UNIVERSITY OF OXFORD
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Consumer Involvement in Private EU Competition Law Enforcement: Evaluating and Reshaping the Enforcement Toolbox–Towards Acceptable Mechanisms

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ABSTRACT

EU competition law rhetoric attributes particular importance to 'consumer interest'. However, despite these often repeated pronouncements, final consumers and their respective interests play only an ancillary role in EU competition law enforcement. This thesis embarks from this observation with the aim of strengthening the importance attributed to 'consumer interest' in the application and enforcement of EU competition law. Taking into account the difficulty in adopting a 'final consumer welfare standard' as the substantive enforcement standard in EU competition law, the thesis shall explore an alternative route and focus predominantly on consumer participation in private competition law enforcement.

The analysis is conducted at three levels. First normative justifications for the advocated consumer involvement are provided ('*added value spectrum*' of consumer participation); these include deterrence of competition law violations and compensation to affected consumers (*principal aims*), as well as aligning the substantive enforcement standard with policy pronouncements, legitimise EU competition policy and contribute to empowering and informing EU consumers (*derivative aims*). *Second*, practical proposals in relation to remedial and procedural measures enabling consumer involvement are formulated. *Third*, in so far as institutional and political limitations impede the adoption of effective measures in the field of private enforcement, alternative routes of consumer participation in public competition law enforcement (that possess the potential to promote the 'added value spectrum') are also examined. In light of the above, practical proposals will also be formulated.

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PART III

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ABBREVIATIONS

AAI	American Antitrust Institute
AB	Antitrust Bulletin
ADR	Alternative Dispute Resolution
AG	Advocate General
Am J Comp L	American Journal of Comparative Law
AMC	Antitrust Modernisation Commission
AmCham	American Chamber of Commerce
Ariz L Rev	Arizona Law Review
BDI	Bundesverband der Deutschen Industrie
BE	Block Exemption
BEUC	Bureau Européen des Unions de Consommateurs
BuffLRev	Buffalo Law Review
CA	Competition Act
CAFA	Class Action Fairness Act
CAT	Competition Appeal Tribunal
CBI	Confederation of British Industries
CC	Competition Commission
CDE	Cahiers de Droit Europeen
CJEU	Court of Justice of the European Union
CJC	Civil Justice Council
CLEF	Consumer Law Enforcement Forum Project
CLI	Competition Law Insight
CLJ	Cambridge Law Journal
CLO	Consumer Liaison Officer

CMLRev	Common Market Law Review
ColumBLR	Columbia Business Law Review
CompLaw	Competition Law Journal
CompLRev	Competition Law Review
CPC Regulation	Consumer Protection Cooperation Regulation
CPI	Competition Policy International
CPN	Competition Policy Newsletter
CPR	Consumer Policy Review
DTI	Department of Trade and Industry
Duke J Comp & Intl L	Duke Journal of Comparative and International Law
EA 2002	Enterprise Act 2002
EAGCP	Economic Advisory Group on Competition Policy
EBLR	European Business Law Review
EBOR	European Business Organisation Law Review
ECCG	European Consumer Consultative Group
ECLR	European Competition Law Review
EconJ	The Economic Journal
EConLRev	European Constitutional Law Review
EESC	European Economic and Social Committee
ELJ	European Law Journal
ELRev	European Law Review
EP	European Parliament
ERCL	European Review of Contract Law
ERPL	European Review of Private Law
ESC	Economic and Social Committee
EurCompJ	European Competition Journal

Fla L Rev	Florida Law Review
Fordm L Rev	Fordham Law Review
FRCP	Federal Rules of Civil Procedure
FSA	Financial Services Authority
GC	General Court of the European Union
GCLR	Global Competition Litigation Review
GeoLJ	The Georgetown Law Journal
GP	Green Paper on Damages Actions for Breach of the EC Antitrust Rules
GP SWP	Staff Working Paper to the Green Paper on Damages Actions for Breach of the EC Antitrust Rules
GSK	GlaxoSmithKline
GWB	Gesetz gegen Wettbewerbsbeschränkungen
Harv Int'l L J	Harvard International Law Journal
Harv J L & Pub Pol'y	Harvard Journal of Law and Public Policy
IAR	Impact Assessment Report
ICC	International Chamber of Commerce
ICCLR	International Company and Commercial Law Review
J L & Econ	Journal of Law and Economics
J L&Soc	Journal of Law and Society
JConAffairs	The Journal of Consumer Affairs
JCP	Journal of Consumer Policy
JECLAP	Journal of European Competition Law and Practice
JEPP	Journal of European Public Policy
JITE	Journal of Institutional and Theoretical Economics
JLEO	The Journal of Law, Economics and Organisation
JPolEcon	Journal of Political Economy

Law and Soc'y Rev	Law and Society Review
LCP	Law and Contemporary Problems
LoyConLRev	Loyola Consumer Law Review
Loyola U Chi LJ	Loyola University of Chicago Law Journal
LQR	Law Quarterly Review
LT	Lisbon Treaty
MichLRev	Michigan Law Review
MLR	Modern Law Review
MVBER	Motor Vehicle Block Exemption Regulation
NCAs	National Competition Authorities
Notre D L Rev	Notre Dame Law Review
Nw J Int'l L&Bus	Northwestern Journal of International Law and Business
OFT	Office of Fair Trading
OJ	Official Journal
OJLS	Oxford Journal of Legal Studies
Pt	part
Q	question
Rev Litigation	The Review of Litigation
SC	Supreme Court
SME	Small and Medium Sized Enterprises
StanLRev	Stanford Law Review
SydLRev	Sydney Law Review
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
U Ill L Rev	University of Illinois Law Review
U Pa L Rev	University of Pennsylvania Law Review

UMKC LRev	University of Kansas-Missouri Law Review
UWG	Gesetz gegen den Unlauteren Wettbewerb
Vand L Rev	Vanderbilt Law Review
VR	Vertical Restraints
WC	World Competition
Wm Mitchell L Rev	William Mitchell Law Review
WP	White Paper on Damages Actions for Breach of the EC Antitrust Rules
WP SWP	Staff Working Paper to the White Paper on Damages Actions for Breach of the EC Antitrust Rules
YEL	Yearbook of European Law

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TABLES/DIAGRAMS

INTRODUCTION

I. Delineation of the Subject Matter

In his 'Political Guidelines for the next Commission', President Barroso emphasized the need to close the 'missing links' in the internal market.[1] This project identifies consumers' inability to actively participate in the enforcement of competition law as one of the existing missing links.[2] This issue is of greatest relevance to European consumers and bears upon two very important EU policies relevant to the internal market building, namely, competition and consumer policy.

This thesis focuses on the private enforcement of competition law and sets to examine the importance of consumer interest in EU competition law with a view of reshaping the current enforcement toolbox in the competition law field. The *main research question* concerns the *reasons justifying more active consumer participation as well as the necessary remedial and procedural tools facilitating such participation*. The *structure* and *methodology* are prescribed by the factors inspiring the research question namely: a. the reported shift in EU competition law towards a consumer welfare oriented approach (policy and substantive factors) and b. the contemporary EU debate on private competition law enforcement and consumer collective redress (procedural factor).

Building on the identified policy, substantive and procedural factors, *a two part structure* is employed that further incorporates the individual chapters. The *first normative part* essentially builds the framework upon which this thesis is premised. It deals with policy

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[1] Barroso, 'Political Guidelines for the Next Commission' (3 September 2009) <http://ec.europa.eu/commission_2010-2014/president/pdf/press_20090903_en.pdf> accessed 20 June 2011, 3.

[2] Cf Monti, 'A New Strategy for the Single Market' (Report to the President of the European Commission, 9 May 2010) <http://ec.europa.eu/bepa/pdf/monti_report_final_10_05_2010_en.pdf> accessed 28 January 2012 ('Monti Report'), 41-42.

implications and normative justifications for an increased consumer involvement in competition law. After formulating the normative framework and placing the whole debate of consumer involvement in competition law in a wider EU law perspective, the *second practical part* moves on to address the remedial and procedural measures allowing for such involvement.

II. Nature of the Subject Matter

This thesis deals with consumer participation in private EU competition law enforcement. Despite the fact that its subject matter suggests that it could be addressed from an EU competition law perspective, in reality it is much broader and has to tackle many challenging issues from the wider EU law discipline. This explains why some broader themes, not confined to EU competition law, recur throughout the analysis. Some of these points concern consumer participation in general, whereas others pertain to the relevant consumer participation either in private or public competition law enforcement. However, all help to locate the central topic of the present research within the wider contemporary EU law debates.

These recurring themes are briefly introduced here, in order to show the wide variety of complex issues involved, in trying to justify increased consumer participation in EU competition law enforcement and formulate appropriate measures for facilitating such participation.

1. EU Competition law enforcement: a fused approach

The first contentious issue concerns different approaches towards the enforcement system in EU competition law, which is comprised of both public and private mechanisms.[3] The most pronounced aims of the EU competition law enforcement system are deterrence and compensation.[4] While the traditional view suggests a clear attribution of these functions to public and private enforcement respectfully, this thesis chooses a fused/ integrated approach to competition law enforcement, as the analysis in the individual chapters will reveal. This approach reinforces the underlying substantive aims of EU competition law, acknowledges the importance of private actors and private claims in the EU legal order and justifies the herein advocated increased consumer participation in EU competition law enforcement. Further, it is in line with recent attempts to deliver a stronger single market.[5]

2. The consumer role in EU competition law enforcement

The consumer role in EU competition law enforcement is influenced by the fused approach to EU competition law enforcement, briefly sketched above. In this thesis, the consumer is not treated just as a self-interested motivated individual seeking to redress damage flowing from

[3] Council Regulation (EC) 1/2003 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty [2003] OJ L1/1. See also Commission(EC), 'Notice on Cooperation within the Network of Competition Authorities' [2004] OJ C101/43; Commission (EC), 'Notice on the Handling of Complaints by the Commission under Articles 81 and 82 of the EC Treaty' [2004] OJ C101/65; Commission (EC) 'Notice on the Cooperation Between the Commission and the Courts of the EU Member States in the Application of Articles 81 and 82 EC' [2004] OJ C101/54.

[4] On the aims of the EU competition law enforcement system see Wils, 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages'(2009) 32 WC 3, 5. See also Komninos, 'Relationship between Public and Private Enforcement: Quod Dei Deo, Quod Caesaris Caesari' (16th Annual EU Competition Law and Policy Workshop, EUI Florence, 17-18 June 2011)<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1870723> accessed 27 October 2011, 2. Apart from the deterrence and compensatory element Wils adds also the task of law clarification, see Wils, *Efficiency and Justice in European Antitrust Enforcement* 50.

[5] See *Monti Report* (n2) 96, 97. Monti suggests reinforcing enforcement and, in particular, he views infringement procedures, informal problem solving and private enforcement as a 'seamless web of remedies' for breaches of EU law.

EU competition law violations. On the contrary, the consumer's role is systemic. Through appropriately formulated enforcement mechanisms, consumers could assume an instrumental role in competition law enforcement, further promoting the aims of the system as a whole. Arguments in favour of this are first drawn from the contemporary debates in EU consumer and competition law. Consumers not only stand to benefit from well functioning markets but they also assume a more active role in promoting and sustaining them. Their participation in private enforcement and in EU competition law enforcement in general could be viewed as a means to achieve this end and fits well with current EU proposals on consumer empowerment.[6]

3. Function of tort law

Another, related, contentious issue is whether the fused approach to competition law enforcement and the functional consumer role therein can be reconciled with the principal compensatory function of tort law.[7] Notwithstanding its principal function, tort law is also attributed a deterrent function.[8] In fact, neither compensation nor deterrence could alone explain the multiple applications of tort law.[9] Ideally the two functions should be reconciled but, even in case of conflict, it is possible that deterrence may be the preferred function for

[6] Commission(EU), 'Single Market Act – Twelve Levers to Boost Growth and Strengthen Confidence' (Communication) COM(2011) 206 final, [2.4].

[7] Van Gerven, Lever and Larouche, *Tort Law* 19, 30, 740. This is the prevailing view in Member States' legal systems. The main opposing approaches to tort law theory stem from the law and economics school of thought and from justice-driven theories. For two interesting collection of essays on these different approaches to tort law see Weinrib (ed), *Tort Law*; Owen (ed), *Philosophical Foundations of Tort Law*. On the law and economics approach see Landes and Posner, *The Economic Structure of Tort Law*. For a concise presentation of these two approaches and their main representatives see Schwartz, 'Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice' (1997) 75 Texas L Rev 1801, 1802-1811.

[8] Deakin, Johnston and Markesinis, *Markesinis and Deakin's Tort Law* 50-52. Cane, *The Anatomy of Tort Law* 217-225.

[9] *Schwartz* (n7) 1801; Englard, 'The Idea of Complementarity as a Philosophical Basis for Pluralism in Tort Law' in Owen(ed), *Philosophical Foundations of Tort Law* 183.

certain forms of economic behaviour. This thesis argues in favour of a primary deterrent function of damages actions for low value consumer claims that further allows a partial fulfilment of the compensatory function. Arguments to that effect are drawn from the EU institutions' approach to private EU competition law enforcement, as well as from the nature of consumer claims.

4. Harmonisation: unity or diversity?

The pertaining different Member States' approaches towards tort law and civil procedure raise the issue as to how much harmonisation is permissible or even desirable. Even if the relevant need is identified and the legal issue of the EU's competence to introduce harmonised measures on consumer participation in private competition law enforcement is resolved, different approaches in national legal systems in regard to remedies and procedures remain a large issue. One is then confronted by bottom–up pressures exerted by individual Member States claiming that they are protecting their national legal systems and opposing any harmonised measures proposed. Part of this opposition could be seen as an attempt to protect national legal systems in their cultural context, and much has been written on the culturally-embedded nature of legal systems and the impossibility of having successful legal transplants.[10] At the same time, though, part of this opposition is an expression of political opportunism and different interests. Ultimately how to satisfy this opposition is a complex political matter that may, at times, impede the adoption of effective legal solutions.

[10] Legrand, *Fragments on Law as Culture*; Legrand, 'European Legal Systems are not Converging'(1996) 45 ICLQ 52; Legrand, 'The Impossibility of Legal Transplants' (1997) 4 Maastricht J Eur&CompL 111; Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies'(1998) 61 MLR 11. For the opposite view see Watson, *Legal Transplants: An Approach to Comparative Law*.

III. Methodology and Terminological Clarifications

In trying to develop a theoretical framework on consumer involvement in EU private competition law enforcement and suggest remedial and procedural measures for its realization, this thesis examines both EU institutions' as well as individual Member States' approaches. It also takes due account of the opinions of other stakeholders, such as businesses and consumer organisations. The aim is to address diverse legal and political hurdles permeating the analysis.

First, the present research reviews relevant EU legal sources and policy documents. It examines EU legislation and the relevant CJEU case law as well as the Commission's approaches to date. The Commission's past efforts in advancing private enforcement of EU competition law, despite being unsuccessful, can serve as a useful starting point, since they depict a tendency to adopt modest measures and may well influence future initiatives in this field. The measures proposed need to reflect the Union's institutions approaches to the aims and functions of private competition law enforcement.

At the same time, though, any proposed measures need to attract Member States' consent or any proposals to adopt harmonised legislation are doomed to fail. Therefore, the analysis also takes into account Member States' approaches towards remedial and civil procedure rules, as well as the US federal class action model, but it does not present itself as a comparative venture. It draws upon publicised materials on private competition law enforcement and collective redress, comprising Commission reports, national reports, stakeholder comments and other academic reports presenting quantitative and qualitative data on Member States' legal systems and litigation levels. In addition, personal contacts with consumer organisations were helpful in discerning the consumer view. The aim was to unravel different national trends that could potentially serve as examples and guidance for future steps to be taken at the EU level.

Further, some terminological clarifications are warranted. Mention is often made in the present research to the consumer role in competition law *enforcement* and the formulation of the necessary facilitating *remedial* and *procedural measures*. A broad approach to 'enforcement' encompasses mechanisms/procedures that permit the application of the substantive competition law rules (Articles 101 and 102 TFEU and their national equivalents) by public authorities and national courts (*procedural enforcement*) as well as the actual enforcement standard itself (*substantive enforcement*). The enforcement standard refers to the fulfilment of the aims of EU competition law (retaining a competitive market structure, economic freedom, consumer welfare etc).[11] Unless otherwise stated, in this thesis 'enforcement' refers to the former, and encompasses both public mechanisms (Commission and NCAs actions) and private mechanisms (damages claims before national courts).

Clarifying the content of procedural measures and distinguishing them from remedial measures is a complex, sometimes even insurmountable, task.[12] When reference is made in this thesis to 'remedial and procedural' measures, this is to distinguish these rules from the directly effective EU competition rules and the substantive rights granted by them. The challenge is to formulate 'remedial and procedural' rules to permit the application of substantive EU competition rules before national courts.

[11] See chapter I, text to n39-63.

[12] See chapter VI, text to n47-57. See also Jolowicz, *On Civil Procedure* 60,61, 65-69 pointing to difficulties in distinguishing procedural law, proceedings and substantive law.

IV. Thesis Structure

In *Chapter I* the following questions are addressed: Who is the consumer and what is meant by ‘consumer interest’ in the context of EU competition law? What is so different about consumers that merits a different approach? How are their interests depicted in the substantive competition law analysis? The analysis in this chapter points to the inconsistencies between the frequent presence of the consumer interest in the Commission’s policy documents and its rather limited role in European courts’ case law and the Commission’s actual practice. This finding points to the need for more active consumer involvement in actual competition law enforcement as an alternative route for bringing consumer interests to the fore. In addition, it links the policy and substantive element with the advancement in chapter II of concrete normative justifications for an increased consumer involvement.

The analysis in *Chapter II* advances, what, in this thesis, is referred to as the ‘added value spectrum’ of consumer involvement and is aimed at justifying an enhanced consumer participation in private competition law enforcement. The ‘added value spectrum’ is comprised of five factors; two principal and three derivative. Deterrence and compensation constitute the two principal reasons, since they can be drawn directly from the CJEU jurisprudence, while a closer reading of the respective case law, together with the Commission’s early statements, advocates in favour of ranking deterrence first when formulating the individual measures. Following a correct choice regarding the principal aim, it is argued that private enforcement of competition law can contribute to the attainment of very important derivative aims; these being aligning practice and rhetoric, legitimising competition policy towards its ultimate addressees and contributing to the proliferation of consumer information and empowerment.

The first two chapters, thus, provide the theoretical justifications for the herein advocated increased consumer participation. Chapters III and IV then move on to formulate practical proposals enabling consumers to assume a more active role, or to put it in accurate terms, actually allowing consumers to assume a role in private competition law enforcement. The analysis in *Chapter III* embarks on a classification of consumer claims for competition law violations based on their respective value, and distinguishes between 'Group A' and 'Group B' consumer claims. 'Group B' consumer claims (unlike 'Group A' claims) comprise claims of very low value, in which the judicial costs of bringing the claim far outweigh the claim value itself. This type of claim constitutes the main bulk of consumer claims in competition law but, as 'Group A' claims can be raised in theory (see, for example, the *Manfredi* saga) measures facilitating this type of claims also need to be addressed. Therefore, common measures that facilitate both types of claims are dealt with in *Chapter III*, by focusing on offensive and defensive passing on and access to evidence problems.

In *Chapter IV* the formulation of effective collective action procedures for 'Group B' consumer claims is addressed and the difficulties in reaching political consensus for adopting such a solution by individual Member States are also underlined. Therefore, the research in *Chapter V* examines alternative consumer participation avenues in the field of public enforcement that could potentially be more acceptable to the Member States as well as EU institutions. Finally, the analysis in *Chapter VI* examines whether a legal basis exists in the Treaty for the introduction of the herein proposed measures. In addition to the partial harmonisation of civil procedural rules (strict approach), it also addresses alternative soft law instruments that have the potential to increase the role of consumer interest and consumer participation in competition law enforcement.

Through the formulation of the ‘added value spectrum’, this thesis highlights how consumer involvement advances the aims of EU competition law enforcement and wider EU aspirations. At the same time the formulation of practical measures shows that *de lege ferenda* such participation is possible. However, because it acknowledges the relevant institutional and political limitations, it also examines the possibilities for consumer involvement in the course of public competition law enforcement. It aspires to reveal that the line between public and private enforcement mechanisms, and the respective role of the different actors, is somewhat blurred. This ‘blurring’ may be of benefit to both competition law enforcement and to the protection of the ‘consumer interest’. In a multi–level system, as with the EU, it is vital to consider emplacement of new modes of enforcement and governance in order for desired policy ends to be achieved; but, most importantly, for also attaining the acceptance of the ultimate addressees of competition policy.

CHAPTER I

CONSUMER INTEREST IN EU COMPETITION LAW: A POLICY ANALYSIS

I. Introduction

This chapter sets to introduce the main variables which influence the undertaken analysis. These include the ‘consumer’, ‘consumer interest’ and ‘consumer welfare’ and are presented in a three part structure. In the first part the relationship between competition and consumer law is examined; this points to potential spill-over effects between the two disciplines and explains why the approach adopted in this research is to view the subject matter from a competition law perspective. Following this, an examination of the notion of ‘consumer interest’ reveals its multifaceted content and the aspects better accommodated under EU competition law are identified. In the second part, the importance attributed to ‘consumer interest’, as is herein defined, is explored at a policy level. The current discussion on the aims of EU competition law is presented, together with the advocated increased importance of ‘consumer welfare’, which arguably trumps other goals adopted in the past. Further, an explanation is provided as to why this research focuses on final consumers.

In the third part of the chapter, the extent to which application of competition provisions by the Union institutions reflects Commission policy pronouncements is questioned from a substantive law perspective. The discussion moves on to examine the perception of the consumer interest (or the dearth thereof) in decisional practice, and points to the inconsistencies between rhetoric and practice. The aim is to show that competition law analysis should take the interests of final consumers more explicitly into account, in line with the relevant policy pronouncements. This conclusion serves as the springboard for the discussion in chapter II, which builds a normative framework in favour of an increased consumer involvement in EU competition law enforcement.

II. 'Consumer Interest' in EU Competition Law

1. The interplay between competition law and consumer law

The subject matter of this thesis (consumer involvement in private EU competition law enforcement) challenges the approach that views consumers as beneficiaries of competition law without though examining how they can become influential actors in competition law enforcement. The central tenet of this research is to argue that competition law is relevant to consumers, and that consumers are equally relevant to competition law. Thus, first it is important to address the relationship between consumer and competition law. A consideration of the role of competition law vis-à-vis consumer law facilitates the subsequent discussion on 'consumer interest' in EU competition law.

Policy makers often point to the interdependencies between competition and consumer policy and their potential to deliver maximum benefits for consumer welfare and productivity growth,[1] although without addressing, in any detail, the role of consumers. In this section the relationship between the two disciplines is delineated,[2] with the aim of justifying the competition law approach taken in this research, as well as explaining the often recurring consumer law issues in the subsequent analysis. Competition law and consumer law apply to a wide range of market transactions consisting of Business to Business (B2B)

[1] OECD, 'The Interface Between Competition and Consumer Policies' (Policy Roundtables) DAF/COMP/GF(2008)10 ; OFT, 'Joining up Competition and Consumer Policy' (OFT 1151) (December 2009) <http://www.oft.gov.uk/shared_oft/speeches/2009/spe-1209.pdf> accessed 23 January 2012, [1.2]; See also OFT, 'Interactions between Competition and Consumer Policy' (OFT991) (April 2008) <http://www.oft.gov.uk/shared_oft/economic_research/oft991.pdf> accessed 23 January 2012; Sylvan, 'Activating Competition: The Consumer Protection – Competition Interface' (Speech delivered at the University of South Australia Trade Practices Workshop, 29 October 2004) <http://www.accc.gov.au/content/item.phtml?itemId=600861&nodeId=f4b9b7acc429ffa09fc04f77e59b19d6&fn=20041029%20SA%20Uni%20Trade%20Practices%20Workshop.pdf> accessed 23 January 2012. In the UK competition regime the interplay between competition and consumer law is evident in the field of market studies and market investigations. See *OFT 1151*, [4].

[2] For a thorough analysis of the relationship between consumer and competition law see Cseres, *Competition Law and Consumer Protection* especially ch 7.

transactions, regulated by competition law, and Business to Consumer (B2C) transactions, regulated by both competition law and consumer law. If both view consumer as the ultimate beneficiary,[3] the question can be formulated as follows: how well does competition law protect consumer interests, what kind of interests can be accommodated under competition law enforcement and what is then the role of consumer law in protecting consumers?[4]

Competition law provisions have been present in the Treaty since its inception, while specific provisions on consumer protection were inserted in 1992 by the Maastricht Treaty and were further modified by the Treaty of Amsterdam.[5] This, however, did not prevent the formation of a European consumer policy, albeit of a more 'indirect' nature. European consumer policy was advanced through the application of free movement and competition provisions. These provisions are of central significance in the promotion of the internal market and the realisation of a European wide market, from which consumers will, ultimately, benefit.[6]

The Commission acknowledged early on the potential of competition law to tackle consumer problems. This is evident from the insertion of a section on 'consumer protection'

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[3] On the notion of consumer in EU competition law see text to n96-105.

[4] For example on the discussion as to whether unfair standard contract terms constitute a competition law problem see Nebbia, 'Standard Form Contracts Between Unfair Contract Control and Competition Law' (2006) 31 ELRev 102; Monti, 'The Revision of the Consumer Acquis From a Competition Law Perspective' [2007] ERCL 295, 307-310.

[5] Although discussions on the need for consumer protection and information policy began much earlier; see Council, 'Preliminary Programme of the EEC for a Consumer Protection and Information Policy' (Resolution) [1975] OJ C92/1. See Reich, 'Protection of Consumers' Economic Interests by the EC' (1992) 14 SydLRev 23; Weatherill, *EU Consumer Law and Policy* 1-33; *Cseres* (n2) 193-240; Twigg-Flesner, 'UK and EU Consumer Law' in Twigg-Flesner and others (eds) *Yearbook of Consumer Law 2008,* 365 for the evolution of consumer protection policy in the EU. See Stuyck, 'European Consumer Law After the Treaty of Amsterdam: Consumer Policy in or Beyond the Internal Market?'(2000) 37 CMLRev 367 for changes in consumer protection policy after the Treaty of Amsterdam.

[6] ESC, 'Opinion on the Twenty-second Competition Report' in Commission (EC), *XXIIIrd Report on Competition Policy 1993* (Brussels, Luxembourg 1994)< http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=CM8294650> accessed 24 January 2012, Annex I, 368. For a detailed account of EU consumer policy *Weatherill* (n5).

in the first two Commission Reports on Competition Policy.[7] The following abstract from Commission's First Report on Competition Policy (1972) is germane:

> An active competition policy pursued in accordance with the provisions of the Treaties establishing the Communities makes it easier for the *supply and demand structures* continually to adjust to technological developments (...) competition enables enterprises continuously to improve their efficiency, which is the *sine qua non* for *a steady improvement in living standards* and employment prospects within the countries of the Community (...) competition policy is an essential means of satisfying the *individual and collective needs of our society*.[8]

Competition policy can, thus, be viewed as a form of consumer policy.[9] Competition law caters for the availability of consumer choice. On the other hand, consumer law provides consumers with relevant information for the effective exercise of this choice.[10] Since consumer law problems may arise in competitive markets as well,[11] an effective consumer policy is also needed. For example, this might be in relation to markets of complex goods or

[7] Commission (EEC), *First Report on Competition Policy* (Brussels, Luxembourg 1972) <http://ec.europa.eu/competition/publications/annual_report/ar_1971_en.pdf> accessed 24 January 2012, 187-200; Commission (EEC), *Second Report on Competition Policy* (Brussels, Luxembourg 1973) <http://ec.europa.eu/competition/publications/annual_report/ar_1972_en.pdf > accessed 24 January 2012, 163-171.

[8] *First Report on Competition Policy* (n7) (emphasis added) 11.

[9] Commission(EC), *XXIInd Report on Competition Policy 1992* (Brussels, Luxembourg 1993) <http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=CM7693689> accessed 24 January 2012, [74]; Howells and Weatherill, *Consumer Protection Law* 518; Weatherill, 'The Links between Competition Policy and Consumer Protection' in Howells and others(eds), *Yearbook of Consumer Law 2007,* 187; Vickers, 'Healthy Competition and its Consumer Wins' (2002) 12 CPRev 142.

[10] This essentially reflects Averitt and Lande's 'consumer sovereignty' theory. Averitt and Lande, 'Using the "Consumer Choice" Approach to Antitrust Law' (2007) 74 Antitrust L J 175; Averitt and Lande, 'Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law' (1997) 65 Antitrust L J 713. Averitt, 'Protecting Consumer Choice: Competition and Consumer Protection Together' in Drexl and others(ed), *More Common Ground for International Competition Law?*36. Nihoul comments that this is, indeed, the approach adopted in the EU. See Nihoul, 'Is Competition Law Part of Consumer Law?' in Drexl and others(ed), *More Common Ground for International Competition Law?* 46, 46.

[11] Howell and Wilson, 'The Limits of Competition: Reasserting the Role for Consumer Protection and Fair Trading Regulation in Competitive Markets' in Parry and others(eds), *Yearbook of Consumer Law 2009,* 147.

services in which consumers cannot readily process the information (eg financial services or credence goods). It may also arise in newly liberalised telecoms or energy markets in which opening these markets to competition has not yielded the desired results.[12]

At the same time, consumers not only stand to benefit from competitive markets but also play a role in generating them.[13] Consumer preferences shape firms' market strategies and consumer law has a definite role to play in this area. Consumer education is vital so that consumers can choose products that better suit their needs and so that they are able to avoid being exploited, not only to their own disadvantage but also to the detriment of the competitive process.[14] Consumer law can address certain market failures on the demand side (eg information asymmetries, high search and switching costs, unfair contract terms), enhancing the consumers' ability to choose, and this will further invigorate the competitive process.

The prevailing assumption in consumer law is that consumers act rationally so that, when they have the necessary information, they will act in their own best interest. However, new insights from behavioural economics challenge that assumption.[15] Securing information

[12] Giulietti, Waddams Price and Waterson, 'Consumer Choice and Competition Policy: A Study of UK Energy Markets'(2005) 115 Econ J 949; Cseres, 'What Has Competition Done for Consumers in Liberalised Markets?'(2008) 4 CompLRev <http://www.clasf.org/CompLRev/Issues/Vol4Iss2Art1Cseres.pdf> accessed 26 January 2012, 77.

[13] *Howells and Weatherill* (n9) 48; DTI, 'Extending Competitive Markets: Empowered Consumers, Successful Business' (June 2005) <http://www.berr.gov.uk/files/file23787.pdf> accessed 10 October 2010; OFT, 'Assessing the Effectiveness of Potential Remedies in Consumer Markets' (OFT 994) (April 2008) <http://www.oft.gov.uk/shared_oft/economic_research/oft994.pdf> accessed 24 January 2012, [1.1].

[14] The Commission pointed to the importance of consumer education. See Commission (EC), 'EU Consumer Policy Strategy 2007-2013' (Communication) COM (2007) 99 final, [4]. However, the importance of consumer education should not be confined only to consumer policy. See Davies, *The European Consumer Citizen in Law and Policy* 43-45, on the importance of consumer education for advancing the 'consumer citizen'.

[15] See OECD, 'Roundtable on Demand-side Economics for Consumer Policy: Summary Report' DSTI/CP(2006)3/FINAL(20 April 2006), 11; Jolls, Sunstein and Thaler, 'A Behavioral Approach to Law and Economics' (1998) 50 Stan LRev 1471; Ulen, 'Information in the Market Economy – Cognitive Errors and Legal Correctives' in Grundmann, Kerber and Weatherill (eds), *Party Autonomy and the Role of Information in the Internal Market* 98. See Camerer and others, 'Regulation for Conservatives: Behavioural Economics and the

flow to consumers is not enough;[16] rather, more pervasive measures are needed in order to tackle consumers' irrational decisions. So, there is a need to move from a liberal model of consumer protection, which emphasises information disclosure, to a 'quasi-paternalistic' model, in which more active interventionist measures are employed.[17] Furthermore, choosing a 'model' consumer (in terms of education, income and potential for rational decision making) for the purposes of consumer law analysis is, in itself, a difficult balancing exercise[18] and might adversely impact on competition policy.

Behavioural economics recently attracted some attention in competition law analysis.[19] This is an area in which competition policy can benefit from consumer policy.[20] Competition law applies to undertakings that, arguably, act in a more rational way than

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Case for Asymmetric Patternalism' (2003) 151 U Pa LRev 1211, 1247 for an attempt to reconcile the rationality assumption with the insights of behavioural economics.

[16] Gans, 'Protecting consumers by protecting competition: Does behavioural economics support this contention' 12 (Melbourne Business School, 31 May 2005) < http://www.mbs.edu/home/jgans/papers/consumerprotection.pdf> accessed 24 January 2012; McAuley, 'Behavioural Economics and Public Policy: Some Insights' (Working Paper, February 2007)<http://www.home.netspeed.com.au/mcau/academic/bepubpol.pdf> accessed 24 January 2012, 12; King and Smith, 'Does competition law adequately protect consumers?' (2007) 7 ECLR 412.

[17] See *Cseres* (n2) 170-192, for a concise presentation of models for consumer protection. See also Reich, 'Diverse Approaches to Consumer Protection Philosophy' (1992) 14 JCP 257, 258-261, 267.

[18] *Davies* (n14) 32-42;Hondius, 'The Notion of Consumer: European Union versus Member States' (2006) 28 SydLRev 89, 93-97; Stuyck, 'The Notion of Empowered and Informed Consumer in Consumer Policy and How to Protect the Vulnerable Under Such a Regime' in Howells and others (eds), *Yearbook of Consumer Law 2007* 167; Weatherill, 'Who is the Average Consumer?' in Weatherill and Bernitz (eds), The Regulation of Unfair Commercial Practices under EC Directive 2005/29: New Rules and New Techniques 115. Everson, 'Legal Constructions of the Consumer in Trentmann(ed), *The Making of the Consumer* 99, 108 explores the question of whether EU law has managed to establish a coherent construction of the consumer from a legal perspective.

[19] Stucke, 'Behavioral Economics at the Gate: Antitrust in the Twenty – First Century' (2007) 38 Loyola U Chi LJ 513; Stucke, 'Am I a Price Fixer? A Behavioral Economic Analysis of Cartels' in Beaton-Wells and Ezrachi, *Criminalising Cartels* 263; Tor, 'A behavioural approach to antitrust law and economics'(2004) 14 CPRev 18. For a criticism see Wright, 'Nudging Antitrust? Commissioner's Rosch's Weak Case on Behavioral Antitrust'(July 2010)< http://truthonthemarket.com/2010/07/12/nudging-antitrust-commissioner-roschs-weak-case-for-behavioral-antitrust-part-1/> accessed 24 January 2012.

[20] *OFT 1151* (n1) [3.9].

individual consumers. However, legal entities, such as undertakings, act through their agents (natural persons), who can be motivated by many things aside from profit maximisation.[21]

Leaving aside the difficult political question as to how interventionist consumer law should be, the potential for a functioning competition regime to provide consumers with an appropriate environment within which they act and make choices is incontestable. Competition law comes before consumer law, in that it provides the general market regulation (market – cadre). Then, consumer law corrects mistakes in consumer behaviour that cannot be caught by competition law. Thus, if competition law were able to protect consumer interests in a more satisfying way and if consumer themselves could become more involved in competition law enforcement,[22] the need for consumer law measures would be minimised. The caveat, though, is that competition law caters only for specific aspects of the consumer interest; consumer regulation is still needed for the remainder.

2. Defining Consumer Interest

An *abstracto* definition of the consumer interest with a satisfying level of accuracy is almost impossible. This stems from the very fact that consumers do not form a homogeneous group, and often have different needs and different hierarchical values.[23] However, in competition law the fact that the consumers do not form a homogeneous group is not a problem, since, in this case, the consumers who require protection are identified with reference to a certain anti-competitive conduct. This section addresses the notion of ‘consumer interest’, and points to

[21] *Stucke* (n19) 533-536. See also Armstrong and Huck, ‘Behavioral Economics as Applied to Firms: a Primer’ (2010) 6 CPI 3, 4.

[22] See, for example, chapter II, text to n168-178.

[23] Brobek, ‘Defining the Consumer Interest: Challenges for Advocates’(2006) 40 J Con Affairs 177, 178; For example, varied consumer habits in different Member States, differences in income, education etc; also see Reich, ‘Competition Law and the Consumer’ in Gormley (ed), *Current and Future Perspectives on EC Competition Law* 127, 127; *Howell and Wilson* (n11)168; *Howells and Weatherill* (n9) 5.

its different aspects, indicating which are better accommodated within competition law analysis.

'Consumer interest' comprises economic and non-economic elements. Consumers may exercise their purchase habits according to environmental (eg purchasing environmentally friendly products) or social considerations (eg avoiding the purchase of products stemming from child labour).[24] In addition, in order to exercise their purchase habits, they should possess the necessary information, and also, should their interests (broadly defined) be breached, they should have recourse to some dispute resolution mechanism (judicial or extra–judicial).Thus, it is necessary to examine different aspects of consumer interest, in order to consider policy formulation.

President Kennedy advanced four consumer rights: the right to safety, the right to be informed, the right to choose and the right to be heard.[25] These are broadly reflected in the consumer protection provision in the LT.[26] Article 169 (1) TFEU (ex 153 TEC) reads

> In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the *health, safety and economic interests of consumers*, as well as to promoting their *right to information, education and organise themselves in order to safeguard their interests*.[27]

Thus, in the area of consumer protection, the European Union identifies the following consumer rights:

1. The right to protection of health and safety,

[24] Tunney, 'The Neglected Tension Between Disclosure of Information in Consumer and Competition Law Contexts'(2002) 25 JCP 329, 330-331. This dimension of 'ethical buying' is connected to the notion of 'consumer citizen'. See *Davies* (n14) 90.

[25] President Kennedy, 'Special Message to the Congress on Protecting the Consumer Interest' (15 March 1962) <http://www.presidency.ucsb.edu/ws/index.php?pid=9108> accessed 24 January 2012.

[26] [2008] OJ C115/13 (TEU) and C115/47 (TFEU).

[27] Emphasis added.

2. The right to safeguard consumer economic interests,

3. The right to information and education, and

4. The right to self-organisation and self-protection of their interests.[28]

Out of these four identified rights, an examination is required as to which can be accommodated under competition law.[29]

If 'consumer interest' is perceived as a broad category, including interests ranging from economic to non-economic (health and safety considerations, environmental and social criteria), it is here argued that competition law should only accommodate the first category of economic interests and, within this category, the narrower category of interests in the form of lower prices, increased output and enhanced quality.[30] This is not to suggest that consumer law does not cater for consumers' economic interests. It protects consumer economic interests in cases in which competition law is not applicable, for example, consumer exploitation in the form of high prices or low quality products by the conduct of a single non–dominant firm.

The second category of consumer non-economic interests is better dealt with by a broader range of regulatory tools under the realms of consumer law. Consumer non-economic interests can be accommodated under competition law only as long as they can be translated

[28] In line with the consumers' rights first identified in the *Council Resolution* (n5)[3].

[29] In its reply to the EESC Opinion on the Report on Competition Policy 2004, the Commission states that 'EC competition policy takes into account consumers' interests. But it cannot take the place of an autonomous consumer protection policy implemented through specialised legislation, such as rules on misleading advertising. Commission (EC), *Supplement to the Report on Competition Policy 2005* (2007) <http://ec.europa.eu/competition/publications/annual_report/2005/report_supplement_20061113.pdf> accessed 24 January 2012, 170.

[30] These being the benefits, competition brings to consumers. See for example Commission(EC), *XXXth Report on Competition Policy 2000* SEC (2001) 694 final <http://ec.europa.eu/competition/publications/annual_report/2000/en.pdf> accessed 24 January 2012 , 41.

into efficiency gains.[31] Further, a third 'remedial' category can be identified for redressing economic and non-economic consumer interests, should they be breached.

These three categories of consumers' interests can act as a demarcation between consumer and competition policy (with the third remedial category applying equally to both) with the following two caveats. First of all, as a matter of principle, it is a matter for debate as to whether competition law enforcement should accommodate non-economic goals.[32] Indeed, there have been instances in the past in which EU competition law has been applied in a protectionist manner.[33]

Second, the distinction between economic and non-economic interests is, in itself, not a clear cut one. The OFT defines direct economic benefits as benefits that improve the value for money offering for consumers of the product or service (that is, improvements in regard to the price, quality, range and service – the PQRS – offering).[34] This definition corresponds, to a large extent, to the Commission's distinction between cost and qualitative efficiencies.[35] However, there is a fine line between qualitative efficiencies promoted by competition law and agreements on some product qualities that remain outside its remit. This point can be

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[31] Commission(EC), 'Guidelines on the Application of Article 81(3) of the Treaty' (Notice) [2004] OJ C101/08('Guidelines on 81(3)EC') [33], [42], [44], [49], [57], [59], [85].

[32] See, for example, Townley, 'Which Goals Count in Article 101(3) TFEU? Public Policy and its Discontents: The OFT's Roundtable Discussion on 101(3) TFEU' (2011) 32 ECLR 441.

[33] For an example in which reference was made to the non-economic interest of consumers , see Case C-309/99 *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577, [97]. The rationale in *Wouters* resembles decisions in the field of free movement provisions. Joined Cases C-94/04 and C-202/04 *Federico Cipolla v Rosaria Fazari et al* [2006] ECR I-11421. See O' Loughlin, 'EC Competition Rules and the Free Movement Rules: an Examination of the Parallels and their Furtherance by the ECJ in the Wouters Decision' (2003) 24 ECLR 62. For an example where safety considerations were taken into account see Asahi/Saint-Gobain (Case IV/33.863)Commission Decision of 94/896/EC [1994] OJ 354/87, [24].

[34] OFT, 'Article 101(3) – A Discussion of Narrow Versus Broad Definition of Benefits' (Discussion Note for OFT Breakfast Roundtable)< http://www.oft.gov.uk/shared_oft/events/Article101%283%29-discussionnote.pdf> accessed 24 January 2012('OFT on 101(3)'), [3.3].

[35] *Guidelines on 81(3)EC* (n31) [59]. *OFT on 101(3)* (n34) [3.7].

illustrated by the following example. In *CECED*[36] the Commission exempted an agreement to cease production and distribution of certain washing machines because this would contribute to more environmentally friendly performance in regard to those products. Has the Commission limited consumer choice by taking into account non-economic interests of an environmental nature? The Commission, by granting an exemption to this agreement, answered this question in the negative, and expressed the primary environmental interest in economic terms, since more environmentally friendly machines consume less energy and result in consumer savings.

The analysis presented above suggests that 'consumer interest' in EU competition law embraces consumers economic interests (even if, in some cases, these are broadly defined) in the form of lower prices, better quality and increased choice, and should not be mixed with the more varied consumer interest notion in consumer law that embraces both economic and non-economic interests. Pointing to different aspects of consumer interest is helpful in delineating between the consumer and competition law disciplines. In as much as competition can effectively cater for 'consumer interest', the need for consumer protection legislation is reduced. At the same time, though, an expansionist approach to 'consumer interest' should be avoided since this distorts the substantive enforcement of competition law. Hence, consumer law measures are needed for the protection of other types of consumer economic and non-economic interests. The following sections examine whether EU competition law enforcement caters for the adequate protection of the 'consumer interest' by discussing the aims of EU competition law and their actual reflection in EU courts case law.

[36] *CECED* (Case IV.F.1/36.718) Commission Decision 2000/475 EC [2000] OJ L187/47.

III. Policy Analysis

1. Introduction

Policy justifications influence the application of the substantive law and its enforcement at any given time.[37] This section explores the importance attributed to 'consumer interest' at a policy level, in light of the current move towards the 'consumer welfare' aim, and further explains why the focus of this research is on the final consumers. The aim of this analysis is twofold; first, it provides a preliminary justification for increased consumer participation in private competition law enforcement. Second, it allows for a comparison to be drawn between the role of 'consumer interest' in the Union institutions' rhetoric and its relevant role in the enforcement of EU competition provisions by the Commission and EU courts. If an inconsistency is identified, more active consumer involvement in private competition law enforcement can be viewed as an alternative route for bringing 'consumer interest' to the fore.

2. Multiplicity of aims in EU competition law

The following analysis presents the influential variables for EU competition law, in order to underline the current focus on the 'consumer welfare' goal (see part 3 below), without attempting to present an historical evolution of EU competition policy.[38] The Commission has noted that 'competition policy cannot be pursued in isolation, as an end in itself, without

[37] See Marsden, 'Checks and Balances: European Competition Law and the Rule of Law'(2009) 22 LoyConLRev 51, 59 quoting Judge Cooke, the Judge Rapporteur in *Microsoft*, who stated that ' these Article [101 and 102 TFEU] cases are 20 percent fact, 20 percent law and 60 percent policy'.

[38] See Resch, 'Phases of Competition Policy in Europe'(2005) Working Paper AY0504<http://www.escholarship.org/uc/item/7wr2g49j> accessed 25 January 2012; Weitbrecht, 'From Freiburg to Chicago and Beyond: The First 50 Years of European Competition Law' (2008) 29 ECLR 81.

reference to the *legal*, *economic*, *political* and *social context.*'[39] Thus, the multifaceted context within which EU competition policy operates, has influenced its goals. These goals can be further categorised, as discussed below.

First, from a historical perspective, EU competition law was not adopted on a clean slate. On the contrary, it was influenced, to some extent, by US antitrust law and, most importantly, by the ordoliberal Freiburg school of thought.[40] The ordoliberals were sceptical of private economic power and their concern was to eliminate this or, at least, to prevent its harmful effects.[41] Thus, they focus more on the structure of the market, protection of economic freedom of market players and competition as a process, as ends in themselves. Even today, it remains debatable as to whether EU competition law can be emancipated from this ordoliberal tradition.[42]

Further, the drafters of the Treaty viewed competition law as a tool for opening up the then fragmented national markets.[43] Thus, market integration was considered (and still is) an

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[39] *XXIInd Report on Competition Policy 1992* (n9) 13 (emphasis added). See also Whish and Bailey, *Competition Law* 20; Posner, *Antitrust Law* 286; Case 283/81 *CILFIT and Lanicio di GavardoSpA v Ministry of Health* [1982] ECR 3415, [20].

[40] Buxbaum, 'German Legal Culture and the Globalisation of competition law: A Historical Perspective on the Expansion of Private Antitrust Enforcement' (2005) 23 Berkley J Int'l L 101, 106; Gerber, 'Constitutionalising the Economy: German Neo-liberalism, Competition Law and the "New" Europe'(1994) 42 Am JCompL 25, 64; Contra Akman, 'Searching for the Long-Lost Soul of Article 82 EC' (2009) 29 OJLS 267.

[41] *Gerber* (n40) 49-56; Gerber, *Law and Competition in the Twentieth Century Europe: Protecting Prometheus* ch 7; Ahlborn and Grave, 'Walter Eucken and Ordoliberalism: An Introduction from a Consumer Welfare Perspective'(2006) 2 CPI < https://www.competitionpolicyinternational.com/walter-eucken-and-ordoliberalism-an-introduction-from-a-consumer-welfare-perspective/> accessed 25 January 2012, 197 for an overview of the main concepts of ordoliberalism. See also Moeschel, 'The Proper Scope of Government Viewed from an Ordoliberal Perspective: The Example of Competition Policy' (2001) 157 JITE 3,4.

[42] Note, for example, the approach towards exploitative abuses of EU competition law and the adopted formalistic approach towards abusive practices in Case T-219/99 *British Airways Plc v Commission*[2003] ECR II-5917; Case T-203/01 *Manufacture Francaise des Pneumatiques Michelin v Commission*[2003] ECR II-4071. *Ahlborn and Grave* (n40) 208-209.

[43] Information Service High Authority of the European Community for Coal and Steel Luxembourg, 'The Brussels Report on the General Common Market' (June 1956) ('Spaak Report') (Unofficial English Translation) <http://aei.pitt.edu/995/1/Spaak_report.pdf> accessed 22 October 2011; Gerber, 'The Transformation of European Community Competition Law?'(1994) 35 Harv Int'l L J 97, 102.

important goal in EU competition law. [44] For example, the revised Guidelines on vertical restraints mention market integration as one of the important factors in assessing vertical agreements. Market integration, though, is not a single-standing objective but, rather, a means to promote competition within the EU.[45] In this sense, market integration is an economic objective. However, in the short and medium term market integration may conflict with economic efficiency goals also pursued by competition policy; a fact that highlights the political nature of this goal as well.[46]

Aside from the protection of economic freedom advocated by the ordoliberals and the promotion of market integration, the consumer welfare standard has recently gained in popularity as the desired goal of competition law.[47] This has emerged from the Commission's approach to the modernisation of competition law and its attempts to introduce a more economic-based approach in the application of competition law.[48] To some extent, this can be

[44] Joined Cases 56/64 and 58/64 *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission* [1966] ECR 299, 340; Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR I – 3055, [36]; *First Report on Competition Policy* (n7) 13; Commission (EC), *XXth Report on Competition Policy* (Brussels, Luxembourg 1991) http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=CM6091410 accessed 25 January 2012, 11; Commission (EC), *XXIst Report on Competition Policy 1991* (Brussels, Luxembourg 1992)<http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=CM7392247> accessed 25 January 2012, [43-44];Commission(EC), 'White Paper on the completion of the internal market' COM(85) 310 final, [19]; Ehlermann, 'The Contribution of EC Competition Policy to the Single Market' (1992) 29 CMLRev 257; Albors – Llorens, 'Competition Policy and the Shaping of the Single Market' in Barnard and Scott(eds), *The Law of the Single European Market* 311. For a recent case on the market integration objective see Joined Cases C-403/08 and C-429/08 Football Association Premier League Ltd [2011] OJ C 347/2, [139-140].

[45] Commission (EU), 'Guidelines on Vertical Restraints' [2010] OJ C 130/1 ('Guidelines on Vertical Restraints'), [7].

[46] Ehlermann and Laudati, Introduction in Ehlermann and Laudati (eds) *European Competition Law Annual 1997: the Objectives of Competition Policy* x.

[47] Parret, 'Shouldn't we Know what we are Protecting? Yes we Should! A Plea for a Solid and Comprehensive Debate about the Objectives of EU Competition Law and Policy' (2010) 6 EurCompJ 339, 359.

[48] See Commission Regulation (EC) 2790/1999 on the Application of Article 81 (3) of the Treaty to Categories of Vertical Agreements and Concerted Practices [1999] OJ L 336/21 ('*Previous Vertical Agreements BE'*); Commission(EC), 'Guidelines on Vertical Restraints'(Notice) [2000] OJ C 291/01, [7], [102] ('*Previous Guidelines on VR'*). See Drexl, 'Competition Law as Part of the European Constitution' in Bogdandy and Bast

seen as an attempt to synchronise EU competition law with its US counterpart in an international market place, as well as incorporating insights from economic theory.[49]

EU competition law analysis has also occasionally, embraced public policy considerations such as environmental, social and industrial policy considerations.[50] These cannot be said to constitute aims of EU competition law, but nonetheless they have influenced the respective analysis. This is explicable, given the purposive interpretation adopted by the CJEU[51] in applying the competition provisions in conjunction with Article 2 and 3 TEC[52] and the existence of integration clauses for a number of EU policies.[53]

(eds), Principles of European Constitutional Law 659, 669- 679, on the different implications of the 'more economic approach' on EU competition law enforcement.

[49] See Kovacic, 'Competition Policy in the European Union and the United States: Convergence or Divergence? (Bates White Fifth Annual Antitrust Conference Washington, June 2008) <http://www.ftc.gov/speeches/kovacic/080602bateswhite.pdf> accessed 25 January 2012, on possible convergence between the two systems.

[50] See for example, *CECED* (n36) [30-37], [48], [51-57]; *DSD* Commission Decision 2001/837 EC [2001] OJ L 319/1, [143-145] on environmental considerations; *Ford/Volkswagen* (Case IV.33.814)Commission Decision 93/49/EEC[1993] OJ L20/14, [36] on social and employment considerations;Case T-17/93 *Matra Hachette v Commission* [1994] ECR-II 595, [96]; Case C-67/96 *Albany International BV v Stichting Bedrijspensioenfonds Textielindustrie* [1999] ECR I-5751 ('*Albany*'), [54]. DG Comp, 'The Application of Articles 85 and 86 of the EC Treaty by National Courts in the Member States' (Brussels, July 1997)('Braakman Report')< http://ec.europa.eu/competition/publications/art8586_en.pdf> accessed 25 January 2012, [148] for references to relevant case law; Monti, 'Article 81 EC and Public Policy' (2002) 39 CMLRev 1057, 1069-1078; Townley, *Article 81 and Public Policy;* Sauter, *Competition Law and Industrial Policy in the EU*; Amato, *Antitrust and the Bounds of Power*; Vedder, 'Of Jurisdiction and Justification. Why Competition is Good for 'Non-Economic Goals but may need to be Restricted' (2009) 6 CompLRev <http://www.clasf.org/CompLRev/Issues/Vol6Issue1Article3Vedder.pdf> accessed 26 January 2012, 51. Schweitzer, 'Competition Law and Public Policy: Reconsidering an uneasy relationship, The Example of 81' (2007) (EUI WP Law 2007/30) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1092883> accessed 18 February 2012, 2-8.

[51] Case 14/68 *Walt Wilhelm v Bundeskartellamt* [1969] ECR 1,14; Case 6/72 *Europemballage Corporation and Continental Can Company Inc v Commission* [1973] ECR 215, [23-25]; *Albany* (n50) [54].

[52] After the adoption of the LT, Articles 2 and 3 TEC were repealed. The objectives of the Union are now to be found in Article 3TEU. However, the reference to a system of undistorted competition has been deleted.

[53] On the integration clauses in the LT see Article Article 7 TFEU, Article 11 TFEU (on the environment), Article 12 TFEU (on consumer protection), Article 147 (2) TFEU (on employment), Article 173 (3) TFEU (on industrial policy).

Arguably, after its 'modernisation', this is no longer a valid application of EU competition law.[54] This fact is also evident in the change regarding enforcement priorities in the Commissioners' speeches.[55] Ultimately though, despite the Commission's efforts, this approach to competition law and policy has to be embraced by the EU courts. This is even more the case in the light of the LT that embraced a 'highly competitive social market economy',[56] and has moved the objective of undistorted competition[57] from the introductory provisions of the Treaty into a protocol.[58] This may, arguably, reinforce industrial and social policy considerations in the enforcement of competition law provisions and will result in a more complex application of competition rules by national courts.[59] However, in *TeliaSonera* the GC suggested that the approach to EU competition policy will not change post the LT.[60]

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[54] *Guidelines on 81(3) EC*(n31) [42]; Venit, 'Brave New World: The Modernization and Decentralization of Enforcement Under Articles 81 and 82 of the EC Treaty' (2003) 40 CMLRev 545, 579; Odudu, *The Boundaries of EC Competition Law* ch 7. Modernisation refers to the changes in competition law enforcement brought about by Council Regulation (EC)1/2003 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty [2003] OJ L1/1 ('*Regulation 1/2003*'). However, modernisation may also be linked with desirable changes in substantive application of EU competition law towards a more effects-based 'consumer welfare' approach, commencing with the *Previous Vertical Agreements BE* (n48) and the *Previous Guidelines on VR* (n48).

[55] See Monti, 'New Directions in EC Competition Law' Tridimas and Nebbia (eds), *European Union Law for the Twenty-First Century: Rethinking the New Legal Order* 177, 178 in which he points to Karen van Miert's view of competition policy as a tool that contributes to the fundamental aims of the Treaty, while its successor, Mario Monti views it as a tool to enhance consumer welfare.

[56] Article 3(3) TEU.

[57] Riley, 'The EU Reform Treaty and the Competition Protocol: Undermining EC Competition Law'(2007)28 ECLR 703, 704 quoting Petite, the Director General of the European Commission's Legal Service, who views competition as a means, rather than an objective, of the Union; Contra Barents, 'Constitutional Horse Trading: Some Comments on the Protocol on the Internal Market and Competition' in Bulterman (ed), *Views of European Law from the Mountain: Liber Amicorum Piet Jan Slot* 123, 127 arguing that '...there is no strict hierarchy in the sense of objectives and means since both provisions constitute the foundations of the EC'.

[58] Protocol (No 27) on the Internal Market and Competition [2008] OJ C115/309. Protocols form an integral part of the Treaties, enjoying the same legal validity. Article 51 TEU.

[59] Lane, 'EC Competition Law Post Lisbon: A Matter of Protocol' in Bulterman (ed), *Views of European Law from the Mountain: Liber Amicorum Piet Jan Slot Liber Amicorum Slot* 167, 176. Sarkozy, 'Conférence de presse finale sur le contenu de l'accord des 27 pays membres de l'Union européenne concernant le Traité européen simplifié' (Brussels, 23 June 2007) <http://discours.vie-publique.fr/notices/077002000.html> accessed 22 October 2011; Semmelman, 'The European Union's Economic Constitution under the Lisbon Treaty: Soul-Searching Shifts the Focus of Procedure' (2010) 35 ELRev 516, 524 argues that LT will not change the approach to EU competition policy but, at the same time, she points to the need for clarification of EU

In addition, unification of competition and the internal market into a single protocol in the LT seems to highlight the importance of competition rules for the internal market and emphasize their potential to promote market integration. In this way, it eschews a US-inspired enforcement standard based solely on efficiency considerations[61] and, in case of conflict between the two, grants priority to the internal market rationale. Interestingly though, as Riley argues, erasing the 'undistorted competition objective' from the opening articles of the Treaty may result in a more 'consumer welfare'-orientated enforcement of Article 102, as opposed to the current protection of market structure and the institution of competition.[62]

3. 'Consumer welfare' as the emerging primary aim in light of the Commission rhetoric

Given the multiplicity of aims in EU competition law, the analysis would be greatly facilitated if one of them were to be accorded priority, especially in cases in which different goals could lead to different outcomes. Odudu points out that 'legal certainty and justiciability are enhanced by a unitary goal'.[63] Pursuing other policy aims under the guise of EU competition law entails the risk that markets will not work efficiently, resulting in consumer harm.[64] In addition and in light of the 'modernisation'[65] and current efforts of

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competition policy. See also Semmelman, 'The Future of the Non-competition Goals in the Interpretation of Article 81 EC'(2008) 1 Global Antitrust Rev 15.

[60] Case C-52/09 *Konkurrensverket v TeliaSonera AB* [2011] OJ C103/3, [20].

[61] Marsden and Whelan, 'The "Consumer Welfare" standard as a form of substantive protection for consumers under European Competition Law' (2009) in Ezrachi and Bernitz (eds), *Private Labels, Brands and Competition Policy* 353, 360.

[62] *Riley* (n57) 705. In this vein, see also Komninos, 'Continuity and Change in EU Competition Policy'(February 2010) CPI <https://www.competitionpolicyinternational.com/continuity-and-change-in-eu-competition-policy/> accessed 25 January 2012, 6. *Drexl* (n48) 697.

[63] *Odudu* (n54) 159. He identifies allocative efficiency as superior to market integration and economic freedom and rejects non-efficiency goals in the application of Article 101 TFEU. If non-efficiency goals are accorded priority, he believes that this is ultimately a constitutional question external to competition law that should be better resolved at constitutional level.

'privatisation'[66] of EU competition law, it will greatly complicate its application at national level.

Adoption of consumer welfare as the primary aim of EU competition law can initially be supported by EU legislation and soft law instruments.[67] The wording of Articles 101 and 102 TFEU, as well as the way they are interpreted by the Commission seem to attribute particular emphasis to the impact of certain conduct on consumers.[68]

According to Article 101(3) TFEU, an otherwise anti-competitive agreement, caught by Article 101 (1) TFEU, can be exempted from the scope of EU competition law, if it is beneficial in terms of production, distribution or technical and economic progress, as long as it provides consumers with a fair share of this benefit (and provided, of course, that the two residual conditions of this Article are met). In fact, this condition of passing on efficiencies to consumers is reiterated in EU legislation and Commission documents.[69] It has also been expressly stated that 'the objective of Article [101 TFEU] is to protect competition on the

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[64] Malinauskaite, 'The Development of "consumer welfare and its application in the Competition Law of the European Community and Lithuania' (2007) ICCLR 354, 357.

[65] *Regulation 1/2003* (n54).

[66] Commission (EC), 'Damages actions for breach of the EC antitrust rules' (Green Paper) COM (2005) 672 final ('*GP*'); Commission (EC), 'Damages actions for breach of the EC antitrust rules' (White Paper) COM (2008) 165 final ('*WP*').

[67] However, Drexl argues that Treaty provisions do not support 'consumer welfare' as the goal of EU competition law and that reference to consumers in EU competition provisions only helps to define anti-competitive behaviour, and not the aim of the EU competition law system. *Drexl* (n48) 686.

[68] Commission (EC), *XXXIst Report on Competition Policy 2001* (Brussels, Luxembourg 2002) <http://ec.europa.eu/competition/publications/annual_report/2001/en.pdf> accessed 26 January 2012, 19-21 presenting Commission decisions that provide evidence of the direct impact of competition policy on consumer welfare.

[69] See, for example, Commission Regulation (EU) 1218/2010 on the application of 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements [2010] OJ L335/43 Recital 6, 10; Commission Regulation (EU) on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements' [2010] OJ L335/36 Recital 10; *Previous Guidelines on VR* (n48) [136]; Commission (EU), 'Guidelines on Vertical Restraints' [2010] OJ C 130/1, [122]; *Guidelines on (81(3)EC)* (n31), [85].

market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources'.[70]

According to Article 102 (b) TFEU, a conduct is abusive when it limits production, markets or technical development to the prejudice of consumers. Indeed, in its 'Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings' ('*Guidance Paper'*) the Commission seems to attribute increased attention to the 'likely consumer harm' in the finding of abusive conduct.[71] Similar statements on competition law objectives are to be found in the 'Discussion Paper on the Application of Article 82 of the Treaty on Exclusionary Abuses' ('*Discussion Paper').*[72] Thus, the ultimate aim is the protection of consumer welfare while the competitive process serves as a means to that end, rather than being an aim in itself.[73] In essence, as Brodley put it, 'the economic goal of antitrust includes both an end result and a preferred means by which this end result is to be achieved'.[74]

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[70] *Guidelines on 81(3)EC* (n31) [13], [33]; Commission(EC), 'Guidelines on the Application of Article 81 of the EC Treaty to Technology Transfer Agreements' [2004] C101/02, [5], [7]; Commission(EU), 'Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements' [2011] OJ C 11/1, [269].

