptions that the other European Union jurisdictions will

follow this path. As it was indicated, some jurisdictions introduced class action with an opt-in model. This suggests that in order to achieve uniformity across the European Union is not possible to rely on national legislators. Consequently, the intervention from the European Union legislator is necessary.

## 10. Conclusions

1. Many scholars consider that public enforcement of competition law is insufficient and it needs to be complemented with private enforcement. Effective private enforcement of competition law can create a culture of competition among citizens and a relief of pressure on competition authorities – a possibility to save their resources for more complex cases.
2. In the European Union the Court of Justice case law established that Member States have an obligation to provide a remedy in damages where harm has been inflicted as a result of an infringement of competition law. It resulted in the Regulation 1/2003 from the European Union legislator, which established the framework for private enforcement of competition law infringements in the European Union and the opportunity for the national courts to rule on private competition law cases. However, a later study on the condition on claim for damages found that levels of private competition law enforcement through damages claims in European Union remained very low.
3. The harm of the competition law infringement to one person may be small, and insufficient to merit the risk and cost of bringing an action for damages. Consequently, one of the main problems for effective private enforcement of competition law infringements (in particular for private individuals, small and medium sized businesses) is that there is no effective uniform class action system across the European Union.
4. Class actions play a vital role in the United States private enforcement of antitrust claims due to their role in aggregating large numbers of small claims. The main feature of the US style class action effectiveness – it is based on an opt-out model (the opt-out model automatically litigates on behalf of all eligible claimants and allows individuals to withdraw from the claim). The outcome leads to approximately 1000 class action competition law enforcement cases throughout the year in the United States. The history shows that such actions brought significant compensations to the consumers for competition law infringements.
5. Noteworthy, US style class action has possible drawbacks – potential conflicts of interest and overlitigation. However, US style class action is the only way to enable the vindication of small claims and to provide an effective remedy in damages where harm has been inflicted as a result of an infringement of competition law.
6. The European Commission's approach on collective redress is evidenced in Recommendation 2013/396/EU. The Recommendation 2013/396/EU is suggesting the application of an opt-in principle in national collective redress procedures. Whereas, scholars note that the European Commission's approach risks being ineffective in low damages claims, because consumers are unlikely to file a claim individually or in an opt-in procedure, as the litigation cost risk being higher than the expected financial benefit of a successful case.
7. The latest European Commission's instrument regarding actions for damages for infringements of the competition law is [Directive 2014/104/EU](#). The Directive 2014/104/EU seeks a balance between the need for a public repression and the right of private individuals and companies to be compensated for the damages they suffered. However, the improvements are insufficient, whereas the Directive 2014/104/EU is silent on procedural rules of a uniform collective redress system across the European Union.
8. In recent years, a significant number of European Union jurisdictions nationally introduced class action mechanisms. However, only a few European Union jurisdictions introduced an opt-out model for competition law infringements, while other follow the European Commissions approach of an opt-in principle in national collective redress procedures. Otherwise, no specific class action law exists in such significant European Union Member States as Germany and Austria. The diversity of national collective redress regimes implies the need for the European Union legislator to intervene and create a uniform collective redress system across the European Union. Whereas, collective redress system with an opt-in model risks being ineffective in low damages claims, the European Union legislator should introduce collective redress system with an opt-out model.

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