[71] Commission(EC), 'Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings' [2009] OJ C45/7 ('*Guidance Paper'*), [19].

[72] DG Competition, 'Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses' (December 2005) <http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf> accessed 26 January 2012 ('*Discussion Paper'*), [1], [4].

[73] Commission (EC), *Report on Competition Policy 2006* (2007) <http://ec.europa.eu/competition/publications/annual_report/2006/en.pdf> accessed 26 January 2012, 3 (Foreword); Lowe, 'Consumer welfare and Efficiency – New Guiding Principles of Competition Policy' (13th International Conference on Competition and 14th European Competition Day, Munich, 27 March 2007)<http://ec.europa.eu/competition/speeches/text/sp2007_02_en.pdf> accessed 26 January 2012; contra Eilmansberger, 'Dominance – The Lost Child? How Effects-based Rules Could and Should Change Dominance Analysis' (2006) 2 EurCompJ 15,18.

[74] Brodley, 'The Economic Goals of Antitrust: Efficiency, Consumer Welfare and Technological Progress' (1987) 62 NYU LRev 1020, 1023; For a different view emphasizing the value of 'competition as a means' see Andriychuk, 'Can We Protect Competition Without Protecting Consumers?' (2009) 6 CompLRev <http://www.clasf.org/CompLRev/Issues/Vol6Issue1Article4Andriychuk.pdf > accessed 26 January 2012, 77.

In the context of public enforcement, the Commission is eager to make 'consumer welfare' the appropriate enforcement standard.[75] However, despite the Commission's overt dedication to 'consumer welfare', it seems questionable as to whether the Commission itself is indeed prepared to adopt this standard. An example, drawn from the *Guidance Paper*, illustrates that, despite the adoption of 'consumer welfare' as the objective of competition law, the manner according to which the Commission identifies 'consumer harm' (as well as the causation requirement between foreclosure and consumer harm) remains vague.[76]

The fact that, after the modernisation of EU competition law, 'consumer welfare' has been bestowed a higher status can be deduced from the Commissioners' speeches and other Commission initiatives.[77] For example, the recent dedication to promote private enforcement of competition law was, to a large extent, grounded on the potential for competition law to promote the interests of the final consumers.[78] Apart from its efforts in the advancement of private competition law enforcement, the Commission has undertaken a number of initiatives aimed at raising awareness and involvement of European consumers in EU competition

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[75] Commission (EC), 'Report on Competition Policy 2008' COM (2009) 374 final, [108] in which it is stated that 'The Commission places consumers' concerns at the heart of its competition activities and considers it essential that the main thrust of competition policy should be on maximising consumer welfare'.

[76] Petit, 'From Formalism to Effects? – The Commission's Communication on Enforcement Priorities in Applying Article 82 EC'(2009)< http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1476082> accessed 26 January 2012, 1, 19.

[77] For example see Monti, 'Competition in a Social Market Economy' (Conference of the European Parliament and the European Commission on 'Reform of European Competition Law', Freiburg, 9-10 November 2000) <http://ec.europa.eu/competition/speeches/text/sp2000_022_en.pdf> accessed 26 January 2012; Kroes, 'Delivering Better Markets and Better Choices'(European Consumer and Competition Day, London, 15 September 2005, Speech/05/512)< http://ec.europa.eu/competition/speeches/text/sp2007_11_en.pdf accessed 26 January 2012; Kroes, 'Competition Policy and Consumers' (General Assembly of BEUC, Brussels 16 November 2006, Speech/06/691) <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/06/691&format=HTML&aged=0&language=EN&guiLanguage=en> accessed 26 January 2012. See also Lowe, 'Preserving and Promoting Competition: A European Response' [2006] 2 CPN 1; Lowe, 'The design of competition policy institutions for the 21st century – the experience of the European Commission and DG COMP' [2008] 3 CPN 1,6 .

[78] *GP*(n66); *WP*(n66).

policy; hence the launching of European Competition Days.[79] In addition, the appointment of a Consumer Liaison Officer in the DG COMP, responsible for taking complaints from end users, indicates the importance attributed by the Commission to consumer interests.[80]

The wording of EU competition provisions interpreted in light of Commission policy pronouncements suggests that 'consumer welfare' can be treated as the primary aim of EU competition law. However, this conclusion will not facilitate the analysis in specific cases given the vagueness of the 'consumer welfare' term, which calls for an examination of its exact content.

4. Defining consumer welfare in EU competition law

EU courts' jurisprudence can be of little assistance in searching for the proper meaning of 'consumer welfare', since this term has appeared very scarcely and its content was never formulated.[81] Confusion regarding the notion of 'consumer welfare' can be partly attributed to the proponents of the Chicago school. Bork equated consumer welfare with total welfare.[82]

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[79] *XXXth Report on Competition Policy* (n31) 23; Norberg, ' Competition Policy of the European Commission: In the Interest of Consumers?' (Leuven, 20 June 2003) <http_ec.europa.eu_competition_speeches_text_sp2003_021_en> accessed 26 January 2012.

[80] *Report on Competition Policy 2008* (n75) [109]; Commission(EC), *XXXIII Report on Competition Policy 2003*, SEC(2004) 658 final, 16. The problem is though, that the CLO is an under resourced body. See Dayagi-Epstein, 'Representation of Consumer Interest by Consumer Associations – Salvation for the Masses?' (2007) 3 CompLRev <http://www.clasf.org/CompLRev/Issues/Vol3Issue2Art3DayagiEpstein.pdf> accessed 26 January 2012, 209, 217.

[81] See 'consumer welfare' reference in Case C-8/08 *T-Mobile Netherlands BV v Raad van Bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529,Opinion of AG Kokkot, [59] only to reject T-Mobile's argument; Case T-201/04 *Microsoft Corp v Commission* [2007] ECR II- 3601, [41] only when reiterating the Commission decision; Case T-168/01 *GlaxoSmithKline Services v Commission* [2006] ECR II-2969, [118]; Case C-501/06P *GlaxoSmithKline Services v Commission* [2009] ECR I-9291, [49] only when referring to GSK's argument; Case C-53/03 *SYFAIT v GlaxoSmithKline Plc* [2005] ECR I-4609, Opinion of AG Jacobs, [91]; Case C-209/07 Competition Authority v Beef Industry Development Society [2008] ECR I-8637, Opinion of AG Trstenjak, [56-57]; *Eco Swiss* (n44), Opinion of AG Saggio, [42] referring to the well-being of consumers. See also *TeliaSonera* (n60) [22] oddly referring to the well-being of the European Union.

[82] Bork, *The Antitrust Paradox* 91; Ginsburg, 'Judge Bork, Consumer Welfare, and Antitrust Law' (2008) 31 Harv J L & Pub Pol'y 449. Bork has also employed a historic analysis attributing consumer welfare (with the meaning of efficiency) as the Sherman Act's goal since its inception, a finding rebutted by Lande who argued that, on the contrary, the legislative intent embraced redistribution of wealth. See Bork, 'Legislative Intent and the Policy of the Sherman Act' (1966) 9 J L & Econ 7. Lande, 'Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged (1982) 34 Hastings L J 65. Lande, 'Proving the

Kirkwood and Lande commented that, in so doing, 'Bork used "consumer welfare" as an Orwellian term of art that has little or nothing to do with the welfare of true consumers'.[83] Choosing between the consumer welfare standard and the total welfare standard is important because they may lead to different outcomes in certain cases; for example, when collaboration between competitors results in higher prices for consumers but lowers production costs.[84]

Contrary to Bork's definition of consumer welfare, it is generally accepted that 'consumer welfare' can be defined (in economic terms) as consumer surplus.[85] Improvement in consumer welfare is synonymous with providing consumers with access to a range of competitively priced goods and services.[86] This is consistent with Article 101 (3) TFEU, which, arguably, excludes a neo-classical interpretation of consumer welfare and incorporates distributive justice elements, since the exempted agreement should '[allow] consumers a fair share of the resulting benefit'.[87] Very early on, the Commission seems to have opted for the adoption of 'consumer welfare', in the above-mentioned sense, as opposed to 'total welfare'. Note, for example, that in the 'First Report on Competition Policy' it stated that:

> such a [competition] policy encourages the best possible use of productive resources for the greatest possible benefit of the

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Obvious: The Antitrust Laws Were Passed to Protect Consumers (Not Just to Increase Efficiency)' (1999) 50 Hastings L J 959, 961 on this debate.

[83] Kirkwood and Lande, 'The Fundamental Goal of Antitrust: Protecting Consumers not Increasing Efficiency' (2008) 84 Notre Dame LRev 191, 199.

[84] *Brodley* (n74)1034.

[85] Motta, *Competition Policy* 18.

[86] Cseres, 'Competition and Consumer Policies: Starting Points for Better Convergence' (2009) Amsterdam Center for Law&Economics Working Paper No 2009/06 <http://ssrn.com/abstract=1379322> accessed 26 January 2012, 4.

[87] *Monti* (n50)1065; *Cseres* (n2) 252, 253.

> economy as a whole and for the benefit *in particular of the consumer*.[88]

This raises the further question of when these resulting benefits should accrue to consumers; is long term or short term consumer welfare the appropriate standard? It has been recognised that if only short term consumer benefits were accounted for, this would have a detrimental impact on firms' incentives to promote innovation and dynamic efficiencies.[89] Thus, long term consumer welfare seems preferable, as it reconciles competing consumer and producer incentives, while allowing for the benefits to be passed on to consumers, at least at some point in the future.

This approach seems to be in line with the Commission's rhetoric.[90] In its *Guidelines on 81(3) EC* it is stated that 'the fact that pass-on to consumers occurs within a certain time lag does not in itself exclude the application of [Article 101(3)]'. Thus, the Commission does not, in principle, reject a long term consumer welfare standard, since it accepts that it is not necessary for the benefits to be passed on to consumers immediately. It points, though, to the fact that 'the greater the time lag, the greater must be the efficiencies to compensate also for the loss to consumers during the period preceding the pass-on'.[91]

However, long term consumer welfare is difficult to administer as it is difficult to agree on the future time lag and there is always the possibility that the expected future benefits will not be realised.[92] Nevertheless, there have been instances in which a long term

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[88] *First Report on Competition Policy* (n7) 12 (emphasis added).

[89] *Brodley* (n74) 1036; Adhar, 'Consumers, Redistribution of Income and the Purpose of Competition Law' (2002) 23 ECLR 341, 350; Bishop and Walker, *The Economics of EC competition law,* [2.19].

[90] See *XXIIIrd Report on Competition Policy 1993* (n6) [82]; *XXXth Report on Competition Policy* (n30), 42.

[91] *Guidelines on 81(3) EC* (n31), [87]. The OFT's view on this issue is presented in *OFT on 101(3)* (n34), [1.8].

[92] Here, the issue of future consumers receiving benefits that they have not paid for is not addressed. See *OFT on 101(3)* (n34), [1.8] and section 5.

consumer welfare approach was considered in the application of Article 101,[93] whereas the application of Article 102 TFEU seems to be guided, at times, by short-term consumer welfare.[94]

5. The notion of consumer: Emphasis on the final consumer

The repeated statements in favour of the consumer welfare standard can be seen as an attempt by the Commission to increase consumers' confidence in competition policy and gain political support.[95] However, arguably, this overt enthusiasm masks the fact that the notion of consumer in competition law is wider than the common perception of 'consumer' in everyday life. This further conceals the fact that, in certain cases, different stakeholders, all of whom fall under the 'consumer' tag, have conflicting interests that cannot be pursued simultaneously.[96]

In competition law, the term 'consumer' refers not only to final consumers but also to direct and indirect users of the product affected by the anti-competitive conduct or agreement.[97]Thus, the competition law notion of consumers is broader than the one used in consumer law[98] and, therefore, the protective scope of competition law cannot (and should

[93] Case C-501/06P *GlaxoSmithKline Services v Commission* (n81), [91-94];*OFT on 101(3)* (n34), [5.6].

[94] For example in exploitative abuses. See Section IV(3) below. In favour of a long term approach in the application of Article 102 see Case C-7/97 Oscar Broenner v Mediaprint [1998] ECR-I 7791, Opinion of AG Jacobs, [57].

[95] Cf *Cseres* (n86) 5.

[96] On this issue see Akman, ' "Consumer" versus "Customer": The Devil in the Detail' (2010) 37 J L&Soc 315.

[97] *Guidance Paper* (n71), [19] fn15; *Guidelines on 81(3) EC* (n31), [84]; Commission (EC), 'Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings'[2004] OJ C 31/5, [79].

[98] A general definition is provided in Commission(EC), 'Proposal for a Directive of the European Parliament and of the Council on Consumer Rights'COM(2008) 614 final, 8 October 2008, Article 2.

not) be limited to the protection of final consumers.[99] Competition law is not an instrument of consumer policy, nor is it just about consumer protection.[100] That said, however, while competition law is aimed at enhancing consumer welfare, and the notion of consumer embraces a wider variety of stakeholders, final consumers are also included in that category and, to that extent, competition law definitely has a role to play. This is evident in judgements in which particular emphasis was given to the interests of final consumers.[101]

In addition, the 2008 Commission Report on Competition Policy[102] features, as its central focus, the topic 'Cartels and Consumers,' while specifically mentioning the benefits accruing to final consumers by a properly functioning competition regime. According to the Report:

> The fight against cartels is central to ensuring that the benefits of a properly functioning competition regime are offered to the final consumer in a given market for products or services... Cases such as the Banana cartel show that the impact of the cartel on final consumers may be direct when they are purchaser or user of a product or service.[103]

[99]Cseres, 'The Controversies of the Consumer Welfare Standard' (2007) 3 CompLRev <http://www.clasf.org/CompLRev/Issues/Vol3Issue2Art1Cseres.pdf> accessed 26 January 2012,121,133.

[100] Vedder, 'Competition Law and Consumer Protection: How Competition Law can be Used to Protect Consumers Even Better – Or Not?' (2006) 17 EBLR 83, 87.

[101] Case 28/77 *Tepea v Commission* [1978] ECR 1391, [56], [66-67]; Case T-168/01 *GlaxoSmithKline Services v Commission* (n81), [118]; Joined Cases T-213/01 and T-214/01 *Oesterreichischer Postsparkasse AG v Commission*[2006] ECR II-1601, [115]; Joined cases T-259/02 to T-264/02 and T-271/02 *Raiffeisen Zentralbank Oesterreich AG v Commission* [2006] ECR II-5169, [99]; Commission (EU), Notice published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Case COMP/C- 3/39.530 — Microsoft (Tying) [2009] OJ C 242/20, [8].

[102]*Report on Competition Policy 2008* (n75).

[103] Ibid, [5-6]; see also Commission, (EU), 'Staff Working Paper accompanying the Report from the Commission on Competition Policy 2008' COM(2009)374 final *('SWP to 2008 Report')*, for example [325].

The Commission, also states that 'the impact of an effective competition policy is focused on maximising consumer welfare. Put simply, this means ensuring that the benefits of a functioning competition regime accrue to the end consumer in a given product market'.[104]

In the present research, the emphasis is on final consumers. This is due to the fact that, first of all, the interests of final consumers are not always aligned with the interests of other direct or indirect users of the product;[105] rather, the opposite is true. The Commission seems to take this fact into account in its *Guidance Paper* when stating that, in the case in which intermediate users are actual or potential competitors of the dominant undertaking, the analysis on the 'anti-competitive foreclosure' focuses on the harm to consumers further downstream.[106] Akman argued that the Commission should have been more radical in this respect, as, even when the intermediate customers are not competitors, it cannot be presumed that their interests are necessarily identical with those of the final consumers. She takes the example of non-linear pricing to argue that the presumption of the harm/benefit to intermediate customers being passed on to final consumers is not supported by modern economic theory.[107] Furthermore, the outcome in a large number of Article 102 TFEU cases[108] might have been different, had EU courts examined the effects of the conduct on the

[104] *SWP to 2008 Report* (n103), [355].

[105] See EAGCP, 'An Economic Approach to Article 82'(July 2005) available at <http://ec.europa.eu/competition/publications/studies/eagcp_july_21_05.pdf> accessed 26 January 2012, 9; Dayagi-Epstein, 'The Evolution of the Notion of Consumer Interest in Light of the Modernisation of Article 82' in Ezrachi (ed), *Article 82: Reflections on its Recent Evolution* 67; Evans, 'European Competition Law and Consumers: The Article 85(3) Exemption'(1981) 2 ECLR 425, 429.

[106] *Guidance Paper* (n71), [19].

[107] *Akman*(n96), 319-321, 328-31.

[108] Joined Cases 6/73 and 7/73 *Commercial Solvents v Commission* [1974] ECR 223, [25]; *Michelin* (n42); Case C-95/04P *British Airways Plc v Commission*[2007] ECR I-2331. *Akman*(n96) 333-335.

market, and on final consumers, instead of focusing on the economic freedom of market operators.[109]

Despite the fact that, in some cases, it is difficult to assess the impact of competition law violations on final consumers (for example, in exclusionary abuses in intermediate markets), in other cases (cartels in the retail sector, or selective distribution agreements), the impact on final consumers' interests is more evident. Combating competition law violations in these cases is even more important given that such actions demonstrate, to a wider audience, the benefits flowing from a well-functioning competition policy.[110] Thus, despite the cautious warnings against making effects on final consumer welfare the test for an anti-competitive finding, because of the difficulties of tracing the harm at the level of final consumers,[111] in some markets, final consumer welfare can act as the appropriate enforcement standard.

In addition, as the situation now stands in Europe, final consumers are, to a large extent, excluded from the shaping of EU competition policy as well as EU competition law enforcement. Arguably, a final consumer welfare standard may increase the legitimacy of EU competition policy.[112] Furthermore, the latest developments in the European edifice, with the introduction of the single currency and the combat against trade barriers (either public or private), have brought a significant change in the way in which products reach the final consumers. These developments have also resulted in changes in the retail sectors, and

[109] Gormsen, 'Article 82: Where Are We Coming From and Where Are We Going To?' (2005) 2 CompLRev <http://www.clasf.org/CompLRev/Issues/Vol2Issue2Art1Gormsen.pdf> accessed 26 January 2012, 5.

[110] *XXth Report on Competition Policy* (n44) 14.

[111] Werden, 'Essays on Consumer Welfare'(2009) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1352032> accessed 26 January 2012, 28.

[112] See chapter II, text to n158-167.

brought about new and complex competition law implications. Therefore, it is very timely to explore consumer interests in these sectors.[113]

[113] *Marsden and Whelan* (n61) 353, 354. Murray, 'Consumers and EU Competition Policy' (Centre for European reform, September 2005) <http://www.cer.org.uk/pdf/policybrief_consumers.pdf>accessed 26 January 2012.

IV. Policy Manifestations and their Presence in EU Jurisprudence

1. Introduction

In section III a rhetorical preference was discerned towards the 'consumer welfare' aim in EU competition law and the vagueness of this term was pointed out. Exploration of its constituent elements, namely the consumer and the welfare variables, led to advocation in favour of a long-term final consumer welfare standard. Ultimately the meaning attributed to 'consumer welfare' alludes to the potential of EU competition law to promote 'consumer interest'. Whether the frequent reference to consumer welfare in policy documents is accompanied by an analogous presence of this term in EU jurisprudence is questioned in this section, together with the extent that consumer interest is actually taken into account in the enforcement of Article 101 and 102 TFEU. [114] In what follows selected cases are analyzed, with the focus on cases indicative of the inconsistency between rhetoric and substantive EU competition law enforcement. In the selected cases a conflict can be discerned between the consumer welfare and other EU competition law aims (market integration, economic freedom and competitive market structure). Further, these cases are relevant to the interests of 'final' consumers and the analysis will seek to show how these interests have affected the enforcement of EU completion law.

2. Consumer welfare and Article 101 TFEU

The bifurcated structure of Article 101 TFEU (prohibition – exemption) allows consumer interest to be taken into account at two different stages of the analysis. First, in finding that an agreement has, as its *object* or *effect*, the *restriction of competition* (Article 101(1) TFEU); and second, in ruling that this agreement is, nonetheless, not caught by Article 101 TFEU, since it *improves production* or *distribution of goods* or *promotes technical and economic*

[114] See Buttigieg, *Competition Law: Safeguarding the Consumer Interest* for a detailed analysis of this issue.

progress while allowing *consumers a fair share of the resulting benefit* (Article 101(3) TFEU).

The interpretation of the object and effect categories, as well as the notion of restriction of competition, links back to the multiplicity of aims in EU competition law.[115] If consumer welfare is the preferred standard for EU competition law over, for example, economic freedom or market integration as a political objective, then the meaning attributed to restriction of competition[116] is different. Prior to 'modernisation' of EU competition law, consumer interest assumed a peripheral role in finding a restriction of competition. For example, in Consumer Guarantees cases, while consumer interest was also addressed, the most important factor was market integration.[117]

In Article 101 TFEU consumer interest can be taken into account at a further stage when examining possible efficiencies flowing from the agreement, given that a 'fair share' must accrue to consumers (broadly defined). This analysis, as the Commission Guidelines on 81(3) reveal, points to a long-term consumer welfare standard.[118]

Before the 'modernisation' of EU competition law, the *Braakman Report* suggested that the 'consumer passing on' condition should not have been understood literally, given the wide notion of the term 'consumer' in competition law,[119] as well as broad interpretation of 'benefit' in the case law of EU courts.[120] It has generally been assumed in the application of

[115] See text to n38-62 above.

[116]On this notion see *Odudu* (n54), ch 5; Nazzini, 'Article 81 EC between Time Present and Time Past: A Normative Critique of "Restriction of Competition" in EU Law' (2006) 43 CMLRev 497; Robertson, 'What is a Restriction of Competition? The Implications of the CFI's Judgment in O2 Germany and the Rule of Reason' (2007) 28 ECLR 252.

[117] Goyder, 'Consumer Guarantees and Competition Issues' in Lonbay (ed), *Enhancing the Legal Position of the European Consumer* 80, 85 with references to the relevant case law.

[118] *Guidelines on 81(3) EC* (n31) [87]. See text to n90-91.

[119] See text to n97-101.

the first condition of Article 101(3) TFEU that, as long there are productive or dynamic efficiencies flowing from the agreement, these will generally be passed on to consumers.[121] Thus, this condition was easily satisfied.[122]

Arguably, this is no longer the case after the adoption of an effects-based approach in the application of Article 101.[123] However, the Commission states in its *Guidelines on 81(3)* that, in cases in which the restrictive effects are limited, and efficiencies are substantial, it is not necessary to engage in a detailed analysis of this condition, provided that the other three conditions are met.[124]

The cases described below are indicative of the approach towards consumer interest in Article 101 TFEU cases, indicating that it is unlikely for consumer interest to assume a more meaningful role in the application of competition law norms, even after 'modernisation' of EU competition law.

i. T-Mobile

This case concerned an alleged anti-competitive concerted practice between five mobile telephone operators in the Netherlands. Their agreement concerned the reduction in remuneration paid to dealers for post-paid subscriptions. The CJEU gave a preliminary ruling

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[120] *Braakman Report* (n50), [151];See *Philips/Osram* (Case IV/34.252) Commission Decision 94/986/EC [1994] OJ L378/37, [27]; *EBU/Eurovision* (Case IV/32.150) Commission Decision 93/404/EEC [1993] OJ L179/23, [68]; *Synthetic Fibres* (Case IV/30.810) Commission Decision 84/380/EEC [1984] OJ L207/17, 39; *BPCL/ICI* (Case IV/30.863) Commission Decision 84/387/EEC [1984] OJ L212/1, [36].

[121] *Buttigieg* (n114)70, 130; *Howells and Weatherill* (n9) 534; Suffrin, 'The Evolution of Article 81(3) of the EC Treaty'(2006) 51 AB 915, 933 arguing that 'in reality there is only one substantive condition, the first';Kjolbye, 'The New Commission Guidelines on the Application of Article 81(3): An Economic Approach to Article 81'(2004) 25 ECLR 566, 573, 575; Consumer Focus, 'Response to Vertical Restraints Block Exemption Regulation'(September 2009) < http://www.consumerfocus.org.uk/assets/1/files/2009/11/ConsumerFocusresponsetoconsultationonverticalrestraints.pdf> accessed 26 January 2012, 3 in which it calls for increased attention from the Commission when this condition is evaluated.

[122] *Evans* (n105) 434.

[123] *Kjolbye* (n121) 575.

[124] *Guidelines on 81(3) EC* (n31), [90].

on (among other things), whether this practice constituted an anti-competitive agreement by object. The referring court suggests that, because the direct object of the alleged agreement is not the determination of prices for post-paid subscriptions in the retail market, this cannot qualify as a restriction by object. This is because, in this case, it cannot be said that 'the actual detrimental effects on competition are unmistakable', so the agreement falls under the stricter object category.[125] From this approach, it seems that the referring court gave particular attention to the conditions of competition in the retail market, specifically addressing the interests of end-users and rejecting the formalism of examining only the reduction of inter-firm rivalry. Unfortunately, the CJEU followed the AG's opinion, adopting a rather formalistic approach.[126] In so doing, it refrained from re-shaping the aim and focus of Article 101 TFEU, especially when retail markets are involved.

Interestingly enough AG Kokkot in *T-Mobile* argues that:

> from its wording alone, [Art 101(1) TFEU] is directed in general terms against the prevention, restriction or distortion of *competition* within the common market. Nor do the various examples listed in subparas (a) to (e) of [Art. 101 (1) TFEU] contain any restriction in terms such that only anti – competitive business practices having a direct impact on *final consumer* are prohibited. Instead [Article 101 TFEU] forms part of a system designed to protect competition within the internal market from distortions (art.3(1)(g) EC). Accordingly, [Article 101 TFEU], like the other competition rules of the Treaty, is not designed only or primarily to protect the immediate interests of individual competitors or consumers, but to protect the *structure of the market* and thus *competition as such (as an institution)*.In this way consumers are also indirectly protected. Because where competition as such is damaged, disadvantages for consumers are also to be feared...*To narrow the prohibition of [Art.101(1)] simply to behaviour having a direct influence on consumer prices* would deprive that provision, which is fundamental for the internal market, of much of its practical effect.[127]

[125] *T-Mobile* (n81), [19-20].

[126] *T-Mobile* (n81), [38],[39],[43].

[127] *T-Mobile* (n81), Opinion of AG Kokkot, [57-60] (emphasis added).

This formalistic approach reflects the ordoliberal tradition[128] and raises the question as to how 'competition as an institution' is to be defined? Which is the relevant legal test that the courts should follow? It seems that the notion of the 'competitive process' and 'competition as such' is not straightforward, and can only be clarified with reference to a further objective.[129] Generally, everyone would agree that 'competition' is desirable. The further question, though, concerns the purpose for which it is desirable. Is it to promote efficiency, market integration, economic freedom, or some other value?[130]

In particular, in *T-Mobile* the CJEU approach seems to ultimately protect the economic interests of the dealers by outlawing a commercial agreement between mobile telephone operators. While it is true that the prohibition of Article 101(1) TFEU should not be narrowed down solely to behaviour having a direct influence on consumer prices, it is also true that the CJEU should reconsider its approach, especially in cases in which retail markets are involved and no relevant consumer harm is to be feared. Otherwise, this may deter firms from entering into pro-competitive agreements, to the detriment of consumers.

The Commission itself, despite its repeated pronouncements on protecting consumer interest accepts the CJEU analysis in this case on restrictions of competition by object since it states that '...in order to find that a concerted practice has an anticompetitive object, there does not need to be a direct link between that practice and prices charged to final consumers'.[131] Even, if this statement depicts the current state of EU case law, the fact that

[128] See text to n40-42.

[129] Nazzini, 'Welfare Objective and Enforcement Standard in Competition Law' (2009) in Ezrachi and Bernitz (eds) *Private Labels, Brands and Competition Policy* 379, 387.

[130] *Odudu*(n54) 2.

[131] Commission (EU), 'Draft Guidelines on the Applicability of Article 101 TFEU to Horizontal Cooperation Agreements' SEC(2010) 528/2, fn 44. Note however, that this footnote was dropped from the final text. See *Guidelines on horizontal co-operation agreements* (n70)[59].

the Commission makes a direct reference to *T-Mobile* in its Draft Guidelines to Horizontal Cooperation Agreements, whereas as analysed above, the negative impact on consumer interests in this particular case was not evident, shows that the Commission is eager to stay with the current formalistic approach ranging the protection of competitive market structure above consumer welfare.

ii. Glaxo v Commission

The GC in *Glaxo v Commission* adopted a rather different approach.[132] In this case the GC reversed the earlier Commission decision and refused to accept that Glaxo's dual pricing scheme constituted a restriction of competition by object.[133] It stated that:

> in effect, the objective assigned to [art.101(1) TFEU] (...)is to prevent undertakings by restricting competition between themselves or third parties, from reducing the *welfare of the final consumer* of the products in question. Consequently, the application of Article [101(1) TFEU] to the present case cannot depend solely on the fact that the agreement in question is intended to limit parallel trade in medicines(...)but also requires an analysis designed to determine whether it has as its object or effect the(...)restriction(...)of competition, *to the detriment of the final consumer*(...)while it is accepted that an agreement intended to limit parallel trade must in principle be considered to have as its object the restriction of competition, *that applies insofar as the agreement may be presumed to deprive final consumers of those advantages*.[134]

In this case, the GC eschewed a formalistic treatment of the Glaxo scheme, limiting parallel trade. In reaching that conclusion it took particular account of the specific conditions

[132] For a review of this judgment see Korah, 'Judgment of the Court of First Instance in GlaxoSmithKline' (2007)6 CompLaw 101; Eccles, Parallel Exports in the Pharmaceutical Sector: Taking Nothing For Granted' (2007) 28 ECLR 134.

[133] However, it concluded that it had the effect of restricting competition. Case T-168/01 *GlaxoSmithKline Services v Commission* (n81), [190].

[134]Case T-168/01 *GlaxoSmithKline Services v Commission* (n81) [118 - 119], [121](emphasis added); A similar argument was raised in *Cityhook Limited v Office of Fair Trading* [2007] CAT 18, [180] in which the Joint Interveners argued (by citing *Glaxo v Commission*) that Cityhook could claim that 'if the OFT had taken a clear decision that the collective boycott and the collective setting cases involved no detriment to consumers, this may be taken to infer no infringement of Chaper I prohibition (on the basis that this prohibition which is the domestic analogue of [Article 101], is all about protecting the welfare of final consumers). The CAT did not, however, address that point.

in the pharma-industry, as well as the final consumers' interest.[135] Essentially, by viewing the increase in the welfare of final consumers as the aim of Article 101(1) TFEU,[136] the GC refused to accept that the GSK scheme could be inferred to lead to the reduction of consumer welfare,[137] and thus to classify it as a restriction by object. Interestingly, the GC compares its undertaken analysis in this case with the one adopted by the CJEU in the seminal *Consten and Grundig*,[138] suggesting that consumer welfare has been the guiding principle of EU competition law all along. In *Consten and Grundig* the CJEU ruled that an absolute territorial protection constitutes a restriction by object, however, before reaching that conclusion, it undertook an 'abridged but real economic analysis' of this practice and its possible impact on prices charged to final consumers.[139]

Glaxo v Commission is important in so far as it makes a clear pronouncement of principle in favour of consumer welfare.[140] In this way, it reveals the potential ability of competition law to embrace and promote consumer interest, especially in markets in which the impact of the anti-competitive practice on consumers is more evident.

However, this decision was subsequently reversed by the CJEU, who treated this scheme as a restriction by object (even in the pharmaceutical sector), without taking into

[135] See Rey and Venit, Parallel Trade and Pharmaceuticals: A Policy in Search of Itself' (2004) 29 ELRev 153 for a very inclusive previous consideration of these conditions in light of the Case T-41/96 *Bayer AG v Commission* [2000] ECR II-3383.

[136] However, one should be cautious as to the meaning attributed to (final) consumers that includes both the health insurance schemes and patients. See Case T-168/01 *GlaxoSmithKline Services v Commission* (n81), [184-185].

[137] According to AG Trstenjak, this approach could not be applied in the *Beef Industry* case, given the absence of any statutory provisions that may prevent benefits to be passed on to consumers. Case C-209/07 *Competition Authority v Beef Industry* [2008] ECR I-8637, Opinion of AG Trstenjak, [74].

[138] *Consten and Grundig* (n44).

[139] Case T-168/01 *GlaxoSmithKline Services v Commission* (n81), [120-121]; *Consten and Grundig* (n44) 343, 343;*Korah* (n133), 104 stating that 'the judgment of the [CFI] is an important reinterpretation of the [ECJ's] judgment in 1966, which I welcome'.

[140] Howard, 'Object and Effect: What's in an Object?' (2009)8 CompLaw 37, 42 arguing that 'the CFI has refocused the purpose of Article 81 EC within the scheme of the EC Treaty as a whole'.

account that it was not likely to lead to a reduction in consumer welfare.[141] Thus, it adopted the same approach as the AG and the CJEU in the *T-Mobile* case stating that:

> ...Article [101 TFEU] aims to protect not only...but also *the structure of the market, and in so doing competition as such*...for a finding that an agreement has an anti competitive object, it is not necessary that final consumers be deprived of advantages of effective competition in terms of supply and price.[142]

Again, what is evident from this quote is the preference towards the protection of competitive market structures over the consumer welfare aim. Despite that they may at times yield the same outcomes, this is not the case here, in light of the factual circumstances in *Glaxo v Commission*. In practical terms, classification of the Glaxo scheme as a restriction by object will make it more difficult for the company to argue efficiencies under Article 101 (3) TFEU, despite the fact that this is possible, in theory.[143] Arguably, in this case the CJEU should have opted for the GC's approach and refrained from categorising Glaxo's conduct as a restriction by object. If a structural aim of Article 101 TFEU is adopted, namely protecting '*competition as such'*, then a limit on parallel trade (despite the specific conditions in the pharmaceutical sector) falls under the object category. However, if consumer welfare is seen as the primary aim, in line with the Commission policy pronouncements, then for the agreement to be labelled as restrictive of competition by object, it should at least be capable, from its content and the legal and economic context,[144] of reducing consumer welfare.

In addition, the focus of the GC on final consumers seems preferable in this case, despite the broader notion of consumers in competition law. This is explicable in light of the

[141] Case C-501/06P *GlaxoSmithKline Services v Commission* (n81), [59-60].

[142] Ibid, [63] (emphasis added).

[143] Case T-168/01 *GlaxoSmithKline Services v Commission* (n81), [233]; *Consten and Grundig* (n44)342-343; *Matra Hachette* (n50), [85]; Case T-374/94 *European Night Services v Commission* [1998] ECR II-3141, [136]; *Guidelines on Article 81(3) EC* (n31), [46].

[144] Case T-168/01 *GlaxoSmithKline Services v Commission* (n81), [110-111], [117-119].

nature of the product market concerned and its importance for end consumers. In this case, the interests of intermediate customers (the wholesalers) clashed with the interests of the final consumers. This fact was taken into account by the GC who stated that:

> ...Consequently, while it is expected that an agreement intended to limit parallel trade must in principle be considered to have as its object the restriction of competition, that applies *insofar as the agreement may be presumed to deprive final consumers of those advantages*...In effect the wholesalers are economic agents operating at an intermediate stage of the value chain and may keep the advantage in terms of price which parallel trade may entail, *in which case the advantages will not be passed on to the final consumers*.[145]

Thus, given the conditions prevailing in the pharmaceutical industry, in this case parallel trade would benefit the intermediaries, rather than the final consumers; a fact which the GC took into account in refusing to accept a restriction by object.

3. Consumer welfare and Article 102 TFEU

In Article 102 TFEU cases the interests of consumers were rarely taken into account, despite Article 102 TFEU being viewed by commentators, in its inception, as an instrument combating only directly exploitative practices.[146] In the EU, it is now established case law that Article 102 TFEU catches both exploitative and exclusionary abuses.[147] This stands in contrast with Section 2 of the Sherman Act, its US counterpart, which is not applicable to exploitative abuses, revealing more faith in the self-correcting potential of market

[145] Ibid, [121-122] (emphasis added).

[146] Joliet, *Monopolisation and Abuse of Dominant Position* 131, 249, 250; *Akman* (n40), 296; see also Schweitzer, 'The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC' in Ehlermann and Marquis (eds), *European Competition Law Annual 2007: a Reformed Approach to Article 82 EC* 119, 120 referring to the opposite opinion of Mestmaecker .

[147] *Continental Can* (n51), [26]; *Guidance Paper* (n71)[7] .

mechanisms.[148] Exploitative abuses can take different forms; excessive pricing being the most common. [149]

Case law so far indicates that very few cases have been brought in regard to exploitative abuses, which can be partly attributed to the Commission's declared reluctance to act as price regulator, given the difficulties in calculating the excessiveness of the price.[150] So far, the Commission and EU courts have been cautious in finding an exploitative abuse, and, in the majority of the relevant cases, an exclusionary abuse was also present.[151]

The Commission, however, appears prone to finding an exploitative abuse under 102 (c) cases concerning final consumer interests. In *Football Cup 1998* the Commission found a discriminatory abuse in favour of French consumers without there being an effect on the market structure. It expressly declared that:

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[148] Fox, 'Monopolization and Dominance in the United States and the European Community: Efficiency, Opportunity and Fairness' (1986) 61 Notre Dame LRev 981, 993-994; Verizon Communications Inc v Law Offices of Curtis V Trinko, LLP 540 US 398, 407, 124 SCt 872 (2004); Contra Ezrachi and Gilo, 'Are Excessive Prices Really Self Correcting?' (2008) 5 J Comp L&Econ 249.

[149] On excessive pricing see *General Motors* (Case IV/28.851) Commission Decision 75/75/EEC [1975] OJ L29/14; on appeal Case 26/75 *General Motors Continental NV v Commission* [1975] ECR 1367, [12]; *Chiquita* (Case IV/26.699) Commission Decision 76/353/EEC [1976] OJ L95/1; on appeal Case 27/76 *United Brands Company and United Brands Continental BV v Commission* [1978] ECR 207, [250-251]; *British Leyland* (Case IV/30.615) Commission Decision 84/379/EEC [1984] OJ L 207/11; on appeal Case 226/84 *British Leyland Plc v Commission* [1986] ECR 3263;*DSD* (Case COMP D3/34493) Commission Decision 2001/463 [2001] L166/1, [111]; on appeal T-151/01 *Der Grüne Punkt – Duales System Deutschland GmbH v Commission* [2001] ECR II-1607 ,[121]; *Deutsche Post*(Case COMP/C-1/36.915) Commission Decision 2001/892/EC [2001] OJ L331/40, [159-167]. See Akman, 'The Role of Exploitation in Abuse under Article 82 EC' in Barnard and Odudu (eds), *Cambridge Yearbook of European Legal Studies: Volume 11, 2008-2009*, 165. In the UK, see *Napp Pharmaceuticals Holdings Ltd v Director General of Fair Trading* [2002] CAT 1, [353ff].

[150] Commission (EEC), Fifth Report on Competition Policy (Brussels, Luxembourg 1976) <http://ec.europa.eu/competition/publications/annual_report/ar_1975_en.pdf> accessed 27 January 2012, [76]; Commission (EC), *XXIVth Report on Competition Policy 1994* (Brussels, Luxembourg 1995) <http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=CM9095283 > accessed 27 January 2012, [207]; See Motta and De Streel, 'Excessive Prices and Margin Squeeze under EU Law' in Ehlermann and Atanasiu (eds), *European Competition Law Annual 2003: what is an Abuse of a Dominant Position?* 91, 109 on these difficulties. See *Attheraces Ltd v The British Horseracing Board Ltd and BHB Enterprises plc* [2007] UKCLR 309, [6-7] on difficulties possibly encountered by UK courts in making pricing assessments. See also Robertson, 'UK Competition Litigation: From Cinderella to Goldilocks?' (2010) 9 CompLaw 275, 284, who argues that the court addressed the issue of excessive pricing in a satisfactory manner.

[151] See, for example, *United Brands* (n149) in which price discrimination, refusal to supply and excessive pricing were addressed.

> consumers' interests are protected by [Article 102], such protection being achieved either by prohibiting conduct by dominant undertakings which impairs free and undistorted competition or which is direct prejudicial to consumers. [152]

In exploitative abuses, the finding of an abuse is not based on the effects of the dominant undertaking's conduct on the market structure but, rather, on the impact of such conduct on consumers.[153] The EU approach to exploitative abuses is guided by a short-term consumer welfare rationale that can adversely impact on long-term consumer welfare and innovation.[154] This has received widespread criticism by commentators, some of whom have called for a limited application of Article 102 in regard to exploitative abuses[155] and others for a refined application, based on first finding an effect on the market.[156] The second approach is based on a two step test, finding first an anti-competitive effect, and then consumer harm. This is certainly similar to the Commission's advocated approach towards exclusionary abuses and does not seem consistent with the treatment of exploitative abuses in EU competition law so far. Whether the current approach is sensible from an economic point of view (although strong arguments suggest that it is not)[157] remains outside the remit of the present research. It is, however, consistent with the wording of the Treaty and the case law so

[152] *1998 Football World Cup* (Case IV/36.888) Commission Decision 2000/12/EC [2000] OJ L5/55, [100]. In the same vein Commission (EC), 'Commission approves ticketing arrangements for Euro 2000' (Press Release, IP/00/591); Commission (EC), 'Commission welcomes improved access to tickets for the 2006 World Cup' (Press Release, IP/05/519); See also *Deutsche Post* (n149) [133].

[153] Siragusa, 'The Application of Article 86 to the Pricing Policy of Dominant Companies: Discriminatory and Unfair Prices' (1979) 16 CMLRev 179, 187.

[154] O' Donoghue and Padilla, *The Law and Economics of Article 82 EC*, 626.

[155] *O' Donoghue and Padilla* 601, 602; Paulis, 'Article 82 EC and Exploitative Conduct' in Ehlermann and Marquis (eds), *European Competition Law Annual: a Reformed Approach to Article 82 EC 2007*, 515; Evans and Padilla, 'Excessive Prices: Using Economics to Define Administrable Legal Rules'(2005) 1 J Comp L&Econ 97,99-100.

[156] *Akman* (n149).

[157] *Evans and Padilla* (n155).

far, as well as with the Commission's pronouncements in favour of protecting consumer interests under the ambit of competition law. From a policy perspective, delivering concrete results to consumers plays an important role in winning their support and raising their interest in competition policy.

It was only after the seminal *Continental Can*[158] that the concept of exclusionary abuses came into play, as the second and most popular type of abuse, and it has been the dominant form of abuse in Article 102 TFEU jurisprudence ever since. The absence of consumer interests from the analysis undertaken can be partly attributed to the nature of exclusionary abuses, *as practices detrimental to [consumers] through their impact on an effective competition structure*.[159] Final consumers are often a step too far from dominant firms' practices and their impact on the market**.** This renders difficult the finding of an abuse based on consumer harm. That said, however, there are instances in which the interests of consumers were taken into account in the analysis undertaken, however, without bearing a significant influence on the final outcome of the case. This approach can be attributed to the ordoliberal underpinnings of Article 102 TFEU and the prevailing opinion that the protection of the competitive process safeguards consumer interests as well.[160] While it is true that economic freedom and consumer welfare might, at times, coincide, the fact that they are based on different normative values can also lead to different outcomes.[161] This is evident in

[158] *Continental Can* (n51).

[159] Ibid [26].

[160] Marsden and Whelan, ' "Consumer Detriment" and its application in EC and UK competition law' (2006) 27 ECLR 569.

[161] Gormsen, 'The Conflict Between Economic Freedom and Consumer Welfare in the Modernisation of Article 82 EC' (2007) 3 EurCompJ 329. Nazzini rejects consumer welfare as the aim of 102 TFEU. He argues that 102 TFEU jurisprudence pursues a long term social welfare whereas economic freedom and market integration are legal norms contributing to the attainment of this objective. Nazzini, *The Foundations of European Union Competition Law* 4-5.

British Airways, in which both the GC and the CJEU (and in line with previous case law)[162] held that it was not necessary to examine the effects on consumers in order to find an abuse; it suffices that the conduct at issue had a restrictive effect on competition.[163] Had the EU courts examined the effects of the abusive conduct on consumers and possible consumer detriment in consequence, the outcome of this case might have been different.[164]

Consumer interests were taken into account in cases concerning refusal to supply an input protected under IP legisation.[165] This is due to the nature of these cases in light of the test formulated in *Magill*.[166] According to this test, one of the conditions that need to be satisfied for a refusal to supply to be abusive is that it should prevent the emergence of *a new product* for which there is *potential consumer demand*.[167] This is consistent with AG Jacobs' dictum in *Oscar Bronner* that:

> ...it is important not to lose sight of the fact that the primary purpose of [Article 102] is to prevent distortion of competition – and in particular to safeguard the interests of consumers – rather than to protect the position of particular competitors.[168]

[162] *Continental Can* (n51) [26].

[163] *British Airways* (n108)[107].

[164] Akman (n96)334-337.

[165] Joined cases C-241/91 and 242/91P *RTE and ITP v Commission* [1995] ECR I-743, [51-56] ('*Magill*'); *Oscar Broenner*(n94), [39-41]; Case C-418/01 *IMS Health GmbH and Co OHG v NDC Health GmbH and Co KG* [2004] ECR I-5039, [38], [52]; *Microsoft* (n81) [332]; Rousseva, *Rethinking Exclusionary Abuses in EU Competition Law* 414-416 argues that the Guidance Paper makes 'consumer harm' a condition for ruling in all refusal to supply cases; Guidance Paper (n71) [81], [86-88].

[166] *Magill* (n165) [54-56].

[167] Haracoglou, 'Competition Law, Consumer Policy and the Retail Sector: the Systems' Relation and the Effects of a Strengthened Consumer Protection Policy on Competition Law'(2007) 3 CompLRev<http://www.clasf.org/CompLRev/Issues/Vol3Issue2Art2Haracoglou.pdf> accessed 27 January 2007, 175,202 argued that the decisive factor is the suppression of a new product, rather than the presence of consumer demand. See *Microsoft* (n81), [647] for a different, and wider, interpretation of the 'new product' requirement.

[168] *Oscar Broenner* (n94), Opinion of AG Jacobs, [58]; See also Case T-184/01 *R IMS Health Inc v Commission* [2001] ECR II – 3193, [145].

However, as *Microsoft* reveals, consumer interests, even where overtly addressed, do not play an important part in the analysis. Despite the fact that the GC, in this case, addressed potential instances of consumer harm (such as impact on innovation and reduced consumer choice), once again, and in line with the Commission decision,[169] the GC came to the conclusion that:

> It is settled case law that Article [102 TFEU] covers not only practices that may prejudice consumers directly [exploitative abuses] but also those which indirectly prejudice them by impairing an effective competitive structure. In this case, Microsoft *impaired the effective competitive structure* on the work group server operating systems market *by acquiring a significant market share on that market*.[170]

The last part of the pronouncement above seems to condemn Microsoft only because of its market power, and thus embraces an ordoliberal rationale. In light of this, it is questionable as to whether there is room for a more effects-based consumer-oriented approach in the application of Article 102 TFEU. AG Jacobs' Opinion in *Syfait* suggests that the answer to this may be positive. In this case, AG Jacobs argued that in light of the specific conditions in the pharmaceutical industry 'it cannot be assumed that parallel trade would in fact benefit either the *ultimate consumers* of pharmaceutical products or the Member States, as primary purchasers of such products'.[171]

In his Opinion, AG Jacobs refrained from a formalistic application of Article 102 TFEU, and refused to accept that a refusal constitutes a per se abuse in light of the dominant undertaking's intention to limit parallel trade.[172] Essentially, in this case (given the conditions pertaining in the pharmaceutical industry), AG Jacobs did not consider parallel trade to be

[169] *Microsoft* (Case COMP /C-3/37.792) Microsoft Commission Decision of 24/3/2004, C(2004) 900 final, [693-708].

[170] *Microsoft* (n81), [664](emphasis added).

[171] *Syfait* (n81), Opinion of AG Jacobs, [100] (emphasis added).

[172] Ibid, [69].

beneficial to the consumer interest. By contrast, a limitation on parallel trade in this case would not amount to consumer harm. It could also have a positive impact on the firm's incentive to innovate.[173] His analysis is consistent with the Commission's approach in its *Guidance Paper*.[174]

Regrettably, the CJEU did not issue a preliminary ruling in this case, since it did not consider the national body making the reference (the Greek Competition Commission) to be a court or tribunal.[175] It was only after a second preliminary reference that the CJEU expressed its opinion on this matter arguing that '...such an undertaking cannot base its arguments on the premise that the parallel exports which it seeks to limit are of only minimal benefit to the final consumer'.[176]

Despite the Commission's overt efforts to reform Article 102 TFEU enforcement,[177] it seems that EU courts (and regrettably also the Commission itself) [178] have adopted a rather more formalistic approach in the application of Article 102 TFEU. They attribute more importance on the effect of the incumbent firm's conduct on market structure, rather than inquiring into the likely effects of this conduct on consumers.[179] Even when these effects on

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[173] Ibid,[89-91], [100].

[174] *Guidance Paper* (n71) [19-20], [31].

[175]*Syfait* (n81), [37-38].

[176] Joined Cases C-468/06 to 478/06 *Sot Lelos kai Sia EE v GlaxoSmithKline AEVE* [2008] ECR I-7139, [57].

[177] On the debate as to whether the Commission is acting within its competence see Ezrachi, 'The European Commission Guidance on Article 82 EC – The Way in which Institutional Realities Limit the Potential for Reform' (2009) Oxford Legal Studies Research Paper No 27/2009 <http://ssrn.com/abstract=1463854>, accessed 27 January 2012; Gormsen, 'Why the European Commission's Enforcement Priorities on Article 82 EC Should be Withdrawn' (2010) 31 ECLR 45.

[178] See also Geradin, 'The Decision of the Commission of 13 May 2009 in the Intel Case: Where is the Foreclosure and Consumer Harm?' (2010) (TILEC Discussion Paper No 2010-22)<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1490114>, accessed 24 October 2011, in which Geradin criticises the Commission for not standing up to its pronouncements in the Guidance Paper.

[179] See *National Grid plc v Gas and Electricity Markets Authority* [2009] CAT 21 for a national account in which the CAT rejected the claimants' argument that, because Article 102 TFEU aims at enhancing consumer

consumers are examined, the former evaluation is ultimately more important. This is not a satisfactory approach, in light of modern economic theory, nor is it consistent with the 'consumer welfare standard' that the Commission is overtly trying to promote.

However, calling for a more effects-based approach, with emphasis on consumer interest, entails certain dangers. This necessarily entails a higher burden of proof for competition authorities and courts and, therefore, it may lead to under-enforcement of competition, such that many competition law violations remain undetected. On the other hand, an aggressive approach, based on protecting market structure and 'competition as such', is also not satisfactory, as this will lead to chilling competition and innovation to the detriment of consumers.[180] If the agreed standard of competition law enforcement is 'consumer welfare', the issue of under or over-enforcement of competition law is better addressed when regulating the burden of proof.[181] After all, difficulties in establishing a competition law violation should not caution against the adoption of a 'consumer welfare' standard but, rather, act in favour of devising the necessary mechanisms that would render 'consumer welfare' manageable and enforceable in practice.

A further point is that, in order for the Commission policy initiative to succeed, EU courts should adopt more explicitly the consumer welfare standard. After all the CJEU 'is not

welfare, the authority has to show that the alleged abusive conduct had a direct effect on consumers; also *Burgess v OFT* [2005] CAT 25,[344], 'Competition law is there in order to protect consumer choice, and to ensure that legitimate consumer needs and preferences are not thwarted by the actions of dominant firms, particularly for vulnerable classes of consumers'. In *The Competition Authority v O'Reagan and Others*, Irish Supreme Court [2007] IESC 22, the Irish Supreme Court declared that '...The entire aim and object of competition law is consumer welfare. Competitive markets must serve the consumer. That is their sole purpose. Competition law, as is often said, is about protecting competition not competitors, even if it is competitors who most frequently invoke it...Competition law does not outlaw economic power, only its abuse. Economic power may, indeed should, be the reward of effective satisfaction of consumer needs'.

[180] For an account of the US situation see Chang, Evans and Schmalensee, 'Has the Consumer Harm Standard Lost Its Teeth?' (2002) AEI-Brookings Joint Center Working Paper; MIT Sloan Working Paper No. 4263-02 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=332021> accessed 23 October 2011.

[181] For an interesting proposal see Nazzini, 'The wood begun to move: an essay on consumer welfare, evidence and burden of proof in Article 82 EC cases' (2006) 31 ELRev 518.

formally bound by its own judgments' and 'has recognised the importance of adapting its case law in order to take account of changes that have taken place in other areas of the legal system or in the social context in which the rules apply'.[182] However, until the EU courts formally adopt a more effects-based approach, the Commission is still bound by their respective jurisprudence, and not the other way around.[183]

In addition, the differences between the Commission pronouncements and the EU courts' approach allows leeway for confusion, not only at the EU, but also at national level as well,[184] since national courts are bound by European precedents and not the Commission's policy documents.[185] A more coherent theory of harm in EU jurisprudence will facilitate enforcement at the national level and, arguably, prompt consumers to bring follow-on actions before national courts. This is because it would then be easier for them to prove (and quantify) their own harm in private litigation. The current inconsistency in policy pronouncements and substantive enforcement of competition provisions unfortunately brings development two steps ahead and one step behind.

4. Embracing 'consumer welfare' as the enforcement standard in EU case law: From rhetoric to reality

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[182] *Federico Cipolla* (n33), Opinion of Maduro AG [28-29].

[183] *British Airways* (n108), Opinion of AG Kokkot, [28] stating that 'it is immaterial how the Commission intends to define its competition policy with regard to Article 82 EC *for the future*. Any reorientation...can be of relevance only for future decisions of the Commission ...Moreover, even if its administrative practice were to change, the Commission would still have to act within the framework prescribed for it by Article 82 EC as interpreted by the European Court of Justice'. See also Case T-155/06 *Tomra System and Others v Commission* [2010] OJ C288/31, [219] pointing to the fact that '...the Commission, *even though the case-law does not require it*, also analysed, in the light of market conditions, the actual effects of the applicants' practices' (emphasis added). See also ibid, [287-289].

[184] Ezrachi, 'The Commission's Guidance on Article 82 EC and the Effects Based Approach-Legal and Practical Challenges' in Ezrachi (ed), *Article 82 EC: Reflections on its Recent Evolution* 51.

[185] However *Nazzini* (n181) 521 argues that national courts should take into account Commission guidelines under [Article 4(3) TEU] (duty of cooperation).

The analysis presented above reveals that increased emphasis is attributed to the maintenance of competitive market structures rather than to examining potential effects on consumer interest. Judicial pronouncements in favour of a formalistic approach continue to be present. This can be attributed to the significance of formulating and applying administrable legal tests.[186]

An adherence to the consumer welfare standard and the formulation of a more coherent theory on consumer harm, through an economic analysis of the effects on the market, despite being complex and difficult to apply,[187] entails certain advantages. First, it is possible that over-enforcement of competition law will be avoided. However, even if this standard could potentially lead to under-enforcement, due to the entailed complexities to claim and prove a competition law violation, this can be avoided if a coherent theory on the standard and burden of proof is to be formulated.[188] Thus, this standard has the potential to contribute to the maintenance and functioning of competitive markets to the consumer benefit.

Secondly, in procedural terms, the consumer welfare standard may trigger an increased involvement of consumers and consumer organisations in competition law enforcement, both in private and public enforcement of competition law. Such an approach towards consumer interest can potentially raise awareness of final consumers as the ultimate stakeholders in competition law. The downside of such an approach is the increased difficulty in proving a competition law violation before national courts in private litigation, which will act as an impediment to actions in regard to private damages.[189] However, this does not

[186] See *Rousseva* (n165) 330-344, 366 for a discussion on devising an appropriate test for exclusionary conduct and the respective advantages and disadvantages of each test and the Commission choosing a mixed approach.

[187] *Rousseva* (n165) 342.

[188] See *Nazzini* (n181) for a relevant theory.

lessen the potential of the 'consumer welfare' approach in substantive law application to instigate a competition culture amongst consumers, and possibly increase the number of consumer complaints to the competent competition authorities. After all, consumers are more likely to bring follow-on actions, rather than stand alone ones, which are usually initiated by the competitors of the incumbent undertaking. Thus, this standard will act as a disincentive for competitors to engage in nuisance litigation benefiting, rather than curtailing, private enforcement.

Since Articles 101 and 102 TFEU promote the same aim,[190] despite different enforcement approaches, elevating consumer welfare to be the principle aim and examining the impact on consumer interest in more detail can potentially bridge the differences in enforcement between these two Articles and align substantive application of competition law with Commission rhetoric. However, the inconsistency between rhetoric and EU competition law enforcement vividly points to the strong roots of the ordoliberal tradition and the market integration objective in EU competition law[191] that render very difficult attempts to redefine EU competition law goals. Thus, involving consumers in EU competition law enforcement could form an alternative route for increasing the relevance of consumer interest.

[189] *Nazzini*, (n181) 521; Werden, 'Monopsony and the Sherman Act: Consumer Welfare in a New Light' (2007) 74 Antitrust LJ 707, 736 argues that claims by end users will be very difficult to bring due to their remoteness and indirect purchaser doctrines. However, in the EU a different approach is adopted in regard to the standing of indirect purchasers, as is explained in chapter III below.

[190] *Continental Can* (n51), [26].

[191] See text to n40-46.

V. Conclusions

The relationship between competition law and consumer law has been examined in this chapter, and consumer interest for the purposes of competition law analysis has been outlined. Further, it has been argued that the current overt movement towards the consumer welfare standard and the protection of consumer interest within the ambit of competition law in policy documents is not equally depicted in the substantive competition law analysis. This mismatch can have a negative impact not only on the protection of consumer interest but also on the consistency in the application of EU competition law.

The approach advocated in the present research calls for a more 'consumer focused' application of competition law, which is by no means synonymous with a widening of the scope of competition law enforcement so as to embrace wider consumer considerations (such as safety issues,[192] or unfair contract terms).[193] This falls under the ambit of consumer law. It argues for a more concrete adoption of the consumer welfare rationale in the EU competition law jurisprudence, and a detailed analysis of consumer interest in markets in which this is relevant.[194] Buttigieg argues that, if competition law provisions were to be enforced so as to further wider Union objectives, then such enforcement could also promote the interest of consumers.[195] The view adopted in the present research is somewhat narrower. Not every consumer interest can be accommodated by competition law but, rather, only economic interests under the notion of consumer welfare. This presents a legitimate interpretation for

[192] T-30/89 *Hilti AG v Commission* [1991] ECR II-1439, [118-119]; *Guidance Paper* (n71), [28].

[193] In the same vein Osti, 'Interpreting Convergence: Where Antitrust Meets Consumer Law' (2009) 5 EurComJ 377, 386. However, the distinction is not always a clear cut one, see *Nebbia* (n4)102; also *Monti*, (n4)307-310.

[194] See, in a similar vein, Waller, 'In Search of Economic Justice: Considering Competition and Consumer Protection Law'(2005) 36 Loyola U Chi LJ 631,639.

[195] *Buttigieg* (n114)128.

the consumer integration clause, which the LT placed amongst the introductory provisions of the Treaty.[196] If consumer integration clause were to be interpreted wider, competition law enforcement would turn into a paternalistic system, promoting any kind of consumer interest over efficient market structures. The challenge is to encapsulate consumer interest within competition law analysis.

In addition, the present research does not adopt the view that competition law protection should only extend to final consumers. Rather, the point here is that, even though they are not the sole beneficiaries, they should be granted a more meaningful role in relation not only to substantive competition law enforcement but also (and more importantly) to procedural enforcement. The analysis presented in this chapter has depicted an overall reluctance on the part of the EU courts to expressly address consumer interest, which can be attributed to the difficulties entailed in such an analysis, in terms of proving consumer harm as well as the deeply-embedded EU competition law objectives of market integration and economic freedom. However, the Commission has stressed, on numerous occasions, the importance of the final consumers for competition law and policy. Thus, if aligning Commission rhetoric with substantive law application presents a complex task, which requires a careful and slow movement in the courts' case law and the Commission's enforcement standard, then one needs to look at alternative paths for increasing the importance of consumer interest and role in competition law. This requires devising the necessary measures to allow the stakeholders themselves to assume a more active role in enforcement of EU competition law.

[196] Article 12 TFEU.

CHAPTER II

NORMATIVE JUSTIFICATIONS FOR INCREASED CONSUMER INVOLVEMENT

I. Introduction

In the past decade, two trends could be discerned in EU competition law. The first relates to the refocusing of its respective aims calling for a more economic-based approach and pointing to 'consumer welfare' as the preferred standard in EU competition law analysis. This can be termed substantive modernisation of EU competition law enforcement.[1] The second trend can be coined as procedural modernisation and seeks to alleviate the Commission of some enforcement burden as well as involve more actors in EU competition law enforcement (NCAs, national courts and private parties).[2] Efforts to improve private EU competition law enforcement should be viewed as a further step in this direction.[3]

Since, as argued in chapter I, substantive modernisation has not yet succeeded, consumer participation in private competition law enforcement could be viewed as an alternative vehicle in bringing consumer interest within EU competition law analysis. In chapter II this option is addressed and normative justifications for such participation are provided. The focus is on developing reasons for justifying consumer participation in private competition law enforcement. Private enforcement is ascribed a narrow meaning

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[1] See chapter I above, text to n47-48.

[2] Council Regulation (EC)1/2003 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty [2003] OJ L1/1 ('*Regulation 1/2003*'). The Commission views Regulation 1/2003 as the 'keystone of the modernisation of European Union's antitrust enforcement rules and procedures'. Commission(EC), 'Report on the Functioning of Regulation 1/2003'(Communication) COM(2009) 206 final, [1].

[3] Commission (EC), 'Damages actions for breach of the EC antitrust rules' (Green Paper) COM (2005) 672 final ('*GP*'); Commission (EC), 'Damages actions for breach of the EC antitrust rules' (White Paper) COM (2008) 165 final ('*WP*').

encompassing only damages actions[4] since, notwithstanding their contemporaneous character and the minimal consumer involvement therein, they have an additional compensatory function.

First, in chapter II the primary aims of consumer damages actions are identified by assessing Commission current efforts in enhancing EU private competition law enforcement in light of EU case law. Despite Commission emphasis on the compensatory component of damages actions, it is argued here that increased attention should be given to their deterrent role. Together, compensation and deterrence, in as much as they are proclaimed by the Union institutions, are classified as the 'principal aims' of damages actions and constitute the first two reasons for the 'added value spectrum' of increased consumer involvement in competition law enforcement advanced in the second section of this chapter. The third reason views consumer involvement as a bridging instrument between Commission current rhetorical emphasis on consumer welfare and its inadequate presence in competition law enforcement. Finally, the last two reasons aim at justifying consumer involvement on wider EU law aspirations. Apart from the 'principal aims', the rest forms the 'derivative aims' category and can only be attained if the choice of the principal aim is the correct one. This 'added value spectrum' analysis offers a concise normative justification for raising consumer involvement in private competition law enforcement and facilitates the formulation of specific procedural instruments in that regard addressed in subsequent chapters.

[4] In general, private enforcement can be defined as the invocation of competition law provisions in private litigation by private parties. See *GP* (n3), [1.1]. It encompasses a variety of different tools, ranging from injunctive relief and the defensive use of competition law (Article 101(2) TFEU) to damages actions. In this thesis 'private enforcement' and 'damages actions' are used interchangeably. See Nebbia, 'Damages Actions for the infringement of EC competition law: compensation or deterrence?' (2008) 33 EL Rev 23 pointing to a subtle difference in meaning.

II. EU Institutions' Approach towards Private Enforcement: in search of a principal aim

1. Introduction

The analysis in this section deals first with EU case law on damages actions for EU competition law violations, before turning to examine how this has affected Commission pronouncements, in order to discern the appropriate place for damages actions in the EU competition law enforcement system. Identifying the respective aims of private enforcement in EU competition law is vital since the adopted measures should be consistent and should promote and reflect the underlying aims of private enforcement in the EU context.

Courage[5] and *Manfredi*[6] (in the same line of reasoning) are illustrative of the CJEU approach towards EU private competition law enforcement. The analysis in this section points to the main issue in *Courage*, namely whether an EU right in damages for competition law violations exists, whether its conditions are premised on national or EU law, and what the aims are of the respective right. Relevant to the purposes of this chapter is only the latter question, whereas the former is addressed in detail in chapter VI, which deals with EU competence to propose measures for the promotion of this right.

2. Court's approach

a. *Courage*: providing impetus to private enforcement of EU competition law

i. Facts

Crehan (publican) signed two 20-year lease agreements with Intrepreneur Estates Ltd ('IEL') that was co-owned by Courage(brewer). The agreement contained an exclusive purchasing

[5] Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2001] ECR I-6297 ('Courage').

[6] Joined Cases C-295/04 to 298/04 *Vincenzo Manfredi and Others v Lloyd Adriatico Assicurazioni SpA and Others* [2006] ECR I-6619 ('Manfredi'). See also Case C-421/05 *City Motors Groep NV v Citroën Belux NV* [2007] ECR I-653, [34].

obligation for Crehan to obtain all his beer supplies from Courage. Courage brought an action against Crehan before the English courts for recovery of unpaid deliveries of beer, and Crehan argued that the beer tie was contrary to Article 101TFEU and launched a counter-claim for damages suffered as a result.[7] The English Court of Appeal applied for a preliminary ruling asking the Court whether the English 'in pari delicto rule', ie that a party to an illegal agreement cannot claim damages from the other party, thereby benefiting from its own misconduct, was contrary to the uniform application of EU law. Essentially, it wanted to know whether a party to an illegal agreement may rely on Article 101 TFEU in order to claim damages from the other party coming as a result of his adherence to the prohibited clause, and whether the English 'in pari delicto rule' should be disallowed as contrary to EU law and, if yes, what circumstances should the national court take into consideration.[8]

ii. Right to damages as a matter of EU law and its respective aims

In *Courage* the CJEU ruled, though not explicitly, on the existence of an EU right to damages for breaches of competition rules by private undertakings,[9] and alluded to its underlying aims.[10] This section examines the aims of this right. The Court's reasoning regarding the

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[7] *Courage* (n5), [3-7].

[8] *Courage* (n5), [16].

[9] The majority of commentators accepts that a Union right in damages exists; for example see Komninos, *EC Private Antitrust Enforcement – Decentralised Application of EC Competition Law by National Courts,* 172-176; Van Gerven 'Harmonisation of Private Law: Do we need it?' (2004) 41 CMLRev 505, 520; Drake, 'Scope of Courage and the Principle of "Individual Liability" for Damages: further Development of the Principle of Effective Judicial Protection by the Court of Justice' (2006) 31 ELRev 841, 849; Reich, 'The 'Courage' doctrine: Encouraging or Discouraging Violations for Antitrust Injuries?' (2005) 42 CMLRev 35, 38; Contra Miege, 'Modernisation and Enforcement Pluralism' (2005) : the Role of Private Enforcement of Competition Law in the EU and the German Attempts in the 7th Amendment of the GWB' (2005) (Amsterdam Centre for Law and Economics, Workshop on Remedies and Sanctions in Competition Policy), 25-27; Edelman and Odudu, 'Compensatory Damages for Breach of Article 81' (2002) 27 ELRev 327, 336; Odudu, 'Effective Remedies and Effective Incentives in Community Competition Law' (2006)5 CompLaw 134, 141 fn45; Albors Llorens, 'The Ruling in Courage v Crehan: Judicial Activism or Consistent Approach? (2002) 61 CLJ 38, 40-41; Dougan, National *Remedies Before the Court of Justice* 382-383; but see ibid 386; See also Case T-395/94 *Atlantic Container Line v Commission* [2002] ECR II-875, [414].

existence of this right is only addressed to the extent that it is inextricably linked with its relevant aims.[11]

The referring court pointed to the tension between the uniform application of Union law[12] and the principle of national procedural autonomy.[13] The CJEU solved the issue in favour of the uniform application of Union law, providing yet another example of the relativity of national procedural autonomy.[14] It is regrettable that the Court did not pronounce the existence of individual liability for infringement of competition law in an unequivocal way similar to that in *Francovich* on state liability, where it stated that '*...it is a principle of Community law that the Member States are obliged to make good loss and damage caused to individuals by breaches of Community law for which they can be held responsible'.* [15] Nevertheless, if the Court's reasoning is cautiously followed, it is suggested it had actually arrived to the same conclusion.

The Court begins its reasoning by emphasizing the principles of supremacy and direct effect of the EU legal order and the respective duties imposed thereby on national courts, as these were pronounced in the seminal *Costa v Enel*[16] and *Van Gend en Loos* respectively.[17] It

[10] The question of individual liability for breach of the competition law rules was first answered by AG Van Gerven; Case C-128/92 *H J Banks & Co v British Coal Corporation* [1994] ECR I-1209, Opinion of AG Van Gerven, [36-45]. AG Van Gerven suggests that the principle of individual liability is inherent in the system of the Treaty in the same way as the principle of state liability. Ibid, [39-41], [45]. This formulation was clearer than that of *Courage*. See text to n15.

[11] See text to n41 on the content of this right. The distinction between substantive rights and remedial and procedural conditions is addressed in more detail in chapter VI, dealing with the Union competence for advancing specific proposals about consumer involvement in EU private competition law enforcement.

[12] This being '...a fundamental requirement of the [Community] legal order'; Joined cases C-143/88 and 92/89 *Zuckerfabrik AG v Hauptzollamt* [1991] ECR I-415, [26].

[13] *Courage* (n5), [15].

[14] See text to n50 below.

[15] Joined Cases C-6/90 and 9/90 *Andrea Francovich and Others v Italian Republic* [1991] ECR I-5357, [37]. Courage has been viewed as the extension of *Francovich* in the area of individual liability. See *Banks* (n10), Opinion of AG Van Gerven, [40-45].

then reiterates *Eco Swiss* on the importance attributed to competition law provisions and *BRT v SABAM* on the directly effective nature of competition law provisions and the individual rights they create, which the national courts must safeguard. [18] After this three-step analysis based on general principles of EU law and the nature of competition provisions, the Court concludes that

> ...*any individual* can rely on a breach of Article [101 (1)] of the Treaty before a national court even where he is a party to a contract that is liable to restrict or distort competition within the meaning of that provision.[19]

Thus, the Court clarifies the issue of who has standing, as a matter of principle, to invoke breach of competition provisions and suggests that as a matter of EU law standing is to be granted to any individual. Therefore, national laws denying standing to co – contractors (as the English law at issue) will be contrary to EU law.[20] Note too that AG Mischo has also alluded to the possibility of consumers being potential claimants, as he stated that *'...the individuals who can benefit from such protection are, of course, primarily third parties, that is to say consumer and competitors who are adversely affected by a prohibited agreement'.* [21]

For the formulation of the right to damages the principle of effectiveness has played a pivotal role. The meaning attributed to this principle in *Courage* seems wider than the one in

[16] Case 6/64 *Costa v ENEL* [1964] ECR 585.

[17] Case 26/62 *NV Algemene Transport – en Expeditie Onderneming van Gend en Loos and Nederlandse Administratie der Belastingen* [1963] ECR 1. *Courage* (n5), [19]. Note that in *Francovich* the Court begins its reasoning in exactly the same way, *Francovich* (n15), [31].

[18] *Courage* (n5), [20-23].

[19] *Courage* (n5), [24](emphasis added).

[20] Brkan, 'Procedural Aspects of Private Enforcement of EC Antitrust Law: Heading Toward New Reforms?' (2005) 28 WC 479, 494.

[21] See *Courage* (n5), Opinion of AG Mischo, [38].

Francovich. In *Courage* the Court not only refers to the '*full effectiveness*' of EU competition law rules and the '*protection of rights they confer on individuals*',[22] it further adds that:

> 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...Indeed, *the existence of such a right strengthens the working of the Community 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 Community*.[23]

The practical effect of the competition law prohibitions is the more important, especially given the fact that in this very judgment the Court pointed to the significance of those provisions for the accomplishment of the EU objectives, the functioning of the internal market being underlined.[24] The Court in the above quote clearly accepts the potential of damages actions to increase compliance with competition law norms and therefore act in the public interest.[25] As AG Mischo points out, the deterrent potential of damages actions has also been supported by the UK and the Commission, a view which he shares. Damages actions are not viewed as a penalty; however, they have an inherent deterrent effect flowing from the direct effect of competition provisions.[26]

b. *Manfredi*: Reaffirming Courage

i. Facts

In *Manfredi*, consumers filed damages actions against insurance companies for damages flowing from an agreement raising the price of insurance premiums following the agreement

[22] *Courage* (n5), [25-26]; Cf *Francovich* (n15), [32-33].

[23] *Courage* (n5), [26-27](emphasis added).

[24] *Courage* (n5), [20].

[25] Komninos, 'Civil Antitrust Remedies Between Community and National Law' in Barnard and Odudu (eds) *The Outer Limits of European Union Law* 363,382, where he notes that more authoritative words in favour of the 'private attorney – general' role could not be pronounced.

[26] *Courage* (n5), Opinion of Mischo AG, [56-58].

having been declared unlawful by the national competition authority. The referring courts asked the CJEU whether Article 101 TFEU (if applicable in this case) should be interpreted as allowing third parties with a relevant legal interest to claim damages when there is a causal connection between the prohibited practice and the harm. Further, it addressed preliminary questions on limitation periods and punitive damages.[27]

ii. New points addressed

The CJEU stated that:

> *any individual* can rely on the invalidity of an agreement or practice prohibited under [that article] and, where there is a *causal relationship* between the latter and the *harm* suffered, claim compensation for that harm.[28]

In adding causality as a condition of the right to damages, the CJEU relied again on the principle of effectiveness.[29] However, the Court did not refer to damages actions' potential to contribute to the maintenance of effective competition in Europe, as it did in *Courage*.[30] Thus, one could conclude the emphasis now to be on the effective protection of the right to damages rather than the effective enforcement of competition law. Nonetheless, this would have been a preliminary conclusion in that the CJEU stressed this element of damages action in relation to the preliminary question on punitive damages, and actually linked it to the first reference to the principle of effectiveness in relation to the preliminary question on causation as a condition of the right to damages.[31]

[27] *Manfredi* (n6), [2], [20-21].

[28] Ibid, [63](emphasis added).

[29] Ibid, [60].

[30] See text to n23 above.

[31] *Manfredi* (n6), [60], [90-91].

Manfredi also addressed the issue of granting punitive damages. The CJEU accepted damages actions may '[contribute] *to the maintenance of effective competition in the Community*'; however, it did not go as far as to accept an obligation on the part of national courts to grant punitive damages, which is an issue to be solved according to national law based on the principle of equivalence and effectiveness.[32] Thus, the CJEU as a matter of EU law accepts that damages actions can assume a deterrent role without punitive damages being necessary to that effect.

Overall, *Manfredi* followed *Courage* on the point of the aims of damages actions. This judgment was important for the additional reason that it concerned consumer damages actions, thereby pointing to their relevant deterrent function.

c. Reading *Courage* and *Manfredi* in light of effective enforcement of EU law: a comment on the aims

Courage and *Manfredi* specifically address the right to damages in the field of private competition law enforcement and seem to be the natural offspring of the Court's rich case law on the effective enforcement of EU law before national courts.[33] They are both premised on the principle of effectiveness of EU law that embraces: a) the effective judicial protection of individual rights and b) the principle of full effectiveness of EU law.[34] From an overall

[32] Interestingly, despite the fact that the Italian government submitted that punitive damages are contrary to the Italian legal system (*Manfredi* (n6), [85]), the referring court did award punitive damages at the end; see Oxera, 'Quantifying Antitrust Damages: Towards Non-binding Guidance for Courts' (December 2009), Study prepared for the European Commission <http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf> accessed 27 January 2012, 94.

[33] Commission (EC), 'Annex to the Green Paper, Damages actions for breach of the EC antitrust rules', (Staff Working Paper) SEC(2005) 1732, 19 December 2005 ('GP SWP'), [19-20]. See also Temple Lang, 'The Principle of Effective Protection of Community Law Rights' in O'Keeffe and Bavasso (eds), *Judicial Review in European Union Law – Liber Amicorum in Honour of Lord Slynn of Hadley* 235, 250, 273; Smith, 'The Francovich Case: State Liability and the Individual's Right in Damages' (1992) 13 ECLR 129, 132; Hoskins, 'Garden Cottage Revisited: The Availability of Damages in the National Courts for Breach of the EEC Competition Rules' (1992) 13 ECLR 257, 259; *Banks*, Opinion of AG Van Gerven(n10).

[34] Nazzini, 'Potency and Act of the Principle of Effectiveness: The Development of Competition Law Remedies and Procedures in Community Law' in Barnard and Odudu (eds), *The Outer Limits of the European Union,* 401, 404, 416; Tridimas, *The general principles of EU law* 418; Dougan (n9) 27-45.

enforcement perspective the latter seems more important. Private parties can supplement enforcement of EU norms, a fact reiterated by EU institutions on a number of occasions in the past.

The CJEU acknowledges that EU law confers rights on individuals which arise not only when they are expressly granted but also as a derivative from clearly defined obligations imposed by the Treaty on individuals, Member States and EU institutions.[35] It goes on to state that

> ...the *vigilance of individuals* concerned to protect their rights amounts to an *effective supervision* in addition to the supervision entrusted by [Articles 258 and 259] to the diligence of the Commission and of the Member States...It follows ... that [Article 30] must be interpreted as producing *direct effects* and creating *individual rights* which *national courts must safeguard*.[36]

From this statement, it is suggested that individuals can rise as enforcement actors to the benefit of EU law. Thus, not only is EU law beneficial for individuals in the sense that it creates directly effective rights, it is also through the enforcement of those rights before the national courts that compliance with EU norms can be safeguarded.[37] Whether these rights have a substantive content or are merely restricted in an invocation entitlement depends on the nature of the Treaty provision at issue.[38]

The direct effect of competition provisions and the fact that they grant rights to individuals, has already been acknowledged in *BRT v SABAM*. Competition law provisions

[35] *Van Gend en Loos* (n17). See Lenaerts, 'Constitutionalism and the Many Faces of Federalism' (1990) 38 Am J Comp L 205, 209-210 for the importance of this judgment for the EU legal order.

[36] Ibid 13(emphasis added).

[37] Eilmansberger, 'The Relationship Between Rights and Remedies in EC Law: In Search of the Missing Link' (2004) 41 CMLRev 1199, 1205.

[38] Ibid 1205-1206. Eilmansberger in this article attempts a classification of the relevant case law on the evolution of EU rights and remedies.

are directly applicable since they apply horizontally, are directly effective and create individual rights enforced by national courts.[39] Defining the exact content and the beneficiaries of the individual rights under competition provisions presents a complex task.[40] A formulation regarding the content of the right can be related to the obligation imposed by the same provisions.[41] In the case of an undertaking breaching its obligation not to engage in anticompetitive conduct, this will create rights for individuals following the *Van Gend en Loos* formulation. In this case, the right will be to undo the consequences of the anticompetitive breach. This is supported by the AG in *Courage* where he observes that [directly effective rights under Article 101] include '*the right, for individuals, to be protected from the harmful effects which an agreement which is automatically void may create'*.[42]

Thus, if a competition law violation occurs, the primary obligation is breached giving rise to the derivative right, which can be protected through specific remedies before the national courts. In *Courage*, the CJEU refers to '*the existence of such a right* [in damages]'. Thus, the CJEU clarified the content of Union rights conferred on individuals by the directly effective competition provisions. The importance of *Courage* lies in the fact that the Court ruled that a private party can exercise this right to damages through an appropriate remedy

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[39] Case 127/73 *Belgische Radio en Televisie and Societe belge des auteurs, compositeurs et editeurs v SV SABAM and NV Fonior 'BRT I'* [1974] ECR 51, [16]; See also Case 37/79 *Marty v Estée Lauder* [1980] ECR 2481, [13]; Case C-234/89 *Stergios Delimitis v Henninger Braue AG* [1991] ECR I-935 , [45]; Case C-242/95 *GT-Link AC v De Danske Statsbaner* [1997] ECR I-4349, [57]; Case C-282/95 P *Guerin Automobiles v Commission of the European Communities* [1997] ECR I-1503, [39]. See Leczykiewicz, 'The Constitutional Dimension of Private Law Liability Rules in the EU' (Paper given at 'The Involvement of EU Law in Private Law Relationships', 28th-29th September 2011, Oxford) 3-9 on the distinction between 'direct applicability', 'direct effect' and 'horizontality' of the direct effect.

[40] Leczykiewicz, 'Private Party Liability in EU Law: In Search of the General Regime' in Barnard and Odudu (eds), *The Cambridge Yearbook of European Legal Studies – Volume 12, 2009-2010*, 257, 278-279.

[41] See *Nazzini* (n34) 405 for a different approach. He views effective enforcement of Articles 101 and 102 TFEU as the legal base of the right to damages. The content and function of the right to damages are formulated based on the principle of effectiveness. Eilmansberger criticises this legal basis and instead argues in favour of the adoption of the 'protective scope' theory. *Eilmansberger* (n37) 1241.

[42] *Courage* (n5), Opinion of Mischo AG, [37].

that is not impeded by a national rule. Essentially, the Court ruled that the English 'in pari delicto rule' (in its absolute form) should be set aside. This has the effect of giving co-contractors a remedy not available to them under English law.[43] The Court based its conclusion on the effective protection of individual rights and the effective enforcement of competition norms,[44] while it is here suggested that the deciding factor was the latter.[45]

The nature of the remedy in damages for competition law violations, ie whether they are premised on EU or national law, is not clear. *Rewe* stated that the Treaty was not intended to create new remedies.[46] Member States, though, have an obligation to provide remedies sufficient to safeguard effective judicial protection in the areas covered by EU law.[47] *Rewe* echoed the principle of national procedural autonomy[48] and the national courts' obligation to enforce EU rights in line with the principle of equivalence and effectiveness.[49]

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[43] Even if not expressly pronounced by the CJEU and despite the fact that the AG's reasoning in the case suggests that no new EU remedy is created; see *Courage* (n5), Opinion of Mischo AG, [47]. On the contrary, the fact that *Courage* provided for a Union remedy in damages can also be supported by *Manfredi* (n6), Opinion of AG Geelhoed, [52-57], [63].

[44] Unlike its AG and the CJEU in *Francovich* it did not refer to the principle of cooperation enshrined in [now] Article 4(3) TEU. See *Courage* (n5),Opinion of AG Mischo, [46]; *Francovich* (n15), [36].

[45] See also *Eilmansberger* (n37) 1226-1228. In the same vein see Drexl, 'Competition Law as Part of the European Constitution' in Bogdandy and Bast (eds), *Principles of European Constitutional Law* 659, 677-678.

[46] Case 158/80 *Rewe Handelsgesellschaft Nord mbH and Rewe-Markt Steffen v Hauptzollamt Kiel* [1981] ECR-1805, [44].

[47] Article 19 (1b) TEU; On the significance of this provision see *Tridimas* (n34) 419-420; Also *Komninos* (n25) 375 comments that it is wrong to deduce from this provision that remedies are a matter of national law only.

[48] For a critical appraisal of this principle see Kakouris, 'Do the Member States Possess Judicial Procedural "Autonomy"?'(1997) 34 CMLRev 1389; see also Ruffert, 'Rights and Remedies in European Community Law: A Comparative view'(1997) 34 CMLRev 307, 330. This terms refers not only to procedural rules stricto sensu, but also to the wider set of rules for the enforcement of EU rights, either remedial or substantial. See *Komninos* (n25) 372; Haapaniemi, 'Procedural Autonomy: a Misnomer?' in Ervo, Graens and Jokela (eds), *Europeanization of Procedural Law and the New Challenges to the Fair Trial* 87, 94-95.

[49] On these two principles see Case 33/76 *Rewe v Landwirtschaftskammer fuer das Saarland* [1976] ECR 1989, [5]; Case 45/76 *Comet v Produktschap voor Siergewassen* [1976] ECR 2043, [13]; Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal* [1978] ECR 629, [22]; Case 199/82 *Administrazione delle Finanze dello Stato v SpA San Giorgio* [1983] ECR 3595, [12].

However, since then the Court's case law seems to have cast doubts on the existence of the principle of national procedural autonomy.[50] In *Francovich* it expressly acknowledged that State liability for damages caused to individuals from a breach of EU law is inherent in the system of the Treaty.[51] Thus, the remedy for damages is provided by EU law. It came to this conclusion by building on the *Van Gend en Loos* principle of directly effective Treaty rights and the national courts obligation to safeguard them in accordance with the cooperation principle now enshrined in Article 4(3) TEU.[52] The Court with this formulation caters for the '*full effectiveness of Community rules*' and the '*protection of the rights which they grant*'.[53] As AG Mischo observed, the formulation of State liability for damages as a matter of EU law has also the potential to act as an incentive for Member States to comply with their obligation, [54] safeguarding in this way the 'full effectiveness of Community rules'. Thus, State liability under EU law is formulated so as to enlist the 'vigilance of individuals' for the enforcement of their rights and through this for the enforcement of EU law. [55]

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[50] Tridimas, 'Enforcing Community Rights in National Courts: Some Recent Developments' in O'Keeffe and Bavasso (eds), *Judicial Review in European Union Law – Liber Amicorum in Honour of Lord Slynn of Hadley* 465; *Tridimas* (n34) 500. Weatherill, 'Addressing Problems of Imbalanced Implementation in EC Law: Remedies in an Institutional Perspective' in Kilpatrick (ed) *The Future of Remedies in Europe* 87, 99. *Haapaniemi* (n48) 111-118.

[51] *Francovich* (n15), [35]. See also Joined Cases C-46/93 and 48/93 *Brasserie du Pêcheur SA v Federal Republic of Germany* [1996] ECR I-1029, [20], [22], [31-33]; For case law paving the way to *Francovich* see Case 6/60 *Humblet* [1960] ECR 559, [36]; Case 60/75 *Carmine Antonio Russo v AIMA* [1976] ECR 45, [9]; *Simmenthal* (n49), [22-23]. Case C-213/89 *R v Secretary of State for Transport ex parte Factortame Ltd* [1990] ECR I-2433, [20-23].

[52] *Francovich* (n15), [31-37].

[53] Ibid, [32-33].

[54] *Francovich* (n15), Opinion of AG Mischo, [92].

[55] For example on the potential deterrent effect of compensation see Case 14/83 *Von Colson and Kamann v Land Nordrhein – Westfalen* [1984] ECR 1891, [28]; Case C-271/91 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1993] ECR I-4367, [24]. See also on civil litigation's potential to strengthen compliance with quality standards Case C-253/00 *Muñoz Cia SA and Superior Fruiticola Ltd and Redbridge Produce Marketing Ltd* [2002] ECR I-7289, [30-31]. For a comment on this case see Biondi, 'C-253/00 Muñoz Cia SA and Superior Fruiticola Ltd and Redbridge Produce Marketing Ltd [2002] ECR I-7289' (2003)40 CMLRev 1241.

The 'compliance role' ascribed to private litigation is particularly important in the field of competition law given that

> ...according to [Article 3(1)(g) EC] (...) [Article 101] constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular for the functioning of the internal market.[56]

Competition law provisions are attributed a public policy character.[57] They impose obligations on private parties, yet their aim is to safeguard the competitive process as a means to confer benefits to consumers.[58] A competition law violation is established whenever a certain conduct adversely impacts on the competition law aim, which serves the general interest. However, at the same time and depending on the nature of the competition law violation in each specific case, certain private interests are affected as well. This adds to the dual nature of competition provisions as laws for the protection both of private and public interests.[59] Through the protection of the rights of private parties before national courts, the public element of competition law is reinforced.

The above analysis indicates that private enforcement of EU competition law is supported by the general principles of the EU legal order as evidenced by the Court's case

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[56] Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR I-3055, [36]; For the potential changes to competition law and policy brought by the Lisbon Treaty see Lane, 'EC Competition Law Post Lisbon: A Matter of Protocol' in *Liber Amicorum Slot* 167; Riley, 'The EU Reform Treaty and the Competition Protocol: Undermining EC Competition Law'(2007) 28 ECLR 703; Barents, 'Constitutional Horse Trading: Some Comments on the Protocol on the Internal Market and Competition' in *Liber Amicorum Slot* 123; Komninos, 'Continuity and Change in EU Competition Policy'(February 2010) CPI 1.

[57] *Eco Swiss* (n56), [36-39]; *Manfredi* (n6), [31]; Case C-8/08 *T-Mobile Netherlands BV v Raad van Bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529, [49]. On the public policy character of competition law norms see Gyselen, 'Comment from the Point of View of EU Competition Law' in Wouters and Stuyck, *Principles of Proper Conduct for Supranational, State and Private Actors in the European Union: Towards a Ius Commune', Essays in Honour of Walter van Gerven* 135, 141-145.

[58] On the multiplicity of aims see chapter I, text to 38-62.

[59] Freedland, 'The Evolving Approach to the Public/Private Distinction in English Law' in Freedland and Auby (eds), *The Public Law/ Private Law Divide* 93,107 that views competition law as being 'indeterminate' between public and private law.

law. At the same time, EU competition law presents certain characteristics that are particularly suitable for the development of private damages actions and an EU private liability regime in damages.[60] As Weatherill points out 'competition rules are unusually well suited to the development of a Community law principle that damage shall be made good by parties responsible for causing loss in breach of the Treaty. Anticompetitive practices are more effectively controlled by opening up potential liability in damages'.[61] Indeed, this was the path taken by the Court in *Courage* and *Manfredi*. By employing the bifurcated principle of effectiveness, the Court pronounced on a Union right to damages for competition law violations that primarily contributes to the effective enforcement of EU competition law. The next section examines whether the Commission approach reflects the Court's stance.

3. Commission approach: the road to the White Paper on Damages Actions for breach of EU competition rules

a. Commission approach before the Green Paper

The allocation of enforcement modalities between the Commission at central EU level and the national authorities and courts has been troubling the EU competition law enforcement system since its inception.[62] Regulation 17/62[63] solved this issue in favour of a centralised enforcement system granting the Commission the sole authority to enforce Article 101(3)

[60] See text to n39, n56-57 above; On the contrary, one should not rely on EU competition law to draw a general regime of liability. See *Leczykiewicz* (n40) 259-260. However, the Swedish Labour Court in its judgement granting damages to Laval by also referring to the field of competition law, pointed to the existence of a general principle of EU law according to which damages are to be granted to private parties following a violation of a Treaty provision that has horizontal direct effect. See Bernitz and Reich, 'Case No A 268/04, The Labour Court, Sweden (Arbetsdomstolen), Judgement No 89/09 of 2 December 2009, Laval un Partneri Ltd v Svenska Byggnads – arbetarefoerbundet et al'(2011) 48 CMLRev 603, 609-610.

[61] Weatherill, 'Public Interest Litigation in EC Competition Law' in Micklitz and Reich (eds), *Public Interest Litigation Before European Courts* 169, 185.

[62] See Deringer, 'The Distribution of Powers in the Enforcement of the Rules of Competition under the Rome Treaty' (1963) 1 CMLRev 30.

[63] Council (EEC) Regulation No 17: First Regulation Implementing Articles 85 and 86 of the Treaty [1962] OJ Spec Ed 87 ('Regulation 17/62').

TFEU.[64] Central administrative enforcement of competition rules was dictated by the need to advance a uniform competition policy in Europe;[65] however, it restricted the role of national authorities and courts.[66] The courts' role was further restricted by the prevailing perception in Europe that viewed competition law as public law better enforced by competent public authorities.[67] That being said however, the Commission on numerous occasions drew attention to the significance of private enforcement for the implementation of competition norms in the EU.

In 1966, the Commission published a study on the situation of private enforcement of competition rules in the then six Member States. According to this study, private parties can have adequate recourse to national courts when damaged by a competition law violation.[68] In the 'Thirteenth Report on Competition Policy' the Commission for the first time dedicated a separate section to the application of EU competition law by national courts, thereby acknowledging a widespread misconception regarding the Commission being the sole enforcer of competition law in the EU despite the national courts' potential to enforce competition norms as well.[69] It also stated that:

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[64] *Regulation 17/62* (n63) Article 9(1).

[65] According to the Commission, this central authorisation system has proved very effective in that regard. See Commission (EC), 'White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty' COM(99) 101 final, 28 April 1999, Executive Summary, [3].

[66] See Jones and Sharpston, 'Beyond Delimitis: Pluralism, Illusions and Narrow Constructionism in Community Antitrust Litigation' (1997) 3 Colum J Eur L 85 for a proposal of a more 'operational' private enforcement system under Regulation 17/62.

[67] Temple Lang, 'Community Antitrust Law-Compliance and Enforcement'(1981) 17 CMLRev 335, 338.

[68]Commission(EEC), 'La Reparation des Consequences Dommageables d' une Violation des Articles 85 et 86 du Traite Instituant la CEE' (Brussels, 1966) Serie Concurrence No 1, 5; see also DG Comp, 'The Application of Articles [85] and [86] of the EC Treaty by National Courts in the Member States' (Brussels, July 1997)(hereinafter 'Braakman Report'))< http://ec.europa.eu/competition/publications/art8586_en.pdf> accessed 25 January 2012 for a similar descriptive account.

[69] It was timely for the Commission to explore the possibility of national courts' involvement some time after the enactment of Regulation 17/62, since this allowed time for the Union institutions to explore the implications of this Regulation and the Commission's exclusive competence to enforce Article 101(3).

> The machinery for enforcing competition law is thereby to some extent *decentralised*, the *availability of relief* more evenly distributed geographically and the place where *justice* can be obtained brought *closer* to the individuals seeking it...Scant use has yet been made of the possibility of actions for damages for breaches of the Community competition rules. There is a need to make all concerned more aware of this possibility. The Commission believes it desirable that the judicial enforcement of Articles 85 and 86 should also include the award of damages to injured parties because this would render *Community law more effective*.[70]

The above passage suggests that damages actions possess the potential to redress victims' harm, while at the same time bring closer to the wider public the benefits of competition law enforcement and contribute to the effective enforcement of competition law. By quoting *BRT v SABAM*, the Commission stresses the obligation of national courts to protect directly effective Treaty rights conferred on individuals.[71] At the same time though, by referring to the 'decentralised [enforcement] machinery' it seems to suggest that damages actions possess additional merits other than delivering justice to affected individuals.[72] This was expressly stated two years later when the Commission accepted that:

> ...the application by national courts would be in the interests of the proper functioning of the system of competition rules, which ultimately benefits all economic operators in Europe. [73]

[70] Commission (EC), *Thirteenth Report on Competition Policy* (Brussels, Luxembourg 1984) <http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=CB3883823> accessed 27 January 2012, [217-218] (emphasis added).

[71] Ibid.

[72] This additional 'dissuasive effect' of damages actions was picked up by the ESC, which urged the Commission not to take measures that would induce excessive litigation, ESC, 'Opinion on the Thirteenth Report on Competition Policy' [1984] OJ C343/03, [5]; see also Commission (EC), *Fourteenth Report on Competition Policy* (Brussels, Luxembourg 1985), http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=CB4184822> accessed 27 January 2012, [47] where the Commission states that '[private enforcement] would allow the Commission's staff to deal more rapidly with particularly complicated cases'.

[73] Commission (EC), *Fifteenth Report on Competition Policy* (Brussels, Luxembourg 1986) <http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=CB4585430 > accessed 27 January 2012, [38-39].

The Commission views private enforcement not only as a system of protecting individual rights but also as a wider instrument securing the observance of EU competition norms. Despite emphasizing the former by pointing to the distinct functions of private and public enforcement, it nevertheless accepts its deterrent role as well.[74] After all, enlisting national courts as full-forced enforcement authorities was one of the driving forces behind Regulation 1/2003.[75]

b. The Green Paper

Even after the adoption of Regulation 1/2003 the rate of private antitrust litigation in Europe remained relatively low. The Ashurst Study[76] identified the main obstacles in bringing damages actions in competition cases and it is the tackling of these obstacles that the Commission is attempting in its current effort to promote private enforcement of competition law.[77] In its Green Paper ('GP') the Commission, echoing a number of Commissioner

[74] Commission (EC), 'Notice on Cooperation Between National Courts and the Commission in applying Articles 85 and 86 of the EEC Treaty' [1993] OJ C39/6, [4], [16]; Commission (EC), 'Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty' [2004] OJ C101/65, [1] , [13]; Commission (EC), 'Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC' [2004] OJ C101/54, [4]. For the same approach in the UK see DTI, 'Productivity and Enterprise – A World Class Competition Regime' (July 2001) Cm 5233, [8.1]. Interestingly the debate on enhancing private enforcement of competition rules in the UK preceded the one at EU level.

[75] Monti, 'Effective Private Enforcement of EC Antitrust Law' in Ehlermann and Atanasiu (eds), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* 3. Sinclair, 'Damages in Private Antitrust Actions in Europe'(2002) 14 LoyConLRev 547, 548.

[76] Waelbroeck, Slater and Even-Shoshan, 'Study on the conditions of claims for damages in case of infringement of EC competition rules' (Comparative Report) ('Ashurst Study') (31 August 2004) <http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf> accessed 28 January 2012. The Ashurst Study will be employed in this thesis as a point of reference further supported by subsequent studies and legal literature, since arguably the Ashurst Study is now to a large extent outdated. It does provide however, the broader picture of the EU private competition enforcement landscape.

[77] However the picture of 'total underdevelopment' of damages actions is not uniform in all Member States; for an overview of the UK situation see Robertson, 'Competition Litigation in UK Courts-Recent Cases' (2006) 5 CompLaw 5; Robertson, 'Competition Law in the UK Courts: A Review of the Last 3 Years' (2009) 8 CompLaw 79; Robertson, 'UK Competition Litigation: From Cinderella to Goldilocks?' (2010) 9 CompLaw 275, 285; Rodger, 'Private Enforcement of Competition Law, The Hidden Story: Competition Litigation in the United Kingdom 2000-2005' (2008) 29 ECLR 96;See also Idot, 'Private Enforcement of Competition Law – Recommendations Flowing from the French Experience' in Basedow (ed) *Private Enforcement of EC Competition Law* 85, 87; Peyer, 'Myths and Untold Stories – Private Antitrust Enforcement in Germany'(2010)

speeches at the time,[78] comments on the compensatory and deterrent function of damages actions.[79] At this point, the Commission simply reiterates *Courage* and seems to recognise both compensation and deterrence as equally important goals of private enforcement.[80]

Another role ascribed to damages claims is that they bring competition law closer to the citizens and contribute to the creation of a competition culture. It seems that competition policy lacks the necessary social support and the market cannot perform at its best due to the fact that the consumers' voice is rarely heard in competition policy.[81] Trying to enlist consumers as enforcement actors could address this situation. In addition, the Commission stresses the importance of private enforcement, in order to sustain the competitiveness of the European economy and the existence of open markets in the EU internal market, which constitute the key elements of the 'Lisbon strategy'.[82] Thus, by linking damages actions to the promotion of these important public interest goals, the Commission seems to suggest that private litigation can also serve the public interest.[83]

Further, the special analysis dedicated to consumer interests and consumer damages claims in the *GP*, apart from the fact that this was necessary given the additional complexities

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UEA CCP Working Paper 10-12 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1672695> accessed 28 January 2012.

[78] Monti, 'Private litigation as a key complement to public enforcement of competition rules and the first conclusions on the implementation of the new Merger Regulation' (Speech at IBA – 8th Annual Competition Conference, Fiesole, 17 September 2004, SPEECH/04/403); In the same vein see also his successor Kroes, 'Enhancing Actions for Damages for Breach of Competition Rules in Europe' (Speech at the Harvard Club, New York, 22 September 2005, SPEECH/05/553).

[79] *GP* (n3), [1.1]; *GP SWP* (n33), [4-6], [179-180].

[80] Bulst, 'Of Arms and Armour-The European Commission's White Paper on Damages Actions for Breach of EC Antitrust Law' [2008] Bucerius Law Journal 81,82.

[81] Dayagi-Epstein, 'Furnishing Consumers with a Voice in Competition Policy' (2005) <http://www.luc.edu/law/academics/special/center/antitrust/pdfs/dayagi_epstein_consumers_voice.pdf> accessed 28 January 2012.

[82] *GP SWP* (n33), [9-11].

[83] *GP SWP* (n33), [52]; This has also been acknowledged by the Commission in Joined Cases T-22/02 and 23/02 *Sumitomo Chemicals v Commission* [2005] ECR II-4065, [128].

of consumer claims, also reveals that consumer interests have been an important impetus for the Commission initiative on private enforcement.[84] This analysis is also in line with frequent policy pronouncements on consumer welfare and competition law's potential to protect the interests of final consumers.[85]

Overall, the *GP* illustrates that what prompted the Commission to undertake the initiative to improve damages actions in Europe was not only the compensatory rationale and justice considerations for the victims of antitrust infringements, but rather its quest to raise compliance rates and sustain a more competitive economy for the citizens of Europe. Thus, given its limited resources, it wanted to employ more actors in that regard.[86]

c. The White Paper: Shift in approach and the way ahead

The *WP* should be read in light of the generated criticism on the deterrence element of private enforcement. The Commission took the comments submitted into serious consideration, which might explain the shift in the aims of private enforcement according to the Commission in the subsequent *WP*. A number of respondents argued that the role of damages actions should not include deterrence.[87] In addition, comments submitted by Member States' governments were rather conservative towards private enforcement,[88] in sharp contrast with consumer representatives' comments that urged the Commission to adopt measures

[84] *GP* (n3), [2.5]; *GP SWP* (n33), [188-201].

[85] See chapter I, text to n77-80.

[86] See Hodges, 'Competition Enforcement, Regulation and Civil Justice: What is the case?' (2006) 43 CMLRev 1381, 1382 where he suggests that the Commission's approach towards private enforcement indicates its desire to use 'civil damages claims as an additional regulatory control in deterring breaches of competition law'; Hodges, *Litigating Antitrust Claims in Europe: Proposals and Implications,* 3.

[87] See for example ICC, 'ICC Comments on the Commission Green Paper on damages actions for breach of the EC antitrust rules'; also CBI, ' EC Commission Green Paper on Damages Actions – CBI Response'(April 2006) 1.

[88] See --, 'White Paper: adopts a conservative approach'(2008)1 GCLR R-48; --,'French Government Bodies comment on White Paper on damages actions for breach of EC antitrust rules' (2008) 1 GCLR R-51; --, 'Germany Comments on the Commission's White Paper on damages actions for breach of the EC antitrust rules' (2008) 1 GCLR R-52.

improving consumer damages claims providing both for deterrence and compensation to affected consumers.[89] After all, it was the Commission itself, in line with CJEU jurisprudence that emphasized the bifurcated aims of private enforcement.[90]

The Commission, in codifying the acquis communautaire, recognised the existence of an EU right to damages and distinguished between the existence of such a right as an EU law matter and its exercise as a national law matter.[91] But, if the exercise of the EU right to damages is to be facilitated by the proposal and adoption of common measures at EU level, these measures should further and reflect the underlying aims of this right, as pronounced in the Court's jurisprudence. The Commission emphasis on the compensatory component raises doubts as to the success of this initiative.

The Commission in its *WP* identifies compensation as the first and foremost guiding principle for the proposed measures to improve the conditions for bringing damages actions before the national courts.[92] The deterrent effect (previously identified as a standalone aim) would flow inherently from the improvement in compensatory justice. The Commission currently aims at advancing measures that promote compensation rather than deterrence, since in the majority of Member States damages actions aim primarily at compensating the victim rather than deterring perpetrators.[93] This choice further reflects another guiding

[89] Finnish Consumer Ombudsman and others, 'The EC Green Paper on Damages Actions for Breach of the EC Antitrust Rules' (21 April 2006) ; UFC Que Choisir, 'Contribution au livre vert de la Commission Europeenne' ; Which, 'Consultation Response' .

[90] Cf also EP, 'Resolution of 25 April 2007 on the Green Paper on Damages Actions for Breach of the EC Antitrust Rules' ((2006/2207(INI)), point 1.

[91] Commission (EC), 'Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules' SEC (2008) 404, 2 April 2008 ('WP SWP'),[308-309].

[92] *WP* (n3), [1.2]; *WP SWP* (n91), [14-15].

[93] *Ashurst Study* (n76) 77; *Manfredi* (n6), [87] for the submissions of the Austrian government. See also Danish Ministry for Economic and Business Affairs, 'The Commission's Green Paper on Damages Actions for Breach of the EC Antitrust Rules' (19 April 2006); Secrétariat Général des Affaires Européennes, République Française, 'Note à la Commission Européenne' ; For an account of the Dutch situation see Kortmann, 'The Tort

principle, namely that the proposed measures should be based on a genuine European approach reflecting Member States' legal culture and tradition.[94] The withdrawn *Draft Damages Directive* also reflected this approach. On a closer reading though, both the *WP* and the *Draft Damages Directive* seem to have adopted a functional approach towards private damages claims by enlisting private actors to the effective enforcement of competition law.[95]

The mixed Commission approach overtly promoting compensation, but tacitly aiming at advancing deterrence is evident in its proposal for collective consumer actions. Its proposal for opt-out representative actions, when expressly stating that the opt-out model was to be avoided, reconciles the compensatory and deterrence function of damages actions and demonstrates Commission attempts to overcome Member States' objection towards the deterrence function of damages actions.[96]

The above analysis indicates that private enforcement of EU competition law is supported by general EU law principles as formulated in the CJEU's case law. It is premised on the directly effective individual right derived from the Treaty competition provisions. However, private enforcement does not only cater for the effective judicial protection of those rights but also, and even more importantly from an overall enforcement perspective, it

Law Industry' (2009) 17 ERPL 789, 799, 810. Essentially this echoes the principle of corrective justice which inflicts a rectification duty upon the tortfeasor and it can be contrasted with the prevailing economic analysis underlying common law. See Coleman, 'The Practice of Corrective Justice' in Owen (ed), *Philosophical Foundations of Tort Law* 54, 57, 66. On the principle of corrective justice and the importance of a 'bipolar relationship of liability' as an important feature of private law relations see Weinrib, *The Idea of Private Law* 2, 56-83, 114-144; *Coleman*, The Practice of Corrective Justice, 67. See also Kortmann and Swaak, 'The EC White Paper on Antitrust Damage Actions: Why the Member States are (Right to be) Less than Enthusiastic' (2009) 30 ECLR 340, 341 arguing that '...in many European jurisdictions the instrumentalist view of tort law is a minority view'.

[94] *WP SWP* (n91), [16].

[95] Monti in his Report on the single market is also in favour of a functional approach to private enforcement. See Monti, 'A New Strategy for the Single Market' (Report to the President of the European Commission, 9 May 2010) , 102, 103.

[96] For more details on the Commission collective action proposal, the distinction between the opt-in and opt-out model and why the latter is preferable from a deterrence perspective see chapter IV.

contributes to the functioning of effective competition by increasing compliance with the relevant substantive norms. The CJEU places particular emphasis on the latter function. Regrettably, the Commission has distanced itself in its rhetoric from the relevant case law. In light of the received criticism,[97] the Commission chose to alter its rhetoric and conceal the deterrence goal, thereby risking the success of any future initiative in the field of private competition law enforcement.

[97] See text to n87 and 88 above.

III. Developing the 'Added Value Spectrum'

1. Introduction

The analysis in this section aims at building a concise normative 'added value spectrum' comprising policy reasons that support consumer involvement in private competition law enforcement. It advances arguments not only from a competition law perspective (section II above) but also from different, interwoven areas of law (eg procedural law, EU constitutional law and consumer law). It aspires to justify consumer participation in private competition law enforcement on different grounds, ranging from neoclassical economic theories on optimal enforcement and justice theories redressing affected rights to theories increasing the transparency of EU policies and accountability of EU institutions. The increased consumer involvement advocated herein could potentially address market failures through the detection and deterrence of antitrust violations, as well as market failures pertaining to the demand side of the market thereby contributing to the proliferation of consumer information. It can also account for delivering compensation to affected consumers and bringing European policies closer to the 'peoples of Europe'.[98]

The spectrum consists of the following five reasons, namely that consumer involvement, (1) increases the deterrent effect of competition norms, (2) provides compensation to affected consumers, (3) aligns practice and rhetoric,(4) cultivates a competition culture and increases legitimacy of European competition policy and (5) raises consumer 'empowerment' and approaches the 'informed consumer' ideal as a spur to competitiveness.

The first two can be drawn directly from the CJEU's jurisprudence and therefore form the two 'principal aims', whereas the latter three are deemed to be 'derivative aims'. The

[98] See reference to the 'peoples of Europe' in the Preamble and Article 1 TEU and the Preamble of the TFEU.

derivative aims, in as much as they justify an increased consumer involvement, can only be promoted if the legislator makes a right choice between the principal aims of deterrence and compensation when they appear in conflict.[99] On the contrary, if the Commission advances proposals enhancing private damages actions based primarily on the principle of 'full compensation',[100] these cannot prove to be workable for consumer damages actions. In what follows, the dichotomy between the principal aims will be addressed before moving on to discuss the derivative aims.

2. Principal aims: Deterrence – compensation face off

In *section II* it has been argued that from the Union institutions' perspective, private damages actions in EU competition law are primarily to be encouraged in light of their potential to advance deterrence of competition law violations. Thus, any proposals on EU private competition law enforcement should take deterrence as their guiding principle since this is what the EU legal order dictates. Further the theory on optimal enforcement,[101] and the deterrence theory,[102] following which the optimal sanction shall exceed the gains resulting from the competition law violation divided by the probability of detection, support this approach. Here, the criticisms of the deterrence potential of private enforcement are discussed, in order to allude to this important function, alongside the traditional compensatory function.

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[99] See chapter III, text to n31-38 for the conflict between deterrence and compensation in 'group A' and 'group B' consumer claims.

[100] According to the current Commission rhetoric. See text to n92.

[101] Becker, 'Crime and Punishment: An Economic Approach' (1968) 76 JPolEcon 169; Becker and Stigler, 'Law Enforcement, Malfeasance and Compensation of Enforcers' (1974) 3 J Legal Stud 1; Landes and Posner, 'The Private Enforcement of Law' (1975) 4 J Legal Stud 1; Landes, 'Optimal Sanctions for Antitrust Violations' (1983) 50 U Chi L Rev 652, 656, 678.

[102] See Wils, *Efficiency and Justice in European Antitrust Enforcement* 56-58 pointing to differences between the 'internalisation approach' advocated by *Becker* and *Landes* (n101) and the 'deterrence approach'.

i. Can follow-on actions increase deterrence?

Private litigation raises the financial stakes for undertakings contemplating to engage in anti-competitive conduct and could, thus, act as a disincentive for the said activity. Therefore it seems that, despite consumer damages claims being most probably of the follow-on type, they could, nonetheless, advance deterrence. Private damages actions carry different deterrence potential depending on whether they are brought as stand-alone or follow-on claims.[103] Stand-alone actions in the context of competition law are difficult to bring due to high costs and complex evidentiary requirements. Therefore, from a pragmatic perspective, if private litigation levels were to increase in Europe, this would most probably concern follow-on rather than stand-alone actions.[104] This holds true especially in the case of dispersed consumer damage. Even when group mechanisms exist, it is more likely to see consumer actions as follow-on actions due to difficulties in obtaining the relevant evidence and proving the infringement.[105]

In the case of follow-on claims, the infringement has already been established by a public authority, and private parties bringing damages claims have to prove causation and their own damage. The deterrent effect of follow-on actions is dependent upon the aggressive public enforcement of competition laws, and reduced public enforcement can have a negative spill-over effect on this type of claims.[106] Relevant here is the possible adverse effect of

[103] For a definition see *Komninos* (n9) 6-7.

[104] Cf Van Gerven, 'Private Enforcement of EC Competition Rules in the ECJ – Courage v Crehan and the Way ahead' in Basedow (ed), *Private Enforcement of EC Competition Law* 19, 24; Bulst, 'Private Antitrust Enforcement at a Roundabout' (2006) 7 EBOR 725, 729.

[105] See chapter III,section V on access to evidence.

[106] Cavanagh, 'Antitrust Remedies Revisited' (2005) 84 Or L Rev 147, 156; Lever, 'Effective Private Enforcement of EC Antitrust Rules Substantive Remedies: The Viewpoint of an English Lawyer' in Ehlermann

private enforcement on leniency programmes; however, the US experience suggests that the two can successfully co-exist.[107]

Follow-on actions, to the extent that they are dependent on public enforcement, can be said not to sufficiently encourage compliance with competition law.[108] This does not seem accurate in the sense that the possibility of facing follow-on damages actions can by itself deter undertakings from committing a competition law violation. This is even more so, as the infringing undertaking might end up paying more in damages than in administrative fines.[109] So, if an undertaking (acting rationally)[110] engages in anti-competitive conduct only when the profits therefrom exceed the potential costs (comprising of fines and damages) divided by the probability of detection, one can reasonably assume that if potential costs are raised,[111] then there is a greater deterrent effect on any potential anticompetitive conduct. Provided the necessary procedural mechanisms are in place, potential costs of a competition law violation

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and Atanasiu (eds), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law*, 109.

[107] Van den Bergh and Camesasca, *European Competition Law and Economics: A Comparative Perspective* 322-324; On leniency programs and damages actions in Europe see Boege, 'Leniency Programs and the Private Enforcement of European Competition Law' in Basedow (ed), *Private Enforcement of EC Competition Law* 217; Kon and Barcroft, 'Aspects of the Complementary Roles of Public and Private Enforcement of UK and EU Antitrust Law: An Enforcement Deficit?' (2008)1 GCLR 11, 16. Further on access to corporate statements given under the leniency programme see chapter III, text to n160-168.

[108] Harker and Hviid, 'Competition Law Enforcement and Incentives for Revelation of Private Information' (2008) 31 WC 297; Eilmansberger, 'The Green Paper on Damages Actions for Breach of the EC Antitrust Rules and Beyond: Reflections on the Utility and Feasibility of Stimulating Private Enforcement through Legislative Action' (2007) 44 CMLRev 431, 478.

[109] For an early US account see Kauper and Snyder, 'An Inquiry into the Efficiency of Private Antitrust Enforcement: Follow-on and Independently Initiated Actions Compared'(1986) GeoLJ 1163, 1222. Block, Nold and Sidak, 'The Deterrent Effect of Antitrust Enforcement' (1981) 89 JPolEcon 429, 444.

[110] The rationality assumption is one of the basic principles of the Chicago School in antitrust, see Posner, 'The Chicago School of Antitrust Analysis'(1979) 127 U Pa LRev 925.

[111] Here increasing potential costs is taken to mean increasing the amount of damages actions. For reasons not allowing fines to be raised beyond a certain standard see *Wils* (n102) 62.

(and thus deterrence) can rise significantly, given that 'victims of competition violations are foregoing not just millions but billions in compensation'.[112]

In addition, the assertion that follow-on actions do not contribute to the detection of competition law violations does not hold true in every case.[113] Follow-on actions can be attributed an indirect detection function in the following way; there is the possibility that private parties, in this case consumers or consumer organisations, are incentivised to alert public authorities of a potential antitrust violation so that a decision in the course of public enforcement is adopted facilitating the subsequent bringing of damages actions.

ii. Risk of enforcement errors

Another criticism often levied against private enforcement of competition law is based on the nature of competition law. Critics argue that because competition law is public law, private litigants are not in a position to achieve the policy goal of deterring competition law violations in order to protect competition on the market as a means to enhance consumer welfare. Thus, it is probable that they deter legal actions as well (over-deterrence problem – Type I errors).[114] The fact that private parties usually act in their own self interest entails the risk that they might engage in nuisance litigation.[115] Even if, in theory, there is a possibility

[112] See Kroes, 'Consumers at the heart of EU Competition Policy' (2008) (Speech at BEUC, 22 April 2008, Speech 08/212).

[113] Kauper and Snyder (n109) 1169.

[114]Wils, 'Should Private Antitrust Enforcement Be Encouraged in Europe?'(2003) 26 WC 473,482; *Wils* (n102) 9; *Hodges, Competition Enforcement* (n86) 1395; For the opposite view see OFT, 'Private actions in competition law: effective redress for consumers and business' (Recommendations) (OFT 916resp, November 2007) ('OFT 916resp'), [2.3] where it is stated that when the OFT asked companies and their advisers for suggestions as to what could be done to improve compliance with competition law in the UK, the most frequent responses included encouraging private damages actions.

[115] Baumol and Ordover, 'Use of Antitrust to Subvert Competition'(1985) 28 J L & Econ 247, 248 where they point out that 'attempts to use the law as an instrument of subversion do not confine themselves to private lawsuits'; Breit and Elzinga, 'Private Antitrust Enforcement: The New Learning' (1985) 28 J L&Econ 405, 433; Snyder and Kauper, 'Misuse of the Antitrust Laws: The Competitor Plaintiff'(1991) 90 Mich L Rev 551; McAfee, Mialon and Mialon, 'Private Antitrust litigation: Procompetitive or Anticompetitive' (2005) Emory Law and Economics Research Paper No 05/18 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=784805> accessed 28 January 2012.

of over – enforcement, the Court's jurisprudence suggests that private individuals can act as agents to the public interest.[116]

Consumers filing a claim against an infringing undertaking do not seek to preserve the competitive process as a means to enhance consumer welfare *in abstracto* but rather are defending their own interests before a national court.[117] However, by so doing they may act in the public interest as well.[118]

A national court faced with a private claim has to protect the rights of the claimant.[119] However, in order for the claim to succeed, the plaintiff has to first show an infringement of the competition provisions. Thus, a court implementing those provisions will interpret them in the light of the public interest they seek to protect;[120] as long as it finds a competition law infringement, it will then examine whether the plaintiff sustained individual damage thereof.[121] The fact that the Commission, as a public authority, can intervene before national courts to defend the public interest[122] reinforces the above approach. The national court has to show every effort to enforce competition rules in the public interest and private interests are protected in as far as they are aligned with it.

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[116] See text to n25. For a contrary opinion see BDI, 'Position – Commission white paper on damages actions for breach of the EC antitrust rules'; CBI, 'Damages Actions for Breach of the EC Antitrust Rules – CBI Response to the Commission White Paper' 2.

[117] Kelemen, 'Suing For Europe: Adversarial Legalism and European Governance'(2006) 39 Comparative Political Studies 101, 121 arguing that private parties can strengthen European policies.

[118] A fact accepted by the Commission, see *WP SWP* (n91), [313]; See also OECD, 'Remedies available to private parties under competition laws' (Report) COM/DAFFE/CLP/TD(2000)24/Final, [3].

[119] *Notice on the handling of complaints* (n74), para 1; *Notice on the cooperation between the Commission and national courts* (n74), [4].

[120] Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] OJ C232/5,[19].

[121] Komninos, 'Public and Private Antitrust Enforcement in Europe: Complement? Overlap?' (2006) 3 CompLRev <http://www.clasf.org/CompLRev/Issues/Vol3Issue1Art1Komninos.pdf> accessed 28 January 2012, 5, 15.

[122] *Notice on the cooperation between the Commission and national courts* (n74), [19].

The above analysis suggests that private enforcement of consumer claims can contribute in the deterrence of competition law violations, provided of course that the necessary procedural measures are adopted. Advancing a more pragmatic approach and given the fact that in the field of competition law consumers suffer very low damages,[123] policy makers may choose to design a collective action system that prioritises deterrence over compensation. After all, even from a consumers' perspective, deterrence is preferable if one considers that an effective enforcement system in achieving deterrence makes the need to provide compensation unnecessary.[124]

iii. Balancing rather disregarding compensation

Even if deterrence is granted priority over compensation, the latter should not be disregarded. The Court's jurisprudence as well as Commission efforts point to a delicate balancing exercise, reconciling the two aims if possible, rather than excluding one altogether. The right of private parties is derived from the Treaty and it cannot be excluded, as in the case of indirect purchasers in the US for example, based on deterrence grounds only.[125] Proponents of the Chicago School approach have advanced arguments against the compensatory aim of private enforcement arguing that, from an economic perspective, it is excessively costly to identify the victims of antitrust violations and quantify their loss. The high costs involved in awarding compensation do not correspond to the value society attributes to it – given the relatively low value of individual claims, especially when private actions are brought by

[123] See chapter III, text to n4-7.

[124] Lopatka and Page, 'Indirect Purchaser Suits and the Consumer Interest' [2003] AB 531, 557.

[125] Jones, *Private Enforcement of Antitrust Law in the EU, UK and USA* 186-187; Brealy, 'Adopt Perma Life, but follow Hannover Shoe to Illinois?' (2002) 1 CompLaw 127,133; Komninos, 'The Road to the Commission's White Paper for Damages Actions: Where We Came From' (2008) 4 CPI < https://www.competitionpolicyinternational.com/the-road-to-the-commissions-white-paper-for-damages-actions-where-we-came-from/ > accessed 28 January, 81, 101.

consumers. [126] This approach cannot be accepted in a legal system that takes justice and fairness considerations into account, apart from economic arguments of efficiency and cost-minimisation. In the EU, the right to damages, as a right granted by EU law should be effectively safeguarded.[127] This is also consistent with the right to a fair trial, which is guaranteed in the constitutions of individual Member States and by Article 6 ECHR as well as Article 47 of the Charter of Fundamental Rights of the European Union. This right incorporates the right to effective access to the courts.[128]

The consumer right to damages for competition law violations is a directly effective Treaty right and cannot be totally excluded. At the same time, compensation should not be viewed as an absolute goal - it should also be pursued in accordance with the proportionality principle.[129] In essence this means that, in cases where the individual consumer places no particular importance on compensation, the enforcement system should prioritize other aims without abandoning the compensatory aim completely. The compensatory function would yield to the deterrent function, and alternative forms for the provision of compensation can be devised. For example, cy-pres mechanisms can be put in place.[130]

Ranking deterrence as the primary aim of competition law damages actions, while respecting to the largest possible extent the compensatory aim of those actions, allows for the proposal of functional measures that could in turn promote the three important derivative aims to which we now turn.

[126] Schwartz, 'An Overview of the Economics of Antitrust Enforcement' (1980) 68 Geo LJ 1075, 1086; Schwartz, *Private Enforcement of Antitrust Laws: An Economic Critique* 31, 32.

[127] *Komninos* (n9) 10; Jones, 'Private Antitrust Enforcement in Europe: A Policy Analysis and Reality Check' (2004) 27 WC 13, 14.

[128] See EESC (EC), 'Defining the collective actions system and its role in the context of Community consumer law' (Opinion) [2008] OJ C162/1, 3, 14.

[129] Hodges, *The Reform of Class and Representative Actions in European Legal Systems* 188.

[130] Cf European Justice Forum, 'Comments on the Commission White Paper' [1]; Shapiro,' Consumer class actions made easy' (2008) 7 CompLaw 203, 207.

3. Derivative aims

a. Alter EU decisional practice – align practice and rhetoric

This reason builds on the interplay between policy pronouncements, substantive application of EU competition law and procedural measures and advocates a linkage between them. In chapter I the following inconsistency has been identified. The attention paid to consumer interest in policy declarations does not match its treatment in EU jurisprudence. In the past, the Commission and EU courts have neither addressed consumer interest in a consistent manner nor developed a clear notion of consumer benefit/detriment.[131]

Procedural measures allowing increased consumer participation could direct authorities' and courts' attention to consumer interest.[132] In his Foreword to the 30th Report on Competition Policy, the then Competition Commissioner Monti emphasized that [a more direct consumer involvement in competition matters] 'helps competition policy to focus more clearly on actions, which are ultimately beneficial to consumer's interests'.[133] In addition to the avenues open to consumers in public enforcement procedures,[134] private enforcement provides an additional path for direct consumer involvement. Enhanced consumer participation can not only allow competition policy to focus on consumer interest but more importantly, it can also shift the current EU competition law enforcement standard towards a consumer welfare approach.

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[131] Reich, Competition Law and the Consumer in Gormley(ed), *Current and Future Perspectives on EC Competition Law* 126,137; Hutchings and Whelan, 'Consumer Interest in Competition Law Cases'(2006) 16 CPRev 182.

[132] *Reich* (n131) 137; Buttigieg, 'Consumer Interests under the EC's Competition Rules on Collusive Practices' [2005] EBLR 643, 664; Haracoglou, 'Competition Law, Consumer Policy and the Retail Sector: the Systems' Relation and the Effects of a Strengthened Consumer Protection Policy on Competition Law'(2007) 3 CompLRev 175, 196, 205; Stuyck, 'EC Competition Law After Modernisation: More than Ever in the Interest of Consumers'(2005) 28 JCP 1, 16; Asher, 'Enhancing the Standing of Competition Authorities with Consumers' (15 April 2004, ICN Conference, Korea) .

[133] Commission(EC), *XXXth Report on Competition Policy 2000* SEC (2001) 694 final <http://ec.europa.eu/competition/publications/annual_report/2000/en.pdf> accessed 24 January 2012, 7.

[134] See chapter V in detail.

In the past, procedural changes have influenced the substantive application of competition law.[135] The relationship between the introduction of Regulation 1/2003 and the shift towards a more economic-based approach in the application of Article 101 TFEU has been explored by Gerber. He argued that the Commission success in introducing Regulation 1/2003 demonstrated that it would be easier for it to push forward with the adoption of a more economic-based approach towards competition law enforcement in the application of Article 101 TFEU.[136] Securing the necessary political support for Regulation 1/2003 provided the necessary impetus for the realisation of the substantive reform.

Thus, it is arguable that, if the Commission current initiative on the introduction of measures facilitating private competition law enforcement and more specifically measures facilitating consumer involvement succeeds, this might signal an alteration in substantive competition law enforcement towards a real contemplation of the consumer interest. Exploring the here identified linkage between procedural and substantive changes could potentially have a beneficial effect on the current Commission efforts to impart a more economic approach in the application of Article 102 TFEU, especially considering that the *Guidance Paper* seems to pay particular attention to consumer harm for ruling on an abusive conduct.[137]

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[135] Also it has been accepted that procedural rules impact on the enforcement standard. See Calkins, 'Summary Judgment, Motion to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System' (1986) 74 Geo L J 1065; Kovacic, 'Competition Policy in the European Union and the United States: Convergence or Divergence? (Bates White Fifth Annual Antitrust Conference Washington, June 2008) 22-24; Kovacic, 'Private Participation in the Enforcement of Public Competition Laws' in Andenas, Hutchings and Whelan(eds), Current Competition Law 2002, 167; Kovacic, 'The Intellectual DNA of Modern US Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix' [2007] ColumBLR 1, 63-64.

[136] Gerber, 'Two Forms of Modernization in European Competition Law' (2008) 31 Fordham Int'l LJ 1235, 1257.

[137] Commission(EC), 'Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings' (9 February 2009) C/2009 864 final, [19].

The above analysis suggests that rhetoric and practice can be aligned through the adoption of procedural measures according to the following three steps. The first step concerns Commission rhetoric emphasizing the importance of consumer interest for competition law and policy. At a second level, the Commission could employ this rhetoric in the debate on private enforcement and secure political agreement for the introduction of procedural measures facilitating consumer involvement. At a third level, the Commission could exploit the political agreement reached to push forward with substantive reform. Thus, the Commission would have an additional reason to push forward its current efforts in the field of private enforcement, since it could facilitate the shift towards a consumer welfare standard.

In addition, a shift towards a consumer welfare standard could be facilitated by actual consumer participation in private enforcement. In private enforcement, the involvement of consumer/consumer organisations has been very limited to date.[138] Given that consumer claims will most probably be of the follow-on type, thereby relying on the finding of an infringement by a competition authority, it can be said that they cannot influence the relevant substantive test. However, this is not true.

Follow-on actions can potentially influence the enforcement standard for the following reasons. First, because procedural measures facilitating consumer damages actions can potentially trigger consumers'/ consumer organisations' complaints to competition authorities, so that they could then pursue a follow-on action.[139] Consumer participation could be instrumental in identifying consumer harm in retail markets and contribute to the conceptualisation of an adverse impact on consumer welfare by the relevant institutions,

[138] See chapter IV, text to n115-152.

[139] See Regulation *1/2003* (n2) Article 16; *WP* (n3), [2.3] on the binding effect of competition authorities' decisions.

especially given that competition law usually concerns B2B relations and in the majority of cases the competent authorities and courts are aware only of the perspective of the industry.[140] Consumers, being the ultimate beneficiaries of competition policy, should be in a position to provide their views, thus, allowing for a balance of often conflicting viewpoints. The importance of consumer input has also been recognised by the Commission itself, which is looking for the linkages between competition and consumer welfare.[141] Consumer procedural involvement possesses the potential to highlight such linkages. In addition, private follow-on actions could point to and highlight the actual consumer harm, since this has to be quantified for the granting of a damages award.

Thus, following the above analysis, the introduction of measures supporting consumer involvement (procedural reform) could potentially change the substantive enforcement standard (substantive reform). However, the relationship between procedure and substance is a dynamic one and evolves over time providing for a second route of potential spill-over effects between the two. Procedural involvement impacts first on the substantive application of competition law. In addition, should the substantive enforcement standard move towards a consumer welfare standard, that pays due account to the consumer interest, this could in turn trigger more active consumer involvement. If competition authorities take consumer harm into account, quantification of the respective consumer damage in follow-on litigation will be easier, thereby facilitating consumer damages claims.

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[140] Reich (n131); see also EAGCP, 'An Economic Approach to Article 82'(July 2005) available <http://ec.europa.eu/competition/publications/studies/eagcp_july_21_05.pdf> accessed 26 January, 9 where the EAGCP states that '...competitors are usually much better organised than consumers. The competition authority receives more complaints and more material from competitors, so the procedure tends to be biased towards the protection of competitors. Developing a routine for assessing consumer welfare effects provides a counterweight to this bias'.

[141] Commission (EC), 'Report on Competition Policy 2008' COM (2009) 374 final , [368] stating that 'Consumer input is also an important asset in understanding markets, as consumers and their representatives are best placed to explain directly how they perceive the impact of a particular action'. See also ibid, [370].

To sum up, effective procedural measures supporting consumer involvement will allow the actual adoption of a consumer welfare standard since the Commission, having secured the necessary political will for the introduction of those measures, could appear more determined to go through with the substantive reform as well. Further, consumer involvement could contribute to the actual identification of consumer harm in retail markets that in turn will influence the finding of a competition law violation. Increased consumer involvement can influence the substantive enforcement standard and vice versa; if the consumer interest is taken into account in competition law enforcement, more consumer involvement is to be expected in the future.

The interplay between procedure and substance alluded to in this section suggests that procedural measures in favour of consumer involvement can create a virtuous circle, permitting consumers to protect their interests as well as the competition law enforcement system to cater for the interests of consumers in line with frequent policy statements.

b. Legitimisation of EU policies

Further procedural measures allowing for active consumer involvement in private competition law enforcement possess the potential to bring EU citizens in their capacity as consumers closer to EU competition policy, and act as an alternative form of control on Commission and NCAs' decision making. Essentially, increased consumer involvement could cater for the often pronounced 'democratic deficit' problem of the EU.[142] The 'democratic deficit' is taken here as synonymous with the distance between EU citizens and EU policy decision making, [143] that can be attributed to the Union's complex and secretive

[142] On the different aspects of the 'democratic deficit' see Craig, 'Integration, Democracy and Legitimacy' in Craig and De Burca, *The Evolution of EU Law* 13, 30-40. Generally on the 'democratic deficit' and citizen participation see Harlow, 'Citizen access to political power in EU' (1999) (European University Institute, Working Paper RSC No 99/2) < http://www.eui.eu/RSCAS/WP-Texts/99_2t.html> accessed 28 January 2012.

nature as well as to the difficulties in establishing accountability.[144]Increased consumer involvement can potentially bridge the gap between EU competition policy and its addressees and it should be seen in light of two recent tendencies in the EU; the first concerns efforts to improve European governance and the second relates to an observed tendency to promote private enforcement of EU law.

The first tendency concerning European governance 'proposes opening up the policy making process to get more people and organisations involved in shaping and delivering EU policy'.[145] One of the proposals for change concerns the involvement of civil society.[146] This is a form of ex ante participation. For example, consumers, either on their own or through their respective organizations as actors of civil society, can provide comments in an open debate prior to the adoption of any concrete legislative measure or policy decision.[147]

[143] For a different definition see Van Gerven, 'Wanted: More Democratic Legitimacy for the European Union' in Wouters, Verhey and Kiiver (eds), *European Constitutionalism Beyond Lisbon* 147, 156 that points to the democratic deficit in procedures where the EP has a less important role than the Council of Ministers.

[144] Moravcsik, 'Europe without Illusions' (Prospect 111, 23 July 2005) <http://www.prospectmagazine.co.uk/2005/07/europewithoutillusions/> accessed 28 January 2012 rejects the idea of a 'democratic deficit' in EU; Cf Siedentop, A crisis of legitimacy (ibid); Moravcsik, 'In Defence of the "Democratic Deficit": Reassessing Legitimacy in the European Union' (2002) 40 JCMS 603; Van Gerven (n143) 148, 153; On the notion of accountability see Neyer, 'Justice, not Democracy: Legitimacy in the European Union' (2010) 48 JCMS 903; Benz, Harlow and Papadopoulos, 'Introduction' (2007) 13 ELJ 441, 443-445.

[145] Commission (EC), 'European Governance' (White Paper) COM(2001) 428 final ('Governance White Paper), Executive Summary 2. The Governance White Paper defines 'governance' as the rules, processes and behaviour that affect the way in which powers are exercised at European level, particularly as regards openness, participation, accountability, effectiveness and coherence. Ibid n1. See Hartnell, 'EUstitia: Institutionalising Justice in the European Union' (2002) 23 Nw J Int'l L&Bus 65, 128 pointing to the different meanings of 'governance'.

[146] *Governance White Paper* (n145) 14. Encouraging the involvement of civil society is equally topical today. See Commission(EU), 'Single Market Act – Twelve Levers to Boost Growth and Strengthen Confidence' (Communication) COM(2011) 206 final, 20. See Armstrong, 'Rediscovering Civil Society: the European Union and the White Paper on Governance'(2002) 8 ELJ 102 for a critical account of the notion of civil society in the Governance White Paper.

[147] See Article 10(3) and Article 11 TEU; BEUC, 'Response to the White Paper on Governance' (28/03/2002, BEUC/156/02) .

Ex ante participation is important for the purposes of this thesis that focuses on ex post participation in private enforcement procedures, since it allows the reaching of an interesting analogy. In the field of ex ante participation, new modes of governance have emerged (ranging from framework directives, the OMC and other soft law instruments)[148] complementing the traditional 'command and control' type of regulation adopted in the past.[149] Participation of the interested stakeholders in the legislative process constitutes one of the key characteristics of these emerging forms of governance in the EU.[150] The element of involvement as a desideratum is the same in both ex ante and ex post enforcement procedures and can contribute towards increased openness and accountability.

The second tendency concerns a discerned shift from the administrative-led enforcement of EU law to a model where affected actors should assume a more active role. Note the recent initiatives in the consumer field,[151] the environmental liability directive[152] and most importantly for the subject matter of this thesis the private enforcement initiative in the field of competition law.[153] The increased employment of litigious ex post enforcement

[148] For a criticism on these new forms of governance see Idema and Kelemen, 'New Modes of Governance, the Open Method of Co-ordination and other Fashionable Red Herring'(2006) 7 Perspectives on European Politics and Society 108.

[149] Cafaggi and Muir-Watt, ' Introduction' in Cafaggi and Muir-Watt (eds), *Making European Private Law: Governance Design* 7; De Burca and Scott, 'Introduction: New Governance, Law and Constitutionalism' in De Burca and Scott (eds), *Law and New Governance in the EU and US.*

[150] *De Burca and Scott* (n149) 3.

[151] Commission (EC), 'Green Paper on Consumer Collective Redress' (Green Paper) COM (2008) 794 final, 27 November 2008; EESC, 'Opinion on the Green Paper on Consumer Collective Redress' OJ [2010] C128/97.

[152] Council Directive 2004/35/EC of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage [2004] OJ L 143/56.

[153] *GP* (n3); *WP* (n3).

methods reveals a certain advent of the 'adversarial legalism' movement in the European continent.[154]

Adversarial legalism is identified as the dominant regulatory style in the US having the increased role of adversarial procedures in solving disputes as one of its main characteristics.[155] True, Member States' legal cultures cannot support the rise of litigation as is the case in the US.[156] By contrast, this does not detract from the fact that this tendency is indeed present and can assume an ancillary role, as the efforts to enhance access to justice, to grant a more active role to national judiciaries and to expand EU rights reveal.[157]This is even more so in the field of competition law after *Courage* and *Manfredi* and the changes to the enforcement system brought by Regulation 1/2003.

Promoting consumer damages claims for EU competition law can be located in the juncture between the two tendencies identified above. It brings the beneficial element of participation of interested stakeholders into a changing landscape of enforcement and can increase the legitimacy of competition policy.[158] Scharpf distinguishes between input and output legitimacy, the former reflecting authentic preferences of citizens and the latter catering for effective outcomes.[159] Consumer participation in private competition law

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[154] Kelemen, 'Americanisation of European Law? Adversarial Legalism à la européenne' (2008) 7 European Political Science 32 where the author examines whether the adversarial legalism approach can be transposed in the EU.

[155] Kagan, *Adversarial Legalism: the American Way of Law* 7-8.

[156] Kagan, 'American and European Ways of Law: Six Entrenched Differences' in Gessner and Nelken (eds), European Ways of Law: Towards a European Sociology of Law 41, 57.

[157] These three variables are identified by Kelemen as evidence of the advent of adversarial legalism in the EU, *Kelemen* (n117) 103.

[158] See Estella, *The EU Principle of Subsidiarity and its Critique* 37-53 on the concept of legitimacy.

[159] See Scharpf, 'Economic Integration, Democracy and the Welfare State' (1997) JEPP 18, 19. Scharpf places increased emphasis on output legitimacy. In the same vein see Menon and Weatherill, Legitimacy, Accountability, and Delegation in the European Union' in Arnull and Wincott (eds), *Accountability and Legitimacy in the European Union* 113. See also Wincott, 'The Governance White Paper, the Commission and the Search for Legitimacy in Arnull and Wincott (eds), *Accountability and Legitimacy in the European Union*

enforcement, in as much as it enhances effective enforcement of EU competition law, can account for better output legitimacy. At the same time, it improves input legitimacy since it provides an avenue for affected consumers to get involved in the enforcement of EU competition law.

One of the main challenges for the Union is to re-connect with and benefit the European citizens.[160] And even though there is a distinction between the 'consumer role' and the 'citizen role', with the latter wider in scope,[161] it is 'in their role as consumers that the EU can most directly connect to the daily lives of our citizens and demonstrate the benefits of the EU'.[162] European consumers, as market actors, enjoy market rights, whereas European citizens enjoy not only market rights but also political and social rights.[163] Consumer involvement in private competition law enforcement aims at protecting the market rights of consumers and, more specifically, rights derived from competition law. At the same time, though, it reinforces the element of citizen participation.[164]

379, 380 stating that 'legitimacy might be improved if the peoples of Europe were better served by and/or more fully involved in the Union'. On the contrary Craig underlines the importance of input legitimacy, as well. See *Craig* (n142) 39-40.

[160] Commission (EC), 'EU Consumer Policy Strategy 2007-2013' (Communication) COM(2007) 99 final, 2; Commission(EC), 'A Single Market for Citizens' (Communication) COM(2007) 60 final, 3.

[161] Hesselink, 'European Contract Law: A Matter of Consumer Protection, Citizenship or Justice?' in Grundmann(ed), *Constitutional Values and European Contract Law*241, 248, 262-264; On Union citizenship see Article 20-25 TFEU. On concepts of citizenship see Davies, *The European Consumer Citizen in Law and Policy* 78-87. On EU citizenship evolving from market citizenship see Maduro, 'Europe's Social Self: "The Sickness Unto Death" ' in Shaw(ed), Social Law and Policy in an Evolving European Union 325, 332-340. See also Everson, 'The Legacy of the Market Citizen' in Shaw and More (eds), *New Legal Dynamics of European Union* 73; Shuibhne, 'The Resilience of EU Market Citizenship' (2010) 47 CMLRev 1597.

[162] *EU Consumer Policy Strategy 2007-2013* (n160) 2; see also Commission(EC), 'Staff Working Document Accompanying the Report on Competition policy 2008' COM(2009)374 final, para 354.

[163] Van Gerven, *The European Union. A Polity of States and People* 200.

[164] This participation element can be seen as an aspect of the 'consumer citizen'. On this term see *Davies* (n161) 90.

Allowing consumers to get involved in the enforcement of competition law will potentially raise their trust in market forces.[165] This is even more important if one considers consumer protection model adopted in the EU. The emphasis is on market-oriented outcomes (trust in competition) accompanied with a certain reluctant adoption of consumer regulation.[166] So, in so far as the individual is ascribed a more responsible role,[167] the necessary tools should be put in place for this role to be effectively exercised.

This became even more important after the adoption of the LT and the symbolic shifting of the objective of undistorted competition from the first Treaty provisions to a protocol. Even if this will not change the application of EU competition law, it reveals a certain scepticism towards EU competition policy. So, maybe now (more than ever before) it is time for European citizens to realise the advantages derived from competition law enforcement. Arguably, the best way forward is to have the actual beneficiaries more involved in the enforcement process by devising the appropriate mechanisms enabling them to do so.

c. Proliferation of information – Contributing to consumer education and empowerment

In the consumer law field, increased attention is given at improving consumer education, which in turn will raise consumer confidence in shopping cross-border.[168] Consumers' role exerts a vital influence in any given market.[169] '...Just as competition is good for consumers,

[165] Van Rompuy, 'How to Preserve Trust in Anti-Trust' (EUbusiness,8 October 2009) <http://www.eubusiness.com/Members/bvrompuy/competition-day> accessed 28 January 2012.

[166]Cseres, *Competition Law and Consumer Protection* 3, 202.

[167] Arkenstette, 'Reorientation in Consumer Policy – Challenges and Prospects from the Perspective of Practical Consumer Advice Work'(2005) 28 JCP 361, 368.

[168] Commission (EC), 'Consumer Policy Strategy 2002-2006' (Communication) COM(2002) 208 final, OJ [2002] C137/02, [3.3.2.2.]; *EU Consumer Policy Strategy 2007-2013* (n160), 8,11; For a UK account see DTI, 'Extending Competitive Markets: Empowered Consumers, Successful Business' (June 2005) [5].

enhancing the power of consumer choice is good for competition'.[170] Indeed, the power of consumer choice can be improved through regulatory instruments under consumer protection law.[171] This section builds on the interplay between competition and consumer law and argues that more active consumer involvement in private competition law enforcement can in turn raise consumer awareness and improve the conscious exercise of consumer choice. It can, thus, be seen as an alternative form of information proliferation and consumer education, which in turn will increase literacy and consumer choice as a spur to competitiveness.

Information asymmetries constitute a frequently identified market failure on the demand side.[172] Consumers fail to exercise their right to choose according to their needs due to a lack of the necessary information. Thus, the provision of information is a common regulatory approach in the field of consumer law.[173] A further related question is how much information is actually enough, since recent studies suggest that the consumer cannot always process the information in an effective way, thus creating further market problems.[174] Getting consumers more actively involved in private competition law enforcement will result in an increased information flow without the need to adopt specific measures for information disclosure.

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169 Waterson, 'The Role of Consumers in Competition and Competition Policy'(2001) Warwick Economic Research Papers No 607 <http://www2.warwick.ac.uk/fac/soc/economics/research/workingpapers/publications/twerp607.pdf> accessed 28 January 2012.

170 Vickers, 'Healthy competition and its consumer wins' (2002) 12CPR 142, 146.

171 See to that end mandatory information disclosure, harmonised rules to protect consumers' health and safety; *Consumer Policy Strategy 2002-2006*, [2].

172 Cseres, 'What Has Competition Done for Consumers in Liberalised Markets?'(2008) 4 CompLRev <http://www.clasf.org/CompLRev/Issues/Vol4Iss2Art1Cseres.pdf> accessed 26 January 2012, 77.

173 Commission(EC), 'Proposal for a Directive of the European Parliament and of the Council on Consumer Rights'COM(2008) 614 final, 8 October 2008.

174 *Cseres* (n172) 91 with further references. Howells, 'The Potential and Limits of Consumer Empowerment by Information' (2005) 32 J L&Soc 349, 356-362.

Imagine the following situation; a consumer organisation *A* brings an action for damages against two retailers, *B* and *C* (both large toy outlets) following a competition authority's decision. *A* claims that because of the price-fixing agreement between *B* and *C* regarding the price of a popular item, consumers were damaged by *x*amount. The court rules in favour of *A*. This judgment (with the publicity that it would assumingly receive) could signal to consumers to engage in price comparisons. At the same time, it would allude to the possibility of getting involved in competition law enforcement. In turn, the availability of this participatory right could prompt consumers to responsibly process the available information and be more careful when exercising their right to choose.

Even if one ascribes to neoclassical economic theories of information which view information asymmetries and imperfect information as a market failure, potentially calling for state regulation[175] or to bounded rationality theories identifying additional problems in people's ability to process the relevant information,[176] this section's central proposition remains valid. A more involved and assertive consumer could potentially actively seek more information and in the event that the information is available be more careful in processing this information.

Effective enforcement and the involvement of the relevant actors can partially assume the role of information proliferation. It can also address the problem, identified by Wilhelmsson, of consumer education failing to deliver results to less privileged consumers especially if the power of the advertising industry is taken into account.[177] Here, the term information does not entail supplying detailed data (necessary for concluding contracts and/or

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[175] Grundmann, Kerber and Weatherill, 'Party Autonomy and the Role of Information in the Internal Market – An Overview' in Grundmann, Kerber and Weatherill (eds), *Party Autonomy and the Role of Information in the Internal Market* 3,12-16; Stigler, Economics of Information' (1961) 64 J Pol Econ 213.

[176] First developing 'bounded rationality' theory, see Simon, *Models of Man*.

[177] Wilhelmsson, 'The Informed Consumer v the Vulnerable Consumer in European Unfair Commercial Practices Law – A Comment' in Howells and others (eds), *The Yearbook of Consumer Law 2007* 211, 215.

choosing products or services) but rather raising awareness and prompting the consumer to be more responsible, to search for available options and to make use of the already available information. The informed consumer in this context is the aware, suspicious and assertive consumer, who actively seeks rather than passively waits for information. Devising the necessary procedural measures allowing for consumer damages actions in the competition law field and, following that, achieving successful judgments against infringing undertakings could lead towards a more assertive and active stance on the consumers' part.[178]

[178] See Commission(EU), 'Consumer Empowerment in the EU' (Staff Working Paper) SEC(2011) 469 final, [3] on consumer ecmpowerment depending on accessible means of redress. However, this document addresses consumer empowerment only as a consumer law matter.

IV. Conclusions

The analysis in chapter II discerned, first, the primary function that consumer claims in the field of competition law should serve, based on the CJEU's jurisprudence and the Commission policy initiative on private competition law enforcement. In identifying this primary function, it employed a backward-looking approach. To the extent that the Commission efforts were triggered by the CJEU's judgements, namely *Courage* and *Manfredi*, it examined first the CJEU's approach towards damages claims and their role in the field of competition law. These two judgments were further read in light of the jurisprudence on the effective enforcement of EU law and directly effective Treaty rights before national courts. The conclusion was that the CJEU favours the effective enforcement of EU competition law norms over the effective protection of individual rights.

Following this, the Commission approach towards private enforcement was addressed and it was questioned, whether this Commission approach was consistent with the relevant case law. Regrettably, this was the case until the issuance of its *WP*. In the *WP*, the Commission placed considerable emphasis on the compensatory rationale of damages actions departing from the CJEU's approach. The primary aim attributed by the Commission to damages actions is important, since it impacts on the form of the proposed measures. Procedural and remedial measures should be structured in accordance with the aim of the EU right to damages, as pronounced by the CJEU. On the contrary, if the Commission proposed measures do not conform to the CJEU's formulations a confusing message will be conveyed. As AG Tesauro noted, '*Member States' autonomy with regard to judicial remedies for the infringement of rights conferred by Community provisions is firmly tight to the result sought* *by Community law'*.[179] The same goes for the Commission's discretion with regard to proposed measures for the enforcement of EU rights emanating from directly effective Treaty provisions.

Then, the analysis moves on to develop the 'added value spectrum' of increased consumer involvement comprising legal, economic, social and political reasons reflecting to a large extent the complex nature of the European edifice. By drawing insights from different yet interrelated areas of law and policy, it develops five reasons supporting this thesis' main proposition calling for a more active consumer involvement in private competition law enforcement. This is desirable since: 1. it can potentially raise deterrence levels for antitrust violations; 2. it can bring some sort of compensation to affected consumers; 3. it is consistent with Commission rhetoric and can potentially affect the substantive application of competition law, thus aligning rhetoric with reality; 4. it can increase the legitimacy of EU competition policy; and 5. it can act as an information mechanism raising consumer awareness and empowerment.

These five reasons were grouped into two categories, the 'principal' and 'derivative' aims of consumer damages claims. Deterrence and compensation are the 'principle aims' whereas the rest constitute 'derivative aims'. Only if procedural measures are structured on the basis of deterrence can the very important derivative aims be achieved. Also the compensatory aim is not entirely rejected, but applied in a more pragmatic way compatible with the low value of consumer claims in the competition field.

[179] Joined Cases C-46/93 and 48/93 *Brasserie du Pecheur v Germany and R v Secretary of Transport ex part Factortame* [1996] ECR I-1029, Opinion of AG Tesauro AG, [47].

CHAPTER III

'STANDING' AND 'ACCESS TO EVIDENCE': OBSTACLES FOR 'GROUP A' AND 'GROUP B' CONSUMER CLAIMS

I. Introduction

The analysis so far has provided the theoretical background justifying increased consumer involvement in EU private competition law enforcement. It has depicted reluctance on the part of the Union institutions to endorse consumer interest and adopt a real consumer welfare standard in the substantive application of competition law, depicting a mismatch between policy pronouncements and actual practice. Given the complexities in changing the enforcement standard, more active consumer involvement in private competition law enforcement is seen as an alternative for bringing consumer interest to the fore in a way that can actually influence competition law and policy. Effective measures, based primarily on the deterrence principle, should be adopted in this field, since this would permit consumer involvement, bringing a number of additional tangible benefits.[1]

The analysis in *this chapter* undertakes a forward looking approach and develops the practical framework in order to enhance consumer involvement in private competition law enforcement. In order to do this, it first alludes to the intrinsic characteristics of consumer claims and discusses the important role of consumer organisations (see *section II*). This analysis elucidates the proposed categorisation of consumer claims in 'Group A' and 'Group B', based on their respective value (*section III)*. The value criterion is further related with the different obstacles encountered by different types of claims. The first category comprises claims of a certain amount that can be brought as individual claims (*Manfredi* litigation), though an aggregation mechanism would, in any event, facilitate the initiation of claims of this type ('Group A' consumer claims). Very low value consumer claims require different

[1] See chapter II on the 'added value spectrum' of increased consumer involvement.

treatment. Emphasis will be given to this second category. Notwithstanding the fact that it constitutes the main bulk of consumer claims in the competition field, effective measures promoting the multitude of low value consumer claims possess the potential to advance the ‘added value spectrum’ (‘Group B’ consumer claims).

Following the categorisation of consumer claims, the obstacles to private competition law enforcement are presented, and those common to both categories of claims are addressed; ‘standing’ and ‘access to evidence’ problems (see *sections IV-V*). In *chapter IV* the more acute problems encountered by ‘Group B’ consumer claims are examined.

II. Characteristics of Consumer Claims and the Role of Consumer Organisations

1. Introduction

Long before the debate on the private enforcement of competition law, the Commission alluded to the possibility of consumers seeking application of competition rules in national courts.[2] Consumer involvement in private competition law enforcement is defined by its subject matter. In other words, claims for damages flowing from a competition law violation include both those brought by individual consumers as well as bundled consumer claims brought by a representative party, most probably a consumer organisation. Both consumer and consumer organizations claims are discussed in this section. Consumer claims should be distinguished from customer and competitor claims in light of their distinct characteristics.[3] The following analysis addresses the intrinsic characteristics of consumer claims and the involvement of consumer organisations, and provides a further pragmatic argument in favour of adopting procedural measures advancing deterrence of competition law violations.

2. Characteristics of Consumer Claims

Consumers rarely raise competition law damages claims on their own. A competition law violation has an impact on a very large number of consumers. Individual consumers' damage is often too insignificant to act as an incentive for them to bring damages actions.[4] The low

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[2] Commission (EC), *Sixteenth Report on Competition Policy* (Brussels, Luxembourg 1987) < http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=CB4886060> accessed 29 January 2012, [11]; Commission (EC), *XXIIIrd Report on Competition Policy 1993* (Brussels, Luxembourg 1994) <http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=CM8294650> accessed 29 January 2012, [228].

[3] Peyer, 'Myths and Untold Stories – Private Antitrust Enforcement in Germany'(2010) UEA CCP Working Paper 10-12 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1672695> accessed 28 January 2012, 40-41, provides empirical data for the very limited consumer participation in Germany and compares it to the frequent involvement of customers and competitors. See Salop and White, 'Economic Analysis of Private Antitrust Litigation' (1986) 74 Geo L J 1001, 1005, for a US account.

[4] Commission (EC), 'Annex to the Green Paper, Damages actions for breach of the EC antitrust rules', (Staff Working Paper) SEC(2005) 1732, 19 December 2005 ('GP SWP'),[188]; Commission (EC), 'Staff Working

value of their claims does not justify the litigation costs, making damages claims too costly for consumers[5] and creating the so-called 'rational apathy' problem,[6] where injured individuals lack the incentive to claim an otherwise very large aggregate damage.[7] In addition, it is unlikely that consumers will identify a competition law infringement given their often covert nature (the 'information inadequacy' problem), [8] as well as actual consumer ignorance concerning competition law matters.[9]

The 'rational apathy' problem associated with the low value of consumer claims can be addressed through effective collective action mechanisms for the aggregation of these claims. Collective actions are not only a procedural device that permit the bundling of small, scattered claims so as to create economies of scale in litigation;[10] they can also be viewed as a vehicle through which consumers are able to enforce their substantive rights and secure

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Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules' SEC (2008) 404, 2 April 2008 ('WP SWP'), [39].

[5] Cf Deutsch, 'Consumer Class Actions: Are They a Solution for Enforcing Consumer Rights? The Israeli model' (2004) 27 JCP 179, 180; Landes and Posner, 'The Private Enforcement of Law' (1975) 4 J Legal Stud 1, 33.

[6] Behavioural economics challenge the rationality assumption. See chapter I, text to n15 and references therein. However, in the case of the 'rational apathy' problem, the rationality assumption seems valid since the amounts of consumer damages will usually be so low that not even out of grunge will affected consumers raise a claim.

[7] Schaefer, 'The Bundling of Similar Interests in Litigation. The Incentives for Class Actions and Legal Actions taken by Associations'(2000) 9 Eur J L & Econ 183, 185; Van den Bergh and Visscher, 'The preventive function of collective actions for damages in consumer law' (2008)1 Erasmus LRev 5, 14.

[8] *Van den Bergh and Visscher* (n7) 5, 13; Renda, Peysner, Riley, Rodger and others, 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios' (Report for the European Commission) (December 2007) <http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf> accessed 29 January 2012 ('*External Impact Study*'), 28.

[9] Consumers' unfamiliarity with competition law issues is evident in two recent studies concerning criminal sanctions against cartels (one in the UK and one in Greece) in which the vast majority of consumers did not perceive cartel conduct as similar to theft. See Stephan, 'Survey of Public Attitudes to Price Fixing and Cartel Enforcement in Britain' (2008) 5 CompLRev 123,136-137; Brisimi and Ioannidou, 'Criminalising Cartels in Greece: A Tale of Hasty Developments and Shaky Grounds' (2011) 34 WC 157.

[10] *Van den Bergh and Visscher* (n7) 18; Eisenberg and Miller, 'The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues' (2004) NYU Law and Economics Research Paper No 04/004 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=528146> accessed 29 January 2012, 1.

compensation for competition law violations. Thus, the availability of collective actions within a legal system dramatically changes the balance of power between legal 'haves' and 'have nots'.[11] Collective actions can also assume an important regulatory role, in that they deter competition law violations.[12]

Instances of individual consumer claims cannot be excluded, although these would appear to be rare due to the intrinsic characteristics of consumer claims. The 'Italian motor-vehicle insurance companies cartel' provides an example of individual consumer claims for competition law violations since it gave rise to a number of consumer actions brought by individual consumers.[13] It prompted *Manfredi*,[14] in which the CJEU had the second opportunity (after *Courage*)[15] to rule on questions of private enforcement in the context of competition law. In this case the Italian small claims court awarded Mr Manfredi damages (890 euros approximately) and legal costs (500 euros approximately),[16] indicating that, in

[11] Hensler, 'The Globalisation of Class Actions: An Overview' (March 2009) 622 The ANNALS of the American Academy of Political and Social Science, The Globalisation of Class Actions Contents 7, 8 with further references to Galanter, 'Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9 Law and Soc'y Rev 95.

[12] Polverino, 'A Class Action Model for Antitrust Damages Litigation in the European Union' (2006) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=927001> accessed 29 January 2012, 9.

[13] *External Impact Study* (n8) 40; Incardona and Poncibo, 'The Corte di Cassazione takes "Courage". A recent ruling open limited rights for consumers in competition cases' (2005) 26 ECLR 445, 446-447. Carpagnano, 'Private Enforcement of Competition Law arrives in Italy: Analysis of the Judgement of the European Court of Justice in Joined Cases C-295-289/04 Manfredi' (2006) 3 CompLRev <http://www.clasf.org/CompLRev/Issues/Vol3Issue1Art3Carpagnano.pdf> accessed 29 January 2012, 47, 53-55. Note that,at the time, consumers in Italy were denied standing, an unfortunate situation now reversed by the Unipol judgment of the Italian Supreme Court (Corte di Cassazione, Decision No.2207/2005); *Incardona and Poncibo* (ibid).

[14] Joined Cases C-295/04 to 298/04 *Vincenzo Manfredi and Others v Lloyd Adriatico Assicurazioni SpA and Others* [2006] ECR I-6619 ('Manfredi').

[15] Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2001] ECR I-6297 ('Courage').

[16] Nebbia, '...So What Happened to Mr Manfredi? The Italian Decision Following the Ruling of the European Court of Justice' (2007) 28 ECLR 591 with further reference to Sentenza del Giudice di Pace di Bitonto No.172/2003, Manfredi c Lloyd Adriatico; see Oxera, 'Quantifying Antitrust Damages: Towards Non-binding Guidance for Courts' (December 2009), Study prepared for the European Commission < http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf> accessed 27 January 2012, 94.

this case, the amount of individual consumer damage was high enough so as to incentivise consumers to engage in litigation. The *European Small Claims Procedure*[17] and *Rules on Legal Aid*, [18] although not only applicable for consumer claims, can be listed as tools encouraging individual claims with a cross-border element. Both share the common aim of minimizing costs, thereby increasing access to justice in cross-border cases.[19]

3. Role of Consumer Organisations

A vast array of collective actions exists in individual Member States.[20] Chapter IV deals with collective actions in more detail. What is important to note for the purposes of this chapter is one thing that these national collective action models usually have in common; they all attribute an important role to the involvement of consumer organisations. The involvement of consumer organisations in the litigation process as intermediate actors contributes towards overcoming the rational apathy and information asymmetry problem of individual consumers. This has been acknowledged by the Commission in its proposal on representative actions which emphasizes the role of consumer organizations.[21] Consumer organization involvement on behalf of consumers offers a pragmatic alternative to individual consumer claims that would not otherwise have been brought in light of their minimal value.

However, consumer organisations should not be viewed as a panacea.[22] First, both the Commission and consumer organisations themselves have recognized that consumer

[17] Council Regulation (EC) 861/2007 establishing a European Small Claims Procedure [2007] OJ L199/1.

[18] Council Directive 2002/8/EC of 27 January 2003 to Improve Access to Justice in Cross-border Disputes by Establishing Minimum Common Rules Relating to Legal Aid for Such Disputes [2003] OJ L 26/41.

[19] *European Small Claims Procedure* (n17) Article 1; *Legal Aid Directive* (n18) Article 1.

[20] For an overview see Hodges, *The Reform of Class and Representative Actions in European Legal Systems*; Fairgrieve and Howells, 'Collective Redress Procedures – European Debates' (2009) 58 ICLQ 379, 383.

[21] *WP SWP* (n4), [49-50]; *GP SWP*(n4), [198-200].

[22] See Epstein, 'Representation of Consumer Interest by Consumer Associations – Salvation for the Masses?' (2007) 3 CompLRev <http://www.clasf.org/CompLRev/Issues/Vol3Issue2Art3DayagiEpstein.pdf> accessed 26 January 2012 209, 222-236, for a concise overview of impediments facing consumer organizations.

organisations in Europe are under-resourced bodies.[23] Second, empirical research in the field of private enforcement of consumer claims has revealed limited involvement of consumer organisations in litigation.[24] There is a record of consumer organisation involvement in raising competition law claims only in the UK, France, Spain and Portugal and, even in these cases, the relevant involvement was, in the majority of cases, unsuccessful.[25]

Another example of inadequate involvement of consumer organisations can be drawn from the Injunctions Directive,[26] which has rarely been used in practice.[27] This can be attributed to consumer organisations' lack of funding and expertise.[28] This procedure does not apply to competition law violations,[29] but, is, rather, indicative of the consumer

[23] Commission (EC), *XXXIInd Report on Competition Policy* (2002) SEC(2003) 467 final, para 311; BEUC, 'Response to the White Paper' <http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/beuc_en.pdf> accessed 29 January 2012, 11-12.

[24] However, there may be more cases since no official national reports exist on this point. The data here are based on Waelbroeck, Slater and Even-Shoshan, 'Study on the conditions of claims for damages in case of infringement of EC competition rules' (Comparative Report) ('Ashurst Study') (31 August 2004) < http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf> accessed 28 January 2012; *External Impact Study* (n8); National Reports submitted for the project 'Globalisation of Class Action' undertaken by Stanford Law School and the Oxford Centre of Socio-Legal Studies available at http://www.law.stanford.edu/library/globalclassaction/reports.html#eu accessed 29 January 2012; EU Competition Policy Reports (1971-2009) <http://ec.europa.eu/competition/publications/annual_report/index.html> accessed 29 January 2012 ; Civic Consulting, 'Evaluation of the Effectiveness and Efficiency of Collective Redress Mechanisms in the European Union' (26 August 2008) (Report prepared for DG SANCO) ('Civic Consulting Study') and also National Reports Submitted under this project ('Civic Consulting National Reports') <http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm> accessed 29 January 2012. For the UK situation see OFT, 'Private actions in competition law: effective redress for consumers and business' (Recommendations) (OFT 916resp, November 2007) < http://www.oft.gov.uk/shared_oft/reports/comp_policy/oft916resp.pdf > accessed 28 January 2012 ('OFT 916resp') [2.4].

[25] Maybe with the exeption of Portugal. For more details see chapter IV, text to n115-152.

[26] Council Directive 98/27/EC of 19 May 1998 on injunctions for the protection of consumers' interests [1998] OJ l66/51 ('Injunctions Directive'); Council Directive 2009/22/EC of 23 April 2009 on injunctions for the protection of consumers' interests (codified version) [2009] OJ L110/30.

[27] Commission (EC), 'Report concerning the application of Directive 98/27/EC of the European Parliament and of the Council on Injunctions for the Protection of Consumers' Interest' COM(2008) 756 final [13], [32].

[28] Ibid, [18], [21]; Cafaggi and Micklitz, 'Administrative and Judicial Enforcement in Consumer Protection: The Way Forward' (2008) EUI Working Papers Law 2008/29 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1317342> accessed 29 January 2012, 7, 18.

organisations' capacity to act as agents to the consumer interest. This problem might also be exacerbated in the context of competition law; if consumer organisations are reluctant to get involved in 'core' consumer law problems, they will be even more reluctant to engage in the enforcement of competition law. It is evident from the enforcement record to date that consumer organisations are only peripheral players in the competition enforcement field, calling for the adoption of specific procedural measures.

Third, the issue of the representativeness of consumer organisations needs to be addressed. This is related to the issue of whether they are allowed to raise a damage claim only on behalf of their affected members or on behalf of all consumers affected, irrespective of whether they are members of the respective organisation. If the policy makers opt for the latter option the necessary safeguards of adequate representativeness need to be devised. [30]

[29] According to Article 1, the Injunctions Directive (n26) exclusively applies in case of violation of the Directives included in the Annex I.

[30] For the proposal advanced in this thesis see chapter IV, text to n172-174.

III. A Proposed Categorisation of Consumer Claims

1. Introduction

A categorisation of consumer damages claims is presented in this section. A distinction is drawn between claims of certain value that can be brought either individually or through an aggregation mechanism ('Group A' consumer claims) and claims that are of such low value that they can only be brought collectively ('Group B' consumer claims).[31] In the case of 'Group A' consumer claims, the aggregation mechanism performs a different function than with 'Group B' consumer claims. In the case of 'Group A' claims, it merely facilitates individual claims rather than permitting litigation that would not, in any case, be brought without it. However, for 'Group B' consumer claims, which are claims in which the judicial costs exceed the value of the claim, the aggregation mechanism constitutes the only available option.

Consumer damages claims are grouped based on their respective value and it is argued that the obstacles possibly encountered and the aims pursued by each differ in certain respects. In the case of 'Group B' consumer claims, an aggregation mechanism is indispensable for achieving access to justice. An aggregation mechanism can be functional, only if it structured according to the deterrence principle. As it will be further explained in chapter IV, structuring mechanisms primarily on the deterrence principle, does not

[31] See Coffee Jr, 'The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action' (1987) 54 U Chi L Rev 877, 904-906 on a similar distinction. Coffee also identifies a third 'Type C class action' category, comprised of both marketable and unmarketable claims. See also (for a similar categorisation of claims in general and not just consumer claims) Redish, Julian and Zyontz, 'Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis' (2010) 62 Fla L Rev 617, 618 fn1. The distinction between Group A and Group B claims also resembles the distinction between negative expected value claims (NEV) and positive expected value claims (PEV). See Silver, ' "We are scared to death" : Class Certification and Blackmail' (2003) 78 NYU L Rev 1357, 1371. The distinction proposed herein is different in the sense that 'Group B' consumer claims are NEV claims, but Group A claims are not PEV claims, since the PEV claims category is comprised of large claims; 'Group A' claims should be treated as a separate category, in between PEV and NEV claims

necessarily disregard compensation to indivisual consumers, a laudable obejective that can still be pursued to a certain extent.[32]

2. 'Group A' and 'Group B' consumer claims

Distinguishing between 'Group A' and 'Group B' consumer claims on a European-wide basis is particularly challenging given that the costs of bringing an individual claim differ in EU Member States. A relevant study conducted for DG SANCO is employed in formulating a general rule of thumb.[33] Member States' national reporters were asked to estimate the threshold for claims (in Euro) under which a rational consumer would refrain from seeking individual redress through ordinary court procedures. The answers provided varied widely and depicted diversity in consumer willingness to bring individual claims in different Member States.[34] Despite individual differences they do display some common trends. These findings can be relied upon to draw conclusions on a common EU denominator regarding the suggested value of consumer claims falling under the 'Group B' category.

The lowest threshold was estimated at between €50 and €250 and was provided in Germany. However, it seems that, in general, consumers would be reluctant to commence procedures even if their claim amounts to some hundred Euros or more. The recent Commission Staff Working Paper on Consumer Empowerment supports this statement.[35] Based on a survey on 55,000 consumers from the EU, Iceland and Norway, the Commission concluded that the threshold for losses for which consumers are willing to go to court is

[32] See chapter IV, text to n42-58.

[33] See *Civic Consulting Study* (n24).

[34] See *Civic Consulting National Reports* (n24), question [1.7.1]. These reports are specific to consumer law but are relevant here in as much an argument can be made regarding the value of the claim.

[35] Commission(EU), 'Consumer Empowerment in the EU' (Staff Working Paper) SEC(2011) 469 final.

€1,000.[36] In addition, the complexity of competition claims also influences consumer willingness to undertake competition litigation since this directly impacts on their chances of success.[37]

In the case of 'Group B' consumer claims the legal costs in the respective jurisdiction exceed the value of the claim. Since legal costs vary widely in different Member States, 'Group B' may be wider or narrower depending on these costs in the respective jurisdiction and no rigid limit can be put forward. However, reaching consensus on the definition of 'Group B' consumer claims is very important. The €2,000 threshold in the Small Claims Regulation is instructive to that regard;[38] €2,000 could serve as the maximum value for 'Group B' consumer claims. 'Group B' consumer claims should comprise claims of lower value, but agreeing on the exact value of those claims seems very difficult in light of the existing diversity of regulations for legal costs in different Member States. However, given the complexity of competition claims it seems unlikely for consumers to bring claims of some hundred Euros and, in any case, consumer damage flowing from a competition law violation would, in the majority of cases, be lower than this threshold.

[36] Ibid, [5], [11]. According to the same survey, the threshold is €500 for recourse to ADR mechanisms. However, the *Consumer Empowerment SWP* concerns only consumer damages flowing from consumer law violations. An argument can only be made for competition law violations in regard to the threshold. ADR procedures are not suitable for consumer damage flowing from competition law violations. See chapter IV text to n29 below.

[37] The probability of winning, the trial costs and the relationship between the expected benefits and costs are factors that affect an individual's decision to litigate. See Shavell, *Foundations of Economic Analysis of Law* 390; Cabrillo and Fitzpatrick, *The Economics of Courts and Litigation* 112.

[38] *European Small Claims Procedure* (n17), Article 2(1). See Tzakas, 'Effective Collective Redress in Antitrust and Consumer Protection Matters: A Panacea or a Chimera?'(2011) 48 CMLRev 1125, 1140. Kocher, 'Collective Rights and Collective Goods: Enforcement as Collective Interest' in Steele and Van Boom, *Mass Justice: Challenges of Representation and Distribution* 118, 129-130. See also EP, Resolution of 2 February 2012 on 'Towards a Coherent European Approach to Collective Redress' (2011/2089(INI)) [18] referring to this threshold but on a different context.

3. Importance of the Group A *v* Group B distinction

Obstacles for private damages actions, as identified by the Commission in its effort to increase private enforcement, encompass a wide range of issues, ranging from substantive to procedural. They cover, amongst other points: 1) indirect purchasers' standing, 2) the availability of the passing on defence, 3) access to evidence, 4) collective action mechanisms, 5) costs of actions,[39] which appear to be particularly severe for minor consumer claims. These obstacles are likely to be encountered in every consumer claim with varying degrees of severity depending on the amount of the claim and on whether the claim is of the stand alone or follow-on type.

Essentially 'Group A' claims resemble customers' and competitors' claims, since, technically, they are of a certain amount permitting them to be brought as individual claims. They differ in some aspects; first, consumer claims of this kind would still be of a low value, certainly lower than customers' and competitors' claims. Second, consumers are, by definition, the weak party whereas customers and competitors can be of equal, or even stronger, economic power than the defendants. The formulated remedial and procedural measures should, therefore, allow for overcoming this situation of unequal economic power and provide adequate incentives. Third, consumers are more likely than other plaintiffs to be indirect purchasers. Therefore, clarifying indirect purchaser standing could primarily be beneficial for consumer damages claims.

'Group B' consumer claims can only be brought collectively, so these require the adoption of more aggressive collective action mechanisms. Chapter IV addresses this issue. However, since 'Group A' claims are different from other competition claims brought by customers or competitors, they need to be encouraged by specific procedural measures as

[39] *WP SWP* (n4), [7-11]. The OFT has identified the same obstacles in the UK regarding consumer and SMEs claims; see OFT 916, 'Private Actions in Competition Law: Effective Redress For Consumers and Businesses' (Discussion Paper, April 2007) , [1.2], [2.12], [3.1-3.10].

well. The next sections deal with indirect purchaser standing and access to evidence, since this requires a common approach for both categories of consumer claims, before moving on to chapter IV to discuss the issue of collective actions for ‘Group B’ consumer claims.

IV. Consumer Standing and Passing on

1. Introduction

The analysis in this section deals with the issue of consumer standing to raise competition law claims, the standing of indirect purchasers, as consumers often will be, and the directly linked issue of the passing on defence. The issue of consumer standing is related to the question as to whether consumers enjoy a right to damages under competition law and whether they can raise competition law claims. Indirect purchaser standing is also relevant, since consumers will often fall under the indirect purchaser category. Passing on defence is addressed as it relates to the issue of indirect purchaser standing.

In damages actions, passing on can be invoked by the defendant arguing that the claimant is not entitled to compensation, as the overcharge[40] has been passed on to customers further down the supply chain and, therefore, no damage was sustained (defensive passing on). If the indirect purchaser was the one harmed by the anti-competitive conduct, his standing to sue the infringer should be recognised (offensive passing on).

Depending on the industry, the supply chain may have many different levels before the product reaches the final consumer. In this case, different intermediate producers qualify as indirect purchasers and can potentially bring damages actions against the infringer.[41] However, consumer claims are distinguished by the fact that the passing on defence cannot be raised against them, since consumers are last in the supply chain, and so, by definition, cannot pass on the overcharge any further. In this case the defendant would argue that consumers have not sustained any damage, since this has been absorbed further up the supply chain, or may attack consumer claims by reason of remoteness.

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[40] Defined as the difference between the competitive price and the price actually paid after the competition law violation.

[41] *Oxera Study* (n16), [2.3] for an illustrative presentation of the parties who are potentially harmed.

This section first addresses the Court's stance towards consumer standing and passing on. Then, the Commission proposal on the issue of passing on is presented and assessed in light of the US experience, EU jurisprudence and the Member States' practice, in order to determine whether this proposal will, in fact, facilitate consumer claims.

2. Passing on: the Court's perspective

a. Consumer Standing

Consumer standing to bring competition law claims is not only relevant to the question of allowing indirect purchaser standing but also to the broader matter of principle as to whether consumers, irrespective of their situation as direct or indirect purchasers, can act as claimants under competition law. This is because, in some Member States, claimants have to fall under the protective scope of competition law in order to bring damages claims.[42] In Italy, consumers were seen as falling outside the protective scope of competition law and were, therefore, excluded from bringing competition law claims.[43]

Essentially, the issue of standing has been resolved by the CJEU.[44] Following *Courage* and *Manfredi*, the controversy as to whether consumers enjoy a right to damages under competition law, and whether they have standing to raise a competition law claim, has been resolved. According to the CJEU in *Courage* any individual can rely on a breach of

[42] For example, in Germany, prior to the last competition law amendment (new Article 33(3) GWB), only persons falling within the protective scope of competition law could bring damages claims. See Boege and Ost, 'Up and Running, or is it? Private Enforcement – the Situation in Germany and Policy Perspectives' (2006)27 ECLR 197, 199; see also Komninos, *EC Private Antitrust Enforcement* 189 with references to relevant German case-law.

[43] See *Nebbia* (n16) 592 with reference to *Unipol Decision No 2207/2005* reversing this approach. See also *Incardona and Poncibo* (n13) 445; Tesauro and Ruggiero, 'Private Damage Actions Related to European Competition Law in Italy'(2010) JECLAP 514, 517.

[44] See *WP SWP* (n4), [33-37]; Cf *Boege and Ost* (n42) 201 in which they argue that, as *Courage* did not concern an indirect purchasers' claim, it did not provide a definite answer to the question of indirect purchasers' standing. For a thorough discussion, and an argument regarding the unresolved nature of this issue, calling for an urgent resolution at Union level, see Milutinović, *The 'Right to Damages' under EU Competition Law* ch 10. Milutinovic points to the same wording of Section 4 Clayton act regarding the 'any individual' formulation and the different solution formulated by the SC. Ibid 218.

competition provisions. AG Mischo, in this case, was even more specific by stating that the parties that can primarily benefit from such a protection are competitors and consumers.[45]

In *Manfredi* the CJEU went a step further by elaborating on the conditions of the right to damages; these being violations of competition provisions, harm and causation between the violation, and the respective harm. Thus, if there is a violation of competition provisions, any individual, irrespective of being a direct or indirect purchaser that can prove his/her harm and a causal connection between the harm and the competition law violations has a right to raise a damages claim.[46] *Manfredi* is important for consumers' right to damages for competition law violations given that the preliminary ruling came as a result of consumer claims raised before the Italian courts.

The fact that the CJEU clarified the issue of standing has, in itself, had a positive impact on consumer damages claims, irrespective of consumers being direct or indirect purchasers. Of course, in claims brought by consumers as indirect purchasers, remoteness issues could intensify the problem even further.[47]

b. Passing on defence

No similar acquis communautaire exists on the issue of passing on defence in competition law. However, as the *GP SWP* suggests, some insights can be drawn from the CJEU's unjust enrichment cases on non-contractual liability of EU institutions and on Member States' liability for illegally levied taxes.[48] This line of case law could potentially shed some light on

[45] *Courage* (n15), Opinion of AG Mischo, [38]. On *Courage* see chapter II, n7-n26.

[46] On *Manfredi* see chapter II, n27-32.

[47] Moellers and Heinemann, *The Enforcement of Competition Law in Europe* 578, 579*; Ashurst study* (n24) 10, 78, 110.

[48] *GP SWP* (n4), [165]. See reference to this case law in *Courage* (n15), [30]; *Manfredi* (n14), [94].

the passing on defence problem in competition law cases. However, the additional complexities inherent in the latter cases should be borne in mind.[49]

In *San Giorgio*, the CJEU held that a Member State should, in principle, repay the charges levied contrary to EU law.[50] While it is not contrary to EU law to resist the repayment of such charges, when this would result in the unjust enrichment of the recipients,[51] EU law precludes any presumption or rule of evidence that shifts the burden of proving that the charges have not been passed on to the trader concerned.[52]

In *Comateb* the CJEU accepted that:

> (...)the trader may have suffered damage as a result of the very fact that he has passed on the charge(...)because the increase in the price of the product brought about by passing on the charge has led to a decrease in sales...In such circumstances the trader may justly claim that, although the charge has been passed on to the purchaser, the inclusion of that charge in the cost price has, by increasing the price of the goods and reducing sales, caused him damage, which excludes, in whole or in part, any unjust enrichment...[53]

In *Weber Wine*'s the CJEU maintained that:

> (...)as that exception [from the obligation to make a repayment] is a restriction on a subjective right derived from the Community legal order, it must be interpreted restrictively, taking account in particular of the fact that passing on a charge to the consumer does not necessarily neutralise the economic effects of the tax on the taxable person[54]

and concluded that:

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[49] *GP SWP* (n4),[167].

[50] Case 199/82 *Administrazione delle Finanze dello Stato v SpA San Giorgio* [1983] ECR 3595, [12]; Cf Joined Cases C-441/98 and 442/98 *Kapniki Mikhailidis AE v Idryma Koinonikon Asfaliseon* [2000] ECR I-7145, [30].

[51] *San Giorgio* (n50), [13]; *Kapniki Mikhailidis* (n50), [31]; Case 68/79 *Hans Just v Danish Ministry for Fiscal Affairs* [1980] ECR 501, [26].

[52] *San Giorgio* (n50), [14]; *Kapniki Mikhailidis* (n50), [36-37], [42].

[53] Joined Cases C-192/95 to 218/95 Societe *Comateb and others v Directeur General des Douanes et Droits Indirects* [1997] ECR I-165, [31-32].

[54] Case C-147/01 *Weber's Wine World Handels-GmbH v Abgabenberufungskommission Wien* [2003] ECR I-11365, [95].

> the rules of Community law(...)are to be interpreted as meaning that they preclude national rules which refuse(...)repayment of a charge incompatible with Community law on the sole ground that the charge was passed on to third parties, without requiring that the degree of unjust enrichment that repayment of the charge would entail for the trader be established.[55]

The following conclusions may be drawn from the above case law that indicate the possible approach of the CJEU towards the passing on problem in the context of competition law. According to the CJEU, the passing on of charges does not necessarily amount to unjust enrichment. Passing on can be viewed as a necessary, but not the sole, condition for unjust enrichment. Thus, the CJEU accepts the passing on defence as long as the passing on of the overcharge has not resulted in any reduction in sales.

The Commission, after reviewing the relevant case law, concluded that no passing on defence existed as a matter of EU law. Only an unjust enrichment defence, which requires proof of passing on and proof of no reduction in sales or other reduction to income, exists.[56] Now, if the gist of this case law is transcribed into the context of competition law, it means that, in order for the claimant not to be unjustly enriched, the defendant would have to prove that the overcharge has been passed further down the production chain and no other reduction in income (due to, for example, a reduction in sales) was sustained. Proving passing on as the first condition of the unjust enrichment defence seems to suggest that excluding passing on would be contrary to EU law, but the CJEU has yet to rule on this issue. On the other hand, excluding passing on is definitely not compatible with the compensatory legal tradition

[55] Ibid [102].

[56] *GP SWP* (n4), [173]; See Van Dijk and Verboven, 'Cartel Damages Claims and the Passing on Defence'(2007) CEPR Discussion Paper No. DP6329 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1136655> accessed 30 January 2012, 5 where they call this unjust enrichment defence an adjusted version of the passing on defence, which also takes into account the 'output effect' following the passing on. They attempt to show how this 'adjusted passing on defence' operates in a variety of competitive circumstances.

prevailing in the majority of Member States.[57] In fact, the issue of passing on has been explicitly accepted by some national courts in Europe.[58]

3. Proposals on passing on: the Commission approach

The Commission has proposed, in line with the Court's case law the recognition of standing to any individual, which includes indirect purchasers.[59] A different proposal would essentially run counter to EU law.

Apart from recognising indirect purchaser standing, the Commission took due account of the difficulties faced by indirect purchasers in quantifying their harm. Notwithstanding strong opposition from businesses,[60] the Commission chose to alleviate the indirect purchasers' burden of proof by proposing the adoption of a rebuttable presumption regarding

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[57] See chapter II, text to n93.

[58] In regard to the complex situation in Germany see Reich, 'The 'Courage' doctrine: Encouraging or Discouraging Violations for Antitrust Injuries?' (2005) 42 CMLRev 35, 42; Wurmnest, 'A New Era for Private Antitrust Litigation in Germany? A Critical Appraisal of the Modernized Law against Restraints of Competition' (2005) 6 German LJ 1173,1184; Cook, 'Private Enforcement of EU Competition Law in Member State Courts: Experience to Date and the Path Ahead' (2008) 4 CPI <https://www.competitionpolicyinternational.com/private-enforcement-of-eu-competition-law-in-member-state-courts-experience-to-date-and-the-path-ahead/> accessed 30 January 2012, 3, 59. The recent judgment of the German Supreme Court of 28 June 2011, KZR 75/10 that allowed both the standing of indirect purchasers and the passing on defence ended the previous controversy on these issues. See Baker&McKenzie, 'Liability for Damages to Indirect Purchasers and Passing-On Defence Confirmed by Supreme Court (Newsletter, July 2011) <http://www.bakermckenzie.com/files/Uploads/Documents/nl_germany_scdamageclaims_jul11.pdf> accessed 30 January 2012, for a brief case note. See *External Impact Study* (n8) fn 680 regarding the situation in Italy; see *Oxera Study* (n16) 119-120; see Utzschneider and Parmentier, 'The New Frontiers of Antitrust: Damages Actions by Indirect Purchasers and the Passing-On Defence in France and California' (2011) 32 ECLR 266, 267-268 for the situation in France; see *Devenish Nutrition Ltd v Sanofi-Aventis SA (France)* [2008] EWCA Civ 1086, [2009] 3 All ER 27 for the situation in the UK; Murray, 'Collective cartel damages claims – Practical financial considerations for businesses bringing an action in the English High Court' (2008)7 (12) CL I 14 where he draws attention to *Devenish Nutrition* where the Court of Appeal stated that the English court will compensate losses suffered, wherever they fall.

[59] Commission (EC), 'Damages actions for breach of the EC antitrust rules' (White Paper) COM (2008) 165 final ('WP'), [2.1]; Commission(EC), 'Proposal for a Council Directive governing actions for damages for infringements of Article 81 and 82 of the Treaty' Draft Damages Directive (Document withdrawn before publication – on file with the author), Article 4(1); On the initial four proposals put forward see Commission (EC), 'Damages actions for breach of the EC antitrust rules' (Green Paper) COM (2005) 672 final ('GP'), [2.4].

[60] EuroCommerce, ' White Paper on Damages actions for breach of EC antitrust rules – EuroCommerce Response' (July 2008) 7-8; SEV (Hellenic Federation of Enterprises), 'Comments on the WP' 2 ; AmCham, 'Comments on the European Commission's White Paper on damages actions for breach of the EC antitrust rules ' (7 July 2008) 7; BDI, 'Position – Commission white paper on damages actions for breach of the EC antitrust rules' 19-10.

the passing on of overcharges to the level of the indirect purchasers.[61] Once the indirect purchaser proves the overcharge, it is assumed that this is being passed on to his/her level shifting the burden on to the defendant to prove that this is not the case. As the Commission recognises, the presumption of the overcharge being passed on is an important, although very limited, alleviation of the claimant's burden of proof.[62] The claimant would still have to prove the competition law infringement, its harm and causation.[63] It can, however, provide an impetus to consumer damages claims, since it reduces the claimant's burden of proof to some, albeit limited, extent.

This proposal has been criticised, as it requires the defendant to prove events beyond his/her control, and also because it could potentially result in multiple liability for the defendant.[64] The Commission evades this criticism by acknowledging that adducing proof of pass on is equally difficult for both the claimant and the defendant. However, the Commission made a comparison between 'multiple liability of the defendant' and 'unjust enrichment of the claimant – indirect purchaser' scenario, and found the former to be preferable. This is mainly because the latter scenario was more likely than the former. The Commission stated though that even if the two situations were comparable, it would have still opted for the rebuttable presumption of pass on since it is fairer for the infringer to bear the risks of its illegal act.[65] The proposal of the rebuttable presumption offers yet another

[61] *WP* (n59) [2.6]; *Draft Damages Directive* (n59) Article 11 (2).

[62] See Cumming and Freudenthal, *Civil Procedure in EU Competition Cases before the English and Dutch Courts* 107-108, who draw a distinction between the evidential burden of proof of having suffered damage which falls on the indirect purchaser, and the legal burden of disproving this damage, which falls on the defendant.

[63] *WP SWP* (n4), [208], [215], [220].

[64] O'Donoghue, 'Europe's Long March Towards Antitrust Damages Actions' (April 2011) CPI Antitrust Chronicle <https://www.competitionpolicyinternational.com/europe-s-long-march-towards-antitrust-damages-actions/> accessed 30 January 2012, 2, 6; Kortmann and Swaak, 'The EC White Paper on Damages Actions: Why the Member States are (right to be) less than enthusiastic' (2009) 30 ECLR 340, 345-346.

[65] *WP SWP* (n4), [218].

example of the deterrent principle as the main guiding principle for the Commission's efforts in private enforcement.

The Commission, driven by unjust enrichment considerations, opted for the recognition of passing on defence, which is an issue related to proving the claimants' respective harm. Defendants could invoke the passing on defence, but the standard of proof would not be lower than that imposed on the claimant to prove the damage.[66] Otherwise it would amount to a reversal of the burden of proof, which runs contrary to the principle of full and effective compensation.[67] It also runs contrary to the deterrence principle, as it would make it easier for the defendants to escape liability.

To sum up, the Commission recognised both defensive and offensive passing on with the reversal of the burden of proof in favour of indirect purchasers. This revealed an attempt to reconcile different approaches towards private enforcement in the EU. While seeking to remain loyal to the proclaimed compensatory principle, the reversal of the burden of proof does not seem to be consistent with this principle. In the next sections, which review the US approach, it is questioned as to whether the Commission could have opted for a more progressive stance in order to facilitate indirect consumer claims. One should be aware, though, of the institutional framework under which the Commission is operating. Thus, it would be very difficult to obtain political support for proposals overtly departing from the compensatory nature of damages prevailing in the majority of Member States.

4. Commission approach in light of the US experience

[66] *WP* (n59), [2.6].

[67] *WP SWP* (n4), [214].

The rather controversial US solution to the passing on problem,[68] as shaped by the SC in its landmark rulings *Hanover Shoe*[69] and *Illinois Brick,*[70] is relevant in the EU context to the extent that it highlights the controversy and the difficult policy choices involved in solving the passing on issue. A similar solution, although contemplated, amongst others,[71] cannot be adopted in Europe since it would be contrary to Member States' tort law and, after *Courage* and *Manfredi*, contrary to EU law as well.

In *Hanover Shoe,* the defendant raised the passing on defence and argued that the claimant suffered no damage since the illegal overcharge was further passed on to the claimants' customers by charging a higher price on the goods sold to them.[72] The SC rejected this argument based on the following considerations:

a. the claimant's right to damages should not be compromised by its own efforts to maintain its profit level,[73]

b. 'insurmountable difficulties' in establishing the passing on defence complicating the already complex antitrust proceedings (efficiency argument),[74] and

c. the existence of the passing on defence would deter efficient claimants from bringing damages actions, leaving this task to the ultimate consumers, who would be reluctant to

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[68] Indicative of the controversy surrounding passing on are two seminal papers on this issue published in the aftermath of the above decisions. See Landes and Posner, 'Should Indirect Purchasers Have Standing to Sue under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick' (1979) 46 U Chi L Rev 602; Harris and Sullivan, 'Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis' (1979) 128 U Pa L Rev 269; Also Landes and Posner, 'The Economics of Passing on: A Reply to Harris and Sullivan' (1980) 128 U Pa L Rev 1274; Harris and Sullivan, 'Passing on the Monopoly Overcharge: A Response to Landes and Posner' (1980) 128 U Pa L Rev 1280.

[69] *Hanover Shoe, Inc v United Shoe Machinery Corp* 392 US 481, 88 SCt 2224 (1968).

[70] *Illinois Brick Co v Illinois*, 431 US 720, 97 SCt 2061 (1977).

[71] *GP* (n59), [2.4] Option 22.

[72] *Hanover Shoe* (n69) [488], [491-492].

[73] Ibid [489].

[74] Ibid, [493].

initiate damages actions since they suffer very low damages. Effectively this would result in a dearth of antitrust damages claims, compromising the deterrent effect of such actions (effectiveness argument).[75]

The passing on defence is irrelevant for consumer damages claims, since consumers are, in any case, the last ring in the supply chain. However, *Hanover Shoe* is important in that it directly influenced the SC ruling on indirect purchaser standing.[76] In *Illinois Brick* the SC stated that whatever the rule on passing on, it should apply equally to plaintiffs and defendants. Thus, it had the choice either to overrule *Hanover Shoe* or deny standing to indirect purchasers.[77] Essentially the SC reiterated the effectiveness and efficiency arguments advanced in *Hanover Shoe* and refused to grand standing to indirect purchasers (except in certain limited situations).[78] In addition, the SC reached this conclusion because it feared that, if only offensive passing on were allowed, it could result in multiple liability for the defendants.[79] The denial of standing to indirect purchasers confines the role of final consumers in private antitrust litigation at the federal level to a minimum level.

States have reacted to the SC formulation, most likely for political reasons,[80] by either enacting 'Illinois Brick Repealer Statutes' or through court judgments which effectively

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[75] Ibid, [494].

[76] The following quotation from Justice Blackmun, dissenting, is illustrative in that regard: '... plaintiffs-respondents(...)are the victims of an unhappy chronology. If (*Hanover Shoe*) had not preceded this case, and were it not "on the books," I am positive that the Court today would be affirming, perhaps unanimously, the judgment of the Court of Appeals (which granted standing to indirect purchasers)'. See *Illinois Brick* (n70), [765].

[77] *Illinois Brick* (n70), [728-729]; However, Justice Brennan in his dissenting opinion (endorsed by two other Justices) argued in favour of treating offensive and defensive passing on differently. See *Illinois Brick* (n70), [753].

[78] *Illinois Brick* (n70), [736].

[79] *Illinois Brick* (n70), [731-732].

[80] Cengiz, 'Passing- on Defence and Indirect Purchasers Standing in Actions for Damages against the Violations of Competition Law: what can the EC learn from the US' (2007) UEA CCP Working Paper No. 07/21 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1038521> accessed 30 January 2012, 19.

allow standing for indirect purchasers at the state level.[81] In *California v ARC America Corp*[82] the SC held that those state laws were not pre-empted by federal competition law. The current position of the US law towards passing on results in multiple claims being brought in state and federal courts that complicate class certification and case consolidation.[83] The AMC[84] tried to address this problem and proposed a reversal of the current status quo through legislative action.[85]

State reaction towards the approach of passing on at federal level provides a first indication that the federal approach is rather problematic. Criticism may be raised at two levels, such that this approach cannot be accommodated in the EU context. First, from a legal perspective, the rejection of the compensatory function of damages actions cannot be accepted. This is more so given the Commission emphasis on compensation in the context of private enforcement.[86] *Illinois Brick* denied many injured parties the right to claim compensation, as, arguably, the overcharge will most likely be passed on to the next levels of

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81 For the situation in the US see AMC, 'Report and Recommendations' (April 2007) <http://www.ccianet.org/CCIA/files/ccLibraryFiles/Filename/000000000049/amc_final_report.pdf> accessed 30 January 2012, 266, 268-269; Cengiz, 'Antitrust Damages Actions: Lessons from American Indirect Purchasers' Litigation' (2010) 59 ICLQ 39, 47-51; O'Connor, 'Is the Illinois Brick Wall Crumbling?' (2001) 15 Antitrust 34, 35; Folsom, 'Indirect Purchasers: State antitrust remedies and roadblocks' (2005) 50 AB 181; Karon, 'Your honor, tear down that Illinois Brick Wall!'The National Movement towards Indirect Purchaser Antitrust Standing and Consumer Justice'(2004) 30 Wm Mitchell L Rev 1351-1402.

82 *California v ARC America Corp* 490 US 93,109 SCt 1661 (1989).

83 See Page, 'The Limits of State Indirect Purchaser Suits: Class Certification in the Shadow of Illinois Brick' (1999) 67 Antitrust LJ 1 on class certification problems; Page, 'Class Certification in the Microsoft indirect purchaser litigation' (2005) 1 J Comp L & Econ 303. CAFA 2005 (Class Action Fairness Act, Pub L 109-2 – Feb 18, 2005) tried to address concerns of case consolidation. See 28 USC para 1332 (d) (2).

84 See Foer, 'Putting the Antitrust Modernisation Commission into Perspective' (2003) 51 BuffLRev 1029.

85 *AMC Report* (n81) 267.

86 Arguably the rejection of the compensatory component cannot be accommodated in the US either, since the Clayton Act embraces both a compensatory and a deterrence rationale. See Richman and Murray, 'Rebuilding Illinois Brick: A Functionalist Approach to the Indirect Purchaser Rule' (2007) Duke Law School Legal Studies Paper No 155 <http://ssrn.com/abstract=978968> accessed 30 January 2012, 24; *Illinois Brick*(n70) (Brennan J Dissenting Opinion) [748].

the supply chain and ultimately to the final consumer.[87] In the modern economic world in which transactions consist of multilevel supply chains, *Illinois Brick* raises serious justice considerations. The only parties entitled to compensation, ie the direct purchasers, would most probably not have suffered any harm, whereas many injured parties at different levels will remain uncompensated.[88] The same holds true for final consumers. Denying redress to consumers is very difficult to justify politically, especially in Europe where competition authorities have repeatedly stressed that competition law aims at protecting the interests of consumers.[89]

Secondly, it is questionable from an economic perspective as to whether it sufficiently promotes the deterrent function and reduces the social costs of litigation, especially if one takes into account the unlevel playing field between the federal level and the state level. Even if deterrence were to be recognised as the primary objective, economic and legal literature has contested whether the *Illinois Brick* approach better serves this aim.[90] It challenged the idea that direct purchasers are the most efficient plaintiffs since they might be reluctant to sue their suppliers so as not to disrupt on-going contractual relationships.[91] In

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[87] *Illinois Brick* (Brennan J Dissenting Opinion) (n70), [749]; Bulst, 'Private Antitrust Enforcement at a Roundabout' (2006) 7 EBOR 725,734 with further references to *Harris and Sullivan* (n68) 321ff and 337ff; Cf Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others v. Commission of the European Communities* [2004] ECR I-123, [53].

[88] *Richman and Murray* (n86) 26 where they argue that the Illinois Brick trade off between compensation and deterrence cannot be accepted in modern globalised economy; contra Gubbay and Maton, 'Private enforcement claims – Are they a risk for consumers and businesses?' (2009) 8 (1) CLI 8, 9 where they argue that the fact that businesses in a typical cartel pass on the overcharge to the next levels of the chains until the final consumer exists in 'an economic fairyland'.

[89] See chapter I, text to n69-80.

[90] See for example Basso and Ross, 'Measuring the True Harm from Price Fixing to Both Direct and Indirect Purchasers' (Draft, January 2008) <http://strategy.sauder.ubc.ca/ross/MeasuringtheTrueHarmfromPriceFixing.pdf> accessed 30 January 2012; Hellwig, 'Private Damages Claims and the Passing-on Defence in Horizontal Price-Fixing Cases – An Economist's Perspective' in Basedow(ed), *Private Enforcement of EC Competition Law* 121. See also OECD, 'Private Remedies' (2009) OECD Journal: Competition Law and Policy 7, 16.

addition, antitrust violators might grant direct purchasers a share of the cartel profits in return for their inertia in commencing proceedings.[92] Further, it is true that calculating the amount of the overcharge is very complex, but it is possible to calculate it with the employment of certain economic models.[93] In addition, the fact that this calculation entails a detailed economic analysis is not any different from other concepts in competition law, such as defining the relevant market and assessing market power.[94]

To sum up, it can be said that, in the US, the balancing of the conflicting considerations on passing on has not resulted in a satisfactory solution. The SC erred in favour of deterrence and restricted the role of consumers in private antitrust litigation. This might be due to the nature of the US private enforcement system. However, an analogous solution cannot be accommodated in the EU context.

5. Synopsis: Towards an acceptable proposal on passing on

The Commission, despite its apparent emphasis on 'full compensation',[95] is keen to encourage private antitrust litigation so as to increase the overall deterrent effect of the enforcement system as the proposal on passing on reveals. The Commission's capacity to initiate change is restricted by the Member States' legal traditions. Overall the Commission tried to strike a delicate balance between the prevailing compensatory principle in individual Member States and the effective enforcement of EU competition law norms in order to deter competition law violations.

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[91] *Harris and Sullivan* (n68) 352; Hovenkamp, 'Book Review - The Rationalisation of Antitrust' (2003) 116 Harv L Rev 917, 942, where he cites the Microsoft litigation example where direct purchasers were reluctant to bring claims against Microsoft; a point also accepted by the Supreme Court in *Illinois Brick* (n70), [746].

[92] Schinkel, Tuinstra and Rueggeberg, 'Illinois Walls: How Barring Indirect Purchaser Suits Facilitates Collusion' (2008) 39 The RAND Journal of Economics 683 with examples of recent US cases that indicate symptoms of 'Illinois Walls'.

[93] *Harris and Sullivan* (n68) 269, 272-273; See *Oxera Study* (n16), [4.4] for a recent account in the EU.

[94] *Richman and Murray* (n86) 34.

[95] *Draft Damages Directive* (n59) Explanatory Memorandum, [1.1]; *WP* (n59), [1.2].

It is questionable as to whether the Commission could opt for a different approach in favour of deterrence at a normative level so as to prioritise certain classes of claimants. First of all, the US example and economic theory have challenged the assumption that direct purchasers are the most efficient plaintiffs. Second, restricting standing to indirect purchasers, in line with the US approach, is not feasible and it is not even desirable in Europe in light of the proclaimed EU right to damages for competition law violations and the fact that all Member States recognise, in principle, standing for indirect purchasers,[96]which is consistent with the compensatory nature of damages in most Member States.[97] Further, excluding consumer standing would be hard to reconcile with Commission rhetoric on the consumer interest being of paramount importance in competition law. In fact, this option was never contemplated by the Commission, not even under the proposal of excluding the standing of indirect purchasers (Option 22 in the GP).[98]

The issue is slightly different in regard to the passing on defence. One should distinguish between banning the exercise of a recognised EU right, as the proposal on restricting standing for direct purchasers only would entail, and formulating its exercise based on deterrence or compensatory principles. Prohibiting the passing on defence is not contrary to EU law, yet it cannot be accommodated under the prevailing compensatory tort law principle in the majority of Member States. For deterrence purposes, it might have been preferable if standing were granted to both direct and indirect purchasers while passing on defence were excluded, save in certain limited circumstances.[99] The main criticism aired

[96] See Milutinović, 'Private Enforcement' in Amato and Ehlermann (eds), *EC Competition Law – A Critical Assessment* 725,730-735 on the issue of standing; *Komninos* (n42)190; Brkan, 'Procedural Aspects of Private Enforcement of EC Antitrust Law: Heading Toward New Reforms?' (2005) 28 WC 479, 490.

[97] *Ashurst study* (n24) 48, 84.

[98] *GP SWP* (n4), [183].

[99] See *Hellwig* (n90) 156 arguing in favour of this approach.

against this approach is that it can lead to 'multiple recovery', to the detriment of the defendant.[100] However, it has been suggested that it promotes the effectiveness of competition law, as it incentivises both direct and indirect purchasers to bring actions.[101]

At the current state of private competition law litigation in Europe this would not have been likely to result in over-enforcement. However, it would have been harder for the Commission to justify the exclusion of a passing on defence given the Court's case law described above, and the compensatory principle guiding the *WP* and the Member States' tort law.

Ultimately, the Commission seems to have gone as far as it can, not only in favour of compensating victims but also in deterring antitrust violators. At a normative level, this underlying deterrence rationale should also be taken into account when devising other appropriate procedural mechanisms for final consumers to bring actions for competition law violations. However, the following caveats exist: at the practical level of EU politics, the Commission would have to overcome serious political opposition for proposals of this kind. In addition, recognising standing and the passing on defence resolves the passing on problem as a matter of principle, but the practical implications of such a proposal should also be addressed by providing for an EU-wide coordination mechanism.[102]

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[100] On the contrary *Bulst* (n87) 744 argues that multiple liability is the exception, and thus it should not determine the way in which the passing on problem is solved; Bulst, 'Of Arms and Armour-The European Commission's White Paper on Damages Actions for Breach of EC Antitrust Law' [2008] Bucerius Law Journal 81, 86 states that in US (where indirect purchasers can bring action at state level) there are no reported cases of multiple liability; Henneberry, 'Private Enforcement in EC Competition Law: The Green Paper on Damages Actions – The passing on defence and standing for indirect purchasers, representative organisations and other groups' (2006) http://www.era.int/web/en/resources/5_2341_2394_file_en.3235.pdf accessed September 2009 , 8 in which he argues that determining whether multiple recoveries have occurred is extraordinarily difficult and should not serve as a determining factor in shaping private enforcement policy.

[101] Jones, *Private Enforcement of Antitrust Law in the EU, UK and USA* 197 with reference to Sarris, *The Efficiency of Private Antitrust Enforcement: The 'Illinois Brick' Decision* 133-134, 138.

[102] The formulation of such a mechanism remains outside the scope of the present thesis. See *Cengiz* (n81) 56-63 on this issue, where she argues that the EU can benefit from the US experience (not in terms of substantive approach to the passing on problem but) in order to devise the appropriate procedural mechanisms. See also Nazzini and Nikpay, 'Private Actions in EC Competition Law' (2008) 4 CPI

To sum up, the Commission choice regarding passing on could incentivise more active consumer involvement in private competition law enforcement, thereby promoting the 'added value spectrum' of such participation. At the same time, though, the chosen proposal takes due account of national tort law systems' approaches and seems to have struck a delicate balance between the conflicting considerations involved. In regard to the specific proposal on passing on, the withdrawal of the Draft Damages Directive presents a missed opportunity to reform national tort laws in order to enhance private competition law enforcement and consumer involvement therein. Commission efforts in providing guidance for the quantification of damage could facilitate damages claims;[103] however, given the existing diversity in national rules on the passing on defence and the burden of proof,[104] a more concrete proposal would have been preferable.

<https://www.competitionpolicyinternational.com/private-actions-in-ec-competition-law/ > accessed 30 January 2012,107, 133.

[103] DG COMP, 'Quantifying Harm in Actions for Damages based on Breaches of Article 101 and 102 of the Treaty on the Functioning of the European Union' (June 2011) (Draft Guidance Paper, Public Consultation), [142-151].

[104] Ibid, [146].

V. Access to Evidence

1. Introduction

Access to evidence has been identified as one of the main obstacles for competition damages claims.[105] It is related not only with discovery and disclosure procedures but also with the alleviation of the claimant's burden of proof and the concomitant issue of the binding effect of the Commission or NCA decisions and access to the Commission file in follow-on cases.[106] Competition law claims are very difficult to bring due to their technical, economic, and often covert, nature. This complexity calls for specific measures since general civil procedure rules on access to evidence cannot address specific problems for claims of this type.

In this section these problems are specifically addressed in the context of consumer claims, which will usually be of the follow-on type, and questions as to whether specific measures should be adopted are raised. This is because the 'information asymmetry' problem in this type of claims is more acute than in competitors', or customers', claims.[107] Both 'Group A' and 'Group B' consumer claims will usually be of very low value and concern damages from cartel agreements, whereas competitors and customers claims will run to significant amounts and concern abusive practices or anti-competitive vertical restraints. In

[105] *GP SWP* (n4), [54]; *WP SWP* (n4) [67]; *Ashurst Study* (n24) 11; *External Impact Study* (n8) 345.

[106] On these issues see *GP SWP* (n4), [54-100].

[107] Here, the term 'information asymmetry' does not indicate market failures on the demand side, but, rather, the fact that, in competition cases, the defendant (or third parties) will be in possession of important evidence and information, which is not readily accessible to the claimant. See, for example, Commission (EC), ' Accompanying Document to the White Paper on Damages Actions for Breach of the EC Antitrust Rules - Impact Assessment' SEC(2008) 405, [51]; *Draft Damages Directive* (n59), Explanatory Memorandumm, [4.3].

the latter case, the claimants are more incentivised to pursue the claim and are in possession of more factual information; sometimes more than the Commission or NCAs themselves.[108]

Despite the follow-on character of consumer damages claims, problems regarding access to evidence exist nonetheless, since one has to prove causation and quantify its antitrust damage.[109] The structure of these measures bears an immediate impact on the facilitation of consumer claims and the promotion (or not) of the 'added value spectrum'.

In this section the focus is on the Commission proposal. Before reaching its proposal, the Commission had to balance many variables, including the claimant's 'information asymmetry' against unduly burdening the parties and inciting abusive litigation. Constraints placed by the national legal orders, broadly divided into civil and common law legal families,[110] were also taken into account. In addition, attention was paid to preserve the effectiveness of public enforcement.[111]

In this section these aspects of the Commission proposal that could potentially promote stand alone claims are first reviewed and then those relevant to follow-on claims are addressed. Whether the balancing of different factors (ranging from legal to economic and policy) results in an overall satisfactory solution, enabling consumer claims to reach the courts, is also questioned.

2. Commission Proposal

a. Promoting Stand-Alone Consumer Claims

[108] On the revelation of private information as a boost to competition law enforcement see Harker and Hviid, 'Competition Law Enforcement and Incentives for Revelation of Private Information' (2008) 31 WC 297. See also Reher and Sanchez, 'The Commission's Green Paper on Damages Actions for Breach of Competition Rules' [2007] European Antitrust Review 42, 43, pointing to the fact that problems of access to evidence arise in cases of horizontal agreements.

[109] *WP SWP* (n4), [90]. In stand-alone actions, problems regarding access to evidence are more severe, since the claimants would also have to prove the antitrust infringement. See *External Impact Study* (n8) 345 on access to evidence and the different types of claims.

[110] See *External Impact Study* (n8) 347-350 for the main differences.

[111] See, for example, *Draft Damages Directive* (n59) Explanatory Memorandum, [4.3] on these variables.

Despite the fact that consumer claims will usually be of the follow-on type, from a normative perspective, and provided that the necessary procedural measures are adopted, raising stand-alone consumer claims in the future should not be excluded. Therefore, for reasons of consistency, problems pertaining in stand-alone claims also need to be addressed. Disclosure problems are common to all types of competition law claims, despite being more severe for stand-alone actions.

The Commission proposed the adoption of a disclosure mechanism provided that the following conditions are met:

a. the claimant presents a plausible claim based on the presented facts and the reasonably available to him documents (fact pleading),

b. inability of the claimant, despite applying all efforts reasonably expected to assert the relevant evidence,

c. sufficient specification is made of the precise categories of evidence to be disclosed,

d. the court is satisfied that disclosure is relevant, necessary and proportionate.[112]

This proposal, though, seems rather modest and is unlikely to bring any tangible benefits. Even if it has to be acknowledged that, in formulating a proposal, there were serious constraints flowing from the civil law legal traditions and that, ultimately, the Commission proposal is more advanced than civil procedure rules in some Member States in which disclosure concerns not the category of documents but, rather, specific documents,[113] the proposal fall shorts of being capable to facilitate consumer claims.

In particular, the Commission fails to take account of the fact that competition law infringements of the cartel type are secret in nature, as the vast bulk of evidence remains

[112] *Draft Damages Directive* (n59) Article 8; *WP* (n59) [2.2]. Cf the respective Article in the Directive on the enforcement of IP rights that is more favourable to the claimant than the Commission proposal in the field of competition law enforcement since it poses less stringent conditions. Council Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights [2004] OJ L 195/16Article 6 (1).

[113] See *External Impact Study* (n8) 349 for a list of these countries.

under the control of the competition law violators.[114] The disclosure rules that the Commission proposes seem to be operational only in follow-on claims, since the fact pleading requirement, together with the specification condition, will be almost impossible to satisfy in stand-alone claims,[115] effectively banning actions of this type.

The related question here is whether the Commission should have opted for the introduction of discovery procedures, that is, disclosure of evidence at the pre-trial phase, allowing the claimants to strengthen their case.[116] This would indeed raise concerns on three fronts. First, the use of discovery rules strategically in order to gain access to competitors' business secrets.[117] This risk is less present in consumer claims, as opposed to customers' and competitors' claims, raising the further question as to whether some sort of court-led discovery procedure is called for. These discovery procedures could either be applied in all type of competition law claims, provided that strict conditions are met, or could be introduced specifically for consumer claims.

Second, another justified concern regarding discovery procedures is their impact on the defendants' due process rights in Member States that provide for criminal enforcement of competition law.[118] *Orkem* established a limited right against self-incrimination in administrative procedures. The undertaking being investigated cannot be compelled to

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[114] Jones, 'Exporting Antitrust Courtrooms to the World: Private Enforcement in a Global Market' (2004) 16 LoyConLRev 409, 428.

[115] See *External Impact Study* (n8) 349.

[116] See Sanchez Graells, 'Discovery, Confidentiality and Disclosure of Evidence' (2006) IE Working Papers Derecho WPD06-05 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=952504> accessed 30 January 2012, 13,14, 34 supporting the introduction of discovery rules, albeit limited and court-managed discovery rules. On the notion of discovery see ibid Annex II.

[117] *GP SWP* (n4), [57]; Wils, 'The Relationship Between Public Antitrust Enforcement and Private Actions for Damages' (2009) 32 WC 3, 8.

[118] *Sanchez Graells* (n116) 12; Jacobs and Deisenhofer, 'Procedural Aspects of the Effective Private Enforcement of EC Competition Rules: A Community Perspective in Ehlermann and Atanasiu (eds), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* 188, 205.

answer questions that involve admission of the infringement,[119] however this does not apply in relation to factual questions or requests for providing documents.[120] The CJEU held that this limited right against self incrimination does not apply in national civil proceedings, since evidence obtained in the course of those proceedings cannot be used in administrative proceedings for the establishment of the violation.[121] Thus, in order for discovery procedures not to jeopardise the defendant's due process rights, Member States may provide that evidence obtained in the course of civil proceedings cannot be used in subsequent criminal proceedings. Alternatively, the limited right against self-incrimination in administrative proceedings could be extended to civil proceedings as well.

Third, the cost of discovery could militate against the introduction of relevant procedures. The potential cost of discovery should be weighed against the inability to raise stand-alone competition claims. Carefully structured discovery rules and active case management by courts could prevent abuses of discovery rules.[122]

Discovery procedures of the US type are alien to continental legal systems and were never seriously contemplated in the EU.[123] This should not preclude the adoption of discovery procedures of a different type, provided that certain safeguards important for

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[119] Case 374/87, *Orkem v Commission* (1989) ECR 3283, [35]; Council Regulation (EC)1/2003 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty [2003] OJ L1/1 ('*Regulation 1/2003*'), Recital 23.

[120] Case T-112/98, *Mannesmannröhren-Werke AG v Commission* (2001) ECR II-729, [78].

[121] Case C-60/92 *Otto BV v Postbank NV* [1993] ECR I-5683, [17], [20].

[122] *OECD* (n90) 15.

[123] See Stuerner, 'Duties of Disclosure and Burden of Proof in the Private Enforcement of European Competition Law' in Basedow (ed), *Private Enforcement of EC Competition Law* 163, 170-173 for a comparison of the two systems; see National Commission Staff Papers, 'Scope of Discovery'(1979) 48 Antitrust L J 1063 on the US system; Cavanagh, 'Pleading Rules in Antitrust Cases: A Return to Fact Pleading' (2002) 21 Rev Litigation 1; see *Bell Atlantic Corp et al v Twombly et al* 550 US 127 SCt 1955, 1965 (2007) on introducing limitations to discovery in antitrust cases; see Cavanagh, 'Twombly, the Federal Rules of Civil Procedure and the Courts'(2008) 82 St John's L Rev 877 for a comment. See also Odudu, 'Developing Private Enforcement in the EU: Lessons for the Roberts Court' (2008) 53 AB 873, 877-878; Epstein, 'Of Pleading and Discovery: Reflections on Twombly and Iqbal with Special Reference to Antitrust' [2011] U Ill LRev 187.

continental law legal systems are retained. Procedural rules are sometimes the product of historical circumstances attributed to chance rather than reason. Thus, 'mere divergence' (discovery rules falling under this category), as opposed to systemic differences, is prone to harmonisation. [124]

In that regard, the UK system can serve as a useful example of a jurisdiction bridging the US approach with the continental approach.[125] The UK system provides for court-supervised pre-action disclosure, provided that the application is supported by evidence and is not merely speculative.[126] UK courts have applied the conditions for pre-action disclosure cautiously,[127] thereby preventing 'fishing expeditions'.[128] Interestingly, this points to the fact that judges can actually control broad discovery rules.

In order to promote stand alone consumer claims some form of pre-action disclosure should be introduced.[129] This is because consumer claims would usually concern damages flowing from cartel agreements, which by definition are covert and the relevant incriminating evidence stays with the infringer. So in case of consumer damages claims in the context of competition law, civil procedure rules could provide that court could order the defendant to grant access to the relevant evidence, provided that the claimant (i) has presented a plausible

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[124] Kerameus, 'Political Integration and Procedural Convergence in the European Union'(1997) 45 Am J Comp L 919, 928, 930

[125] See Brealey and Green (eds), *Competition Litigation: UK Practice and Procedure* 219 for an account of the UK system.

[126] CPR 31.16.

[127] *Black v Sumitomo* [2001] EWCA Civ 1819, [95]; *Trouw UK Ltd v Mitsui & Co (UK) plc* [2007] EWHC 863 (Comm), [43-44]; *Hutchison 3G UK Ltd v O2 Ltd and others* [2008] EWHC 55 (Comm), [51], [58], [63].

[128] *Brealey and Green* (n125) 221, 222. See also Brown and Ryan, 'The Judicial Application of European Competition Law'(FIDE Congress Madrid, 2010) <http://www.ukael.org/associates_21_2528442727.pdf> accessed 31 January 2012, [16.3-16.5]. Fishing expedition refers to a strategy of obtaining information from the alleged infringer in an unfocused manner with the hope of finding some evidence that could possibly support a damages claim. *WP SWP* (n4), [70].

[129] See Sarra and Marra, 'Are Monetary Incentives Enough to Boost Actions for Damages in the European Union? On the Relevance of Incompleteness of Laws and Evidentiary Requirements' (2008) 31 WC 369 on a similar opinion advocating the introduction of mandatory discovery.

claim concerning the existence of a cartel (e.g. reports indicating an unusual price co-ordination), (ii) the disclosure concerns broadly-defined categories of documents, and (iii) the relevant material gathered under the disclosure order would be used strictly for the purposes of private litigation. Another proposal is the introduction of a general pre-action disclosure rule under strict conditions. The disclosure order should be granted only exceptionally, in cases of insurmountable 'information asymmetry' between the parties.

The second proposal is more prone to abuse, since it is applicable to all competition law claims (and not just consumer claims), and could also potentially contribute to greater legal uncertainty.[130] Therefore, the first option is to be preferred. The first option could be introduced as an exception to the general proposal on disclosure based on fact pleading and strict judicial supervision in order to address 'information asymmetries' in consumer damages claims. Essentially, to a large extent, it is similar to the Commission proposal but it could be more workable for consumer claims because it dispenses with the 'sufficiently defined precise categories of evidence' requirement.[131]

b. Promoting Follow-on Consumer Claims

Consumer claims will usually be of the follow-on type, not only due to pragmatic constraints but also because follow-on claims possess certain strategic advantages.[132] In these cases, claimants can benefit from the superior investigative powers and the evidentiary material gathered in the course of the administrative investigation, as well as the final Commission or NCA decision,[133] as a form of alleviating the claimant's burden of proof.[134] This section

[130] In a similar vein see *External Impact Study* (n8) 262 , but regarding the introduction of a fee-shifting rule, where arguably leaving it up to the judges' discretion to invoke it, provided that it is warranted by the plaintiff's resources and the risks of litigation, can prove conducive to greater legal uncertainty.

[131] See text to n112 above, condition under (c).

[132] *Jacobs and Deisenhofer* (n118) 195.

[133] See *WP SWP* (n4), [142-151] with reference to UK and German law already providing for the binding effect of NCA decisions. See Milutinović (n44) ch 11 and 12 on this issue.

addresses the issue of access to the Commission's documents, both in general and in cases where a leniency application has been filed.

i. Access to the Commission's documents

No specific provisions exist in regard to regulating access to the Commission's documents for third parties in competition cases.[135] Therefore, the starting point should be that, in principle, EU citizens have a right of access under Article 15(3) TFEU (formerly 255 TEC), Regulation 1049/01 and Article 42 of the Charter on Fundamental Rights.[136] This right has the purpose of enhancing the transparency and accountability of the Union institutions.[137] Thus, an interesting analogy can be drawn between this right and greater consumer involvement in private competition law enforcement, since both constitute mechanisms that possess the potential to increase transparency in the Union.[138] This analogy is also supported

[134] However, Alfaro and Reher point to the fact that the final Commission decision cannot be of much help to the victims, as it does not include comprehensive information on the impact of cartels; Alfaro and Reher, 'The European Commission's Journey to a Directive on Damages Actions: One Step Forward – Two Steps Back' [2011] European Antitrust Review 53, 54. In addition, facts important for establishing a damages claim might not have even been addressed by the Commission; see *WP SWP* (n4), [90].

[135] See Regulation 1/2003 (n119) Articles 27 and 28; Commission Regulation 773/2004 relating to the Conduct of Proceedings by the Commission pursuant to Article 81 and 82 of the EC Treaty [2004] OJ L123/18, Articles 15 and 16; Commission (EC), Notice on the Rules for Access to the Commission File [2005] C325/7 ('Notice on Access to the Commission File'), [1-3], [7]. These concern on-going procedures and are specific to the rights of defence for the incumbent undertakings. See Bartelt, 'Case T-2/03 *VKI v Commission*' (2006) 43 CMLRev 191, 197, 205 (case comment).

[136] Following Article 6(1) TEU the Charter now has the same legal value as the Treaties. Council Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/43 ('Regulation 1049/2001'). Commission (EC), 'Detailed rules for the application of Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents' (Decision) [2001] OJ L345/94; See *Bartelt*(n135) on the relationship of the Notice on Access to the Commission File and Regulation 1049/2001. Goddin, 'Recent Judgments Regarding Transparency and Access to Documents in the Field of Competition Law: Where does the Court of Justice of the EU Strike the Balance?' (2011) 2 JECLAP 10, 20. Case C-139/07P Commission v Technische Glaswerke Ilmenau GmbH [2010] ECR I-5885, [59]. Decision of European Ombudsman regarding complaint 2953/2008/FOR against the Commission (27 July 2010).

[137] *Regulation 1049/2001* (n136), Recitals 1-4. See also the Commission linking the current revision of Regulation 1049/2001 with the 'European Transparency Initiative' in Commission(EC), 'Proposal for a Regulation of the European Parliament and of the Council Regarding Public Access to European Parliament, Council and Commission Documents' COM(2008) 229 final (Proposal Amending Regulation 1049/2001), [1.2].

[138] See chapter II, text to n142-165.

by the simultaneous attempts by the Commission to revise Regulation 1049/2001[139] and enhance private competition law enforcement.

However, the Commission suggested that Regulation 1049/2001 '*...normally does not constitute an appropriate legal basis for obtaining access to evidence for the purposes of pursuing private damages actions...".*[140] This argument should be rejected, since nothing in the regulation suggests that such an exception is permissible, especially in light of the recognised Treaty right of access to documents of the Union institutions. The fact that the Commission would have to take up a balancing exercise between the protection of commercially sensitive information and the said right does not lead to the exclusion of this right altogether in the field of damages actions for competition law violations.[141]

The right of access to the Commission documents is not unconditional though, but is subject to limitations on the grounds of public or private interest;[142] an issue that is even more complicated in the field of competition law, as there is the additional concern of safeguarding the effective application of the Commission's leniency programme. These limitations are to be interpreted restrictively so as not to defeat the purpose of Regulation 1049/2001.[143]

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[139] For the relevant documentation see Statewatch Observatory: The Regulation on Access to EU Documents: 2008-2011 <http://www.statewatch.org/foi/observatory-access-reg-2008-2009.htm> accessed 31 January 2012.

[140] *WP SWP* (n4), [104]. Wils argued that a specific access regime for claimants should be created under Regulation 1/2003. See *Wils* (n117) 18.

[141] See Decision of the European Ombudsman closing his inquiry into complaint 3699/2006/ELB against the European Commission (Ombudsman decision on 3699/2006), [53], [92] pointing that '...the existence of privileged access rights under specific regulations does not exclude the possibility to request access under Regulation 1049/2001' with reference to Case T-403/05 *My Travel v Commission* [2008] ECR II-2027, [89].

[142] Article 15(3) TFEU; Regulation 1049/2001 (n136) Article 4 ; De Leeuw, 'The Regulation on Public Access to European Parliament, Council and Commission Documents in the European Union: Are Citizens Better Off?(2003) 28 ELRev 324, 333.

[143] Joined Cases T-391/03 and T-70/04 *Franchet and Byk v Commission* [2006] ECR II-2023, [84].

Lombard illustrates the European institutions' approach towards the right of access to the Commission file in the field of competition law.[144] In this case, following the Commission decision fining Austrian banks for their participation in a cartel agreement,[145] VKI, an Austrian consumer organisation, sought to claim damages on behalf of Austrian consumers before Austrian courts. In order to substantiate its claim, it sought access to the Commission file claiming that:

> in order to secure damages for the consumers on whose behalf it was acting, it had to be able to put forward *specific claims* regarding both the *illegality of* BAWAG's *conduct under competition law* and the *effects of that conduct*. To that end, consultation of the Lombard Club file would have been a significant, or even indispensable, help to it'.[146]

The Commission rejected VKI's request, and its decision in this case is important as it depicts an inconsistency between Commission pronouncements on competition law's potential to protect consumers' interests and the actual Commission practice, and, further, because it depicts the evidentiary difficulties faced by consumer organisations in follow-on actions, even if it is assumed that the Commission decision finding on a competition law violation is binding upon civil courts.[147] The Commission, in this case, failed to take account

[144] Case T-2/03 *Verein für Konsumenteninformation v Commission* (2005) ECR II-1121 ('*Lombard'*). On access to documents in state aid cases see Case C-139/07 P *Commission v TGI* (n136). On access to documents in merger cases *My Travel v Commission* (n141) and on appeal Case C-506/08 P *Kingdom of Sweden v Commission and My Travel Group* [2011] OJ C269/2; Case T-237/05 *Éditions Jacob v Commission* [2010] ECR II-2245 and on appeal Case C-404/10P *Commission v Editions Odile SAS* [2010] OJ C274/19 (nyd); Case T-111/07 *Agrofert v Commission* [2010] OJ C221/35 and on appeal Case C-477/10P *Commission v Agrofert* [2010] OJ C328/22 (nyd). On these cases see *Goddin*(n136). On TGI see Leino, 'Just a Little Sunshine in the Rain: the 2010 Case Law of the European Court of Justice on Access to Documents'(2011) 48 CMLRev 1215, esp 1222-1228. There are also cases pending before the GC challenging Commission decision not to grant access to the file in cartel cases. See for example Case T-399/07 *Basell v Commission* [2007] OJ C315/43 (nyd).

[145] *Lombard Club* (Case COMP 36.571/D-1)Commission Decision 2004/138/EC [2004] OJ L56/1.

[146] *Lombard* (n144), [9], (emphasis added).

[147] As a matter of fact, Commission decisions are binding upon civil courts according to Article 16(1) Regulation 1/2003 and the Commission proposes the same solution for NCAs decisions. See *WP* (n59) [2.3]; *Draft Damages Directive* (n59) Article 13. Komninos is critical of this approach as it risks undermining private enforcement; *Komninos* (n42)229-230.

of the fact that the request for access to its file was submitted by a consumer organisation acting on behalf of its consumers. It emphasized the workload that would be entailed for the Commission had it acceded to this request.[148]

The GC annulled the Commission's decision, offering a narrower interpretation of the exceptional conditions for refusing access to the Commission's documents.[149] The problem remains, though, to the extent that it does not restrict, in principle, the Commission's margin of appreciation and leaves it open to the Commission to reject similar requests in the future provided that it gives better reasoning for such rejection.[150] A better approach would have been to emphasize the nature of the claimant, in this case VKI as a consumer organisation, and the reasons for making such a request. Regulation 1049/2001 allows the Commission to reject requests for access to its file for certain reasons. However, rejection of such requests is not permitted when there is an overriding public interest in disclosure.[151] The GC should have emphasized that, in *Lombard*, there is an overriding public interest; this being the protection of the interests of Austrian consumers, as well as increasing the overall effectiveness of the competition law enforcement regime.[152]

Two caveats exist, though. First, account should be taken of the fact that, when access to documents is granted, these documents enter the public domain and are accessible by anyone.[153] The Commission, therefore, proposes that national courts can invoke Article 15(1)

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[148] *Lombard* (n144), [20]. The Commission reiterated the problem of the substantial administrative burden entailed in applications of this type in Commission (EU), 'Report on the Application in 2009 of Regulation No 1049/2001 regarding Public Access to European Parliament, Council and Commission Documents' COM(2010) 351 final, [8.1].

[149] *Lombard* (n144) [67-71].

[150] *Lombard* (n144) [115], [122].

[151] *Regulation 1049/2001* (n136) Article 4(2).

[152] See also *Ombudsman decision on 3699/2006* (n144), [97-98].

[153] *WP SWP* (n4) fn50.

Regulation 1/2003 requesting information in the Commission possession, so that commercially-sensitive information is not accessible to third parties.[154] Even if this suggestion is, in principle, correct, in practice it will not prove workable since consumer organisations will still not have enough factual information to support their claim, causing its rejection before the court can seek further information from the Commission.[155] Consumer organisations could provide an undertaking in writing that the information obtained would be used solely for the purposes of private litigation.[156] For consumer claims in cartel cases the public interest in promoting private enforcement and protecting the consumer interest seems to constitute an overriding reason in comparison with the protection of commercially-sensitive information from undertakings that have violated EU competition law.

The second consideration is related to the additional safeguards needed when access is requested in the course of an on-going investigation. It is to be noted that the Commission, in the current efforts for reviewing Regulation 1049/2001, tried to restrict access to documents in the course of on-going administrative proceedings, effectively banning access to these documents and not allowing access for overriding reasons of public interest as was the case under Article 4(2) Regulation 1049/2001.[157] This seems contradictory to the quest for an increased transparency in the EU and could jeopardise damages actions in the field of competition. In the event that the consumer organisations request access to files in the course

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[154] *Ombudsman decision on 3699/2006* (n144), [89].

[155] See *Alfaro and Reher* (n134) 56 in that regard.

[156] This was the VKI's proposal in *Lombard* (n144), [11].

[157] *Proposal Amending Regulation 1049/2001* (n137) Article 2(6). See also Ombudsman, 'Contribution to the Public Hearing on the Revision of Regulation 1049/2001 on Public Access to Documents' (2 June 2008), 3. The EP rejected this proposal. See EP, Legislative Resolution of 15 December 2011 on the proposal for a regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (recast) (COM(2008)0229 – C6-0184/2008 – 2008/0090(COD)) [Amendment 29]. See Commission(EU), 'Proposal for a Council Regulation amending Regulation No 1049/2001' COM(2011) 137 final, for the most recent Commission proposal; Commission(EU), 'Report on the Application in 2010 of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission Documents' COM(2011) 492 final, [1].

of an on-going investigation,[158] (even if this is unlikely, given that they would normally wait for the issuance of the final Commission decision), the current approach should be preferred, namely allowing the Commission leeway to invoke Article 4(2), in order to justify its refusal. To that regard, the Commission could employ Articles 27 and 28 Regulation 1/2003, as well as Articles 15 and 16 Regulation 773/2004 in order to interpret Article 4(2) Regulation 1049/2001 and define categories of documents that should not be disclosed, for example business secrets and internal documents of the Commission. This solution is more flexible as it does not completely ban access to documents during an on-going investigation and allows the Commission to undertake a balancing exercise on a case by case basis.

ii. Access to the Commission File: Preserving the attractiveness of leniency programmes

The Commission, aware of the dissuasive effect of any future private litigation on prospective leniency applicants,[159] sought to put in place strict safeguards effectively banning the disclosure of corporate statements submitted in the course of leniency applications.[160] The GC made also a pronouncement in regard to the interplay between leniency applications and access to the Commission file. The Commission argued that permitting access to documents submitted in the course of leniency applications would deter undertakings from cooperating with the Commission and would be detrimental to inspections and investigations in future cases.[161] The GC accepted this argument, in line with Article 4 (2) Regulation 1049/2001. However, it stated specifically that *'the Commission was not entitled to reach such a general*

[158] This category should be interpreted restrictively. See *Ombudsman decision on 3699/2006* (n144), [25-32]. Joined cases T-391/03 and T-70/04 *Yves Franchet and Daniel Byk v Commission* [2006] ECR II-2023, [109-112].

[159] Commission(EC), 'Notice on Immunity from Fines and Reduction of Fines in Cartel Cases' [2006] OJ C298/17 ('Leniency Notice'), [6].

[160] *Draft Damages Directive* (n59) Article 9; *WP* (n59) [2.9].

[161] *Lombard* (n144) [81]; *Leniency Notice* (n159), [40].

conclusion applicable to the whole of the Lombard Club file without having first carried out a concrete, individual examination of the documents comprising it'.[162]

More recently, in *Pfleiderer,*[163] the Commission expressed a different view that can be explained in light of the different facts of this case. The Commission submitted that access to corporate statements should not be granted, with access to the rest of the documents to be assessed on a case by case basis.[164] *Pfleiderer* concerned a preliminary ruling as to whether the German Competition Authority should grant access to documents submitted by a leniency applicant to a private party for the purpose of suing the members of the cartel. The issue here was addressed from a competition law perspective and no wider issue of transparency and access to documents under Regulation 1049/2001 was raised. The Court took into account both the importance of leniency programmes for cartel enforcement as well as the EU right to damages for competition law violations and its contribution to the maintenance of effective competition.Following these considerations, it alluded to the possibility of non-disclosure of documents submitted by a leniency applicant, with this issue to be assessed on a case by case basis.[165]

Pfleiderer constitutes a missed opportunity for the Court to pronounce on the non-disclosure of corporate statements. It could have done so by reasoning that non-disclosure of

[162] *Lombard* (n144) [82].

[163] Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] OJ C 232/5.

[164] *Pfleiderer* (n163), Opinion of AG Mazak, [17]. See also Commission submissions before the English High Court in *National Grid Electricity Transmissions v. ABB* [2011] EWHC 1717 (Ch). See Skadden, 'National Grid: Disclosure of EC Leniency Materials at Stake'(29 November 2011) <http://www.skadden.com/Index.cfm?contentID=51&itemID=2601> accessed 21 February 2012, for an account of the Commission views.

[165] *Pfleiderer* (n163), [26-32]. In this case the referring court, the Amtsgericht Bonn, decided on 18 January 2012 against the disclosure of leniency documents. See on the outcome of this case as well as other pending national cases regarding the disclosure of leniency documents to third parties Hogan Lovells, 'German Court Excludes Third Party Access to Leniency Applications in Cartel Cases' (6 February 2012) <http://ehoganlovells.com/cv/ce21a8dbbb3ca3946e52ec1a3966a7e092a25078 > accessed 16 February 2012.

corporate statements is essential for the effective application of Article 101 TFEU.[166] The only option after *Pfleiderer* is to introduce this proposal via a legislative amendment.[167]

The Commission proposal for non-disclosure of corporate statements increases the legal certainty for companies and their respective incentives to cooperate with the Commission. It also alleviates, to a certain extent, the Commission's burden to justify its refusal to disclose corporate statements on a case by case basis. The proposal can also be reconciled with the Commission's approach under Article 4 Regulation 1049/2001, since it can be safely assumed that, under this provision, the Commission would refuse the disclosure of corporate statements. In any case, the Commission should adequately reason its decision not to disclose corporate statements and to place narrow constriction on the documents falling under this category.[168]

Thus, according to EU jurisprudence and general EU law, the Commission proposal on non-disclosure of corporate statements is modest. At the same time it acts as a safeguard for businesses contemplating to apply for leniency. However, whenever a balancing exercise takes place between, on the one hand, the integrity of inspections and, on the other, protecting the 'overriding public interest in disclosure',[169] it could be argued that, corporate statements aside (these being narrowly construed), the Commission should provide access to its files, especially when these requests are raised by consumer organisations acting in the consumer interest.

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[166] *Pfleiderer* (n163), Opinion of AG Mazak, [44]. However, as Temple Lang, rightly points out, this was a reference for a preliminary ruling in which the Court is usually reluctant to make definite pronouncements. See Temple Lang, 'The Pfleiderer Case – Disclosing Leniency Applications to Private Claimants' (2011) 8(10) CLI 3,4.

[167] This is also favoured by the Commission. See Italianer, 'Public and Private Enforcement of Competition Law' (17 February Brussels, 5th International Competition Conference) <http://ec.europa.eu/competition/speeches/text/sp2012_02_en.pdf > accessed 21 February 2012, 5-6.

[168] See to that regard T-437/08 *CDC Hydrogene Peroxide v Commission* [2012] 4 CMLR 14 [69-71].

[169] *Regulation 1049/2001* (n136) Article 4(2).

3. Synopsis

It has been suggested that the disclosure mechanisms proposed by the Commission are unlikely to actually promote stand-alone consumer damages claims. Since there are important underlying policy justifications for promoting these types of claims at a normative level, the Commission should introduce a special discovery procedure for consumer claims. Arguably, though, reaching political support for a proposal of this type does not present itself to be a realistic possibility. The second best option for the Commission would be to devise appropriate mechanisms to facilitate consumer access to Commission documents, so as to boost follow-on consumer claims.

On the general right of access to the Commission documents, in as so far as the Commission practice and the Commission's proposal for reviewing Regulation 1049/2001 do not seem to pay adequate attention to providing access to documents to consumer organisations, additional measures should be put in place.[170] For example, a provision akin to the one in Regulation 1367/2006 stating that '...the grounds for refusal as regards access to [Commission information] should be interpreted in a restrictive way, taking into account the public interest served by disclosure...'.[171] The public interest in increasing consumer participation in private competition law enforcement should be considered, thereby tipping the balance in favour of granting, rather than denying, access to documents. If the Commission fears that, once access is granted, the relevant documents will not only be used by consumer organisations in private litigation but, will also enter the public domain, it could, perhaps, propose a system analogous to Article 15 Regulation 1/2003. In this case access is

[170] See also EP, 'Non legislative Resolution on the White Paper on damages actions' (2008/2154(INI)), [13], that '[calls] for the Commission to be required to allow victims of competition infringements access to the necessary information for exercising damages actions and [stresses] that Regulation (EC) No 1049/2001 defines a right of access to documents of the institutions. The Commission must interpret this regulation accordingly, or propose an amendment thereof'.

[171] Council Regulation No 1367/2006 on the application of the provisions of the Aarhus Convention [2006] L263/13, Recital 15 and Article 6(1).

granted only under the condition that the relevant information will remain *inter partes* in the relevant damages actions procedure. The Commission's proposal in regard to the non-disclosure of corporate statements submitted in the course of leniency applications is in line with the Courts' approach on rights of access to the Commission's documents. This proposal may act as an impediment to consumer claims. However, on balance it is necessary to preserve the integrity of the Commission's leniency programme.[172]

[172] Nazzini, 'Potency and Act of the Principle of Effectiveness: The Development of Competition Law Remedies and Procedures in Community Law' in Barnard and Odudu (eds), *The Outer Limits of the European Union,* 401, 404, 429-433.

VI. Conclusions

The analysis presented in this chapter has pointed to the intrinsic characteristics of consumer claims, and the role of consumer organisations, and has suggested a distinction between different forms of consumer claims based on their respective value. The focus is on measures enhancing consumer participation in private competition law enforcement, and passing on considerations and access to evidence problems have been addressed. These two issues were considered here since they can potentially arise in both ‘Group A’ and ‘Group B’ consumer claims. Thus, common solutions are called for in regard to both problems. This stands in contrast with the formulation of collective action mechanisms, as presented in the next chapter, since consumer claims of a very low value (‘Group B’ consumer claims) call for a different treatment.

In regard to passing on, the Commission advocated proposal is satisfactory overall since it employs a deterrence rationale capable of incentivising consumers and promoting the ‘added value spectrum’. However, as far as access to evidence is concerned, the Commission’s approach seems unlikely to increase consumer involvement. Arguments in favour of adopting different discovery procedures for consumer claims are presented in this chapter. However, since from a pragmatic perspective, such a narrow harmonisation proposal is unlikely to be supported by Member States, a more modest revision of the Commission’s practice in granting access to documents is considered to be the best option. Such a proposal could, at least as a first step, promote follow- on consumer claims.

Interestingly, a recurrent observation in trying to formulate measures to promote consumer damages actions in the competition field is in regard to the distinguishing characteristics of consumer claims as opposed to customers and competitors claims. Due to these characteristics, specific measures regarding passing on and access to evidence may need to be adopted, potentially signalling the need to treat consumer claims differently, or even undertake a separate policy initiative, as opposed to generally boosting private enforcement of EU competition law. This is more evident in the examination of the adequate collective action mechanisms in the competition field which is addressed in chapter IV.

CHAPTER IV

COLLECTIVE ACTIONS: ADDRESSING 'GROUP B' CONSUMER CLAIMS

I. Introduction

The analysis in this chapter points towards a collective action mechanism fit to address consumer claims for competition law violations. Improvement of consumer collective redress has been a policy aspiration in EU consumer policy for quite some time now.[1] Interestingly, this policy aim appeared in the competition policy field much later and can be associated with the shift in policy aims and increased attention to the consumer interest.[2] The initiative in the consumer field can serve as a useful point of comparison. In section II, an historical analysis of the approaches towards collective redress at EU level in the field of consumer and competition law is provided. This analysis serves as the springboard for the argument advanced in section III, namely that the function of the collective action mechanism in competition law (at least for 'Group B' consumer claims)[3] should be different, thereby questioning Commission's current efforts to develop 'common principles' underpinning all areas of collective redress policy.[4]

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[1] Commission (EEC), 'Consumer Redress' (Memorandum) COM (1984) 629 final ('Consumer Redress Memorandum'); Commission (EC), 'Consumer Policy Action Plan 1999-2001' (Communication) COM(1998) 696 final, 18; Commission(EC), 'Green Paper – Liability for Defective Products' (Green Paper) COM(1999) 396 final, 31-33. Commission (EC), 'Green Paper on Consumer Collective Redress' (Green Paper) COM (2008) 794 final, 27 November 2008 ('Green Paper on Consumer Collective Redress'); For relevant documents on this issue and the consultation launched by DG SANCO see http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm accessed 7 June 2011.

[2] See chapter I, text to n75-80.

[3] See chapter III, text to n31-38 for the distinction between 'Group A' and 'Group B' consumer claims.

[4] See Almunia, 'Common Standards for Group Claims Across the EU' (Speech at the School of Law, University of Valladolid, Speech 10/554); Commission (EU), 'Public Consultation: Towards a Coherent European Approach to Collective Redress' (Staff Working Document) SEC (2011) 173 final, 4 February 2011 ('Public Consultation'), [15].

It has repeatedly been stated in this thesis that the measures facilitating consumer involvement in competition law enforcement should correspond to, and promote as much as possible, the 'added value spectrum' advanced in chapter II.[5] In section III, additional justifications are offered in support of the adoption of different collective action mechanisms for 'Group B' consumer claims based on the deterrence principle. The compensatory potential of collective actions is not eschewed in so doing. Nonetheless, it is argued that this cannot be the prevailing rational given that 'Group B' consumer claims form the vast majority of respective claims in the competition law field. By drawing the necessary analogies with consumer protection law, the work presented in this chapter argues in favour of adopting a different collective action mechanism for 'Group B' consumer claims while common compensatory collective action mechanisms are adequate for the promotion of 'Group A' consumer claims (since, in this case, no conflict with the deterrence function exists). The argument on devising different mechanisms is based on the interpretation of the 'access to justice' goal and the distinction between the aggregation of individual consumer interests, on the one hand, and collective consumer interest, on the other.

Following the justification of the necessity for different collective action mechanisms in the field of competition law for 'Group B' consumer claims, the analysis in section IV gives a snapshot of the current approach towards collective litigation in regard to consumer claims, both in Europe and the US, based on a thematic approach. Different national models are examined to the extent that they fit the chosen characteristics/themes of collective litigation mechanisms. The chosen thematic approach (as opposed to a jurisdictional approach) better elucidates the lack of collective action mechanisms capable of addressing 'Group B' consumer claims. A 'collective action framework' which would not only promote

[5] See chapter II, text to n98-100.

’Group B’ consumer claims but would also respect as much as possible EU legal culture and Member States’ individual traditions is presented in section V. In building this framework, the EU approach towards collective actions to date is explored and contrasted with the structural characteristics/themes of the US collective action model, with the aim of questioning whether the time is ripe for the adoption of a ‘modified US model’ in the EU.

II. EU Developments on Collective Redress Mechanisms

1. Initial distinct approach in consumer and competition law

Over the last decade, heated discussions have emerged at the EU level in regard to consumer collective redress, first in the consumer law field and, more recently, in the competition law field. Although, at first, effective collective redress mechanisms for consumer and competition law violations were launched as separate initiatives, recently, the Commission has merged the two, pointing to a more conservative approach.[6] This has occurred since, from specific proposals in competition law, the discussion has again shifted to the more general and abstract level of discussing principles.

The Commission has pointed, on more than one occasion, to the need to enhance redress mechanisms for consumers in the consumer law field.[7] In particular, in its '2007-2013 Consumer Policy Strategy' the Commission specifically stated that collective redress actions will be considered in the fields of competition and consumer law without drawing a distinction between them.[8] However, in its subsequent *Green Paper on Consumer Collective Redress*, the Commission excluded collective redress procedures for victims of competition law violations from its material scope, and referred to the treatment of this issue in its *WP*.[9] This suggests that a distinctive approach to competition claims is warranted, according to the Commission.

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[6] *Public Consultation* (n4).

[7] Commission (EEC), 'Three Year Action Plan of Consumer Policy in the EEC (1990-1992)'COM(1990) 98 final; 'Internal Market After 2002: Meeting the Challenge' (Sutherland Report) SEC(92) 2044, 10; Commission (EC), 'Consumer Policy Strategy 2002-2006' (Communication) COM(2002) 208 final, [3.2.3]; Commission (EC), 'Consumer Policy Strategy 2007-2013' (Communication) COM(2007) 99 final, [5.3].

[8] Ibid.

[9] *Green Paper on Consumer Collective Redress* (n1) [5].

Interestingly, the Commission managed to reach a concrete proposal on collective actions in the competition field,[10] whereas a more vague approach is adopted in its *Green Paper on Consumer Collective Redress.* Two procedures were proposed for competition law claims; the first concerns actions brought by representative associations, such as consumer associations, on behalf of identified, or, in limited situations, identifiable victims, and the second concerns opt-in collective actions.[11]

In the consumer field, it restricted itself to making general declarations on elements contributing to the effectiveness and efficiency of collective actions and putting forward four options for further consultation.[12] The fourth option, on the introduction of an EU consumer collective redress mechanism in all Member States, focused, *inter alia*, on whether opt out collective actions should be introduced and the Commission did not dismiss this possibility,[13] as the Commission proposal in the field of competition law also reveals. However, the fact that the Commission proposal was subsequently withdrawn indicates the practical difficulties likely to be faced by the Commission in proposing opt-out mechanisms in the future.

The lack of clear directions on the Commission's part, on a matter already very complex at the national level, will, in all likelihood, not lead to effective solutions. The

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[10] Commission (EC), 'Damages actions for breach of the EC antitrust rules' (White Paper) COM (2008) 165 final ('WP'), [2.1]; Commission(EC), 'Proposal for a Council Directive governing actions for damages for infringements of Article 81 and 82 of the Treaty' (Document withdrawn before publication – on file with the author), Articles 5-7.

[11] Ibid.

[12] Green Paper on Consumer Collective Redress (n1), [13-14], [19-60]. The subsequent Commission consultation paper included a fifth option. See Commission (EC), 'Follow-up to the Green Paper on Consumer Collective Redress'<http://ec.europa.eu/consumers/redress_cons/docs/consultation_paper2009.pdf accessed 9 June 2001 ('Follow-up to the Green Paper on Consumer Collective Redress'), [60-64]. See also --, 'Overview of the Results of the Consultation on Consumer Collective Redress' http://ec.europa.eu/consumers/redress_cons/docs/overview_results_coll_redress_en.pdf, access 31 January 2012.

[13] Green Paper on Consumer Collective Redress (n1) [56-57]. The same is true for the EESC but there is a preference for opting in. See EESC, 'Opinion on the Green Paper on Consumer Collective Redress' [2010] OJ C128/97, [5.1.2], [5.2.3]; EESC, Opinion on Defining the Collective Action System and Its Role in the Context of Community Consumer Law' [2008] OJ C162/1, [7.2]; Mulheron, 'The Case for an Opt-out Class Action for European Member States: A Legal and Empirical Analysis' (2009) 15 Colum J Eur L 409, 451.

situation is further aggravated by the fact that, whatever procedures the Commission proposes, be it in the consumer or the competition law field, it is not clear what the objectives of these procedures are. Note, for example, that while the *Green Paper on Consumer Collective Redress* apparently seeks to improve the conditions for consumers to obtain redress and compensation,[14] option 3 concerns the possible introduction of a skimming-off procedure, via extending the CPC Regulation indirectly, so benefiting consumers by deterring future illegal behaviour.[15] The first step for putting in place effective collective redress procedures should be to explicitly recognise their aims, respective functions and the perplexed aspects of the problem they seek to tackle.[16] Regrettably the Commission has not done this either in the competition or in the consumer field.

The critical overview of the Commission's initiatives to date presented above suggests that the Commission chooses to address the problem of consumer collective redress by a more modest approach than that of some Member States.[17] This may be explained in light of the diversity of national approaches towards this problem, as well as the fact that not all Member States have collective redress procedures in place.[18]

2. Towards a coordinated approach: not the right way forward

Following the initial distinct approach, the Commission shifted the focus of the debate and announced the initiation of a public consultation on the common legal principles which

[14] *Green Paper on Consumer Collective Redress* (n1) [19].

[15] *Green Paper on Consumer Collective Redress* (n1) [45]. Follow-up to the Green Paper on Consumer Collective Redress (n12) [40].

[16] See Gibbons, 'Group litigation, Class Actions and Lord Woolf's Three Objectives – A Critical Analysis'[2008] CJQ 208, 241-242, for a similar criticism of UK policy makers.

[17] Portugal, for example. See text to n152.

[18] *Green Paper on Consumer Collective Redress* (n1) [12], ('...thirteen Member States currently have judicial collective redress mechanisms...').

should guide any future proposals on EU collective redress procedures.[19] This is explicable in light of the Parliament calling for an horizontal approach towards collective redress given '...that several of the obstacles to victims of breaches of competition law [...] occur not only in proceedings relating to EC competition law but also in areas such as product liability and other consumer – related actions'.[20] This may be true, however, the CJEU has pronounced on the potential of the right to damages to contribute in the effective application of competition law, thereby allowing for the introduction of measures departing from the compensatory principle. Such normative justification may be more difficult to advance for measures applying to consumer claims in the field of consumer law. Interestingly, the EP, in its latest resolution, despite still favouring an horizontal instrument, seems to acknowledge the specificities of competition law claims.[21]

Commission efforts to secure support by a large array of stakeholders on collective redress procedures are a long way from coming to fruition, given the diverging opinions of the business community, consumer organisations, legal practitioners and competition authorities.[22] In addition, they provide a mixed signal in regard to the Commission's intentions, and jeopardise the progress already made in the field of competition law.

[19] Commission (EU), 'Commission Work Programme 2010' (Communication) COM (2010) 135 final, 8; Commission (EU), 'Commission Work Programme 2011' (Communication) COM (2010) 623 final, 8. See also Reding, Almunia and Dalli, 'Towards a Coherent European Approach to Collective Redress: Next Steps' (Joint Information Note) SEC (2010) 1192.

[20] EP, 'Report on the White Paper on damages actions for breach of the EC antitrust rules' (2008/2154(INI)) (Committee on Economic and Monetary Affairs, Rapporteur: Klaus-Heiner Lehne) ('EP Report on WP') [3-6]. Note, though, that the EP allows some leeway for a distinctive competition law approach. Ibid.

[21] EP, Resolution on 'Towards a Coherent European Approach to Collective Redress' (2011/2089(INI)) (2 February 2012), [6], [21], [28].

[22] See opinions advanced at the public hearing on a 'Coherent Approach to Collective Redress' (5 April 2011, Brussels) (notes on file with the author). Presentations and opinions expressed <http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm>, accessed 15 December 2011. These opinions are summarised in Mertens and others, 'Detailed Minutes of the Public Hearing "Towards a Coferent European Approach to Collective Redress" (28/10/2011) <http://ec.europa.eu/competition/consultations/2011_collective_redress/study_heidelberg_hearing_en.pdf>

The coordinated reforms will first lead to the adoption of a general EU legal framework on collective redress. This framework will then be used as a baseline for specific legislative initiatives in the different policy domains. In the competition field, Commissioner Almunia seems to favour the adoption of a Directive setting common standards and minimum requirements.[23] A question related to this coordinated reform approach is whether the development of a general framework will prove to be beneficial to collective redress mechanisms in the field of competition law or, alternatively, whether it will lead to the adoption of modest mechanisms unable to address 'Group B' consumer claims.

An initial tentative answer to this question can be derived from the common core principles identified by the Commission in its consultation document, which are somewhat abstract and seem inadequate to guide any meaningful initiative in the adoption of collective redress procedures. These common principles are the following: (1) the need for effectiveness and efficiency of redress; (2) the importance of information and of the role of representative bodies; (3) the need to take account of collective consensual resolution as a means of alternative dispute resolution; (4) the need for strong safeguards to avoid abusive litigation; (5) availability of appropriate financing mechanisms, notably for citizens and SMEs; and (6) the importance of effective enforcement across the EU.[24]

accessed 15 December 2011; Hess and others, 'Evaluation of the Contributions to the Public Consultation and Hearing: "Towards a Coherent European Approach to Collective Redress"(28/10/11) <http://ec.europa.eu/competition/consultations/2011_collective_redress/study_heidelberg_contributions_en.pdf> accessed 15 December 2011. See also Heaton and Chaplin, 'Is the European Commission's Consultation on Collective Redress Trying to Fix an Antitrust Litigation Landscape that is not Broken?' (April 2011) (2) CPI <https://www.competitionpolicyinternational.com/file/view/6469> accessed 9 June 2011 for discussion of the Commission's recent efforts; Jeffries, 'EU Proposals on Collective Redress – Lost in Consultation?' (April 2011)(2) CPI <https://www.competitionpolicyinternational.com/file/view/6470> accessed 9 June 2011.

[23] *Almunia* (n4). The Parliament favors an horizontal all inclusive instrument; at the same time it acknowledges the possibility for competition law specific issues to be addressed in separate articles or chapters of the horizontal instruments or even in separate legal instruments. *EP Resolution* (n21) [17].

[24] *Public Consultation* (n4), [15].

The principles advanced above are expected to induce consensus in principle, given their abstract wording. All stakeholders agree that the adopted collective redress mechanisms should be effective and efficient. However, there is a question as to the interpretation of effectiveness. The Commission itself seems to mix the effective enforcement of EU law through public enforcement with the effective enforcement of substantive rights, implying that they serve the same purpose. For example, it is first mentioned that '*...effective enforcement of EU law is of utmost importance for citizens and businesses alike [...]. Rights which cannot be enforced in practice are worthless*'.[25] In this abstract, the Commission links the enforcement of substantive EU rights with the effective enforcement of EU law. This implies a functional approach towards the enforcement of substantive EU rights serving the purposes of EU law. In the next paragraph the Commission expressly refers to public enforcement of EU law before raising the issue '*of whether further mechanisms of private enforcement should be added to the current system of EU remedies in order to strengthen the enforcement of EU law*'.[26] Business representatives picked up on this point of employing private remedies for increasing the effectiveness of EU law enforcement and argued that the debate on collective redress should not shift from compensation in regard to breach of individual rights to an enforcement perspective.[27] The Commission may have included this point in order to justify the future proposal of measures premised on the deterrence, rather the compensation, rationale.

In addition, a close reading of the consultation document itself reveals two distinct strands of approaches towards collective redress procedures in consumer and competition

[25] *Public Consultation* (n4), [1].

[26] *Public Consultation* (n4), [2-3].

[27] Chauvin, Presentation at the public hearing on 'a Coherent Approach to Collective Redress' (5 April 2011) (Brussels) (Notes on file with the author).

law. For example, *Public Consultation* stresses the need to take account of ADR mechanisms.[28] However, ADR mechanisms are ill-suited for low-value consumer claims as 'Group B' consumer claims would be, and the Commission simply evades this point.[29]

A coherent approach to collective redress, as advocated by the Commission,[30] can be seen as a welcome development as a matter of principle. Regrettably, distinctive characteristics of specific EU law fields, such as EU competition law, do require a different approach and could, indeed, act as hindrance to the Commission current approach. [31] One cannot discuss a coherent approach without expressly pointing out the differences between the sectors in which collective redress is intended to apply. 'Group B' consumer claims in competition law call for different collective mechanisms, as the analysis in the subsequent section will reveal.

[28] *Public Consultation* (n4), [19-20].

[29] See Howells, 'Cy-près for Consumers: Ensuring Class Action Reforms Deal with "Scattered Damages" ' in Steele and Van Boom, Mass Justice: Challenges of Representation and Distribution 58, 66; CLEF, 'Guidelines for Consumer Organisations on Enforcement and Collective Redress' (September 2009) <http://www.groupaction4consumers.eu/docs/Guidelines%20for%20Consumer%20Organisations.pdf> accessed 31 January 2012, 26.

[30] *Public Consultation* (n4), [30].

[31] For the UK government also favouring a sectoral approach see Ministry of Justice, 'The Government's Response to Civil Justice Council's Report: Improving Access to Justice Through Collective Actions' (July 2009) http://www.justice.gov.uk/publications/docs/government-response-cjc-collective-actions.pdf accessed 9 June 2011, [9].

III. Demarcating Collective Action Mechanisms in the Field of Competition Law

1. 'Access to Justice': the distinctive notion for 'Group B' consumer claims

'Access to justice'[32] is often used as a catchphrase for the formulation of measures facilitating consumer claims to reach the courts or be resolved in alternative fora.[33] Collective action mechanisms in the field of competition law have been associated with the aim of compensating the victims of the respective wrongs. In such cases, the compensatory potential is taken as synonymous with 'access to justice'.[34] However, 'access to justice' does not just consider justice as the ultimate aim but also the necessary procedures through which to achieve this aim.[35] Therefore, 'access to justice' should be seen as an umbrella term that may be given many different meanings[36] and functions, with the compensatory component being only one of its constituents. The table below (Table 1) depicts this two-pronged approach to the notion of 'access to justice'.

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[32] See the ambitious four volume project, Cappelletti (gen ed), Access to Justice. See Sarat, 'Access to Justice' (1981) 94 Harv L Rev 1911 (Book Review) for an evaluation of this initiative. Cappelletti 'Alternative Dispute Resolution Processes within the Framework of the World Wide Access to Justice Movement' (1993) 56 MLR 282 provides a concise overview.

[33] See Civic Consulting, 'Study on the Use of Alternative Dispute Resolution in the European Union' (Final Report prepared for DG SANCO, 16 October 2009) <http://ec.europa.eu/consumers/redress_cons/adr_study.pdf> accessed 8 June 2011 ('Civic Consulting – ADR Report') on ADR mechanisms in different Member States; The Study Centre for Consumer Law – Centre for European Economic Law, Katholieke Universiteit Leuven, 'An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings' (Final Report prepared for DG SANCO,17 January 2007) <http://ec.europa.eu/consumers/redress/reports_studies/comparative_report_en.pdf> accessed 8 June 2011 ('Leuven Report'). See Cappelletti (n32) 282 on the notion of ADR mechanisms including both judicial and extrajudicial mechanisms deviating from the traditional types of procedures.

[34] Commission (EC), 'Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules' SEC (2008) 404, 2 April 2008 ('WP SWP'), [7-12], [40].

[35] Or as Micklitz puts it, 'access to justice comprises two elements: "access" and "justice" '. See Micklitz, 'Privatisation of Access to Justice and Soft Law – Lessons from the European Community?' in Wilhelmsson and Hurri (eds), *From Dissonance to Sense: Welfare State Expectations, Privatisation and Private Law* 505.

[36] See Ramsay, 'Consumer Redress and Access to Justice' in Rickett and Telfer (eds), International Perspectives on Consumers' Access to Justice 17, 19 for the distinction between narrow and broad concepts of access to justice. See also Nordh, 'Group Actions in Sweden: Reflections on the Purpose of Civil Litigation, the Need for Reform and a Forthcoming Proposal' (2001) 11 Duke J Comp&Intl L 381, 387-388 for a broad approach to access to justice.

TABLE1: Interpreting 'Access to Justice' – Bifurcated Notion (1)

ACCESS TO JUSTICE	
1. Means – Procedures through which consumer claims reach the courts	2. Ends – Functions/Aims of the respective procedures

'Access to justice' is explored in this section for the purposes of low value consumer claims in the field of competition law ('Group B' consumer claims). It is argued that the compensatory approach, while workable in consumer law, is too narrow and is not designed to address the majority of consumer claims in the field of competition law. The aim is to point to the different meanings of the term in consumer and competition law, shed light on their points of intersection, but also clarify their important conceptual differences. Since collective action mechanisms aim at facilitating access to justice in both fields of law,[37] the demarcation of this aim can act as a justification for the introduction of different mechanisms in the field of competition law. Exploration of the multi-focality of this concept serves to underline the nexus between procedural measures and their respective goals and functions, which will be frequently raised in the subsequent analysis on the formulation of collective action mechanisms. For example, the choice between opt-in or opt-out collective action and the mechanism of distributing the damages awards reveal the preference of a legal system towards either deterrence or the compensatory function of the respective actions.

The Commission launched the debate on improving 'access to justice' for consumers back in 1984, and has examined different means of solving consumer disputes in the consumer law field.[38] 'Access to justice' signalled the Commission's quest to provide

[37] See, for example, Commission (EC), 'Annex to the Green Paper, Damages actions for breach of the EC antitrust rules', (Staff Working Paper) SEC(2005) 1732, 19 December 2005 ('GP SWP'), [200].

consumers with the necessary avenues to enforce their substantive rights.[39] A multiplicity of ADR mechanisms in consumer law exist in individual Member States and the Commission is examining the effectiveness of those means.[40] In addition, the Commission has also examined collective redress mechanisms for low value consumer claims.[41] All these means emphasise the provision of effective redress to consumers, pointing to the perception of 'access to justice' as the sum of the procedural mechanisms that permit consumers to bring claims to court, and the successful enforcement of consumer rights.

The picture is more blurred as to the 'access to justice' notion in competition law. This is because the ultimate purpose served by private damages actions in the competition field is ambiguous. The Commission currently emphasises the compensatory goal, in line with Member States' tort law.[42] However, this approach conforms neither with Commission's previous declarations, or, arguably, its covert aspirations, nor with the CJEU approach.[43] In addition, pragmatic considerations in the case of very low consumer losses call for the structuring of effective procedural measures, in which the principle of compensation gives way to the aim of deterring competition law violations and, thereby, emphasizes the deterrent function of collective action procedures in the field of competition law.

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[38] *Consumer Redress Memorandum* (n1); Commission (EC), 'Green Paper on Access of Consumers to Justice and the Settlement of Consumer Disputes in the Single Market' COM(93) 576 final, 16 November 1993 with further references to earlier documents; EESC, 'Opinion on the Green Paper on Access of Consumers to Justice and the Settlement of Consumer Disputes in the Single Market' [1994] OJ C295/1, [2.1.2], [2.2.1]; On the Green Paper see Hodges, 'Multi Party Actions: A European Approach' (2001) 11 Duke J Comp & Intl L 321, 322-323.

[39] See, for example, *Consumer Redress Memorandum* (n1) 5 stating that '...one aspect of the Community's concern for its citizens is its interest in access to justice, in particular to obtain a just and fair settlement of disputes arising out of ordinary consumer transactions...'.

[40] *Civic Consulting ADR Report* (n33); Leuven Report (n33). See also Wagner, 'Collective Redress – Categories of Loss and Legislative Options' [2011] LQR55, 81.

[41] *Green Paper on Consumer Collective Redress* (n1); *Public Consultation* (n4).

[42] See chapter II, text to n87-93.

[43] Ibid.

The Commission may be able to reconcile the functional approach to consumer claims with the prevailing national legal systems' compensatory approach by distinguishing between two types of consumer claims, and adopting a broader approach to the 'access to justice' notion for 'Group B' consumer claims. Thus, two types of collective action procedures are called for.[44] First, collective actions structured on the compensatory principle conforming with the common principles developed in the public consultation on collective redress; the first of these being the granting of effective compensation for everyone who has suffered damage.[45] This first type of action represents the general rule which is applicable in both the field of consumer law and also to 'Group A' consumer claims in competition law and can be promoted by a horizontal instrument. In this case no conflict exists between the compensation and deterrence principles. The proposed opt-in collective actions are an example of this.[46]

Collective actions for 'Group B' consumer claims will then come as an exemption to this general rule. 'Access to justice' is served in the sense that the relevant mechanisms remain in place for the collective damages action to reach the courts, even if compensation is not delivered to each and every consumer.[47] Nonetheless consumers obtain the moral satisfaction that the perpetrator has been brought to justice and held liable for the relevant competition law violation.[48] In the present case, 'access to justice' has a broader meaning; it provides that consumers, or their respective organisations, are able to have their claims heard

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[44] See *Wagner* (n40) 78-80 in a similar vein, calling for a bifurcated approach towards collective redress for mass torts and scattered losses.

[45] *Public Consultation* (n4), [15] for reference to these principles.

[46] *WP* (n10), [2.1]; Commission(EC), 'Proposal for a Council Directive governing actions for damages for infringements of Article 81 and 82 of the Treaty' Draft Damages Directive (Document withdrawn before publication – on file with the author), Article 5.

[47] See Howells and Weatherill, *Consumer Protection Law* 606.

[48] Lindblom, 'National Report: Group Litigation in Sweden' (Report prepared for 'The Globalization of Class Actions') (6 December 2007) <http://www.law.stanford.edu/display/images/dynamic/events_media/Sweden_National_Report.pdf (hereinafter 'Swedish National Report')> accessed 8 June 2011, 36.

by the courts. However, these mechanisms are not pursued primarily to compensate the victims, but to deprive the perpetrators of the anti-competitive gains and deter future wrong-doing, thus serving the interests of the consumer in an alternative way. These actions can be seen as promoting 'access to justice' *lato sensu*, in the sense that they serve the collective consumer interest; this is the second demarcation criterion for collective action mechanisms.

TABLE 2: Implementing Access to Justice

ACCESS TO JUSTICE	
1. Means – Procedures through which Consumer Claims Reach the Courts	2. Ends – Functions/Aims of the Respective Procedures → i. Group A: Compensation (narrow approach) ii. Group B: Deterrence (broad approach)

2. Individual *v* Collective Consumer Interest as a Demarcation Criterion

The analysis in this section builds on the distinction between the aggregation of individual consumer interests and collective consumer interest and argues that collective action mechanisms for 'Group B' consumer claims should promote the latter.[49] This is not to say that collective action for damages does not also serve individual consumer interests, but,

[49] See Gidi, 'The Class Action Code: A Model for Civil Law Countries' (2005) 23 Ariz J Intl&Comp L 37, 38; Gidi, 'Class Actions in Brazil – A Model for Civil Law Countries' (2003) 51 Am J Comp L 311, 350 for an interesting distinction between 'transindividual' (ie rights belonging to the class as a whole) and 'individual' rights (rights belonging to individual members of the class) corresponding to the three types of group rights (diffuse, collective and homogeneous individual) according to the Brazilian Consumer Code. However, this distinction, although similar to some extent, does not correspond to the demarcation between individual and collective consumer interest. See Reifner and Volkmer, Neue Formen der Verbraucherrechtsberatung cited in Reich, 'Diverse Approaches to Consumer Protection Philosophy' (1992) 14 JCP 257, 279 for an idea relating to the potential of collective consumer interest to avoid organisational problems in the consumer movement. In the same vein see Kocher, 'Collective Rights and Collective Goods: Enforcement as Collective Interest' in Steele and Van Boom, Mass Justice: Challenges of Representation and Distribution 118, 127.

rather, that the function of those mechanisms principally promotes the collective consumer interest and that this should be reflected in the structure of the mechanisms adopted.

Generally, private damages actions are undertaken with the purpose of providing compensation to the victim of the respective wrong. The individual interest of the claimant, in this case, is to obtain compensation. In the context of competition law, the Commission's emphasis on the compensatory component is only sensible in regard to customers and competitors' claims, and, to a lesser extent, for 'Group A' consumer claims. However, if this emphasis on compensation is taken at face value, effective collective action mechanisms for 'Group B' consumer claims, which represent the majority of claims in the competition law field, cannot be devised. First of all, seeking to fulfil the individual consumer interest in such cases, in the sense of delivering compensation, can be extremely costly,[50] especially taking into account that individual consumers themselves pay little regard to enforcing their right to compensation.

The collective consumer interest has already been accepted as the protected legal interest in other EU law measures,[51] despite the difficulties in defining this term.[52] However, it is generally accepted that 'collective consumer interest' represents something more than the sum of individual consumer interests.[53] In the context of competition law, collective actions

[50] *Leuven Report* (n33), [427].

[51] Council Directive 98/27 EC on Injunctions for the Protection of Consumers' Interests [1998] OJ L166/51 Article 1; Council Directive 2009/22/EC on Injunctions for the Protection of Consumers' Interests (codified version) [2009] OJ L110/30 Article 1; Council Regulation (EC)2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation) [2004] OJ 2004 L 364/1 Article 1 and 2(4).

[52] Safjan, Gorywoda and Jańczuk, 'Taking Collective Interest of Consumers Seriously: A View from Poland' (2008) EUI Working Papers 2008/26 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1330909> accessed 8 June 2011, 8-14.

[53] *Leuven Report* (n33), [449]; OECD, 'Consumer Dispute Resolution and Redress in the Global Marketplace' (2006) http://www.oecd.org/dataoecd/26/61/36456184.pdf accessed 8 June 2011, 33 stating that actions in the collective consumer interest 'vindicate the general consumer interest without any showing of actual harm to

serving the 'collective consumer interest' have an important deterrent effect and market rectification potential. Their importance lies not in compensating individual victims but, rather, in maintaining an effective market structure[54] both for currently affected consumers as well as consumers buying the respective products in the future. The Commission could, in principle, advocate a broader approach to collective action mechanisms for low value consumer claims which pursue the collective consumer interest.

This approach would not preclude the right to damages for competition law violations, as pronounced by the CJEU,[55] but would merely adopt a pragmatic enforcement approach to this right, which is given a different, and wider, content. The traditional approach to the right to damages as compensating the victims of the respective wrongs would merely negate the consumer right to damages for competition law violations. A way out of this conundrum could be to devise the remedies appropriate to fulfil this right in its functional approach, thereby drawing a line between the existence of this right and its exercise.[56]

<u>TABLE 3: Consumer Right to Damages – Corresponding Remedy</u>

'*ubi ius, ibi remedium*'
Right to Damages → Remedy of compensation
Consumer Right to Damages → Devise an alternative remedy based on the functional enforcement of

individual consumers...regarded as an important mechanism to correct market failures where the collective harm ... is more than the sum of the individual losses involved'.

[54] For a similar approach (but not in the competition law context) see *Safjan, Gorywoda and Jańczuk* (n52) 8.

[55] Case C-453/99 Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others [2001] ECR I-6297 ('Courage'), [24-27]; Joined Cases C-295/04 to 298/04 Vincenzo Manfredi and Others v Lloyd Adriatico Assicurazioni SpA and Others [2006] ECR I-6619 ('Manfredi'), [90-91]. See chapter II, text to n33-61.

[56] Distinction also made by the Commission in *WP SWP* (n34), [308-309]; See Nazzini, 'Potency and Act of the Principle of Effectiveness: The Development of Competition Law Remedies and Procedures in Community Law' in Barnard and Odudu (eds), The Outer Limits of the European Union, 401, 410 arguing that the content of the right to damages depends on its function which, in turn, depends on the legal basis of the right in question. The argument presented in this thesis views compensation as the content of the right to damages. See chapter II text to n40-45 above. However, the function of this right is two-fold, and embraces both compensation and deterrence. In the case of the consumer right to damages the compensatory component has to be restructured in light of the deterrence function.

this right structured upon the deterrence principle and pursuing compensation as a secondary concern

The consumer right to damages is comprised not only of the provision of actual compensation but also from the additional benefits that consumers derive from the exercise of this right; these being the deterrence of competition law violations and the sustainment of a competitive economy. This deterrent function of the consumer right to damages can be seen as serving the collective consumer interest.

An example of a collective action mechanism serving the collective consumer interest, drawn indirectly from the Commission documents on private enforcement, is the bringing of a collective action by a consumer organisation in favour of *identifiable* victims, with the award granted being distributed according to the cy-près doctrine.[57] In this case, the consumer right to damages is enforced, although not in the conventional private law manner of providing compensation to affected consumers.

To sum up, two different collective action mechanisms should be devised; the first serving the aggregation of individual consumer interests and compensating individuals (‘Group A’ consumer claims), and the second promoting the collective consumer interest of maintaining competitive market structures (‘Group B’ consumer claims). Essentially, collective action mechanisms for ‘Group A’ consumer claims reflect the traditional individualistic approach to litigation, whereas the mechanisms for ‘Group B’ consumer claims embrace a collective approach towards litigation.[58] The individualistic, as opposed to the collective, approach to litigation is reflected in certain structural characteristics/themes of the relevant collective action mechanisms which are addressed in the subsequent section.

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[57] See Mulheron, The Modern Cy-près Doctrine. This hypothetical proposal is derived from a combined reading of *WP* (n10), pt 2.1 and *WP SWP* (n34), [47].

[58] For the distinction between the individualistic and collective justice approach see Shapiro, ‘Class Actions: The Class as Party and Client’(1998) 37 Notre Dame L Rev 913, 916 with further references.

IV. Experiences of Consumer Involvement: Examining Different Types of Collective Actions

1. Introduction

The analysis in section III examined the notion of 'access to justice', pointing to its multiple meanings, and employed the 'collective consumer interest' as a demarcation criterion and as a justification for the introduction of different collective action mechanisms for 'Group B' consumer claims. Following these normative justifications, different structural characteristics – themes of the collective mechanisms are addressed in this section, with the aim of choosing the most appropriate mechanisms for the aggregation of 'Group B' consumer claims. In recognition of the existence of a vast literature on collective actions, the subject matter of this section is approached by employing a three-part structure.

First, the structural characteristics for an effective collective action model are identified in principle (part 2). In part 3, the US class action model[59] is examined from a comparative perspective in order to discern how these structural characteristics are employed in the most popular collective action mechanism, and whether they could act as a model for a future EU collective action mechanism. However, even if, in principle, consensus can be reached in regard to the structural characteristics of an effective collective action mechanism, additional restrictions on the adoption of this mechanism are imposed by the institutional reality in individual Member States. The 'institutional reality' refers to national legal traditions, and is reflected in the available collective action mechanisms. In part 4, the structural characteristics of Member States' collective action mechanisms are examined, with the aim of proposing an effective collective action mechanism in section V which reconciles,

[59] The term 'collective action' is used in this chapter as an all-encompassing generic term. US class actions are a form of collective action which have distinguishing structural characteristics (eg opt-out, entrepreneurial lawyer, contingency fees).

to the best possible extent, the insights from the comparative normative analysis (part 2 and 3) with the national institutional characteristics (part 4).

2. Choosing certain structural characteristics: Opt in *v* Opt-out

Collective action measures for 'Group B' consumer claims should be based primarily on a deterrence rationale, promoting a wide notion of access to justice and furthering the collective consumer interest.[60] This underlying rationale is reflected in the structural characteristics of the collective action mechanisms, primarily in the choice between the opt-in or opt-out mechanism.[61] Further characteristics/themes, such as funding and distribution of awards of damages that may point to the underlying rationale of collective actions, are directly influenced by the adopted opt-in or opt-out model.

In opt-in collective actions, individual consumers must actively express their desire to be included in the action in order to be bound by the final judgment. In opt-out collective actions, the typical example being the US-type class actions, the victims of a competition law violation are automatically considered to be members of the class, unless they expressly state that they want to be excluded. Only in that case will they not be covered by any final judgment.[62] In both cases, though, the due process rights of individual class members should be safeguarded. This makes it absolutely essential for notice to be given to potential class members so that they can exercise their rights to join or leave the class as the case may be.

Opt-out collective actions are superior to opt-in actions from a deterrence perspective. The pool of claims covered by an opt-out collective action will far exceed the one covered by

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[60] See section II above.

[61] See Mulheron, The Class Action in Common Law Legal Systems: A Comparative Perspective 29-38 for a general overview.

[62] *WP SWP* (n34), [58]; On this distinction see also OECD, 'Workshop on Consumer Dispute Resolution and Redress in the Global Market-place' (Report) (2005) OECD Digital Economy Papers No 92 <http://www.oecd-ilibrary.org/docserver/download/fulltext/5kz9j9bttxnq.pdf?expires=1328101791&id=id&accname=guest&checksum=602A9B5259BB4F7D5B03F69539900AA2> accessed 1 February 2012, 28-29.

an opt-in collective action.[63] This is even more the case for low value consumer claims. In these cases, a large number of individual consumers will not even bother to declare that they would like to join the action. They may not even be aware of their right to claim.[64] Subsequently the possible damage award will be lower, and the possible deterrent effect on violators will be fairly insignificant since they are in a position to retain their illicit gains.

Opt-in collective actions, on the other hand, are more aligned with Member States' tort law and the proclaimed compensatory goal of EU private competition law enforcement. Injured parties are individually identified, actively join the collective action, and are compensated in full for their injury. However, there is a caveat here. Opt-in collective actions do not seem to be capable of sufficiently advancing the compensatory goal either, since they may leave many victims uncompensated. It is true that, in opt-in collective actions, the calculation and distribution of damages would be easier, given the fact that the victims are identified. However, in opt-in actions, only a small number of consumers may receive compensation. This does not seem to accord with the *WP* objective to 'improve the legal conditions for victims to exercise their rights under the Treaty to reparation for all damage suffered'.[65] 'Full compensation'[66] would only be available for a handful of the over-charged

[63] While this is a logical assumption to make, there are also empirical studies supporting this assertion. See Bertelsen, Calfee and Connor, 'The Rule 23(b) (3) Class Action: An Empirical Study' (1974) 62 Geo L J 1123, 1148-1151; Eisenberg and Miller, 'The Role of Opt-Out and Objectors in Class Action Litigation: Theoretical and Empirical Issues'(2004) NYU Law and Economics Research Paper Series Working Paper No 04-004 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=528146> accessed 1 February 2012, 4 in which they argue that, in the US, the opt-out rate is less than 1 percent and, in consumer class actions, less than 0.2 percent. See also Mulheron, 'Reform of Collective Redress in England and Wales: A Perspective of Need' (2008) (Research Paper for Submission to the CJC) available at http://www.lawcentres.org.uk/uploads/Collective_Redress_Prof.Mulheron_.pdf accessed 26 November 2011.

[64] Hodges, The Reform of Class and Representative Actions in European Legal Systems 120 with further references to Mulheron (n61). See also 'information asymmetry' and 'rational apathy' problems, chapter III, text to n4-12.

[65] *WP* (n10), [1.2].

[66] Ibid.

consumers, leaving the majority of them uncompensated with the infringer continuing to enjoy its illicit gains.

The difficulty in quantification and distribution of damages in opt-out collective actions should not weigh against the introduction of this type of action. Rather, the difficulties should incentivise policy makers to adopt more relaxed procedures for the quantification of damages, as well as alternative ways to distribute the damage to individual consumers. For example, the Commission in its *WP* considers both direct (by the defendant or by an independent fund) and indirect ways of distribution (cy-près distribution or distribution to a public interest foundation).[67] Interestingly, if adequate notice is given to the injured consumers, opt-out mechanisms encompass the benefits attributed to opt-in mechanisms, that is, they are aligned with the compensatory principle and possess an important deterrent function as well. This is because the consumers who care to opt-in to a collective action most probably claim their individual damage in opt-out procedures as well. Thus, these consumers will be compensated, irrespective of the form of the collective action mechanism. Opt-out mechanisms present the additional benefit that the amount remaining as a result of consumers not claiming individually, apart from contributing to deterrence, may be spent in a manner that is beneficial to the consumer interest.

3. The US class action model: a review of its structural characteristics

A critical analysis of the federal US class action model allows conclusions to be drawn in regard to its potential to serve as a paradigm for European developments in the field. The analysis is by no means comprehensive; the aim is to point to certain often-discussed characteristics of the US class action model in order to discuss their effectiveness in promoting collective action mechanisms for low value consumer claims.

[67] *WP SPW* (n34), [47].

Consumer class actions, as the prime example of small claims class actions, should be distinguished from other types of class actions.[68] In consumer class actions, individual consumer damage is usually of such low value that is pointless for individual claims to be raised. In *Phillips Petroleum Co v Shutts* the SC stated that:

> Modern plaintiff class actions follow the same goals, permitting litigation of a suit involving common questions when there are too many plaintiffs for proper joinder. Class actions may permit the plaintiffs to pool claims which would be uneconomically to litigate individually...most of the plaintiffs would have no realistic day in court if a class action were not available...[69]

Thus, the SC views the class action device as a vehicle which enables these claims to reach the courts, raising the question as to whether such an approach is justified and on what grounds. Commentators advanced different theories for justifying the existence of this type of action that can be classified under either a compensatory or a deterrence approach. Class action is presented as a means to overcome collective action problems[70] in the sense of providing incentives to affected individuals who suffer minor injuries. The herein termed compensatory approach to consumer collective action treats class actions as a device that permits the enforcement of individual claims.[71] The deterrence approach disregards

[68] Here, reference is made to class actions under 23 (b) (3), and not 'mandatory' class actions under 23 (b) (1) and (2). For example, small claims class actions should be distinguished from other mass tort class actions. On mass tort class actions and the distinction with small claims class actions see Coffee, 'Class Wars: The Dilemma of Mass Tort Class Action'(1995) 95 Colum L Rev 1344, 1351-1352; Shapiro, (n58) 923-925, 929. For problems in mass tort cases see Issacharoff, 'Governance and Legitimacy in the Law of Class Actions' [1999] Supreme Court Review 1. See also Amchem v Windsor Products 117 SCt 2231 (1997);Ortiz v Fibreboard 119 SCt 2295 (1999).

[69] Phillips Petroleum Co v Shutts 472 US 797, 809 (1985). See also Deposit Guarantee Bank v Roper 445 US 326, 339 (1980).

[70] See Olson, The Logic of Collective Action: Public Goods and the Theory of Groups. On collective litigation as a form of collective action see also Yeazell, 'Collective Litigation as Collective Action' (1989) 43 U Illinois L Rev 43.

[71] Lang, 'Class Actions and US Antitrust Laws: Prerequisites and Interdependencies of the Implementation of a Procedural Device for the Aggregation of Low Value Claims' (2001) 24 WC 285, 286.

individual rights, as the victims themselves are indifferent to their own minimal loss. Under this theory, consumer class action is an additional enforcement tool against perpetrators and is primarily concerned with deterrence and the impacts on firms' incentives to comply with the law.[72]

Rubenstein advances a very interesting theory to justify small claims class actions.[73] According to him, small claims class actions solve the collective action problem because the FRCP permit the pooling of small claims and the creation of a group of claims rather than a group of claimants. This, in turn, allows for the production of positive externalities that exceed the effect of deterrence on firms' behaviour and include, apart from the 'threat effect', wider 'decree effects', 'institutional' and 'settlement effects'. [74] In essence, this theory encapsulates both of the above-mentioned deterrence and compensation approaches.

Small claims class actions in the US reflect, indeed, a combination of the compensation and the deterrence approaches.[75] This can be deduced from the function of the respective actions, as well as the often-adopted innovative methods for the distribution of the damages awards. This suggests that small claims class actions in the US are also about enforcing individual rights. At the same time, large awards, or the mere threat of them, can certainly influence firms' behaviour. The elements of making small claims class actions a reality are reviewed below since, despite class action being an often employed litigation

[72]Shapiro (n58) 924 argues that deterrence is the sole purpose of small claims class actions.

[73] Rubenstein, 'Why Enable Litigation?: A Positive Externalities Theory of the Small Claims Class Action' (2006) 74 UMKC LRev 709, 710, 718-719, 723.

[74] Ibid.

[75] See Blue Shield of Virginia v McCready 457 US 465 (1982)where, according to the SC '..Congress sought to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations....'; also Mitsubishi Motors Corp v Soler Chrysler Plymouth 473 US 614 , 635 (1985), where, according to the SC'...notwithstanding its important incidental policing function, the treble damages cause of action conferred on private parties by [4[Clayton Act...seeks primarily to enable an injured competitor to gain compensation for that injury...'; Brunswick Corp v Pueblo Bowl-O-Mat, Inc 429 US 477, 485-486 (1977).

model in the US for mass claims, such actions have raised criticism in the US literature as well, mainly because of certain structural features of the litigation.[76]

i. Class counsel

A two-fold criticism that is often aired against small claim class actions is related to the class counsel role, either because it drives defendants into unfair settlements and/or because these settlements are of little benefit to individual class members.[77] Counsel's role is the more important for small claims class actions, especially because the individual consumer damage claim is very small, so precluding any individual consumer from organising the collective group action.[78] Therefore, actions of this type would not have been brought if it were not for the efforts of the class counsel acting as an agent for a large number of consumers (being the principals). However, on closer inspection, the principal-agent relationship in small claim class actions is distorted, since the agent assumes the role of the principal.[79] Given that, in small claims consumer class actions, consumers are indifferent to their trivial individual damages,which is also evident in the low opt-out rates, the court should assume a more active managerial role over the class counsel,[80] since there is, in effect, no class representative

[76] Hensler, Pace, Dombey-Moore, Giddens, Gross and Moller, Class Action Dilemmas: Pursuing Public Goals for Private Gain (RAND Institute for Civil Justice, 2000)79-99; Coffee (n68) 1344,1345, with further references.

[77] Cooper, 'Class Action Advice in the Form of Questions'(2001) 11 Duke J Comp Int'l L 215, 235; Handler, 'The Shift from Substantive to Procedural Innovations in Antitrust Suits' (1971) Colum L Rev 1,9-10 effectively viewing small claim class actions as not open to trial, resulting in 'legalized blackmail' for defendants and benefiting only the plaintiffs' lawyers. See Silver, ' "We are scared to death" : Class Certification and Blackmail' (2003) 78 NYU L Rev 1357, who rejects this idea.

[78] Issacharoff, 'Group Litigation of Consumer Claims: Lessons from the US Experience' (1999) 34 Tex Intl L J 135, 146-147.

[79] Coffee, 'Understanding the Plaintiff's Attorney: The Implications of Economic Theory For Private Enforcement of Law Through Class and Derivative Actions' (1986) 86 Colum L Rev 669, 678 (...courts [...] are prone to emphasize that the plaintiff's attorney has no 'true' identifiable client...); Macey and Miller, 'The Plaintiff's Attorney's Role in Class Action and Derivatives Litigation: Economic Analysis and Recommendations for Reform' (1991) 58 U Chi L Rev 1, 4.

[80] FRCP 23 (g) (1).

assuming that role.[81] The court's role in regard to the adequacy of the class counsel is most important at the class certification and approval of a potential settlement phase,[82] especially if one takes into account the criticism on collusion between the class counsel and the defendant in reaching a settlement which may disregard the interests of the class.[83]

The role of the class counsel has received criticism in the context of coupon settlements, which appear to be frequent in small claim class actions.[84] CAFA[85] partly alleviated these concerns, since it aligned the incentives of the plaintiffs' counsel with those of the class in the case of coupon settlements by providing that attorney's fees are to be calculated based on the percentage of the coupons actually redeemed (and not assessed against those issued, as was the case before).[86]

The fact that the majority of class actions lead to settlements[87] should not exacerbate the principal – agent problem. In other words, the fact that the majority of class actions are settled should not be taken as indicative of a principal-agent problem but, rather, as indicative of the need to formulate an adequate managerial role for the court through legal means. Consumer class actions are usually a win-win situation for consumers, in the sense that they

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[81] *Eisenberg and Miller* (n63) 4, 39.

[82] *Lang* (n71) 293.

[83] *Coffee* (n79) 714; Nagareda, 'The Preexistence Principle and the Role of the Class Action' (2003) 103 Colum L Rev 149, 163; Hay and Rosenberg, ' "Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy ' (2000) 75 Notre D L Rev 1377, 1389. See Bronsteen, ' Class Action Settlements: An Opt-in Proposal' [2005] U Ill L Rev 903 for an alternative solution.

[84] On coupon settlements see Miller and Singer, 'Nonpecuniary Class Action Settlements' (1997) 60 LCP 97; For an attempt to rebut this criticism see Rubenstein, 'On What a "Private Attorney General" is and Why it Matters' (2004) 57 Vand L Rev 2129, 2159ff. On overcoming the problems posed by coupon settlements see Leslie, 'A Market Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation'(2002) 49 UCLA L Rev 991.

[85] Class Action Fairness Act , Pub L 109-2, 119 Stat 4 (Feb 18, 2005) (codified in 28 USC).

[86]28 USC [1712] (a); Blaire and Piette, 'Coupons and Settlements in Antitrust Class Actions' (2006) 20 Antitrust 32,33. Blaire and Piette, 'Coupon Settlements: Compensation and Deterrence' (2006)51 AB 661.

[87] *Nagareda* (n83)151. In fact, economic theory supports the contention that the majority of disputes lead to settlement. See Landes, 'An Economic Analysis of the Courts' (1971) 14 J L&Econ 61.

allow for the trial of otherwise non-viable consumer claims. However small the compensation they may bring to consumers, it is better than receiving nothing at all. Whether this small benefit to class members justifies the high litigation costs is a different question, which the US legal system has answered in the affirmative, with the exception of the *Illinois Brick* formulation which banned indirect purchaser suits before federal courts because final consumers were not regarded as efficient plaintiffs.[88] The active role of the plaintiffs' counsel could effectively rebut this argument.

ii. *Opt–out structure*

In small claims class actions, claimants do not actively form a group but, rather, remain inactive; no group of claimants exists but, rather, a grouping of claims, which is made possible by the fact that class members are coerced into joining the group.[89] The 'quasi-mandatory' group formation is realized through the opt-out character of this type of action and, in fact, it has been suggested that the opt-out structure of the class, introduced in 1966, is effectively what permits small claim class actions to reach the courts.[90]

The opt-out structure gives rise to due process concerns. Due process rights of class members are safeguarded, as they are given adequate notice. They can express their decision not to be included in the class, either before class certification or before the approval of any potential settlement by the court.[91] In *Eisen v Carlisle* the SC required notice to be given to individual class members whose conduct details could be found with reasonable effort.[92] In light of the low opt-out rates in consumer cases, commentators have suggested that this is not

88 Illinois Brick Co v Illinois, 431 US 720, 736 (1977).

89 *Rubenstein* (n73) 718.

90 Kennedy, 'Class Actions: The Right to Opt out' (1984) 25 Ariz L Rev 3, 20-21.

91 FRCP 23 (c) (2) (b) and 23 (e)(1) and (4).

92 417 US 156 (1974).

an efficient approach, as it creates both social, as well as class costs. Instead, individual notice should be replaced by publication and/or electronic notice.[93] Indeed, there are examples of court decisions at the state level which adopt this approach, as was the case in the *Domestic Air Transportation Antitrust Litigation*, in which the court accepted that publication in newspapers and airline magazines sufficed to fulfil the individual notice requirement. [94]

iii. *Funding rules*

Another important factor that contributes to the realization of consumer class action litigation in the US is the funding rules, which permit the class counsel to finance the litigation under a contingency fee arrangement.[95] Also, the fact that each party bears its own costs (and there is no 'loser pays' rule), the so called 'American Rule', incentivises the bringing of such actions.[96] Contingency fees have been criticised for resulting in lucrative lawyer awards while bringing little benefit to consumers; a concern which the CAFA has tried to address.[97]

iv. Distribution of damages

The courts advanced innovative means for the distribution of the damages award.[98] In general, there have been very low claim rates in consumer class actions, given the very small

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[93] *Eisenberg and Miller*(n63) 37-38. See also Bronsteen and Fisse, 'The Class Action Rule' (2003) 78 Notre Dame L Rev 1419, 1437-1438. ALI, Principles of the Law of Aggregate Litigation (Proposed Final Draft, 1 April 2009) 150-151, 161-162.

[94] Calkins, 'An Enforcement Official's Reflections on Antitrust Class Actions' (1997) 39 Ariz L Rev 413, 420-421.

[95] Issacharoff and Miller , 'Will Aggregate Litigation Come to Europe?' (2009) 62 Vand L Rev 179, 199. See Rubinfeld and Scotchmer, 'Contingent Fees for Attorneys: An Economic Analysis' (1993)24 RAND J Econ 343 on the economic justification of contingency fees and their impact on deterrence.

[96] *Coffee* (n79) 670.

[97] See text to n86 above. See also Helland and Tabarrok, 'Contingency Fees, Settlement Delays, and Low Quality Litigation: Empirical Evidence from Two Datasets' (2003) 19 JLEO 517 which shows that contingency fees are preferable to hourly fees.

[98] See DuVal, 'The Class Action as an Antitrust Enforcement Device: The Chicago Experience (II) (1976) American Bar Foundation Research Journal 1273, 1329-1331 for examples of US cases accepting or rejecting

size of individual damages. This calls for distribution mechanisms that also benefit the inactive consumers, ranging from discounts on future purchases (coupons), to establishing a trust fund and giving part of the award to a consumer-related cause. All of these mechanisms fall under the general category of cy-près or fluid recovery,[99] with consumer trust funds being viewed as the most appropriate cy-près form for consumer class actions.[100] Reverter mechanisms, which essentially bring unclaimed profits to the defendant, are of no benefit to private or general consumer interests, since they reduce much of the deterrent effect of the respective class actions.[101]

v. Parens patriae actions as an alternative to consumer class actions

In addition to private class actions, the US legal system provides for *parens patriae* actions brought by the State Attorneys General on behalf of state residents with the aim of recovering damages caused by an antitrust violation.[102] *Parens patriae* actions were introduced as an antidote to the *Eisen* litigation[103] that, according to some commentators, made consumer class

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'fluid class recovery'. See Shapiro, 'Processing the Consumer's Claim' (1972) 41 Antitrust L J 257 for a debate in the light of the antibiotics litigation; Contra Malina, 'Fluid Class Recovery as a Consumer Remedy in Antitrust Cases' (1972) 47 NYU L Rev 477.

[99] Despite the fact that they are usually used as synonyms they are not the same. Fluid recovery provides relief to future consumers through, for example, discounts on future sales. See Foer, 'Enhancing Competition through the Cy Pres Remedy: Suggested Best Practices'(2010) 24 Antitrust 86, fn3.

[100] See also *ALI Principles Draft* (n93), [3.07], accepting cy-près as a second best option, if further distribution to participating class members is not possible, and also calling for a close nexus between the proposed recipient and the class. Hillebrand and Torrence, 'Claims Procedures in Large Consumer Class Actions and Equitable Distribution of Benefits' (1988) 28 Santa Clara L Rev 747, 748, 756, 762, 766; DeJarlais, 'Notes - The Consumer Trust Fund: A Cy Pres Solution to Undistributed Funds in Consumer Class Actions' (1987) 38 Hastings L J 729, 732.

[101] Sepherd, 'Damage Distribution in Class Actions: The Cy-près Remedy'(1972) 39 U Chi L Rev 448.

[102] Hart Scott Rodino Antitrust Improvements Act of 1976 ('HSRA'), Pub L No 94-435, 90 Stat 1383 (1976) (codified as amended in scattered sections of 15 USC) USC 15(c). Calkins (n94) 433-437. On parens patriae actions and AMC proposals for reform see Cengiz, 'The Role of State Attorneys General in US Antitrust Policy: Public Enforcement through Private Enforcement Methods' (2006) (UEA – CCP Working Paper 06-19) 16ff.

[103] See Dam, 'Class Action Notice: Who Needs it?' (1974) Supreme Court Review 97, 100-104 for a concise approach to the Eisen case.

actions theoretically possible but practically infeasible.[104] Interestingly, this fact reveals that US class actions do indeed face problems addressing small consumer claims and some alternative mechanism is called for; a highly topical observation in light of the current EU efforts.

The requirements for bringing *parens patriae* actions are less stringent than private class actions and the State Attorneys General are generally assumed to act in the public interest, so these actions are perceived to be capable of addressing the shortcomings of private class actions.[105] No notification to individual victims is required and only aggregate, and not individual, damages need be calculated.[106] Further, this type of action provides for distribution, as well as cy-près payments.[107]

Parens patriae actions resemble administrative enforcement since standing is granted to a state official. At the same time, though, they remain a form of private enforcement because they are brought before, and assessed by, civil courts. In addition, they bear similarities to consumer organisation actions, given that they are both concerned with addressing the principal-agent problem by granting standing to bodies presumed to be acting to the public interest. The consumer collective redress model advocated in the EU could borrow some elements from the *parens patriae* model, especially in regard to the rules on damages aggregation and distribution.

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[104] *DuVal* (n98) 1356. See Shapiro and Springer, 'Management of Consumer Class Actions after Eisen: Notice and Determination of Damages' (1975) 26 Mercer L Rev 851. Also, parens patriae were viewed as a solution to combating the burdens imposed on the judicial system by class actions and reversed Hawaii v Standard Oil and Co 405 US 251-254 (1972). See Dam, 'Class Actions: Efficiency, Compensation, Deterrence and Conflict of Interest' (1975) 4 J Legal Stud 47, 64. Farmer, 'More Lessons from the Laboratories: Cy-près Distributions in Parens Patriae Antitrust Actions Brought by State Attorneys General' (2000) 68Fordm L Rev 361, 371-376.

[105] *Farmer* (n104) 389-391.

[106] 15 USC [15](d).

[107] 15 USC [15] (e).

This analysis elucidates various considerations present in the European debate as well, such as standing, the opt-in or opt-out model of the collective action mechanism, funding of the actions, and distribution of the damages award. Interestingly, in the US, the class action issue is not at all settled, with frequent attempts, both in the past and more recently, to amend the applicable rules.[108] At the same time, the US class action system, in as much as it addresses small claims class actions, could provide a source of inspiration for EU policy makers.

4. Structural Characteristics of Member States' Collective Action Mechanisms

Several Member States seek ways in which to facilitate multi-party litigation. Indeed, the debate on collective action in Europe was first initiated at the Member States' level. However, collective procedures that enhance procedural efficiency, alter claimants' incentives and promote otherwise non-viable claims were treated in the same manner.[109] The aim here is not to review in detail the different national collective action systems that adopt different public or private models for the enforcement of consumer rights,[110] but to identify

[108] See Miller, 'Of Frankenstein Monsters and Shining Knights: Myth, Reality and the "Class Action Problem"' (1979) 72 Harv L Rev 664 on proposals to reform FRCP 23; Walker, 'The Consumer Class Action Bill of Rights: A Policy and Political Mistake' (2007) 58 Hastings LJ 849, 860-865. See Simmons and Borden, 'The Class Action Fairness Act of 2005 and State Law Antitrust Actions' (2006) 20 Antitrust 19 on recent changes; Casper, 'The Class Action Fairness Act's Impact on Settlements' (2006) 20 Antitrust 26; Burch, 'CAFA's Impact on Litigation as a Public Good' (2008) 29 Cardozo L Rev 2517; Sherman, 'Class Actions After the Class Action Fairness Act of 2005'(2006) 80 Tul L Rev 1593. See also the ALI Project on the principles of the law of aggregate litigation which 'seeks to identify good procedures for handling aggregate lawsuits [...] to help judges, legislators and others to make the aggregation decision correctly [...] and to provide the framework for recommended law reform'. *ALI Principles Draft* (n93), 2. ALI, Principles of the Law of Aggregate Litigation (2010) Official Text.

[109] Fairgrieve and Howells, 'Collective Redress Procedures – European Debates' (2009) 58 ICLQ 379. The same is true on the Parliament's approach to collective redress. See EP Resolution (n21) [5] that points to the 'the possible benefits of collective judicial actions in terms of lower costs and greater legal certainty for claimants, defendants and the judicial system alike by avoiding parallel litigation of similar claims'. However, this is not the aim of 'Group B' consumer claims. Collective action mechanisms in this case allow the bringing of claims that could not be litigated individually, serving other goals, rather than efficiency of litigation.

[110] For an overview see *Hodges* (n64); Caffagi and Micklitz, 'Administrative and Judicial Collective Enforcement of Consumer Law in the US and the European Community' (2007) EUI Law Working Paper No. 2007/22 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1024103 accessed 8 June 2011; Leuven Report (n33). Freshfields, 'Class Actions and Third-Party Funding of Litigation' (June 2007) <

certain prevailing characteristics in the European collective redress procedures, difficult as that may be given the wide variety of different procedures,[111] and to draw general conclusions that could guide the Commission on the design of collective action systems for competition law violations. The focus is on those Member States that have recently enacted laws on collective litigation procedures and on those in which such actions were raised in the past. Also, the proceedings covered have the potential to protect consumer interest in the context of competition law and grant standing either to consumers themselves or to consumer associations.[112] Collective action mechanisms that are not applicable in the field of competition law are not addressed.[113]

a. Furthering individual consumers' interests and the narrow notion of access to justice

In this section a variety of national collective redress mechanisms are examined, all of which serve the *narrow notion of access to justice*, in the sense that their aim is to *compensate* the victims of the respective wrongs, thereby serving the *individual consumer interest*. The

http://www.freshfields.com/publications/pdfs/2007/jun18/18825.pdf accessed 8 June 2011 ('Freshfields Report'); see http://www.law.stanford.edu/calendar/details/1066/ accessed 8 June 2011 for national reports on collective actions submitted under the auspices of the project 'The Globalisation of Class Actions' undertaken by Stanford Law School and the Oxford Centre of Socio-Legal Studies; see The ANNALS of the American Academy of Political and Social Science, The Globalisation of Class Actions Contents (March 2009) 622 ('The ANNALS') 1 for a wide variety of articles concerning collective actions in different jurisdictions. See also Civic Consulting, 'Evaluation of the Effectiveness and Efficiency of Collective Redress Mechanisms in the European Union' (Final Report prepared for DG SANCO, 26 August 2008) http://ec.europa.eu/consumers/redress_cons/finalreportevaluationstudypart1-final2008-11-26.pdf accessed 8 June 2011 ('Civic Consulting-Collective Redress Report') and the National Reports Submitted under this project available at <http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm>, accessed 8 June 2011.

[111] Hodges, 'From Class Actions to Collective Redress: a Revolution in Approach to Compensation' [2009] CJQ 41, 45.

[112] Thus, representative actions initiated by public bodies fall beyond the scope of the present chapter, since the focus here is on enhancing consumers' involvement in private competition law enforcement through collective action mechanisms.

[113] For example, French law provides for actions in regard to the collective consumer interest (art. L 421-1). These actions complement public enforcement of consumer law since, in competition law, consumer organisations can bring an action before the Competition Council. See Idot, 'Private Enforcement of Competition Law – Recommendations Flowing from the French Experience' in Basedow (ed), *Private Enforcement of EC Competition Law* 85, 97.

compensatory and individualistic nature of those actions can be deduced from their opt-in structure, the active role and participation of individual consumers and the emphasis attributed to the distribution of the damages awards to the individual victims. Emphasis is given to those mechanisms that alter claimants' incentives to bring an action.[114]

The structural characteristics present in this category can serve as a useful point of departure for formulating the necessary procedures to address 'Group A' consumer claims. Claims of this type present fewer difficulties to the claimants, and can be more easily accommodated under Member States' civil procedural rules than 'Group B' consumer claims. An adverse relationship can be discerned here. The majority of national mechanisms can only address a minority of consumer claims, so it is clear that they are not fit for private enforcement of competition law when it comes to 'Group B' consumer claims.

i. Opt-in Mechanisms

In this section, examples of national collective actions of the opt-in type are offered that reveal the inadequacy of procedures of this type to promote 'Group B' consumer claims. In *France*, an approved and duly recognised consumer association can sue for damages on behalf of those consumers, if asked by two or more consumers suffering damage originating

[114] Mechanisms, like joint actions, designed just to improve procedural efficiency or case management tools, like the English Group Litigation Order (GLO), exist in almost all Member States. These mechanisms are outwith the scope of this thesis. In joint actions, as Lindblom points out, 'the typical representative situation is not present' since 'all the joined plaintiffs are acting for themselves only and they are all parties'; Lindblom, 'Individual Litigation and Mass Justice: A Swedish Perspective and Proposal on Group Actions in Civil Procedure'(1997) 45 Am JComp L 805, 820; See also Stadler, Collective Action as an Efficient Means for the Enforcement of European Competition Law' in Basedow (ed), *Private Enforcement of EC Competition Law* 195, 201-202; Waelbroeck, Slater and Even-Shoshan, 'Study on the conditions of claims for damages in case of infringement of EC competition rules' (Comparative Report) ('Ashurst Study') (31 August 2004) <http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf> accessed 28 January 2012, 44. For a law and economics approach to available group litigation procedures for competition law violations see Keske, *Group Litigation in European Competition Law: a Law and Economics Perspective*.

from the acts of the same person.[115] This procedure is structured as opt-in, in the sense that the consumer organisation has to secure individual consumer consents, which makes it inappropriate for 'Group B' consumer claims. This is the more so, since, as *Cartelmobile* reveals, in order for the case to be admissible, the consumer organisation should not actively incite consumers to join the case.[116] The representative organisations can only appeal for consumer mandates through the press and not radio, television or the internet[117] and often criticise the proxy constraints as being too strict.[118] In this case, 'UFC Que Choisir?' brought a follow-on action against three mobile phone operators,[119] but the action was held inadmissible by the first instance court and later by the Court of Appeal. 'UFC Que Choisir?' criticised the courts' approach in that it indicates the shortcomings of the French legal system to adequately protect the consumer interest.[120] However, even if the proxy conditions were more lax and the action was held admissible, only a very limited number of consumers joined

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[115] Article L 422-1 of the Consumer Code; see Magnier, 'Class Actions, Group Litigation and Other Forms of Collective Litigation' (Report prepared for 'The Globalization of Class Actions') http://www.law.stanford.edu/display/images/dynamic/events_media/France_National_Report.pdf accessed 8 June 2011. Magnier, 'The French Civil Litigation System, the Increasing Role of Judges, and Influences from Europe' (2009) The ANNALS (n110) 114; Idot (n113) 97.

[116] *Hodges* (n64) 84. The court held that the action was a disguised joint representative action, since the consumer organisation in this case chose not to bring a representative action because of its costs (and maybe the strict proxy requirements) but, rather, appeal to the system of common rules, based on civil action for damages due to unfair practices. See *Magnier*, Report (n115) 20; Jalabert-Doury, 'France' in Foer and Cuneo (eds), *The International Handbook of Private Enforcement of Competition Law* 322.

[117] French law does not expressly mention solicitation via the Internet. The issue was decided by Lille First Instance Civil Court in the Class Action.fr case. However, in this case it was a company (Class Action.fr) who tried to solicit consumers, and not a consumer organisation. *Magnier*, The ANNALS (n115)117.

[118] *Magnier*, Report (n115) 12, 14.

[119] See *Hodges* (n64) 84; Idot (n113) 96-98 for more information on this case.

[120]On 'UFC-Que Choisir?' views see http://www.cartelmobile.org/ accessed 8 June 2011.

the case,[121] which proves that its potential to compensate consumers was also somewhat limited.

In *England*, section 47B CA provides for a procedure according to which authorised consumer organisations can bring 'follow-on' damages actions before the CAT claiming compensation for consumers who had been affected. The consumers have to expressly declare that they want to be included in the action (opt-in mechanism). The only action brought to date was settled, with judicial proceedings continuing on the matter of cost assessment.[122] In this case very few consumers were compensated, thereby promoting further debate for the need to introduce opt-out mechanisms in England.[123]

In the above two examples, the failure of the collective action can be attributed to its opt-in nature. This should not be taken to mean, though, that an opt-out structure alone is a sufficient condition for an effective collective action system.

ii. Primary Opt-out structure with victims claiming only on an individual basis

Technically, declaratory judgments on the violation applicable to all injured parties constitute a form of opt-out mechanism. However, the fact that the injured parties need to come forward and claim their individual damage, and no other form of damages distribution is provided for, shows that these mechanisms cannot advance 'Group B' consumer claims.

For example, in England, apart from the specific collective action mechanisms for competition law violations, it is possible for a person bearing the same interest in a claim to

[121] *Hodges* (n64) 84 estimates the percentage to less than one percent. See also UFC Que Choisir, 'Trade Practices and Competition – Mobile Telephone Cartel' (Presentation at CLEF Meeting, 17-18 May, Brussels) http://www.clef-project.eu/media/d_GaellePatettaUFCcasecartelmobile_75402.pdf accessed 8 June 2011.

[122] The Consumers' Association v JJB Sports Plc (Case No1078/7/9/07)[2009] CAT 2.

[123] CJC, 'Improving Access to Justice Through Collective Actions' (November 2008) http://www.judiciary.gov.uk/Resources/JCO/Documents/CJC/Publications/CJC%20papers/CJC%20Improving< %20Access%20to%20Justice%20through%20Collective%20Actions.pdf> accessed 8 June2011 ('CJC Report') 67-86. OFT916 resp, 'Private actions in competition law: effective redress for consumers and business' (Recommendations) (November 2007) http://www.oft.gov.uk/shared_oft/reports/comp_policy/oft916resp.pdf accessed 8 June 2011, [7.11-7.23].

represent other people, without there being a need for these people to issue their own claim forms.[124] This mechanism, however, possesses limited potential to contribute to the compensation of cartel victims, as *Emerald Supplies Ltd v British Airways plc* (‘*Emerald Supplies*’) indicates. [125] Emerald sued British Airways (‘BA’), on her own behalf, as a direct purchaser and, on behalf of all indirect purchasers, for damages caused to at least 178 further potential claimants, according to Emerald, by British Airways’ participation in the air freight cartel.[126] The court, in this case, essentially upheld BA’s arguments and struck out the representative part since the claimant fails *‘...to provide any basis on which ‘the other persons’ with the ‘same interest in the claim’ can be identified*’ and *‘...that the class, so far as identifiable, is not a single homogenous class but inherently, at least, two classes with conflicting interests...*’.[127] The judgment was upheld on appeal.[128]

In addition to the difficulties flowing from the ‘same interest’ requirement, and the identification of a ‘homogeneous class’, CPR 19.6 is unlikely to promote consumer claims for the additional reason that individual consumer damages will be small and no individual consumer will have an adequate incentive to bring an action on behalf of others.[129] Moreover, CPR 19.6 does not allow for an award of damages to be made to the represented class since ‘

[124] CPR19.6; Brealey and Green (eds), *Competition Litigation – UK Practice and Procedure* 35, 40; Howells, ‘Country Report UK’ (Report prepared for Civic Consulting to be submitted to DG SANCO) <http://ec.europa.eu/consumers/redress_cons/uk-country-report-final.pdf> accessed 9 June 2011.

[125] [2009] EWHC 741 (Ch), [2009] 3WLR 1200. For a criticism see Mulheron, ‘Emerald Supplies Ltd v British Airways Plc: A Century Later the Ghost of Markt lives on’ (2009)8 CompLaw 159.

[126] *Emerald Supplies* (n125) [1-9]. See Cartlidge, ‘UK High Court Strikes out part of Cartel Damages Claim Against British Airways’ (8 September 2008) EU & Competition News http://www.olswang.com/newsarticle.asp?sid=123&aid=2693 accessed 8 June 2011, for an overview of the facts.

[127] *Emerald Supplies* (n125), [25-26], [32-36].

[128] Emerald Supplies Ltd v British Airways Plc [2010] EWCA Civ 1284, [2011] 2 WLR 203 (‘Emerald Supplies A’) [60-69].

[129] Zuckerman, Zuckerman on Civil Procedure: Principles of Practice, [12.30].

...a person coming within that class will be entitled to rely on the declarations as res judicata, but will still have to establish damage in a separate action...', [130] and this detracts from the procedure's potential to contribute to the raising of consumer claims for competition law violations.

Another example of declaratory judgments stems from the recent amendment,[131] of the *Greek Consumer Code* that provides consumer organisations that fulfil certain conditions with the opportunity to obtain a declaratory action for damages.[132] This mechanism does not seem capable of deterring infringements of competition law, thereby promoting the collective consumer interest of retaining competitive markets. This is because, following the declaratory judgment, consumers themselves would have to prove and claim their individual damage from the infringer, which remains very difficult, despite efforts to assist consumers in proving their claims.[133] Given the low value of consumer claims, and the evidential difficulties in proving their damage, consumers will most likely not act at all, leaving the illegal gains to the infringer.

iii. Financial Risk

Financial risk of collective action is related to the initial funding of the action as well as the obligation to pay the other party's costs. For example, the new *Swedish Group Proceedings Act of 2002* provides for collective actions (or else private group actions) of the opt-in type, since individuals who have been affected should make an application to the court to join the

[130] *Emerald Supplies* (n125), [21] citing Prudential Assurance Co Ltd v Newman Industries Ltd [1981] Ch.229, [1980] 2 WLR 339. *Emerald Supplies A* (n128), [24].

[131] L 3587/2007.

[132] Article 10 (16) L2251/1994; Alexandridou and Karipidou, 'Country Report Greece' (Report prepared for Civic Consulting to be submitted to DG SANCO) <http://ec.europa.eu/consumers/redress_cons/gr-country-report-final.pdf> accessed 8 June 2011; Alexandridou and Apallagaki, 'Article 10 L. 2251/1994 in Alexandridou (ed), *Consumer Protection Law* 555 (in Greek).

[133] Article 10(20) L2251/1994.

action.[134] However, the risk of having to pay both parties' costs should the case fail can act as a strong deterrent to prospective plaintiffs, thereby making Swedish collective action mechanisms possible only for cases involving large individual claims.[135]

Denmark introduced a new law on collective actions, with effect from 2008, which provides for opt-in collective and representative actions as well as opt-out representative actions brought by public authorities (a 'public opt-out' mechanism), eg the Consumer Ombudsman.[136] The problem with the opt-in procedure is the financial risk that it entails for the members of the group, which is unlikely to be accepted for small consumer claims. Due to this problem, an opt-out procedure was introduced as well;[137] however, this does not allow consumer participation and does not fall under private enforcement for our purposes.

b. Furthering collective consumer interest and the wide notion of access to justice

This section focuses on collective action mechanisms that serve the *broad notion of access to justice* and could potentially contribute to deter anticompetitive practices, thereby promoting the collective consumer interest. The deterrence function of the respective actions is evident given their opt-out elements and the methods employed for the distribution of the damages award.

i. Opt-out mechanisms

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[134] See *Lindblom* (n48) 10ff, 13. As Lindblom points out, the Swedish Group Proceedings Act is pluralistic since it permits not only private group actions (collective actions) but also actions by organisations (representative actions) and public actions (representative actions initiated by public authorities, eg by the Consumer Ombudsman). However, actions by organisations are only applicable in consumer and environmental law. See also Glader and Alstergren, 'Sweden' in Foer and Cuneo (eds), The International Handbook of Private Enforcement of Competition Law 407.

[135] *Lindblom* (n48) 18.

[136] Werlauff, 'Class Actions in Denmark – From 2008' (Report prepared for 'The Globalization of ClassActions') <http://www.law.stanford.edu/display/images/dynamic/events_media/Demark_Legislation.pdf> accessed 8 June 2011.

[137] The Report notes that an opt-out procedure is foreign to the Danish legal system. However, in light of pragmatic considerations the legislator chose to introduce an opt-out procedure in the end. See *Werlauff* (n136) 4.

The *Dutch collective settlement mechanism*[138] can be employed as a procedural tool in the collective consumer interest. It is based on an opt-out system and applies only to out-of-court settlements, which then need to be approved by the Amsterdam Court of Appeal. It does not provide for litigation in opt-out collective actions, so, no pressure can be exerted on the defendant who is reluctant to settle as it is the case under the US class action regime.[139] This settlement mechanism appears very interesting as it succeeds in the reconciliation of a compensatory approach with the protection of the collective interest, since it can influence the future behaviour of potential infringers.

At its inception, the Dutch Act on collective settlements was meant for the resolution of mass-scale personal injury claims (the *DES case*). The *Dexia case*, which concerned damages caused to retail investors by misleading bank information, showed that it could be used for other purposes as well.[140] Thus, in theory, it is possible that this procedure could be used for consumer competition law claims. Moreover, the fact that this procedure is not confined only to the Netherlands is of particular importance. The *Royal Dutch Shell* settlement includes members from many European countries in addition to the Netherlands.[141]

Since 1995 *Portuguese law* has provided for 'popular actions' to be brought by any citizen who enjoys civil and political rights, and by associations and foundations, irrespective of whether they have an interest in the claim or not, with the Public Prosecutor responsible

[138] Tzankova, 'Class Actions, Group Litigation and other Forms of Collective Litigation – Dutch Report' (24 September 2007) (Report prepared for 'The Globalization of Class Actions') <http://www.law.stanford.edu/display/images/dynamic/events_media/Netherlands_National_Report.pdf>accessed 9 June 2011; Tzankova and Scheurleer, 'The Netherlands' (2009) The ANNALS(n110) 149; Scheurleer, Speyart, Wijers and Fanoy, 'Netherlands' in Foer and Cuneo (eds), The International Handbook of Private Enforcement of Competition Law 375-377.

[139] *Tzankova*, Report (n138), [13].

[140] Ibid [15].

[141] See https://www.royaldutchshellsettlement.com/ accessed 9 June 2011 for updates on this case. The last update concerned the distribution of the settlement amount.

for protecting legality.[142] DECO, the Portuguese consumer association, has brought three actions to date.[143] Further, the fact that this procedure is of an opt-out character,[144] and that any unclaimed funds go to the Ministry of Justice and towards support for the holders of the right of popular action who seek this justifiably after a period of three years from the date of the judgment,[145] indicates the potential of this procedure to bring compensation to individuals, but, most importantly, to impact on the behaviour of potential infringers.[146]

The *Spanish Civil Procedure Act 2000* provides for actions to be brought by consumer associations on behalf of identified victims. However, it is also possible to bring an action on behalf of identifiable consumers by a consumer association that is representative according to the law.[147] Further, the law provides that, when consumers cannot be individually determined, '...the judgement shall establish the details, features and requirements necessary to demand payment and, where appropriate to apply for or take part in the enforcement of the judgement if requested by the claimant association'.[148] This provision, together with the one providing for *res judicata* to be extended to non-litigants as

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[142] Sousa Antunes, 'Class Actions, Group Litigation and Other Forms of Collective Litigation: Portuguese Report' (Report prepared for 'The Globalization of Class Actions') <http://www.law.stanford.edu/display/images/dynamic/events_media/Portugal_National_Report.pdf >accessed 9 June 2011, 6.

[143] *Hodges* (n64) 40. The scarce application of the respective law (L. 83/95) can be attributed to the immature stage of the civil society's development, the prohibition of contingency agreements, or to doubts raised in regard to the application of the respective law, see Sousa Antunes (n142) 20.

[144] *Sousa Antunes* (n142) 13.

[145] *Sousa Antunes* (n142) 27.

[146] *Green Paper on Consumer Collective Redress* (n1), [12] (...the collective redress scheme that reached the most people in a single case is in Portugal...).

[147] On the distinction between multi-party and collective interest in the Spanish law and its impact on the standing requirement see Gomez and Gili, 'Country Report Spain' (Report prepared for Civic Consulting to be submitted to DG SANCO) (25 February 2008) <http://ec.europa.eu/consumers/redress_cons/sp-country-report-final.pdf> accessed 9 June 2011, 6.

[148] Gutiérrez de Cabiedes Hidalgo, 'Group Litigation in Spain' (Report prepared for 'The Globalization of Class Actions')<http://www.law.stanford.edu/display/images/dynamic/events_media/spain_national_report.pdf> accessed 8 June 2011, 9.

well,[149] suggests that Spanish representative actions present opt-out elements. Currently, following the Commission decision in *Telefonica,[150]* a Spanish consumer association (Ausbanc Consumo) filed a claim for damages against Telefonica for harm suffered by consumers in the Spanish market.[151] This case is still pending. The outcome of the case will indicate whether the Spanish representative procedures could, indeed, contribute to the deterrence of antitrust violations.

ii. Innovative ways of distribution of the damages award

The Portuguese popular action's potential to benefit consumers is evident in *DECO v Portugal Telecom*.[152] This case concerned an abuse of the dominant position on behalf of Portugal Telecom by an increase in its call charges and was not preceded by any public enforcement action. Due to the opt-out nature of the Portuguese popular action, approximately 2 million consumers were represented. DECO reached a settlement with Portugal Telecom amounting to €120 million. The settlement terms provided that any consumer filing an individual claim would be reimbursed, and also that Portugal Telecom was to provide free calls on certain pre-arranged dates.

c. Synopsis

The analysis can be summarised in the following two observations. First, national procedures (despite their respective differences) seem capable of addressing 'Group A' consumer claims. The second observation reveals the important role of consumer organisations in raising group

[149] Ibid 8.

[150]Wanadoo España v Telefonica [Case COMP/38.784] Commission Decision of July 04 July 2007. On appeal before the GC; see Case T-336/07 Telefónica and Telefónica de España v Commission [2007] OJ C269/55 (Judgement delivered on 29 March 2012).

[151] Commission (EC), 'Annex to the Report on Competition Policy' (Staff Working Document) SEC (2008) 2038 [19].

[152] On this case see Mulheron, 'Competition Law Cases under the Opt-out Regimes of Australia, Canada and Portugal'(Research Paper for Submission to BERR, 10 October 2008) <http://www.bis.gov.uk/files/file49008.pdf accessed 11 June 2011>, 77-78.

actions, which is intertwined with Member States' legal traditions, unlike the situation in the US. Thus, the Commission should focus on mechanisms facilitating 'Group B' consumer claims which are not addressed in a satisfactory manner in individual Member States.[153] Some structural characteristics of collective actions, which are currently lacking, should be adopted. However, a delicate balancing act should take place, on the one hand, between the structural characteristics that are desired in principle and, on the other, their potential to be accommodated under national tort law rules. For example, the role of the class counsel in the US can, under certain safeguards, spur class actions. If Member States oppose the idea of such active lawyer participation, the policy makers need to look to alternatives and come up with modified solutions as to how to spur collective actions. Consumer organisations could provide a valid alternative to the US class counsel model.

[153] Possibly with the exception of Portugal, the Netherlands and Spain. See text to n142-152.

V. Structuring the Appropriate EU Collective Action Mechanism

1. Re-defining the European Approaches to Collective Actions in Light of the US Model

The current European approach towards consumer involvement in raising competition law claims is not satisfactory. Increased consumer involvement can only be achieved by singling out competition law claims, as was initially the case, and looking more closely at the US approach. The US practice reveals that low value consumer claims are treated *de facto* by the courts in a different way from class actions that concern larger claims. For example, the courts have had to employ different methods for the distribution of the damages awards, even if this is not expressly provided by law. This observation points to the need for any future EU solution to take into account the intrinsic characteristics of very low consumer claims, with claims in competition law being a prime example of claims of this type. In addition, the shifting legal landscape on collective litigation in different Member States demonstrates, emphatically, that effective mechanisms in national laws to address 'Group B' consumer claims are rare, whereas satisfactory mechanisms exist for 'Group A' consumer claims in at least some Member States.[154]

The Commission misses the mark when it states that '*...the objective is to ensure from the outset that any possible proposal in this field, while serving the purpose of ensuring a more effective enforcement of EU law, fits well into the EU legal tradition and into the set of procedural remedies already available for the enforcement of EU law*'.[155] Instead, it should have stressed, as the Commission itself accepts,[156] that national procedures on collective redress vary widely and are incapable of addressing minor consumer claims. Arguably, if

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[154] See text to n153.

[155] *Public Consultation* (n4), [10].

[156] *Public Consultation* (n4), [5], [9].

national procedures are inadequate, something else is needed, and, since collective redress mechanisms serve the purpose of ensuring effective enforcement of EU law, they should be structured to inspire and alter national systems, rather than relying on them.

Collective action mechanisms for competition law violations should primarily further the deterrent effect of the competition provisions. At the same time, though, both the CJEU jurisprudence and national rules of tort law seek private litigation mechanisms that cater for the individual consumer interest and deliver compensation to affected consumers. Thus, the compensatory parameter should be reflected in the measures adopted and cannot be totally disregarded. An analogy can, again, be drawn with the US class action system. Despite the emphasis placed on the deterrent effect of class actions, their compensatory component, even in small claims class actions, is not disregarded, only re-structured, often in the form of cy-près mechanisms.

The US experience also suggests that a collective action model, aimed primarily at deterring potential wrong-doing as the desired functional outcome, should simultaneously provide for the protection of the due process rights of the litigants. The EU legislature should look at those structural characteristics of US class action that serve, equally, the desired outcome as well as acting as gatekeepers for the protection of litigants' rights; the opt-out structure can be given, here, as an example.

Interestingly, despite the wide use of class action in the US, commentators have pointed to the fact that the US legal system remains individualistic,[157] which, in the class action context, is expressed by a variety of devices, such as notice given to members of the class as well as the opportunity to exclude members from class proceedings. However, to a certain extent, class action as a type of collective action, in order to achieve broader group

[157] *Cooper* (n77) 223-225.

gains, inevitably has an adverse impact on individual aims.[158] The concomitant question is to what extent EU Member States can overcome their traditional, individualistic, approaches to litigation.[159] Some compromises will be needed. The collective redress mechanism for 'Group B' consumer claims proposed here (see part 2, below) seeks to reconcile the traditional individualistic approach to litigation with a potential collective function, while respecting national traditions as much as possible and the right to damages proclaimed by the CJEU by adopting a functional approach to collective actions.

Despite their differences, the US system has more to offer to the current European efforts for devising effective collective redress mechanisms. While it is true that '*...the American paradigm is clearly unsuitable for wholesale export to foreign legal systems...*',[160] the piecemeal adoption of certain features of this system cannot be said to amount to wholesale export.[161] On this basis, in the section below, specific proposals for the formulation of an effective collective redress mechanism for 'Group B' consumer claims, which lean on the existing US model, are advanced.

2. Structuring the Collective Action Mechanism

a. Standing: Lead plaintiff and entrepreneurial lawyer *v* consumer organisation

[158] *Yeazell* (n70) 48, 68.

[159] *Lindblom* (n114) 817. *Gidi* (n49) 345-347. Germany's skimming off procedure is an example of a civil law country overcoming the traditional individualistic approach to litigation. See Article 10, Unfair Competition Act (UWG); Baetge, 'Class Actions, Group Litigation and Other Forms of Collective Litigation – Germany's Report prepared for 'The Globalization of Class Actions') <http://www.law.stanford.edu/display/images/dynamic/events_media/Germany_National_Report.pdf> accessed 9 June 2011; Rott, 'Country Report Germany' (Report prepared for Civic Consulting to be submitted to DG SANCO) (6 October 2008) http://ec.europa.eu/consumers/redress_cons/de-country-report-final.pdf accessed 9 June 2011; Micklitz and Stadler, 'The Developments of Collective Legal Actions in Europe, Especially in German Civil Procedure' [2006] EBLR 1473, 1482-1485. Another example is Portugal's 'popular action'. See text to n142.

[160] Faulk, 'Armageddon through Aggregation? The Use and Abuse of Class Actions in International Dispute Resolution' in Rickett and Telfer (eds), International Perspectives on Consumers' Access to Justice 330, 353.

[161] Essentially this corresponds to what Gidi terms a 'responsible transplant'. *Gidi* (n49) 314, 403. For a similar argument see O'Donoghue, 'Europe's Long March Towards Antitrust Damages Actions' (April 2011) (2)CPI https://www.competitionpolicyinternational.com/file/view/6472 accessed 30 January 2012, 1, 5.

A joined reading of the *GP* and *WP* on the issue of collective redress procedures reveals that the Commission favours a solution in which collective claims are brought by consumer organisations rather than individual consumers. The *GP* puts forwards two options: '*a cause of action for consumer organisations without depriving individual consumers of bringing an action*' and '*a special provision by group of purchasers other than final consumers*'. It also expressly states that '*beyond the specific protection of consumer interests, collective actions can serve to consolidate a large number of smaller claims into one action*'.[162] Thus, the *GP* suggests that consumer claims merit a different approach, and only consumer organisations can, in effect, protect those interests.

Subsequently, in its *WP*, the Commission seems to suggest that opt–in collective actions brought by individuals will also be open to final consumers. The *WP* reads that:

> individual consumers, but also small businesses, especially those who have suffered scattered and relatively low damage, are often deterred from bringing an individual action for damages by the costs, delays, uncertainties, risks and burdens involved. As a result many of the victims remain uncompensated[163]

It then goes on to propose two collective action mechanisms. The first is a representative mechanism that is not confined to consumer organisations and can, in exceptional cases, be brought on behalf of identifiable victims. The second mechanism concerns an opt-in procedure open to everyone.[164] The Commission itself seems not to regard opt-in group

[162] Commission (EC), 'Damages actions for breach of the EC antitrust rules' (Green Paper) COM (2005) 672 final, 19 December 2005 ('GP') [2.5].

[163] *WP* (n10), [2.1]. This latter procedure is defined in the withdrawn Draft Damages Directive as group action, and the way it is framed resembles joinder procedures, rather than actually workable group actions in which a large number of victims are involved. See *Draft Damages Directive* (n46) Article 5.

[164] Ibid.

action as appropriate to address consumer claims given that, in its *GP*, it excluded final consumers from bringing actions of this type.[165]

It is somewhat regrettable that the Commission fails to distinguish consumer from other (eg purchaser, competitor) claims in its *WP*. In the case of 'Group B' consumer claims, the consumers are not deterred from bringing an action because of the '*delays, uncertainties, risks and burdens involved'*, but merely because these claims are of such low value that, in any case, they would not be litigated individually. The Commission was certainly aware of this fact when it proposed the introduction of representative action on behalf of identifiable victims, indicating that the Commission finds merit in such actions. However, its role as a policy-shaping authority for competition law in Europe compels the Commission to adopt a clearer stance in regard to its proposals, and their respective aims, as well as their future potential.

Consumer organisation collective actions can, in theory, address 'Group B' consumer claims according to the Commission proposal. The representative action model employed can be easily explained in light of the Member States' legal traditions and the role of consumer organisations in bringing actions in the consumer interest.[166] Therefore, this proposal is more likely to be approved by individual Member States than a more radical approach of proposing, for example, opt-out procedures, brought by a lead plaintiff. The latter solution

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[165] Commission officials have also expressed this view. See Smith, 'Will Europe provide effective redress for cartel victims?' (2008) 4 (2) CPI <https://www.competitionpolicyinternational.com/will-europe-provide-effective-redress-for-cartel-victims/> accessed 1 February 2012, 65, 71.

[166] See text to n115-153 above. This is also the prevailing approach in EU consumer law. See Hodges, 'Competition Enforcement, Regulation and Civil Justice: What is the Case?' (2006) 43 CMLRev 1381, 1387. Cafaggi and Micklitz, 'Collective Enforcement of Consumer Law: A Framework for Comparative Assessment' (2008) 16 ERPL 391, 417; See C-195/98 *Oesterreichischer Gewerkschaftsbund, Gewerkschaft Öffentlicher Dienst v Republik Österreich* [2000] ECR I-10497, Opinion of AG Jacobs, [47] in which he states that 'Collective rights of action are an equally common feature of modern judicial systems... The law grants associations or other representative bodies the right to bring cases either in the interest of persons which they represent or in the public interest. This furthers private enforcement of rules adopted in the public interest and supports individual complainants who are often badly equipped to face well organised and financially stronger opponents'.

reflects the US class action model that, for small claim consumer class actions, is essentially based on the primordial role of class counsel.

As the above analysis of US class actions indicates, controlling the behaviour of entrepreneurial lawyers still remains a thorny issue. The provision of a leading role to lawyers is unlikely to achieve consensus in Europe given the controversial US experience, but also, most importantly, due to the general EU legal culture and approach towards legal services.[167] This proposal would effectively require less intrusive amendments to national rules of civil procedure. Further, the fact that consumer organisations would assume the role of the litigator in the consumer interest sends a stronger signal towards the interplay between competition and consumer law, and the potential of the former to be employed in the consumer interest, thus advancing the proposed 'added value spectrum' in a better way.

On the other hand, the Commission proposal on opt-in collective actions could prove to be operational for 'Group A' consumer claims. Plaintiffs' lawyers' success in bringing actions of this type, might, in future, change attitudes towards the role of these lawyers in consumer litigation, thereby facilitating further reforms in this field to extend their role for 'Group B' consumer claims as well. Structuring alternative mechanisms to enable individual consumers, through their respective lawyers, to bring collective actions akin to US class actions may potentially address the problems attributed to the functioning and role of consumer associations.[168] However, this is not a realistic possibility for the time being, in light of the prevailing approach in the vast majority of EU Member States. In any case, if

[167] However, this might change in the near future in light of the opening of European offices by major US plaintiff's firms. See Cook, 'Private Enforcement of EU Competition Law in Member State Courts: Experience to Date and the Path Ahead (2008) 4(2) CPI <https://www.competitionpolicyinternational.com/private-enforcement-of-eu-competition-law-in-member-state-courts-experience-to-date-and-the-path-ahead/> accessed 1 February 2012, 3, 64.

[168] See Dayagi - Epstein, 'Representation of Consumer Interest by Consumer Associations – Salvation for the Masses? (2007) 3 CompLRev http://www.clasf.org/CompLRev/Issues/Vol3Issue2Art3DayagiEpstein.pdf accessed 26 January 2012, 209 on these problems and ways of addressing them.

consumer organisations are to be allocated the main role of litigators in the consumer interest, the Commission should address other obstacles hindering such actions, for example, the funding of consumer organisations.[169]

In addition, the Consultation Paper considers the conditions that representative entities have to fulfil in order to be granted standing in collective redress procedures and provides the national rules implementing the Aarhus Convention as an example in which some Member States require NGOs to accord with given criteria in order to be granted standing in collective proceedings.[170] These criteria, as provided in the Regulation implementing the Aarhus Convention, include the nature of the representative entity as an independent, non-profit making legal person in accordance with Member States' national law or practice, having, as its primary stated objective, the promotion of environmental protection in the context of environmental law, and having been in existence for more than two years prior to the date of the action.[171] Analogous criteria could be adopted in the context of EU-wide legislation on collective redress. Consumer organisations would be granted standing only if they are constituted as non-profit organisations with the objective of promoting the consumer interest, and have been in existence for two years prior to the action so as to assuage fears of speculative litigation.[172] In addition, consumer organisations should be

[169] See *Hodges* (n166) 1391, on the broader issue of the legitimacy of consumer organisations (which is outside the remit of this thesis). Hodges questions their legitimacy based on the five tests developed by Baldwin, ie legislative mandate, accountability, due process, expertise and efficiency. Baldwin, *Rules and Government*.

[170] *Public Consultation* (n4), [25].

[171] Article 11 Council Regulation (EC)1367/2006 of 6 September 2006 on the Application of the Provisions of the Aarhus Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters to Community Institutions and Bodies [2006] OJ L 264/13. Generally on the Aarhus Convention see Richardson and Razzaque, 'Public Participation in Environmental Decision Making' in Richardson and Wood (eds), *Environmental Law for Sustainability: a Reader* 165, 174-177.

[172] Cf Article 7 Draft Damages Directive (n46). See also EP Resolution(n21) [20] also asking for the designation of European criteria for designated consumer organisations, but pointing to Article 3 of Directive 2009/22/EC on injunctions. This is not satisfactory given that this Article refers to "qualified entities" according to Member States' law and does not stipulate the criteria itself.

sufficiently representative in that they should possess a large member base. An EU legislative measure could, for example, provide that a consumer organisation would be granted standing to sue only if it represents a specified minimum percentage of the country's population. *Ex ante* criteria for standing could provide for the independence of consumer organisations and justify the bringing of opt-out collective actions, thereby representing the interests of a wider group of consumers, and not only the organisation's members.[173]

Regulating the criteria for consumer organisation standing at EU level could improve the recognition of such organisations in different Member States. Further, it could facilitate the building of an informal network of recognised consumer organisations in the EU in which an exchange of information in regard to suspected market failures and possible future collective redress actions occurs, in addition to improving their cooperation in cross-border cases. The Commission could also consider the periodical publication of a list with all the recognised consumer organisations.[174]

b. Forming the group: opt-in *v* opt-out

The experience with consumer organisations bringing collective claims in the consumer interest in England and France clearly indicates that the opt-in nature of the respective mechanisms is not workable for 'Group B' consumer claims.[175] In those cases, a very small

[173] Martinazzi, 'Class Representation: Opt-in, Opt-out or Representative Action?' (April 2011) 4 (2) CPI https://www.competitionpolicyinternational.com/file/view/6471 accessed 10 June 2011, 2, 5.

[174]Cf Injunctions Directive (n51) Article 4(3).

[175] See *OFT 916resp* (n123) [5.7ff]; see also 'Which' announcement that it does not intend to bring more actions under the current regime in Pheasant and Bicarregui, "Striking the right balance between a 'competition culture' not a 'litigation culture? Comment on the European Commission's White Paper on damages actions for breach of EC antitrust rules" (2008)1 GCLR 98, 102; Robertson, 'UK Competition Litigation: From Cinderella to Goldilocks?' (2010) 9 CompLaw 275, 288-292; see The Consumers' Association v JJB Sports Plc (n124), [31-32] on the extremely disproportionate relationship between damages granted to consumers and the costs incurred by the consumer organisation; On the 'cartel mobile' case see http://www.cartelmobile.org/ accessed 1 February 2012. See also Leskinen, 'Collective Antitrust Damages Actions in the EU: the opt-in v the opt-out model'(2010) Working Paper IE Law School 10-03<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1612731> accessed 10 June 2011, 13-14, with further references for this case. UFC Que Choisir, 'Contribution au livre vert de la Commission' (2006)

percentage of consumers opted in, vividly revealing the rational apathy problem in which injured individuals, each suffering very low levels of damage, lack the incentive to claim an otherwise very large aggregate damage.[176] Therefore, in order to overcome the rational apathy problem a different aggregation mechanism is needed that actually induces consumers to join the action. The legislator should pick an aggregation mechanism capable of affecting consumer behaviour without depriving consumers of their freedom of choice through their right to opt-out.[177]

The Commission seems to have made this choice, as it proposed the introduction of representative actions on behalf of identifiable victims.[178] The opt-out nature of this collective action mechanism is more evident in the relevant Article of the Draft Damages Directive, which was subsequently withdrawn[179] in light of the criticism of the proposed introduction of opt-out collective actions.[180]

The representative organisation would not have to individually identify the injured parties that belong to the group according to that Draft Damages Directive, but it would have to inform all those who may have claims for damages within the scope of the representative

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<http://ec.europa.eu/competition/antitrust/actionsdamages/files_green_paper_comments/ufc_fr.pdf> accessed 10 June 2011, 10-12.

[176] Schaefer, 'The Bundling of Similar Interests in Litigation. The Incentives for Class Actions and Legal Actions taken by Associations'(2000) 9 Eur J L & Econ 183, 185; Van den Bergh and Visscher, 'The preventive function of collective actions for damages in consumer law' (2008) 1 (2) Erasmus LRev 5, 14.

[177] This echoes 'libertarian patternalism' theory articulated by Sunstein and Thaler. Sunstein and Thaler,'Libertarian Patternalism is not an Oxymoron'(2003) 70 U Chi L Rev 1159, 1161-1162; Thaler and Sunstein, Nudge: Improving Decisions about Health, Wealth and Hapiness 5,6.

[178] *WP* (n10) [2.1].

[179] *Draft Damages Directive* (n46) Article 6(4) ('...any injured party belonging to the group can exercise its right not to be represented...').

[180] See European People's Party's statements (the leading party in the previous EP) that it would not support any kind of opt-out system. See Tait, 'EU rules to ease burdens on antitrust victims' The Financial Times (London 26 June 2009) http://www.ft.com/cms/s/0/aa75d416-61b3-11de-9e03-00144feabdc0,dwp_uuid=70662e7c-3027-11da-ba9f-00000e2511c8.html?nclick_check=1 accessed 1 February 2012. See also EP, 'Non legislative Resolution on the White Paper on damages actions' (2008/2154(INI)), [10].

action. The collective action could be dismissed if these conditions were not satisfied.[181] Essentially, the proposed structure required notification to be given to individual members, for example, via the press, but would not have over-burdened the consumer organisation with identifying each and every consumer. Furthermore, the fact that the consumer organisation would be charged with this role would have solved the problem of soliciting prospective client–plaintiffs by the plaintiffs' lawyers, which would be incompatible with the provisions regulating lawyers' services in many Member States.[182]

The opt-out nature of the Commission's proposed representative action sought to strike a sensible balance between efficiency and the due process rights of plaintiffs and defendants. However, the Commission overlooked the need to undertake a vigorous campaign in favour of its proposal to persuade reluctant Member States of its merits; for example provide reassurances that due process rights would be protected, as well as show that opt-out procedures were, in any event, already in place in certain Member States, thereby indicating that they are not completely alien to Member States' legal tradition.[183] Instead the Commission largely sought to conceal the extent of the opt-out nature of its represantive actions proposal.[184]

The strongest argument against opt-out collective actions is that they would amount to a violation of the constitutional rights of group members; namely the right to be heard.[185] In addition, they might be seen as contrary to Article 6 ECHR and Article 47 of the Charter of

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[181] *Draft Damages Directive* (n46) Article 6(2)-(3).

[182] *Sousa Antunes* (n142) 14; Von Dietze and Brödermann, 'Germany' in Foer and Cuneo (eds), The International Handbook of Private Enforcement of Competition Law 331.

[183] Gaudet, 'Turning a blind eye: the Commission's rejection of opt-out class actions overlooks Swedish, Norwegian, Danish and Dutch experience' (2009) 30 ECLR 107.

[184] See, for example, *Draft Damages Directive* (n46) Explanatory Memorandum, [2.1] (...respondents welcomed the choice not to suggest ... opt-out class actions...).

[185] *Stadler* (n114) 211 in which she accepts though that '[opt-in collective actions] most likely do not constitute a solution to minor and dispersed damages'.

Fundamental Rights.[186] This approach appears rather formalistic, as it loses sight of the modern economic reality of transnational consumer markets entailing increased risks for consumer damage on a large scale. In addition, the due process rights of individual members are not disregarded, in the sense that they are given the opportunity to opt-out from the class. Further, the US experience shows that, for claims of minimal value, the opt-out rates are very low, since, in any case, these claims cannot be litigated individually.[187] Since opt-out collective actions increase access to justice for consumers with low value claims, they cannot be said to amount to a violation of constitutional rights as long as certain procedural guarantees, including adequate notice, are in place.[188] Due process concerns in regard to group members' rights can be alleviated if there is an express legal provision stating that 'this (opt-out) collective action procedure can only be brought for claims where the minimum average litigation costs exceed the individual damage of group members', that is, for 'Group B' consumer claims, thus precluding the possibility to be litigated individually.[189]

c. Conducting the litigation

i Costs and funding of collective actions

[186] *Leuven Report* (n33) 380. See *Magnier*, Report (n115) 12-13, 17-18 for an account of the French legal system which rejects the opt-out.

[187] See *Eisenberg and Miller* (n63) 4. Issacharoff, 'Preclusion, Due Process and the Right to Opt-out' (2002) 77 Notre Dame L Rev 1057, 1060 where he points out that '...an individual litigant who is unlikely to sue outside an aggregate action is similarly unlikely to exercise a right to opt-out into the domain of unviable individual claims'.

[188] *CJC Report* (n123) 133; Stuyck, 'Class Actions in Europe? To Opt-In or to Opt-Out, that is the Question' [2009] EBLR 483, 491. Adequate notice is important in US class actions. Interestingly, Dam questions whether the requirement of individual notice rests on FRCP 23 or the Due Process clause of the Fifth Amendment. *Dam* (n103) 109.

[189] Cf *OFT 916 resp* (n123) [7.33] in which the OFT suggests that it is for the court to decide whether to allow an action to proceed as an opt-out. A provision, like the one proposed herein, will facilitate the courts in their judgement.

If actions are to be brought by consumer organisations for 'Group B' consumer claims, the issue of funding of these organisations also needs to be addressed.[190] In the US, consumer class actions are basically financed by lawyers operating on a contingency fee agreement. Contingency fees are often regarded as the most successful means of funding class action litigation.[191]

Financing consumer collective actions in Europe in a similar way may shift the representative character towards a US-type class action litigation, in which the lawyers acting on behalf of the organisation assume the economic risk, seek to be more actively involved, and control the consumer organisation. There is a risk that a consumer organisation dependent on those lawyers will resemble the inactive representative plaintiff in US-type class actions. This is not an acceptable possibility in light of the need to employ strong consumer organisations in private competition law enforcement of 'Group B' consumer claims, and their potential to contribute to the cultivation of a competition culture amongst the beneficiaries of competition law.

In addition, contingency fees would require changes in litigation funding rules in the majority of Member States.[192] Regulating funding for consumer organisations would seem to be a more acceptable option, despite a limited acceptance of contingency arrangements in

[190] See BEUC, 'Damages Actions for Breach of EC Antitrust Rules – BEUC Response to the White Paper'11, accepting that '...financing legal action is also a problem for consumer organisations themselves. This is why at the moment are not able to represent consumers in competition cases'; see *Public Consultation* (n4) [27] on the possibility of funding hindering collective litigation.

[191] Sittenreich, 'The Rocky Path for Private Directors General: Procedures, Politics and the Uncertain Future of EU Antitrust Damages Actions'(2010) 78 Fordm LRev 2701, 2735 with further references. See also, in the European context, Joined Cases C-94/04 and C-202/04 *Federicco Cipolla v Rosaria Fasari and others* [2006] ECR I-11421, Opinion of AG Maduro, [94].

[192] Very few Member States accept contingency fee arrangements. See *Ashurst Study* (n114) 93-94, 116. Viitanen, 'The Crisis of the Welfare State, Privatisation and Consumers' Access to Justice' in Wilhelmsson and Hurri (eds), *From Dissonance to Sense: Welfare State Expectations, Privatisation and Private Law* 549, 562.

certain European jurisdictions.[193] However, the funding rules should be structured so as to minimise, to the greatest possible extent, external influences on the consumer organisation, both public and private. Thus, a possible solution could be for the consumer organisation funding to be raised from both private and public sources. In relation to public funding it should be noted that EU legislation provides for funding of European consumer associations;[194] similar provisions could be introduced in Member States for authorised consumer associations.

In effect, the first option would be for the consumer organisation to be self-funded by its own members. However, this would not be viable given that a very large number of members are required, and the consumer organisation members would end up subsidizing other non–member consumers. Member States should consider the respective size and membership base of consumer organisations when authorising them to take collective action.[195] In addition, a fund could be created with the aim of financing consumer organisation collective actions (consumer collective litigation fund).[196] Profits from the fund could emanate from the portion of consumer damages awards and/or public fines.[197] A three-

[193] The German Constitutional Court accepted that, under certain circumstances, there is a constitutional right to be able to bring a case through a contingency fee arrangement with a lawyer. BVerfG, 1 BvR 2576/04 vom12.12.2006. As a result, contingency fees were permitted in 2008. See Hodges, Vogenauer and Tulibacka, ‘Part I’ in Hodges, Vogenauer and Tulibacka (eds), *The Costs and Funding of Civil Litigation: A Comparative Perspective* 26. Contingency fees are also permitted in Spain. See Aranzazu Calzdilla Medina and others, ‘Spain’ in Hodges, Vogenauer and Tulibacka(eds) *The Costs and Funding of Civil Litigation* 492. See Ministry of Justice, ‘Reforming Civil Litigation Funding and Costs in England and Whales – Implementation of Lord Justice Jackson’s Recommendations’ (Government Response) (March 2011) Cm8041 8 for a discussion on lifting the restriction on contingency fees in England.

[194] EU consumer organisations can obtain funding from the EU budget. See Council Decision 1926/2006/EC of 18 December 2006 Establishing a Programme of Community Action in the Field of Consumer Policy (2007-2013) [2006] OJ L404/39 Article 4(1) (c), Annex II Article 5.

[195] See text to n171-173 above arguing that the standing conditions for consumer organisations should be regulated at the EU level and provide, amongst other conditions, fulfil the criterion of possessing a sufficient member base.

[196] See Riley and Peysner, ‘Damages in EC antitrust actions: who pays the piper?’ (2006) ELRev 748, 756-757, 760-761 in support of a contingency legal aid fund (and ways to collect initial start-up capital).

tiered funding system is proposed, which is premised on member financing, special funds for consumer collective litigation, and public funding. Funding stemming from three different sources would mitigate any capture problems.

An alternative proposal could be for professional litigation funders to assume the costs of litigation subject to claiming a percentage of the award. While, this is a type of contingency fee,[198] it may appear preferable to funding consumer organisations from the public purse. Public funding permits leeway for governmental control of setting priorities in pursuing collective actions. On the other hand, this funding solution entails possible agency problems, as the professional funder will control the consumer organisation potentially causing a mis-alignment of incentives between the consumer organisation, as the representative plaintiff, and the consumers represented. These agency problems are unlikely to occur if the above-mentioned diversified funding model is adopted.

Actions brought by consumer organisations would also be greatly facilitated if an exception were to be introduced to the 'loser pays' rule which is to be found in the majority of Member States.[199] Consumer organisations could be exempted from paying the

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[197] Relevant here is the proposal to establish a European fund financed by fines imposed on companies for infringements of EU competition law. See Committee on the Internal Market and Consumer Protection 'Towards a Coherent European Approach to Collective Redress' (Opinion) (12/10/2011) (2011/2089(INI)) [28]. See also BEUC, 'Litigation Funding in Relation to the Establishment of a European Mechanism of Collective Redress' (2/2/12) <http://www.beuc.org/BEUCNoFrame/Docs/1/OBMOJJACNBHDFCHPPPFGECLIPDWY9DBDTK9DW3571KM/BEUC/docs/DLS/2012-00074-01-E.pdf > accessed 22 February 2012.

[198] See *Freshfields Report* (n110) 7 for the adoption of this funding method by Austrian consumer organisations with further reference to the Austrian Supreme Court judgment holding these agreements permissible, despite formal contingency fees agreements being unlawful in Austria. See Claims Funding International, 'Submission to the Commission for the European Communities by Claims Funding International plc- White Paper on Damages actions for breach of the EC anti-trust rules', 3-4 on a proposal supporting strong professional funding litigation. Third party funders are now accepted in the UK as well, doing away with the common law crimes of maintenance and champerty in view of increasing the potential for access to justice. See Hodges, Vogenauer and Tulibacka, *The Costs and Funding of Civil Litigation* 106. *CJC Report* (n123) 179.

[199] *GP SWP* (n37) [204], [212]. *WP SWP* (n34) [252]. *Lindblom* (n48) 19 stating that this rule, which operates in Sweden, is a crucial factor in the rarity of collective actions.

defendant's cost, should the case be lost, except in cases of bad faith litigation.[200] Modifications to the 'loser pays' rule have already been introduced at EU level in the field of enforcement of IP rights and small claims procedure, [201] a fact which points to a future possibility of furthering these exceptions to consumer collective redress procedures.

ii. Calculation and distribution of damages

A further issue that should be specifically addressed for opt-out collective actions brought by consumer organisations concerns the calculation[202] and distribution of damages to individual consumers. The calculation of consumer damages based on the illegal gains rather than on the aggregation of individual losses should be considered since, in opt-out collective actions for very low losses, the latter method of calculating damages is almost impossible to implement.[203] Consumers who were affected could claim their individual damage award following the calculation of the aggregate damage based on the illegal gains and the issuance of the damages award. The 'Cartelmobile case' in France indicates that, even if the calculation of individual consumer damage is difficult, it is not insurmountable, and can be tackled through economic studies which enable consumers to calculate their individual

[200] *BEUC* (n190) 7. *Gidi* (n49) 340 argues that the one-way fee shifting has facilitated collective litigation in Brazil. An argument to that effect can also be drawn by analogy from the environmental law field; see Case C-427/07 *Commission v Ireland* [2009] ECR I-6277, [91-94].

[201] See Article 14 Council Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights [2004] OJ L195/16. Article 16 Council Regulation (EC) 861/2007 of 11 July 2007 establishing a European Small Claims Procedure [2007] OJ L 199/1.

[202] This section only addresses intrinsic issues pertaining to the calculation of damages in collective actions brought by consumer organisations, and does not deal with the complex issue of calculating antitrust damages in general. See DG COMP, 'Quantifying Harm in Actions for Damages based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union' (Draft Guidance Paper, Public Consultation, Brussels, June 2011) on the complexity of the issue and the Commission's intentions to issue guidance on the calculation of damages; WP SWP (n34) [198-199]; Oxera, 'Quantifying Antitrust Damages: Towards Non-binding Guidance for Courts' (December 2009), Study prepared for the European Commission < http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf> accessed 27 January 2012, which attempts to assist the Commission in the preparation of such guidance.

[203] *Epstein* (n168) 222 referring to the Danish SAS/Maersk case, in which the Danish Consumer Council failed to bring the case to court because of insurmountable evidentiary difficulties in calculating the exact loss for every consumer.

damage through a website.[204] In addition, the defendant's records were able to be used for the identification of affected consumers.[205]

The CJEU proclaimed right to damages does not allow for the formulation of a distribution system that disregards damages suffered by individual consumers; nor does it provide for the consumer organisation or other entities to retain the monetary reward.[206] The Commission advocated 'full compensation' aim of damages actions cannot be fully attained for 'Group B' consumer collective actions.[207] Distribution of the damages awards to each and every affected consumer (the narrow approach to the distribution of damages) is not feasible. A compromise is called for between the protection of the individual right to damages and its functional deterrent role, in the context of competition law enforcement.

The Commission, in its *Draft Damages Directive,* effectively sought to reconcile the individual consumer's right to damages with the deterrent effect of collective actions by permitting the injured parties to obtain their part of the damages, accepting, at the same time, that damages should be distributed to the victims to the greatest possible extent, and that a part of the award should go to the consumer organisation in order to cover its expenses in bringing the action.[208]

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[204] *CLEF* (n29) 42.

[205] Richards, 'What Makes an Antitrust Class Action Remedy Successful?: A Tale of Two Settlements' (2006) 80 Tulane L Rev 621, 639-640.

[206] See, for example, the German skimming off procedure. In as much as the illegal gains revert to the State, a similar procedure cannot be employed in competition law, in light of the CJEU pronouncements.

[207] See *Schaefer* (n176) 201 (...it is conceivable to waive the requirement of providing an exhaustive list of the injured persons if this is unreasonable and to calculate the total loss on the basis of probabilities instead...').

[208] *Draft Damages Directive* (n46) Article 6(5). On the Commission contemplating alternative distribution mechanisms see *WP SWP* (n34), [47], [52]; *GP SWP* (n37) [199].

This proposal could be read as recommending the introduction of a form of cy-près distribution mechanism,[209] as it leaves open the possibility for the unclaimed fund to remain with the consumer organisations.[210] Professor Mulheron has extensively examined the US and Canadian case law on cy-près and formulated the following conditions under which cy-près distribution would be particularly suitable;

1. Individual recovery should be extremely low,

2. Identities of class members are unknown for the purposes of distribution,

3. It is very likely that some, or all, class members will not come forward,

4. The identity of class members constantly changes, and

5. Distribution is particularly difficult due to the large number of class members.[211]

The above-mentioned conditions will most likely be present in opt-out consumer collective actions for competition law violations.

As long as priority is given to individual consumers to claim their respective damages, no violation of the compensatory principle can be established[212] when the consumers did not claim individually, thereby allowing the damages to be retained by the consumer organisation. In addition, the Commission's solution resembles the US approach to damages distributions in consumer claims,[213] which, despite the criticism it received, draws a satisfactory compromise between the compensatory and regulatory functions of civil

[209] See *Mulheron* (n57)1-5 for a definition of 'cy-près '. As Mulheron notes, the cy-près doctrine extends to both the calculation and distribution of damages. Ibid 224.

[210] See *Gidi* (n49) 339 for a cy-près system adopted in Brazil, a civil law country. The OFT also discussed this option. OFT916, 'Private Actions in Competition Law: Effective Redress For Consumers and Business' (April 2007) (Discussion Paper) http://www.oft.gov.uk/shared_oft/reports/comp_policy/oft916.pdf accessed 10 June 2011, [4.37]. See also *CJC Report* (n123) 5.

[211] *Mulheron* (n57) 259-263.

[212] Contrary to the views expressed by the Committee on Economic and Monetary Affairs. *EP Report on WP* (n20) 10.

[213] In view of the Due Process Clause, individual claimants cannot be precluded from claiming their damage leaving the sum remaining for cy-près distribution. See *Dam* (n103) 62.

litigation. Criticism of the structural and constitutional problems of the judge-made cy-près doctrine in the US[214] can be alleviated through the introduction of a cy-près distribution mechanism by individual Member States based on EU legislative action.[215] This solution to the distribution of damages can be identified as the 'narrow plus' approach.

From a normative perspective, a third, and wider, approach can be identified by advocating the establishment of a special consumer fund. Damages awards would go directly to the 'consumer fund' that would be responsible for administering the award, granting a part to consumer organisations for their litigation expenses. The remainder would be used for furthering the consumer interest in an alternative way, other than by delivering compensation to affected consumers; for example, by undertaking consumer education campaigns.[216] This wide approach is to be distinguished from the US judge made cy-près doctrine that varies considerably in different cases. Here, a consumer fund would be established by law and could be administered by a board consisting of members of recognised consumer organisations, and subject, also, to public oversight.[217] Such a consumer fund would then choose, with the avowed purpose of furthering consumer interests, what would be done with the funds. The first option would be to administer the awards itself; the second to distribute the funds to other entities. Regulating the distribution of the damage award in law has a different

[214] Redish, Julian and Zyontz, 'Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis' (2010) 62 Fla L Rev 617, 641-649.

[215] In Canada, the Class Action Proceedings Act provides for court ordered cy-près distribution. See Section 26 Class Proceedings Act 1992. Wright and Baer, 'Price-fixing Class Actions: A Canadian Perspective' (2004) 16 LoyConLRev 463, 469-473. Which? is in favour of a cy -pres mechanism since consumer responses call for such an approach. Which?, 'Consultation Response' (To European Commission Consultation on Collective Redress, 26 April 2011) http://ec.europa.eu/competition/consultations/2011_collective_redress/which_en.pdf accessed 12 June 2011 pt2, pt4 at Q9, Q10.

[216] Howells favours this option. See *Howells* (n29)59; Which? points to the fact that such a fund exists in Australia. See Which?, Green Paper on Damages Actions for Breach of the EC Antirust Rules - Response by Which?' (12 April 2006), 9.

[217] See Barnett, 'Equitable Trusts: An Effective Remedy in Consumer Class Actions' (1987) 96 Yale L J 1591, 1609-1614 for a proposal for an equitable trust based on court discretion.

legitimacy than choosing an *ad hoc* cause on a case by case basis. The table below (Table 4) summarizes these three approaches.

TABLE 4. Distribution of Damages: The Options

Narrow → compensation to consumers (this would usually be satisfied by an opt-in model)	Narrow plus→ distribution to consumers who file a claim + the remaining amount reverts to the consumer organisation to cover its litigation expenses and the bringing of similar actions in the future	Wide → Establish a 'Consumer fund' to the general consumer interest

The 'narrow option' cannot accommodate 'Group B' consumer claims. The 'narrow plus' option seems an acceptable compromise between the 'narrow' and 'wide' approaches, and it is also in conformity with EU law. The third approach, even if it is the most functional, would not appear to be accommodated under EU law, given that it totally disregards the consumer right to damages, as formulated by the CJEU.

VI. Conclusions

The analysis presented in this chapter has examined the question of structuring collective action mechanisms to enable increased consumer involvement in EU competition law enforcement. A critical overview of the Commission's approach towards collective action mechanisms, both in the field of consumer and competition law, was provided (section II), in order to introduce the subsequent discussion on the normative justifications for adopting different collective action mechanisms for 'Group B' consumer claims (as opposed to 'Group A' consumer claims) (section III). Definition of the 'access to justice' ideal, and employment of the distinction between the aggregation of individual consumer interests and the collective consumer interest, points to the different goals pursued by each group of claims; a fact that should be reflected in the measures adopted.

In section IV, the structural characteristics of collective actions for 'Group B' consumer claims were examined. Different structural characteristics drawn from existing national collective action mechanisms at Member State level were contrasted with the characteristics desired in principle, and those available in the US class-action system. The respective procedures were distinguished based on whether they promote the collective, or individual, consumer interest and the narrow, or wide, notion of access to justice. 'Group A' consumer claims seem to be addressed satisfactorily in some Member States, unlike 'Group B' claims. Small claim class actions have raised considerable controversy in the US. Many of the issues permeating the current European debate have troubled (and some continue so to do) the US legal system. Transplanting the US system into Europe would not be a workable solution and, in any case, this was never contemplated by EU institutions or individual

Member States. However, as Cappelletti points out *'...successful transplants do occur, sometimes surprising those aware of the difficulties. And this occurrence is most frequent when the transplant is motivated by a social, economic or political 'need' shared in common with the countries involved...'*.[218]

The analysis in this chapter has revealed that the Commission is, indeed, aware of the difficulties. However, in order for these difficulties to be surmounted, the Commission, as the competition policy-shaping authority in the EU should be more explicit as to the functions and objectives of the proposed collective actions. Interestingly, while the deterrence consideration is present, albeit in a covert way, the Commission so far insists on the compensatory aim of actions of this type. Concealment of the different function of collective action mechanisms for 'Group B' claims in private competition law enforcement means that the necessary developments are unlikely to be brought.

In section V, specific suggestions on structuring a collective action mechanism fit to address 'Group B' consumer claims were provided. In so doing, pragmatic considerations and traditional approaches to litigation were balanced and it was shown that there are inherent limits to the measures adopted. However, by employing, at least at this stage of development of collective redress procedures in Europe, consumer organisations as a distinguishing characteristic, and adopting some 'US class action' elements the proposed collective-action mechanism appears to be a workable solution. The mechanism proposed has the following characteristics:

i. it grants standing to authorised consumer organisations,

ii. the conditions for authorisation of such organisations are provided for in EU legislation,

iii. it adopts an opt-out structure,

[218] Cappelletti and Garth, 'Introduction' in Cappelletti (ed.), *Access to Justice and the Welfare State* 6.

iv. it provides for an effective three-tier funding system for consumer organisations whereby funds stem from a combination of the membership, public funds and from an established consumer collective litigation fund, and

v. it adopts a narrow plus approach towards the distribution of the damages award, according to which priority is granted to consumers filing a claim for their individual damage and the remainder reverts back to the consumer organisation bringing the action to cover its expenses and be further used to promote consumer-related purposes.

Ultimately, the above mechanism would appear to strike a delicate balance between the right to damages and compensation to individual consumers, on the one hand, and the effective enforcement of competition norms to the consumer interest, on the other. However, as the Commission's efforts so far have shown, it is hard to gain the necessary political support for innovative private enforcement mechanisms.[219] Therefore, alternative public enforcement mechanisms, capable of promoting the consumer interest, are addressed in the next chapter before turning, in the final chapter, to question which of these public and private enforcement mechanisms could potentially be adopted at the EU level.

[219] Unfortunately the *EP Resolution* (n21) points to this direction, as well.

CHAPTER V

CONSUMER INVOLVEMENT IN PUBLIC COMPETITION LAW ENFORCEMENT: TOWARDS ACCEPTABLE ALTERNATIVES

I. Introduction

In light of the political and institutional limitations associated with the promotion of consumer participation in private competition law enforcement (see chapters III and IV), the analysis presented in this chapter moves on to explore the possible participation opportunities for consumers in public competition law enforcement. The reasons for the shift from private to public enforcement are two-fold; first, it is indicated by the fact that, despite Commission efforts, consumer involvement in private competition law enforcement is unlikely to be enhanced in the near future. Second, it corresponds to a fused approach towards competition law enforcement, in which both public and private enforcement share the same objectives of deterrence and compensation, albeit with differing intensities. Consumer participation in public enforcement is viewed both as an alternative to private enforcement but also has an intrinsic value in itself.

The analysis presented in section II of this chapter re-shapes the added value spectrum for the purposes of public enforcement, with the aim of showing that public enforcement potentially promotes both of the principal aims of the spectrum, namely deterrence and compensation. Current avenues of consumer participation in public competition law enforcement are presented and criticised, and their potential to advance the added value spectrum is assessed. In section III, the potential for consumer participation is advanced further and suggestions for improving the current mechanisms are put forward.

II. Fused Approach to Enforcement: Redefining the 'Added Value Spectrum' in Public Enforcement

1. Introduction

The 'added value spectrum', advocating an increased consumer participation in private competition law enforcement, as developed in chapter II, is comprised of five reasons. The two principal reasons, deterrence and compensation, are derived from the CJEU jurisprudence and EU institutions' policy declarations; the three derivative reasons are: bridging the gap between substantive competition law enforcement and policy pronouncements, legitimising EU competition policy, and enhancing consumer information and empowerment. If the enforcement system scores highly in regard to the principal aims, the important derivative aims will be further promoted as a consequence. The argument advanced in this section is that the 'added value spectrum' applies, equally, in public enforcement, with some essential modifications in regard to the principal aims (deterrence and compensation), while increased consumer participation in public enforcement could potentially serve all three derivative aims.

In *part 2* of this chapter, the potential for public enforcement to deliver compensation is discussed from a normative perspective. Then, in *part 3*, the discussion moves on to present current participation avenues for consumers to become involved in public competition law enforcement. It provides examples of such participation to date and assesses the current mechanisms in light of their potential to advance the different aspects of the 'added value spectrum'.

2. Re-thinking the deterrence-compensation dichotomy: normative justifications for 'public compensation'

The traditional view towards EU competition law enforcement supports a clear distinction between the deterrence and compensation dichotomy, attributing the former to public enforcement and reserving the latter for private enforcement mechanisms.[1] However, in the context of EU competition law, this traditional approach is not supported by either the CJEU jurisprudence or by the EU institutions' pronouncements. In chapter II the binary nature of private enforcement was discussed extensively. The aim, here, is to show that the same holds true for public competition law enforcement as well, and that, despite its primary deterrent role, it may be used as a compensatory mechanism ('public compensation'). In addition, it will be argued that, contrary to views advanced by commentators,[2] the fact that public enforcement mechanisms could potentially deliver compensation does not negate the need to advance effective private enforcement mechanisms, but functions as a second-best solution in cases in which pragmatic constraints impede effective private enforcement.

The compensatory approach to public enforcement is supported by the Commission and NCAs past practice, that allowed the delivery of compensation in cases they deemed

[1] Wils, 'The Relationship Between Public Antitrust Enforcement and Private Actions for Damages' (2009) 32 WC 3, 12. However, Wils does not reject the provision of compensation through public enforcement procedures. Ibid 21. On the deterrence function of public enforcement see Commission (EC), 'Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2) (a) of Regulation No 1/2003' [2006] OJ C210/2 ('Fine Guidelines'), [4]; Joined Cases 100/80 to 103/80 *Musique Diffusion française and others v Commission* [1983] ECR 1825, [106]; Case C-76/06P Britannia Alloys & Chemicals v Commission [2007] ECR I-4405, [22]. On the compensatory potential of private enforcement see Commission (EC), 'Damages actions for breach of the EC antitrust rules' (White Paper) COM (2008) 165 final ('WP'), [1.2]; Commission (EC), 'Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules' SEC (2008) 404, 2 April 2008 ('WP SWP'), [14-15]. For a different proposal on a market-based enforcement policy see Hodges, 'A Market-Based Competition Enforcement Policy' (2011) 22 EBLR 261; Hodges, 'European Competition Enforcement Policy: Integrating Restitution and Behaviour Control' (2011) 34 WC 383.

[2] See text to n7-12 below.

appropriate.[3] Further, in its Resolution on the WP, the EP has indirectly taken a positive stance towards the compensatory potential of public enforcement by stating that:

> [...] in order to encourage undertakings to compensate the victims of illicit behaviour as quickly and effectively as possible, the competition authorities are asked to take account of the compensation paid or to be paid when determining the fine that is to be imposed upon the defendant undertaking(...)calls on the Council and the Commission explicitly to incorporate into Regulation (EC) No 1/2003 those fining principles and further improve and specify them in order to comply with the requirements of the general legal principles...[4]

In addition, the UK Government has accepted the compensatory function of public enforcement since it noted 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*'.[5] The OFT has also acknowledged the compensatory potential of public enforcement.[6] Further, Hodges built on the Macrory Report on regulatory sanctions[7]

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[3] On these cases see text to n75-87 below. This practice challenges the statement in the Commission(EC), 'Proposal for a Council Directive governing actions for damages for infringements of Article 81 and 82 of the Treaty' (Draft Damages Directive) (Document withdrawn before publication – on file with the author), Explanatory Memorandum [1.2], according to which '...Compensation for harm caused by infringements of Articles [81] and [82] of the Treaty cannot be achieved through public enforcement of the competition rules; it is a specific function which is of the domain of courts and of civil law and procedure'. For a similar statement see Commission (EC), 'Staff Working Document-Accompanying Document to the White Paper on Damages Actions for Breach of the EC Antitrust Rules' (Impact Assessment) SEC (2008) 405 (Brussels, 02/04/08) [1].

[4] EP, Resolution of 26 March 2009, on the White Paper on damages actions for breach of the EC antitrust rules (2008/2154(INI)), [11].

[5] Ministry of Justice, 'The Government's Response to the Civil Justice Council's Report: Improving Access to Justice Through Collective Actions' (July 2009)) <http://www.justice.gov.uk/publications/docs/government-response-cjc-collective-actions.pdf > accessed 9 June 2011, [18].

[6] For the OFT's views regarding redress in the context of administrative settlements see OFT, 'Private actions in competition law: effective redress for consumers and business' (Recommendations)(OFT 916resp, November 2007)< http://www.oft.gov.uk/shared_oft/reports/comp_policy/oft916resp.pdf> accessed 28 January 2012, [11.16 – 11.19].

[7] Macrory, 'Regulating Justice: Making Sanctions Effective' (November 2006) (Final Report) <http://webarchive.nationalarchives.gov.uk/+/http://www.bis.gov.uk/files/file44593.pdf > accessed 2 February 2012 (Macrory Report').

and advocated a linkage between regulatory sanctions and compensation.[8] It seems that the compensation provided in the course of public regulatory enforcement accounts for another type of regulatory sanction, either negotiated with, or imposed by, the public authority. He argues that both public and private enforcement could serve these principles, by pointing to the six penalties principles identified,[9] although public enforcement is more effective in attaining them. Therefore, there is no justification for private enforcement. He proposes, instead, a fused approach in which compensation is provided in the course of public enforcement. However, two observations regarding Hodges' proposal are warranted. First, he responds to the question on the compatibility of compensatory function with public enforcement mechanisms in the affirmative by employing an enforcement approach based on wider regulatory theories, in this case, the responsive regulation that influenced the Macrory Report.[9] Private litigation is seen as contrary to responsive regulation since it increases regulatory burdens on businesses.[10] However, despite the fact that responsive regulation theory points to the need for less intrusive penalties to ensure compliance, such as, for example, advocacy mechanisms, persuasion and warning letters, it still does not do away with more severe penalties, such as fines.[11] To the extent that compensation could increase the

8 Hodges, *The Reform of Class and Representative Actions in European Legal Systems* 213-216. Hodges, 'Encouraging Enterprise and Rebalancing Risk: Implications of Economic Policy for Regulation, Enforcement and Compensation' (2009) 20 EBLR 1231, 1261.

9 See also Hampton, 'Reducing Administrative Burdens: Effective Inspection and Enforcement' (HM Treasury, March 2005) ('Hampton Report') <http://webarchive.nationalarchives.gov.uk/+/http://www.bis.gov.uk/files/file22988.pdf> accessed 2 February 2012, [2.13ff]. *Macrory Report* (n7) built upon the findings in *Hampton Report*. On 'responsive regulation' see Ayres and Braithwaite, *Responsive Regulation – Transcending the Deregulation Debate* 4-7, 35-41.

10 Hodges, 'Competition, Enforcement, Regulation and Civil Justice: What is the case?'(2006) 43 CMLRev 1381, 1392. Hodges views this approach is contrary to the Commission 'Better Regulation' agenda. On 'Better Regulation' see *Hodges, Encouraging Enterprise* (n8)1231-1234. Relevant documents available at <http://ec.europa.eu/governance/better_regulation/key_docs_en.htm>, accessed 2 February 2012.

11 See Braithwaite, *Restorative Justice and Responsive Regulation* 29-34, arguing that '...This means that consistent punishment and consistent persuasion are foolish strategies. The hard question is to decide when to punish and when to persuade'.

financial penalty for the incumbents, it could be said to improve the deterrent function of fines. Where fines for competition law violations are beyond the optimal level,[12] additional financial penalties are needed, regardless of the fact that advocacy mechanisms could, indeed, prove to be beneficial.

The second observation concerns the public enforcement system's potential to deliver compensation without the concomitant existence of effective private enforcement mechanisms. The compensatory function of public enforcement does not necessarily entail the abandonment of private enforcement mechanisms. If, as Hodges concedes, both enforcement avenues are able to serve these principles, one should, rather, look to their complementary relationship, rather than disregard one of them completely. The Macrory Report supports this approach, since it upholds the FSA's point that not all cases should include a restorative element; it may be that the harm is not quantifiable or would have been more efficiently and effectively addressed if individuals were able to directly pursue claims with the firm concerned.[13] Thus, public enforcement mechanisms may, indeed, adopt a compensatory function, although effective private enforcement mechanisms are still needed.

3. Current avenues for consumer participation: are they working?

In added value terms, public enforcement contributes primarily to deterrence, but may also assume an ancillary compensatory function. In this section, different aspects of public enforcement and the consumer involvement in these are critically reviewed, and their potential to promote the 'added value spectrum' is assessed. The aim is to point to the

[12] Connor and Lande, 'How High Do Cartels Raise Prices? Implications for Optimal Cartel Fines'(2006) 80 Tul L Rev 513, 559-564; Veljanovski, 'Cartel Fines in Europe: Law, Practice and Deterrence'(2007)30 WC 65, 81, 84. Stephan, 'The Direct Settlement of EC Cartel Cases'(2009) 58 ICLQ 627, 643.

[13] *Macrory Report* (n7), [2.5-2.6]. See also Hodges, who accepts that 'there is some evidence that enforcement officials may traditionally have been reluctant to assume responsibilities'. *Hodges*, *Encouraging Enterprise* (n8)1264-1265.

characteristics that could impede consumer involvement, before moving on, in section III, to propose possible solutions to overcome these obstacles.

Public enforcement encapsulates (a) all avenues open to consumers to alert the competent antitrust authorities of an alleged competition law violation and/or a market failure, as well as participation in ongoing proceedings by means of intervention (*public enforcement stricto sensu*),[14] and (b) also covers mixed enforcement mechanisms in which a competition authority provides some form of redress to the affected consumers in the course of public investigations (*public enforcement lato sensu*).[15] Consultation with consumer organisations prior to the adoption of secondary competition legislation, although very important in increasing transparency and the quality of European policy making,[16] falls outside the scope of this thesis. It is true that this input has a significant role to play in defending the consumer interest;[17] however, it is not connected with actual enforcement of competition law norms.

a. Public enforcement *stricto sensu*

i. Complaints to the Commission

[14] An alternative term to describe these actions is 'privately triggered public enforcement', as employed in Jacobs and Deisenhofer, 'Procedural Aspects of the Effective Private Enforcement of EC Competition Rules: A Community Perspective' in Ehlerman and Atanasiu (eds), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* 187, 197.

[15] See, for example, the 'UK Independent Schools' case, in which the OFT imposed very low fines on the schools involved since they voluntarily agreed to contribute to an educational trust with the purpose of funding students affected by the cartel; OFT Decision No CA98/05/2006 <http://www.oft.gov.uk/shared_oft/ca98_public_register/decisions/schools.pdf> accessed 2 February 2012 ('UK Independent Schools'), [36], [1427]; Also *PO Video Games, PO Nintendo Distribution and Omega Nintendo* (Case COMP/35.587, 35.706 and 36.321) Commission Decision 2003/675/EC [2003] OJ L255/33 ('Nintendo') [440-441]. For more details see text to n75-87.

[16] Commission (EC), 'European Transparency Initiative' (Green Paper) COM (2006) 194 final; Commission (EC), 'Third Strategic Review of Better Regulation in the European Union' (Communication) COM (2009) 15 final, 6- 7.

[17] See, for example, BEUC, 'Response to the White Paper on Damages Actions' (2008); Commission (EC), 'XXIXth Report on Competition Policy 1999', SEC(2000) 720 final, 35-36; Commission (EC), 'Staff Working Document Accompanying the Report on Competition Policy 2008', COM(2009)374 final, [19], [26] on the consumers' input for the new MVBER and the new Insurance BE.

The Commission encourages private parties, both undertakings and consumers, to inform public enforcers of alleged competition law violations.[18] Consumers can become involved in public competition law enforcement either by lodging a complaint with the Commission or by providing market information to spur a subsequent sector inquiry.[19] In this section, the first participation avenue is addressed. Consumer complaints may contribute to the promotion of the whole range of the 'added value spectrum'. First, they may contribute to the detection of a competition law violation, thereby increasing the deterrent effect of the enforcement system. Indirectly, they promote the compensatory aim as well, since they are able to incentivise consumer organisations to launch complaints with a view of subsequently raising follow-on damages actions.

In addition, consumer complaints may further the secondary aims of the added value spectrum. Complaints launched by consumer organisations may reveal anti-competitive practices in retail markets and signal the need for articulating a valid consumer harm theory for the finding of an anti-competitive practice. Increased consumer involvement in raising complaints may possibly shift the substantive competition law enforcement standard towards a real consumer welfare standard. In addition, it may offer valuable support to EU competition policy making, raise consumer awareness, and signpost the linkage between competition and consumer law, and the importance of responsible consumer behaviour in taming market forces.

Examples of complaints

[18] Commission (EC), 'Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty' [2004] OJ C101/65 ('Notice on Complaints'), [2-3]. See also Almunia, 'Competition – what's in it for consumers?' (European Competition and Consumer Day Poznan, 24 November 2011, Speech/11/803).

[19] *Notice on Complaints* (n18), [3-4].

In the past, consumers have raised numerous complaints.[20] Their complaints mainly concerned consumer guarantees systems in the automobile sector, consumer electronics and perfumes.[21] Also, complaints have been filed in the field of motor vehicle distribution agreements, which played a role in the adoption of the Motor Vehicle Block Exemption Regulation.[22] As the Commission points out, there was a significant fall in consumer complaints within one year of the adoption of the Block Exemption Regulation.[23] The Commission recognises the potential consumer contribution in revealing competition law violations but also points to the fact that their involvement is minimal. Further, it acknowledges that increased participation on behalf of consumer organisations would be desirable.[24] For example, recently, an Italian consumer organisation (Altroconsumo) filed a complaint with the Commission regarding an Italian digital broadcasting regulation, which led the Commission to issue a reasoned opinion on its incompatibility with EU competition law.[25] Also, a UK consumer organisation (Which?) has filed two complaints with the

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[20] However, it is questionable as to whether the consumer involvement in raising complaints before competition authorities is indeed satisfactory. See Hutchings and Whelan, 'Consumer Interest in Competition Law Cases' (2006) 16 CPR 182, 184-185.

[21] See, for example, complaints by individuals and BEUC regarding the Ford Germany guarantee scheme in Commission (EC), Thirteenth Report on Competition Policy 1983, (Brussels, Luxembourg 1984) <http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=CB3883823> accessed 2 February 2012, [104-106]; also BEUC complaints on guarantee schemes resulting to the Commission issuing a bulletin warning manufacturers in Commission (EC), *Sixteenth Report on Competition Policy 1987* (Brussels, Luxembourg 1988)<http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=CB4886060> accessed 2 February 2012, [56].

[22] Commission Regulation (EEC) 123/85 of 12 December 1984 on the application of Article [85(3)] of the Treaty to certain categories of motor vehicle distribution and servicing agreements [1985] OJ L15/16.

[23] Commission (EC), *Seventeenth Report on Competition Policy 1988* (Brussels, Luxembourg 1989)<http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=CB5087340>, accessed 2 February 2012, [34].

[24] *XXIXth Report* (n17) 21-22.

[25] Commission (EC), 'Competition: Commission formally requests Italy to comply with EU rules on electronic communications' (Press Release) IP 07/1114. Altroconsumo has also filed complaints before the Italian Competition Authority. See ECCG, 'Opinion on Private Damages Actions' <http://ec.europa.eu/consumers/empowerment/docs/ECCG_opinion_on_actions_for_damages_18112010.pdf

Commission; the first concerning ticket sales arrangements for the 2006 World Cup tickets[26] and the second in regard to an allegedly anticompetitive agreement between Apple and major record companies that resulted in higher prices for UK consumers than others in the EU when downloading music.[27]

The involvement of individual consumers, not through consumer organisations, can also play a role in the detection and punishment of competition law violations, as *Greek Ferries* reveals.[28] In that case, the Commission fined cartelists following a letter from a single consumer. The fact that consumer organisations, and, occasionally, individual consumers, raise complaints with the Commission is to be praised, as it reveals awareness on the consumers' part and may increase the wider acceptance of competition policy. Even in cases in which complaints do not actually amount to the finding of a competition law violation, they can still contribute to the development of competition law jurisprudence.[29] Whether this important legitimising function can be further cultivated rests with the Commission's handling of the respective complaints to which point attention is now turned.

The legitimate interest requirement

>accessed 28 November 2011, 58. This section addresses only ways to improve the complaints process before the Commission and not NCAs.

[26] Commission (EC), 'Competition: Commission Welcomes Improved Access to Tickets for the 2006 World Cup'(Press Release) IP/05/519.

[27] Commission (EC), 'Annex to the Report on Competition policy 2007' (Staff Working Document) SEC (2008) 2038, [327-328]. Commission (EC), 'Antitrust: European Commission Welcomes Apple's Announcement to Equalise Prices for Music Downloads from I-Tunes in Europe'(Press Release) IP/08/22. For more recent complaints raised by consumer association see ECCG, 'Minutes of the ECCG Competition Subgroup Meeting'(28 June 2011, Brussels) <http://ec.europa.eu/consumers/empowerment/docs/eccg_comp_sub_group_minutes_062011_en.pdf> accessed 2 February 2012, 8,9.

[28] *Greek Ferries* (Case IV/34.466)Commission Decision 1999/271/EC [1999] OJ L 109/24, [1]. See also consumer complaints in *Peugeot* (Cases COMP/E2/36623, 36820 and 37275) Commission Decision 2006/431/EC [2006] OJ L173/20, [27]. See Dussart, 'Parallel Imports of Motor Vehicles: the Peugeot Case' [2006] CPN 49, 51, on this case.

[29] See also *Volkswagen* (Case COMP/F-2/36.693) Commission Decision 2001/711/EC [2001] OJ L 262/14, [1]. On appeal Case T-208/01 *Volkswagen v Commission* [2003] ECR II – 5141 dealing with the notion of 'agreement' in EU competition law; Case C-74/04 P *Commission v Volkswagen* [2006] ECR I-6585.

Consumers/consumer organisations can lodge a complaint before the Commission, provided that they show a 'legitimate interest'.[30] Both the Commission and the GC accept the potential of consumer organisations to lodge complaints as long as they can show that their members are liable to be directly and adversely affected.[31] The same applies to individual consumers whose economic interests are adversely affected as they are the purchasers of goods and services that are the subject of an infringement.[32] Therefore, the 'legitimate interest' requirement, which is dependent on the *direct and adverse effect* of the infringement on the complainant or its respective members, can be identified as the first condition for the complaint's admissibility.

The legitimate interest requirement is an important prerequisite of the complainant's status, which is further associated with important procedural rights in the event of initiation of proceedings or the rejection of a complaint.[33] However, if the complainant fails to demonstrate its legitimate interest, the Commission is entitled to dismiss the complaint.[34] In the case of complaints raised by consumer organisations, the Commission appears receptive

[30] Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles [81] and [82] of the Treaty' [2003] OJ L1/1 ('Regulation 1/2003'), Article 7(2); Commission Regulation 773/2004 relating to the conduct of proceedings by the Commission [2004] OJ L 123/18 ('Regulation 773/2004'), Article 5 (1); *Notice on Complaints* (n18), [40]; Weatherill, 'Public Interest Litigation in EC Competition Law' in Micklitz and Reich (eds), *Public Interest Litigation before European Courts* 169, 173, argues that the Commission adopted a broad approach towards the 'legitimate interest' requirement. See Stuyck, 'EC Competition Law After Modernisation: More Than Ever in the Interest of Consumers' (2005) 28 JCP 1, 14 in the same vein.

[31] *Notice on Complaints* (n18), [37-38]. Cf Case T-114/92 *BEMIM v Commission* [1995] ECR II-147, [28] regarding the legitimate interest of an association of undertakings. See also Case C-321/95 P *Stichting Greenpeace v Commission* [1998] ECR-I 1651 restricting standing for environmental organisations. Arguably consumer organisations are more privileged compared to environmental organisations because of the competition specific enforcement mechanism provided by *Regulation 1/2003* (n30) and *773/2004* (n30).

[32] Ibid. Cf Cases T-213/01 and T-214/01 *Oesterreichischer Postsparkasse AG v Commission of the European Communities* [2006] ECR II-1601, [109-110], [113-114].

[33] *Regulation 773/2004* (n30) Article 6-8; *Regulation 1/2003* (n30) Article 27(1) . *Notice on Complaints* (n18) [64-73]. Complainants may also challenge the Commission decision. An important procedural right is the access to the non-confidential version of the statement of objection. See *Osterreichische Postsparkasse* (n32), [106-107].

[34] *Notice on Complaints* (n18) [40].

to accepting a lower information threshold. In so doing the Commission seems to recognise the difficulties associated with the gathering of information in cases of complaints by consumer organisations.[35] This should apply the more to individual consumer complaints. In addition, even in cases in which the legitimate interest requirement is not fulfilled, the Commission retains the right to initiate proceedings on its own initiative,[36]an option which the Commission should use in the event of consumer complaints in light of the 'added value' of consumer involvement.

Arguably, the latter route should have been adopted in *Lord Bethell*,[37] even if the Commission held Lord Bethell's complaint inadmissible for lack of direct interest. The Commission was accused of a failure to act[38] because it failed to provide a proper response to Lord Bethell's complaint, neither stating that it was going to act or providing reasons to the contrary. However, Lord Bethell claimed that the Commission letter addressed to him constituted an act which could be challenged under [Article 263(4) TFEU].[39] The Court held the case inadmissible since Lord Bethell only had an indirect interest in the respective Commission action and, therefore, could not be considered either as an addressee of its decision under [Article 263(4)] or as a potential addressee of a decision which the Commission has a duty to adopt.[40] It should be noted, though, that the 'allegations of fixing

[35] *Regulation 773/2004* (n30) Article 5 (1); *Notice on complaints* (n18) [31]; Wezenbeek, 'Consumers and Competition Policy: The Commission's Perspective and the Example of Transport' [2006] EBLR 73, 78-80.

[36] *Notice on Complaints* (n18) [40]. See also *Oesterreichische Postsparkasse* (n32) [90-92] in which the applicant was granted complainant status, even though the complaint was submitted after the initiation of proceedings on the Commission initiative.

[37] Case 246/81 *Lord Bethell v Commission* [1982] ECR 2277.

[38] Article 265(3) TFEU.

[39] *Lord Bethell* (n37) [14]. See seminal case Case 25/62 *Plaumann v Commission* [1963] ECR 95 on the 'direct and individual concern' condition. See Case T-224/10 *Test Achats v Commission* [Judgement of 12 October 2011] [33-34] for an interpretation of the Plaumann test in the context of a Belgian consumer organisation (Test Achats) challenging a Commission decision clearing a merger.

air transport rates and conditions' that this case concerned, were expressly exempted from Regulation 17/1962 and, therefore, Lord Bethell could not benefit from the competition law specific enforcement toolbox.[41] In addition, the Commission was not under a specific duty to provide reasons for rejecting the complaint.

This case suggests that it would have been harder to challenge Commission acts if Regulation 1/2003 and 773/2004 did not provide for certain favourable conditions. If *Lord Bethell* fell under the specific competition law framework, most probably Lord Bethell would have been granted complainant's status and, were the Commission to reject his complaint, it should have provided adequate reasons. If Lord Bethell were not satisfied with the Commission's reasoning, he could subsequently challenge its decision before the GC. This does not mean that the competition enforcement framework is flawless; only that it provides more support to complainants compared to the general EU framework. However, as will be shown below, a large amount of leeway is afforded to the Commission on the basis of the second identified 'admissibility criterion', 'Union interest' to which we now turn.

The Union interest requirement

The second 'admissibility criterion' is '[Union] interest'.[42] Here, both the complainant's legitimate interest and the nature of the complaint being in the Union interest are addressed as admissibility requirements, even if the former is technically a prerequisite for allowing the complaint to reach the stage of assessment, regardless of whether it is in the Union interest or not. In the latter case, the Commission recognizes that the complainant has a legitimate interest; however, it disposes of the complaint for lack of Union interest after examining the

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[40] *Lord Bethell* (n37) [16].

[41] *Lord Bethell* (n37), *Opinion of AG Lord Slynn* 2296.

[42] *Notice on complaints* (n18) [41-45]. After the adoption of the Lisbon Treaty, 'community interest' is used as synonymous with 'Union interest'.

substance of the complaint. Therefore, the end result is the same in both cases. The Commission rejects the complaint and bears an obligation to provide adequate reasons for this rejection, as will be discussed below. However, if a complaint is dismissed for lack of 'Union interest' the complainant (being recognised this formal status) retains its procedural rights under Regulation 773/2004.

The review of the Commission's past practice and the Union courts' case law suggests that the second admissibility criterion of 'Union interest' affords greater latitude to the Commission for rejecting complaints grounded on competition law, as it functions as a case prioritisation criterion. This is despite of the Union courts having articulated strict conditions of the required Commission justifications when rejecting a complaint for lack of 'Union interest'.

The Commission still enjoys discretion for case prioritisation,[43] especially in light of the fact that, in assessing the '[Union] interest' condition, it is allowed to apply new criteria not considered before in light of the factual and legal background of the case presented before it.[44] The '*general supervisory task entrusted to the Commission*' does not entail an obligation on its part '*to rule on the existence or otherwise of an infringement' and therefore the Commission can prioritise the cases submitted to it'*.[45] The Commission should still examine carefully the legal and factual background of a complaint before rejecting it.[46] As an

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[43] Case T-24/90 *Automec srl v Commission of the European Communities* [1992] ECR I-2223 [77]. On the Commission margin of discretion see Wils, 'Discretion and Prioritisation in Public Antitrust Enforcement, in particular EU antitrust Enforcement' (2011) 34 WC 353, 357-360.

[44] Case C-117/97P *Ufex v Commission*, Case [1999] ECR I-1341 [79-80]. *Notice on Complaints* (n18) [43].

[45] *Automec* (n43) [74-77]; Case T-74/92 *Ladbroke Racing v Commission* [1995] ECR II-115 (*Ladbroke I*) [58]; Cf Case 125/78 *Gema v Commission* [1979] ECR 3173 [18] stating that '...that in no way implies that the applicant within the meaning of [Article 7(2) Regulation 1/2003] is entitled to require from the Commission a final decision as regards the existence or non existence of the alleged infringement'; *Ufex* (n44) [88-89]; Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I-11369, [46]; Case T-229/05 *AEPI v Commission* [2007] ECR II-84 (*T-AEPI*), [39-40]; Case C-425/07P *AEPI v Commission* [2009] ECR I-3205, [31]; Case T-306/05 *Scippecercola and Terzakis v Commission* [2008] ECR II-4, [92]. *Notice on complaints* (n18) [28].

administrative authority, acting in the public interest, the Commission can prioritise its cases based on the criterion of 'Union interest' as long as it provides adequate justifications for its prioritisation.[47] The complainant can then challenge the rejection of its complaint under 263(4) TFEU and, in the event that no formal rejection decision is provided, launch an action against the Commission for failure to act under 265 TFEU.[48]

As it has been alluded before, the 'Union interest' criterion affords considerable discretion in dealing with the cases brought before it. AG Colomer observes that:

> ...[Union] interest [...] is no more than an abbreviated formula, a shortcut, to describe, succinctly, the discretion - neither unfettered nor arbitrary, since it is subject to judicial review - which the Treaties confer on the Commission for its examination of a complaint alleging the existence of anti-competitive practices. The substance of that concept varies very considerably, to the same extent as the widely differing circumstances which surround cases involving infringements of the competition rules.[49]

Notwithstanding the Commission's discretion, certain patterns can be discerned in the European courts' jurisprudence for assessing the 'Union interest' criterion.[50] In particular, it has been held that the Commission can reject a complaint if the complainant is able to bring an action to assert his right before national courts.[51] In the event that evidence is adduced to support the fact that the national system does not provide adequate protection for

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[46] Case T-548/93 *Ladbroke Racing v Commission* [1995] ECR-II 2565, [50-51].

[47] *Automec* (n43) [79], [81], [85]; *Ladbroke I* (n45) [58]; *Ufex*(n44) [90]; *Notice on complaints* (n18) [74-75]. For a concise depiction of the case law on the Commission discretion in rejecting complaints see *Scippecercola* (n45) [94-97], [174], [187], [189-190]. See also Case T-114/92 *BEMIM v Commission* [1995] ECR II-147; On the notion of '[Union] interest' and its role as jurisdictional threshold of case allocation see *Weatherill* (n30) 177-183.

[48] *Notice on Complaints* (n18) [77]. *Weatherill* (n30) 172. The other avenue would be to raise the issue before the Ombudsman. See Article 228 TFEU. Article 43 Charter of Fundamental Rights of the European Union [2000] OJ C 364/1.

[49] C-449/98P *IECC v Commission* [2001] ECR I-3875, Opinion of Colomer AG, [57].

[50] See *Notice on Complaints* (n18) [44] for a concise enumeration.

[51] *Automec* (n43) [88].

complainants' rights, the Commission cannot reject a complaint based on this argument.[52] However, national civil procedural systems do not afford adequate protection to consumer rights[53] and, therefore, the Commission should not reject consumer complaints based on this ground. Even if the Commission retains the case, one could question how an individual complainant's rights are to be safeguarded. It is suggested here that the Commission's policy choice of not addressing a complaint because national courts can safeguard individual rights provides a hint of the added value attributed by the Commission to private claims before national courts and of the complementary nature of public and private enforcement.

In the event that the alleged antitrust infringement does not present a threat to the functioning of the internal market the Commission may as well reject the complaint for lack of 'Union interest'.[54] In this case consumers/consumer associations may refer to their national authorities; but, given their limited resources, it seems unlikely that they would raise a second complaint, leaving consumers unprotected.

The GC accepted the above criteria in a case involving an action brought by consumer organisations. *BEUC v Commission*[55] has been listed as an important victory by consumer advocates.[56] The case commenced when BEUC and NCC launched a complaint before the Commission alleging that the agreement between UK and Japanese car manufacturers which entailed import quotas for Japanese cars in the UK market was anticompetitive. The Commission did not accept this complaint since the 'Union interest' condition was absent,

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[52] On the contrary in *Automec* the GC stated that the applicant has not produced any evidence showing that national law (in this case Italian law) provides no satisfactory legal remedies for the protection of the applicant's rights, a fact taken into account in order to rule that the Commission did not have an obligation to examine the complaint. *Automec* (n43) [94], [97]. See also Case T-575/93 *Koelman v Commission* [1996] ECR II-1 [79]; *T-AEPI*(n45) [44-45].

[53] See chapter IV, text to n153.

[54] *Automec* (n43) [86].

[55] Case T-37/92 *BEUC and NCC v Commission* [1994] ECR II-285.

[56] Goyens, 'A key ruling from the ECJ' (1994) 4 CPR 221.

because (i) the alleged anticompetitive agreement was about to expire, (ii) the agreement was known to, or even encouraged by, UK authorities and (iii) it did not satisfy the effect on inter-State trade requirements.[57] The complainants brought an action for annulment before the GC. The GC rejected the Commission's arguments and annulled its decision not to investigate the complaint since no proper factual and legal analysis was conducted before rejecting the complaint.[58] This is an important judgment as it reveals the readiness of the GC to thoroughly review Commission decisions in rejecting the complaint in a case involving consumer organisations acting in the consumer interest. However, the fact remains. Ultimately, it is for the Commission to set its enforcement priorities provided it gives an adequate reasoning for so doing.

ii. Sector Inquiries

The second participation avenue is the provision of information that falls short of justifying legitimate interest for launching a complaint under Article 7(2) Regulation 1/2003. However, consumer information can trigger a sector inquiry.[59] In any case, the Commission vouches to treat the provided information in accordance with good administrative practice.[60] Sector inquiries, unlike UK market investigations,[61] do not provide the Commission with powerful

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[57] See *BEUC v Commission* (n55) [10-11] for the Commission's reasoning.

[58] *BEUC v Commission* (n57) [43-61]. For a recent decision of the GC annulling the Commission decision for lack of proper factual and legal analysis see T-427/08 *CEAHR v Commission* [2011] 4 CMLR 14 [49], [176].

[59] *Regulation 1/2003* (n30) Article 17. See, for example, the complaints on electricity prices increases that resulted in the energy sector inquiry. Chauve and Godfried, 'Modelling Competitive Electricity Markets: Are Consumers Paying for Lack of Competition?'[2007] CPN 18. Commission (EC), 'Report on Competition Policy 2004' (vol II) <http://ec.europa.eu/competition/publications/annual_report/2004/2004_volume2_en.pdf> accessed 28 February 2012, 167.

[60] *Notice on complaints* (n18) [4]. See *Charter of Fundamental Rights* (n48) Article 41. Ombudsman(EC), 'The European Code of Good Administrative Behaviour'(2005) <http://www.ombudsman.europa.eu/en/resources/code.faces;jsessionid=5DCFB7F16FD3276EF3BFC692DD747792> accessed 3 February 2012.

[61] See Marsden and Whelan, 'When Markets are Failing' (2007) CLI 6(2) 6 for a concise account of the differences between the two regimes. It should be noted, though, that sector inquiries can be broader in scope, as they are not restricted to a particular market. In this regard, sector inquiries resemble UK market studies. See

enforcement tools. However, information requests from different market players does provide the Commission with the opportunity to form an opinion of the functioning of the respective sector and may also result in the opening of infringement proceedings against specific undertakings.[62] Thus, sector inquiries could potentially have a deterrent value. The mere opening of sector inquiries may have beneficial effects, as the price reduction in the leased lines sector inquiry reveals.[63] Also, in the context of sector inquiries (even if these do not concern the retail sector) the Commission can take into account the impact of certain business practices on consumers and suggest a certain cause of action to businesses.[64] Sector inquiries are not restricted to the competition law field, and they also present a beneficial bridging function between consumer and competition remedies. [65] This is the more evident in the sector inquiry in the retail banking sector in which the Commission expressly stated that:

Niels, Jenkins and Casanova, 'The UK Market Investigations Regime: Taking Stock after 5 Years'(2008) 7 CompLaw 346, 347 on sector inquiries as an 'information gathering exercise'.

[62] Commission (EC), 'Citizens' Summary – EU Competition Inquiry into the Pharmaceutical Sector' <http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/citizens_summary.pdf> accessed 21 June 2011. Rosen, 'Sector Inquiries under the Microscope' (2005) 4 (14) CLI 9; Holmes and Jones, 'Investigating the Business Insurance Industry' (2005) 4 (16) CLI 12. See also MasterCard, EuroCommerce and Commercial Cards (Case COMP/34.579, 36.518 and 38.580) Commission Decision of 17 December 2007 [2009] OJ C 264/8. On this case, following the retail banking sector inquiry (however initiated before the latter), see Repa and others, 'Commission Prohibits MasterCard's Multilateral Interchange Fees for Cross Border Card Payments in the EEA' [2008] CPN 1. Commission (EC), 'Competition: Commission Sector Inquiry Finds Major Competition Barriers in Retail Banking' (IP/07/114) (31.01.2007).

[63] Monti, 'Increasing Competition in Leased Lines – The Benefits for European Businesses and Consumers' (Brussels, 22 September 2000, Speech /00/333). Wood and Bavarez, 'Sector Inquiries' (2005) 4 (2) CLI 3, 4.

[64] Commission (EC), 'Staff Working Document Accompanying the Communication from the Commission Sector Inquiry under Article 17 of Regulation (EC) No 1/2003 on Business Insurance' (Final Report) SEC(2007) 1231, [5.4]. DG Competition, 'On the Initial Findings of the Sector Inquiry into Mobile Roaming Charges' (Working Document) (13 December 2000) <http://ec.europa.eu/competition/sectors/telecommunications/archive/inquiries/roaming/working_document_on_initial_results.pdf> accessed 21 June 2011, [6.6] on improving consumer awareness.

[65] For example, the Commission, in its Reports on Sector Inquiries, often refers to the disclosure of information (identified as a widely used remedy in consumer law) as a proposed course of action to businesses. See, for example, Commission (EC), 'Sector Inquiry under Article 17 of Regulation (EC) No 1/2003 on Business Insurance' (Final Report) COM (2007) 556 final, [22]. Commission (EC), 'Sector Inquiry under Article 17 of Regulation (EC) No 1/2003 on Retail Banking' (Final Report) COM (2007) 33 final ('*Retail Banking Report*)[33]. Commission (EC), 'Staff Working Document Accompanying the Communication from the Commission Sector Inquiry under Article 17 of Regulation (EC) No 1/2003 on Retail Banking' (Final Report)

> ...The sector inquiry into retail banking contributes to this agenda by shedding light on the operation of the market; highlighting possible market failures; and identifying where market failures can be tackled through competition law and, where appropriate, other measures.[66]

The Commission has predicted that the tool of sector inquiries will gain pace,[67] following the modernisation and decentralisation of competition law enforcement with Regulation 1/2003, and rightly so, since the Commission has undertaken three major sector inquiries in the energy, pharmaceuticals and financial services sectors. In particular, the Commission acknowledges that:

> ...sector inquiries have become one of its key investigative tools and have enabled it to identify shortcomings in the competitive process of the gas and electricity, retail banking, business insurance and pharmaceutical sectors. They have provided a wealth of factual material that has supported the Commission's enforcement of Articles 81 and 82 in individual cases.[68]

The tool of sector inquiries provides an avenue to consumers and consumer organisations to alert the Commission of possible competition law problems, thereby indicating a potential to legitimise competition policy. Further, the Commission record to date indicates that sector inquiries can be of great value to the Commission in discerning different trends in markets and potential competition law infringements.

iii. Other Participation Avenues: intervention

SEC(2007) 106 ('Retail Banking SWD'),14 (on price transparency), 15 (on information asymmetries and high switching costs).

[66] *Retail Banking Report* (n65) [4].

[67] Commission(EC), 'Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty' (White Paper) (White Paper) COM(99) 101 final, [115]. Commission(EC), 'A Pro-active Competition Policy for a Competitive Europe' COM(2004) 293 final, [4.1]. Sector inquiries were available under Article 12 Regulation 17/1962 as well.

[68] See also Commission (EC), 'Report on the Functioning of Regulation1/2003' (Communication) COM(2009) 206 final ('Report on Regulation 1/2003'), [11]. The observation on the rarity of the sector inquiry instrument seems outdated. Kerse and Khan, *EC Antitrust Procedure* [1.038].

In addition to raising complaints with the Commission, consumers/consumer organisations can apply to be heard by the Commission as third parties provided that they can demonstrate a *sufficient interest*.[69] Consumer organisations are expected to take advantage of this option, and have done so in the past,[70] since individual consumers will most probably be unaware of on-going competition law procedures. In fact, the Commission itself seems to encourage this consumer involvement avenue, since it states that:

> ...consumer associations that apply to be heard should generally be regarded as having a sufficient interest, where the proceedings concern products or services used by the end-consumer or products or services that constitute a direct input into such products or services.[71]

If the Commission statement above is taken at face value, consumer organisations will be granted authorisation to intervene in a large number of competition law cases. Furthermore, consumer organisations can intervene in on-going proceedings before European courts.[72] Interventions of this kind are beneficial in bringing the consumer input into consideration and highlighting the consumer interest in competition law analysis. However, despite the positive influence of consumer intervention,[73] as has been shown in chapter I,

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[69] Regulation 1/2003 (n30) Article 27(3); *Regulation 773/2004* (n30)recital 11 and Article 13(1).

[70] See, for example, consumer organisations intervention in *Intel* (Case COMP/C-3 /37.990) Commission Decision of 13 May 2009 (Provisional Non Confidential Version) http://ec.europa.eu/competition/antitrust/cases/dec_docs/37990/37990_3581_11.pdf> accessed 3 February 2012, [27], [1611].

[71] *Regulation 773/2004* (n30) recital 11.

[72] CJEU Statute [2008] OJ C115/210, Article 40(2) and 53(1). See, for example, Joined Cases 228 and 229/82 *Ford of Europe Incorporated and Ford Werke AG v Commission* [1984] ECR 1129; T-9/92 *Automobiles Peugeot SA and Peugot SA v Commission* [1993] ECR II-493; Cases 41/73 R and others, *Suiker Unie v Commission* [1973] ECR 1465 (intervention by Italian consumer organisation); also T-336/07 *Telefonica and Telefonica de Espana v Commission* [2007] OJ C269/55 in which the GC granted Ausbanc Consumo permission to intervene.

[73] In that regard see also Burgess v OFT [2005] CAT 25,[84], [286-290], [344], in which Which? was granted permission to intervene, causing the CAT to pay increased attention to the consumer choice element. Point raised in Epstein, 'Representation of Consumer Interest by Consumer Associations – Salvation for the Masses?' (2007) 3 CompLRev <http://www.clasf.org/CompLRev/Issues/Vol3Issue2Art3DayagiEpstein.pdf> accessed 26 January 2012 209, 218.

consumer interests bear a sparing and sporadic influence on the competition law enforcement standard employed by the European courts. Hence, they need to be supplemented by additional measures.

b. Public Enforcement *Lato Sensu*: towards a mixed approach to competition law enforcement

In this section, mechanisms and instances to date are covered in which private remedies were provided for in the course of public enforcement ('public enforcement *lato sensu*'). This does not cover instances in which public bodies are entitled to bring damages actions on the part of consumers, as in the Nordic Consumer Ombudsmen model. Since these mechanisms are employed by the courts, they can be classified under private enforcement with the participation of public authorities.[74]

EU cases

In *Nintendo* the Commission found, following a complaint by Omega that the Nintendo distribution system impeded parallel trade. However, following direct compensation made to the victims by Nintendo, the amount of the imposed fine was reduced.[75] In *General Motors* and the *Pre-Insulated Pipe Cartel* the Commission again treated the fact of paying compensation to the victim of the anticompetitive infringement as an extenuating circumstance in setting the appropriate amount of fine.[76] However, compensation to victims as a mitigating factor for the reduction of the fine remains under the Commission's discretion.[77]

[74] See *Hodges*, *The Reform* (n8) 27-35, 216, 228 for a different classification and details on the Nordic model.

[75] *Nintendo* (n15), [440-441].

[76] *General Motors Continental* (Case No IV/28.851) Commission Decision 75/75/EEC [1975] OJ L29/14, [18]; Pre-Insulated Pipe Cartel (Case No IV/35.691/E-4) Commission Decision 1999/60/EC [1999] OJ L24/1, [127], [172].

[77] Case T-59/02 *Archer Daniels Midland Co v Commission* [2006] ECR II-3627, [354-355].

Furthermore, there have been occasions on which the alleged victims of anticompetitive infringements have received economic benefits without the Commission issuing a final infringement decision. For example, in *Macron* the Commission closed the file after Angus Fire gave assurances that it would comply with Article 102 TFEU in the future and made an *ex gratia* payment to the complainant Macron.[78] Also, in *Sony/Phillips Licensing Agreement*, following a preliminary analysis by DG COMP, complainants and complainees were given an opportunity to agree on a settlement and the Commission investigation was put on hold during that time. In this case, an amended Standard Licensing Agreement was drafted which was cleared by the Commission by means of a comfort letter. Philips also committed to make a payment to each licensee of $10,000 on royalties due.[79] Therefore, it seems that informal contacts between the parties may provide an economic benefit of some sort for the victims. However, the alleged victims should possess bargaining power against the incumbent undertakings, a condition unlikely to be fulfilled by consumer organisations, and even less by individual consumers.

<u>*National Cases*</u>

In the *UK Independent Schools* the OFT found that the information exchange regarding future pricing between fifty fee-paying independent schools constituted an infringement of Chapter I prohibition by object.[80] The distinguishing element of this case is the fact that, following the issuance of the statement of objections, the Independent Schools Council

[78] Reference to this case in Beaumont and Weatherill, *EU Law* 909-910. See also Commission (EC), *Seventeenth Report on Competition Policy 1987* (1988) < http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=CB5087340 > accessed 3 February 2012, [81].

[79] See Commission(EC), 'XXXIIIrd Report on Competition Policy 2003' SEC(2004) 658 final, 197-200; On this case see Pena Castellot, 'Commission Settles Allegations of Abuse and Clears Patent Pools in the CD Market' [2003] 3 CPN 56-59.

[80] *UK Independent Schools* (n15), [1-2], [6].

approached the OFT with a view to reaching an agreed solution in place of the imposition of a fine. Following discussion between the parties an agreed resolution was reached. Schools would have to accept the infringement of Chapter I on their part and make an *ex gratia* payment amounting to £3 million in total into an educational charitable trust for the benefit of students attending the schools in the relevant period. In return the fine imposed on each school was of a nominal amount.[81] The treatment of this case represented a pragmatic compromise in light of the possible effects of any fine leading to an increase in student fees.[82]

The OFT and the European Commission adopted a similar approach in *Rover*.[83] The Rover Group ended the practice of setting fixed discount levels with its dealers and notified the Commission and the OFT. It also agreed to compensate its dealers and donate £1 million to the Consumer Association (now called Which?) which is overseen by an independent board, to be spent on consumer information services; as a result, the case was closed. In its annual competition report for that year the Commission stated that the donation does not affect the rights of consumers to claim compensation from the Rover Group, or any of its dealers.[84]

Instances involving compensation in the course of a public investigation were also reported in the Netherlands. In *Interpay*, the Dutch Competition Authority reduced the fines

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[81] *UK Independent Schools* (n15), [36].

[82] Lawrence and Sansom, 'The Increasing Use of Administrative Settlement Procedures in UK and EC Competition Investigations' (2007) 6 CompLaw 163, 168.

[83] No official decision was issued on this case. See Commission(EC), *XXIIIrd Report on Competition Policy 1993* (1994) <http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=CM8294650> accessed 3 Feruary, [228]. See Evans, 'Consumer Interest and Supercomplaints' (Consumers' Association Presentation) <http://www.incsoc.net/conf-2ppt5.ppt> accessed 3 February 2012; see also Mulheron, 'Cy-pres Damages Distribution in England: A New Era for Consumer Redress' (2009) 20 EBLR 307, 320-21 pointing to the lack of information regarding this case; Howells and James, 'Litigation in the Consumer Interest' (2003) 9 ILSA *J Int'l & Comp L* 1, 40; and Nicholson Lord, 'Rover "pays" £1m pounds compensation' (*The Independent*, 17 November 1993).

[84] *XXIIIrd Report* (n83).

imposed on eight banks for setting up Interpay as the sole provider of network services for PIN payments, and thereby excluding competition between them, following the setting up of a €10 million fund by the banks for an efficient payment system. This case also had an abusive practice element since Interpay was allegedly charging excessive PIN tariffs. The Dutch Competition Authority discontinued its investigations on this matter since the investigation would have been very complex and time consuming. In addition, a compensatory scheme was reached between the banks and retailers offering PIN payments to consumers.[85] The Netherlands Competition Authority has also facilitated compensation in the course of settlement procedures in the *construction cartel*.[86] In this case, companies involved in a construction cartel were granted a 10% fine reduction provided that they reached a compensation agreement with the Dutch government that was the victim of the cartel agreement.

In addition, in Germany, the national 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. In another case, *Stadwerke Uelzen*, a local gas supplier, which was found to charge abusive

[85] See the Netherlands Competition Authority '*NMa herziet boetes banken en Interpay*' (Press Release, 22 December 2005) < http://www.nma.nl/documenten_en_publicaties/archiefpagina_nieuwsberichten/nieuwsberichten/archief/2005/05_46_interpay.aspx> accessed 3 February 2012 (in Dutch). See also Bourgeois and Strievi, 'EU Competition Remedies in Consumer Cases: Thinking Out of the Shopping Bag' (2010) 33 WC 241, 250. See also Kalbfleisch, 'The Dutch Experience with Plea Bargaining/Direct Settlements' in Ehlermann and Marquis(eds), *European Competition Law Annual 2007* 481, 483-84; Bos, 'International Scrutiny for Payment Card Systems' (2006) 73 Antitrust LJ 739, 756-61; Spoek, 'The Dutch Competition Authority considers cooperation and Joint selling of Network Services for Pin-Transactions to be an Infringement of the Cartel Prohibiton (Interpay)' (e-Competitions)< http://www.concurrences.com/article.php3?id_article=35979&lang=fr> accessed 3 February 2012.

[86] See Brouwer, 'Antitrust Settlements in the Netherlands: A Useful Source of Inspiration' in Ehlermann and Marquis (n85) 489, 492-93.

prices, was ordered to reimburse its customers. The remedy was subsequently upheld by the German Supreme Court.[87]

The cases mentioned above indicate that the Commission, as well as NCAs, have, in the past, employed innovative ways for the provision of compensation in the course of public enforcement procedures. However, if these procedures are really to be employed in the consumer interest they need to be institutionalised. This possibility is discussed in section III.

[87] There are references to these two cases in Canenbley and Steinvorth, 'Effective Enforcement of Competition Law: Is There a Solution to the Conflict between Leniency Programmes and Private Damages Actions?'(2011) 2 JEurCL&P 315, 325. See Bundeskartellamt, Preismissbrauchsverfahren gegen Gasversorger weitgehend abgeschlossen (Press Release, 1.12.2008) http://www.bundeskartellamt.de/wDeutsch/archiv/PressemeldArchiv/2008/2008_12_01.php accessed 3 February 2012, on the first case. See Stadtwerke Uelzen BGH,Decision of 10. December 2008 – KVR 2/08 – OLG Celle, on the second case.

III. Structuring Adequate Measures

1. Introduction

In this section, amendments to the current public enforcement toolbox, namely complaints to the Commission, sector inquiries, interventions (public enforcement stricto sensu) and the occasional awarding of compensation through public enforcement mechanisms (public enforcement lato sensu), are proposed with a view of improving their contribution to the advancement of the 'added value spectrum'. Proposals on the former concern improvements to current participation avenues, whereas proposals on the latter take a more creative stance and argue in favour of the institutionalisation of a compensation channel, already present in the Commission and NCAs practice.

2. Making Complaints to the Commission More Effective: the consumer complaints allocation mechanism

The shortcomings encountered by consumers/consumer organisations in launching complaints are, to some extent, alleviated by the rather broad definition given to the 'legitimate interest' requirement and the partial dispensation with the obligation to obtain detailed information on the complaint.[88] However, the latitude for case prioritisation afforded to the Commission may inhibit the successful bringing of such claims. Even if the Commission is correct in its assessment of 'Union interest', the rejection of a complaint may still have an adverse impact on consumer interest.

As has been argued in the previous chapter, effective private enforcement mechanisms for consumer claims in the competition field are not to be found in individual Member States. The options for their implementation are two-fold; either devise the necessary collective action mechanisms for the additional reason of supplementing

[88] See text to n35 and p230.

Commission enforcement efforts or look at alternative public enforcement mechanisms. Given that the public enforcement of competition law in individual Member States is, to a large extent, replicated on the EU model,[89] some coordination mechanism is required for the Commission to allocate these consumer cases (in light of the importance attributed to the consumer interest, and the 'added value spectrum' of consumer involvement) to the relevant national competition authority directly, instead of rejecting them outright.

Recital 18 of Regulation 1/2003 provides that *'...the Commission* [should not be prevented] *from rejecting a complaint for lack of [Union] interest* [...]*even if no other competition authority has indicated its intention of dealing with the case'*. This recital, as well as the Notice on cooperation between the Commission and NCAs,[90] could be amended in order to provide for a 'consumer complaints allocation mechanism'. This would be along the lines that, in the event that the Commission rejects a complaint, it will have to directly send the file of the case to the most appropriate NCA. Following allocation of the complaint, the NCA will then decide how to proceed with the complaint depending on the information supporting the complaint and its own work load.

3. Improvements to Sector Inquiries: priorities, structure and outcome

The Commission could incorporate some changes into its sector inquiries regime so as to increase its relevance for consumers. These changes are related to the choice of sectors and the actual conduct of the sector inquiries. First, the Commission could more actively pursue sector inquiries in retail markets so as to point to the competition law relevance for consumers in the chosen sectors. For example, the focus on emerging, and recently liberalised, as well as,

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[89] *Regulation 1/2003* (n30) recital 8, 15, 18, Article 3 and Article 11. On soft convergence under the auspices of the ECN see Whish and Bailey, *Competition Law* 288-289.

[90] Commission (EC), 'Notice on Cooperation within the Network of Competition Authorities' [2004] OJ C101/43.

technology-based markets,[91] as was the case with the energy and 3G sector inquiry, does not sufficiently depict the beneficial effect of competition to consumers.

However, even when Commission sector inquiries concern intermediate markets, they are still conducted in '*key sectors of the EU economy which directly impact consumers*'.[92] In such cases, the Commission reports should expressly point, in a separate paragraph, to the potential benefits of its proposals for consumers. Note, for example, the final Report in the pharmaceutical sector inquiry, in which the benefits to consumers are mentioned throughout the Report without dedicating a separate section to this point.[93]

Further, the design of the conduct of sector inquiries should take consumer interest more explicitly into account. The questionnaires used during the sector inquiry should be drafted in a manner that takes into account not only the business but also the consumer perspective.[94] The Commission should, thus, seek the consumer views and not just those of the business community and, indeed, it has done so in the past.[95] The proposal outlined below in regard to the introduction of a mechanism akin to the UK super-complaint procedure further allows for consumer views to be brought to the fore.

The third amendment concerns the strengthening of the Commission's remedial powers and, unlike the proposals discussed so far, it needs to be introduced through a legislative amendment. Revision of the EU sector investigation regime so as to increase the Commission's remedial powers could prove to be beneficial for the consumer interest and

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[91] Ortiz Blanco, *EC Competition Procedure*, [5.04]; Crawford and Adamopoulos, 'Using the Instrument of Sector-wide Inquiries: Inquiry into Content for 3G Services' [2004] CPN 63; *Rosen* (n62).

[92] *Report on Regulation 1/2003* (n68), [8].

[93] Commission (EC), 'Executive Summary of the Pharmaceutical Sector Inquiry Report' (July 2009) <http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/communication_en.pdf> accessed 22 June 2011 ('Pharma Report'), 2, 7-8.

[94] *Marsden and Whelan* (n61) 8.

[95] See *Pharma Report* (n93) 6; *Retail Banking SWD* (n65) 9.

increase consumer organisations' incentives to bring possible competition law violations or market problems to the attention of the Commission. However, Regulation 1/2003 did not grant the Commission such broad enforcement powers; a fact that may point to the lack of political will for this proposal. In the subsequent section, this proposal is further discussed in relation to the UK markets regime.[96]

4. 'Super-Complaints': the European way

In this section, the possibility of formalising a communication channel between consumer organisations and the Commission, akin to the UK super-complaints procedure, is discussed. Indeed, it has been suggested that the introduction of an 'EU super complaints procedure', modelled upon the current UK 'super complaints' regime, can assist with increased consumer involvement in competition law enforcement.[97] As consumer organisations point out, complaints focus on a specific competition law infringement lacking the potential to tackle wider market problems.[98] Since consumer organisations are, indeed, better placed to raise attention to consumer problems in retail markets,[99] a formal procedure of alerting the Commission should be considered as complementary to an efficient complaint-handling process.

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[96] On the UK market investigation potential to tackle wider market problems see Pickering, 'UK Market Investigations: An Economic Perspective' (2006) 5CompLaw 206, 207-210; Cartlidge and Root, 'The UK Market Investigations Regime: A Review' (2009)8 CompLaw 312, 315-316. On UK market investigation regime potential to tackle tacit collusion problems see OFT511, 'Market Investigation References: Guidance about the Making of References under Part 4 of the Enterprise Act' (March 2006), [2.5]. On the inadequacy of sector inquiries in tackling this problem see Sufrin and Furse, 'Market Investigations'(2002)1 CompLaw 244, 245. On future changes to the UK markets regime see BIS, 'Growth, Competition and the Competition Regime'(March 2012) (Government Response to Consultation) 6-7, 27-39.

[97] Evans, 'Making Competition Real: EU Super-Complaints' (2005) 15 CPR 187.

[98] *Epstein* (n73) 237. Murray, 'Consumers and EU Competition Policy' (Centre for European reform, September 2005) <http://www.cer.org.uk/pdf/policybrief_consumers.pdf>accessed 26 January 2012, 4.

[99] Hutchings and Whelan, 'Consumer Interest in Competition Law Cases'(2006) 16 CPRev 182, 185 with further reference to *Evans* (n97) 191.

The UK markets regime is briefly reviewed with a view to assessing the super complaints' contribution to a more consumer–friendly competition policy.[100] No detailed account of the UK markets regime and the recent proposals for its reform is provided in the scope of the present enquiry,[101] since the aim, here, is to make a much narrower point, namely, to show that the contribution of consumer involvement through super-complaints is beneficial to the functioning of UK markets. This argument is employed to buttress the proposal for introducing a similar mechanism at the EU level.

The EA 2002 provides that designated consumer bodies can make a complaint to the OFT when any feature of a market[102] in the UK appears to be significantly harming the interests of consumers.[103] The UK Government was considering extending the 'super-complaint' regimes to SMEs as well.[104] This proposal could possibly detract from the 'super-complaints' procedure its flagship role of correcting market failures in the consumer

[100] As Fingleton concedes, 'The super complaints process has given greater impetus to the [consumer] group, often underrepresented in the policy debate. Fingleton, ' Market Studies: Finding and Fixing Problem Markets' (OFT market studies conference, 4 June 2008) <http://www.oft.gov.uk/shared_oft/speeches/sp0408.pdf> accessed 3 February 2012, 3.

[101] BIS, 'A Competition Regime for Growth: A Consultation on Options for Reform' (March 2011) ('BIS Consultation'); *Government Response to Consultation* (n96). For a discussion of the Government's proposal see Aitken and Jones, 'Reforming a World Class Competition Regime: The Government's Proposal for the Creation of a Single Competition and Markets Authority' (2011) 10 CompLaw 97; Lever, 'Fusion of the OFT and the CC: Ask for the Evidence' (2011) 10 CompLaw 126; Wilks, 'Institutional Reform and the Enforcement of Competition Policy in the UK' (April 2011) 7 EurCompJ 1; Allan, 'Redesign of the UK's Competition System: the Case for an Efficient Separation of Powers' (2010) 9 CompLaw 389; Bavasso and Pritchard , 'An Opportunity for Reform of the UK Competition Regime' (2010) 1 CPI Antitrust Journal <https://www.competitionpolicyinternational.com/an-opportunity-for-reform-of-the-u-k-competition-regime/> accessed 3 February 2012. The Government is also launching a consultation on the consumer protection regime. See BIS, 'Empowering and Protecting Consumers: Consultation on Institutional Changes for Provision of Consumer Information, Advice, Education, Advocacy and Enforcement' (June 2011) .

[102] See EA 2002, Section 11(9) (a) and Section 131(2) on the content of this notion.

[103] EA 2002, Section 11 (1). See OFT, 'Super-Complaints: Guidance for Designated Consumer Bodies' (July 2003) (OFT Super-Complaints Guidance) for relevant documents on UK 'super-complaints' procedure; BERR, 'Super-Complaints: Guidance for Bodies Seeking Designation as Super-Complainants' (March 2009). Super-complaints can also be made to other sectoral regulators. See EA 2002, Section 205; *OFT Super-Complaints Guidance,* [3.1-3.4]. OFT548, 'Terms of Reference of the Concurrency Working Party' (November 2003).

[104] *BIS Consultation* (n101) [3.14-3.16].

interest.[105]Therefore, the Government dropping this proposal, in light of the generated criticism, should be viewed as a positive development.[106]

In the super-complaints regime, the 90 days deadline within which the OFT must publish a response stating how it intends to proceed with the complaints is of particular importance.[107] Thus, the UK 'super-complaints' procedure imposes a tight deadline on the OFT to justify its proposed actions, and so institutionalises the dialogue between the competition authority and consumer organisation. As the law now stands, following a super-complaint, the options open to the OFT range from taking no action to launching a market study or making a market investigation reference to the CC.[108] To date, fourteen super-complaints have been raised with the OFT, the most recent in regard to travel money on 21 September 2011.[109] It is striking that, out of the thirteen super-complaints that have so far been completed, four market studies and three market investigations were undertaken. These data verify OFT's pledge to consider possible consumer detriment when choosing to

[105] Ioannidou, 'Reforming UK Competition Law Regime: The Consumer Perspective'(2012) 11 CompLaw 28, 34-35.

[106] *Government Response to Consultation* (n96) [4.8-4.9].

[107] EA 2002, Section 11 (2).

[108] *OFT Super-Complaints Guidance* (n103) [2.25]. Market studies, undertaken under s5 EA 2002, bear many similarities with Commission sector investigations. They are not limited in markets in the economic sense. In the course of market studies, the OFT can examine practices across a range of goods and services causing adverse effect on competition and originating either with business and consumer behaviour or government regulation and public policy, with a view to formulating proposals in order to improve the functioning of markets. See OFT519, 'Market Studies: Guidance on the OFT approach'(2010), [2.2-2.3], [2.8]. Market investigations are currently conducted by the CC under s131-138 EA 2002 following a reference by the OFT or the Secretary of State. Market investigations confer on the UK Competition Commission significant remedial powers, since they can influence, or even change, the structure of the market (eg compulsory licensing, divestiture). S138 EA 2002; CC, 'Market Investigation References: Competition Commission Guidelines' (June 2003), [4.18]. On market investigations impact and consumer law remedies see Ahlborn and Piccinin, 'Between Scylla and Charybdis: Market Investigations and the Consumer Interest' in Rodger (ed), *Ten Years of UK Competition Law Reform* 169, 181-183, 193-195.

[109] Materials on these super-complaints and the OFT handling can be found at http://www.oft.gov.uk/OFTwork/markets-work/super-complaints/ accessed 3 February 2012. The data presented here are drawn from a careful review of these materials.

undertake a market study.[110] The remaining four super-complaints (leaving aside one reverted to Postcomm) have also resulted in benefits for consumers, following from solutions negotiated with the industry.

Further, the relationship between super-complaints and market investigations provides an additional argument in favour of the consumers' potential to contribute to the well functioning of markets. Interestingly, one of the criticisms against the UK markets regime is the low number of market investigations conducted to date.[111] Thus, it appears striking that out of thirteen market investigations references to date, three followed from a super-complaint.[112] The large percentage of market investigations flowing from super-complaints indicates the potential for the designated consumer bodies to alert the competent competition authorities of competition problems in retail markets, since market investigations are the instrument for determining whether competition is working effectively in markets as a whole.[113]

The UK market regime is unique, as it encourages the involvement of designated consumer organisations and provides the competent authorities with powers to implement behavioural and structural remedies.[114] Generally, the UK regime is thought to be successful,

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[110] Glover and Owen-Howes, 'The consumer face of the OFT: How Does consumer protection fit in with competition law?' (2009)8(6) CLI 3, 5. OFT519, 'Market Studies: Guidance on the OFT approach'(2010), [3.1-3.7].

[111] *BIS Consultation* (n101), [3.5].

[112] Ibid. The *BIS Consultation* mentions 11 market investigation references. Following its publication, the OFT made two more market investigation references to the CC; one concerned the markets for aggregates, cement and ready-mix concrete in Great Britain and the other the market for statutory audit services to large companies in the UK. See the updated list on the OFT's site available at http://www.oft.gov.uk/OFTwork/markets-work/references/.

[113] *OFT511*(n96) [2.2]. However, see *Marsden and Whelan* (n61) 7 who point to the argument that this can be attributed to the tight response deadline and the threat of judicial review of the OFT's decision not to make a market investigation reference. See *The Association of Convenience Stores v OFT* [2005] CAT 36 for a challenge to the OFT's decision not to make a market investigation reference.

[114] In fact, this is only possible in the UK and Israel. See *BIS Consultation* (n101) [3.4].

and the current proposal for reform concerning the broadening of scope of market investigations and reductions in timescale[115] could potentially improve it even further.

The Commission could propose the adoption of an EU super-complaints procedure[116] building on the UK model, as well as national super-complaints procedures. In regard to EU super-complaints, the procedures and the deadlines within which the Commission must respond could be introduced via an amendment to Regulation 1/2003, whereas the national super-complaint mechanisms may be introduced via emulation of the EU model by the Member States.

The standing of consumer organisations to bring super-complaints should also be regulated. To that end, consumer organisations designated to raise collective actions will also be entitled to raise super-complaints with the NCAs.[117] In *chapter IV* it is argued that the criteria for the designation of consumer organisations should be regulated by EU legislation.[118] The same criteria could apply in the assessment of the authority of a consumer organisation to raise super-complaints.

5. Improving the rest of the armoury: interventions

Article 13(3) of Regulation 773/2204 provides that '*...The Commission may invite any other person to express its views in writing and to attend the oral hearing of the parties to whom a statement of objections has been addressed...*'.[119] It is suggested that the Commission should

[115] On these proposals see *BIS Consultation* (n101) ch 3. On the adopted proposals see *Government Response to Consultation* (n96)27-39.

[116] See proposal made by *Evans* (n97) 189. For a similar proposal see *Murray* (n98) 4.

[117] The UK designation criteria may be informative in that regard. See *BERR* Designation Guidance (n103).

[118] See chapter IV, text to n173-174.

[119] See also *Regulation 773/2004* (n30) Recital 11.

actively employ this provision and encourage consumer organisations to intervene in ongoing procedures concerning retail markets.[120]

6. Redefining Public Enforcement *Lato Sensu*: institutionalising a public compensation approach

Unlike to the improvements to consumer participation avenues discussed above, the proposal in this section discusses a formal approach towards the compensatory potential of public enforcement mechanisms, thereby transcending the boundaries of the traditional functions of public competition law enforcement. EU public competition law enforcement system does not, formally, provide for the provision of compensation to affected parties. However, in *section II3(b)* instances in which victims of anti-competitive practices received direct economic benefits as a result of public enforcement ('public compensation') were discussed. The sparse and sporadic use of the 'public compensation' approach points to the need for institutionalising the relevant procedure by drawing insights from experience to date.[121] A formally institutionalised 'public compensation' approach would not only increase legal certainty for businesses,[122] but would also render the functioning of the EU authorities (in this case, the Commission) as well as NCAs more transparent.[123] It would also signal the potential of competition law to benefit the victims of anti-competitive infringements. A formal

[120] Cf Asher, 'Enhancing the Standing of Competition Authorities with Consumers'(ICN Conference Korea, 15 April 2004) <http://www.internationalcompetitionnetwork.org/uploads/library/doc509.pdf>, accessed 3 February 2012, 4.

[121] See Cichowski, *The European Court and Civil Society* 5, on the term 'institutionalisation', in which she states that '...institutionalisation can be measured in terms of whether the current EU institutions (rules and procedures) governing the legal domain become more binding, precise and enforceable and whether they expand in scope'.

[122] Since Guidelines limit the Commission's discretion and may produce legal effects. See Joined Cases C-189/02P, C-202/02P, C-205-208/02P and C-213/02P *Dansk Rørindustri and Others v Commission* [2005] ECR I-5425, [211].

[123] See *Macrory Report* (n7) 10, 33. Macrory asks regulators to enforce in a transparent manner and be transparent in the way they determine administrative penalties.

institutional public compensation approach would elevate compensation as an embedded goal of the competition regime, and would do so in a transparent and consistent manner. [124]

However, the proposed mechanism departs from the cases discussed. First, the proposed mechanism views compensation as an additional remedy to be considered by the competition authority. As such, it supplements the fine imposed.[125] Second, it elevates the channel of compensation from its current incidental position into an integral part of the enforcement toolbox.

a. Categorisation of cases: the focus of formal 'public compensation'

The cases of 'public compensation' to date can be categorised on two criteria; first, the number of the injured parties, and, second, the provision of public compensation after a formal infringement decision or an informal settlement.

Number of Injured Parties Criterion

The *first category* includes instances, such as the *UK Independent Schools, Rover, Interpay* and *German gas* cases,[126] in which the injured parties are numerous and cannot be individually identified. This category covers all infringements which affect a large number of consumers. The *second category* concerns cases with a limited number of victims that are direct customers or competitors and each suffer a high level of harm. This has been the case in *Nintendo, General Motors, Pre-Insulated Pipe Cartel*, *Macron* and *Sony/Phillips Licensing Agreement.*[127] In regard to the *first category*, attainment of the compensatory aim of EU

[124] See also *Bourgeois and Strievi* (n85).

[125] Ezrachi and Ioannidou, 'Public Compensation' in Competition Cases – A Complementary Mechanism to Damages Actions' (2012) JECLAP (forth); See also Canenbley and Steinvorth (n87) 324-326 for a similar proposal, however as a mechanism to avoid conflicts between private enforcement and leniency programmes and as an alternative (not a supplement) to private enforcement.

[126]See text to n80-85 and text to n87.

[127] See text to n75-79.

competition law enforcement would be very difficult and a gap which public compensation may fill.

Compensation following an infringement decision?

Based on the second criterion, the first category contains cases in which formal infringement procedures were initiated and a fine was imposed (eg *Independent Schools, Nintendo, General Motors, Pre-Insulated Pipe Cartel*)[128] and the second comprises cases that were closed without issuance of an official infringement decision or imposition of a fine (eg *Rover, Sony/Phillips Licensing Agreement*).[129] Any attempt to formalise the 'public compensation' approach should focus on the first category, since compensation reached in the course of informal negotiations, while welcome, remains difficult to regulate in an effective manner. This is because it is case-specific and dependent on the competition authorities' discretion and the willingness of the alleged infringer.

b. 'Public compensation': the mechanism

From a practical perspective, a structured approach to 'public compensation' requires the identification of instances in which such a tool can, and should, be deployed, the quantification of damages, the method of compensation, identification of the beneficiaries and the possible effects on consumers and businesses.

i. Multiplicity of victims: establishing a fund

When the competition law violation impacts on a large number of unidentified individuals, 'public compensation' could benefit the class as a whole. In such cases, the establishment of a fund, and the employment of consumer organisations, may assist in transferring wealth back to the class. For example, in instances in which a particular consumer organisation

[128] See text to n75-76; n80-82.

[129] See text to n79; n83-84.

launches a complaint with the competition authority, that organisation may serve as a vehicle to channel funds back to the class. In this case, after ruling on the existence of a competition law violation and imposing a fine, the competition authority could allocate a sum to be given to the consumer organisation. This fund could then either be channelled back to benefit the consumers affected or, alternatively, it could be used for general causes beneficial to the consumer interests. In cases in which the compensation includes specific payment to injured parties, the consumers affected could claim part of the compensation under an agreed scheme. The remaining fund would be used by the organisation for consumer-related purposes (potentially consumer education campaigns) in the affected market, under the supervision of a trustee. This mechanism resembles the narrow-plus approach to the distribution of damages articulated in chapter IV.[130]

The incentives of organisations to bring competition law violations to the attention of the competition authority may be encouraged by the compensatory mechanisms put in place. Public compensation could prove workable in other cases, and not just when a consumer organisation is involved. In these cases, an intermediary could be appointed to administer the established fund.

ii. Quantification and procedure: Voluntary and involuntary compensation

As the quantification of damages in competition cases is complex and depends on the individual injured parties,[131] it cannot serve as a benchmark for public compensation. Calculation of 'public compensation' can differ in cases in which the Commission imposes a fine on the companies involved, since, here, public compensation is presented as a percentage of the imposed fine. In cases that are closed informally no fine is imposed and, therefore,

[130] See chapter IV, text to n212-215.

[131] See DG COMP, 'Quantifying Harm in Actions for Damages based on Breaches of Article 101 and 102 of the Treaty on the Functioning of the European Union' (June 2011) (Draft Guidance Paper, Public Consultation).

public compensation cannot be calculated in advance. 'Public compensation' is viewed, here, as an additional remedy in the Commission's enforcement toolbox, and it falls on the Commission to define the amount of 'public compensation'.

The calculation of 'public compensation' is carried out in relation to the contemplated fine and should be based on a given percentage derived from the fine levied on the parties. Once calculated, the sum representing the 'public compensation' may either be added to the fine, thus increasing the overall payment and deterrence, in cases in which the fine is below the maximum level allowed by legislation ('fine plus').[132] Alternatively, when the fine is set at the maximum permitted level, 'public compensation' would be a percentage deducted from the fine and channelled back to the affected class to provide for distributional justice (this is referred to as 'fine minus').

iii. Claims following public compensation

The mechanism proposed is complementary to private enforcement, so injured parties should not be barred from launching damages actions in court. When public compensation is channelled to a wide group or class, it will often not directly compensate the injured party for its damages. This is because public compensation serves corrective justice in its wider sense - compensating a group with sufficient nexus to the violation - rather than compensating the individual. Corrective justice, here, has a broader meaning. It does not connote the infringer's duty to compensate the victims of the violation, since the compensation should not necessarily be equal to the harm inflicted. Public compensation presents a flexible mechanism bringing benefits back to the injured parties, identified on an individual basis, or to the injured class. In cases, where public compensation was offered, injured parties may still have the incentive to claim damages in courts. Where part of the public compensation is

[132] See *Regulation 1/2003*(n30) Article 23(2) and (3) on calculating the amount of fines. See *Fine* Guidelines (n1)[32-33] on the maximum legal levels of fines.

directly paid to the injured parties, that sum could be deducted from any future damages that they obtain through the court. However, follow-on actions are unlikely in cases in which victims each suffer a low level of damage.

iv. Incorporating 'public compensation' into current tools

The 'public compensation' approach could be incorporated into existing enforcement mechanisms. First, public compensation could form part of the imposition of the fine following the finding of an infringement. Public compensation could be incorporated in *a general manner* in the *Fine Guidelines*[133] as an additional remedy, reflecting either the 'fine plus' or the 'fine minus' approach, discussed above. The Commission could make use of this remedy in appropriate cases. Since public compensation is to be viewed as part of the fine, no legislative amendment of Regulation 1/2003 is required. While the 'fine plus' approach views compensation as an addition to the fine, the competition agency may view the voluntary offering of compensation as a mitigating circumstance, and adopt, *de facto*, a 'fine minus' approach.[134]

In addition, *cartel settlement procedures* may also form a viable route, providing the competition agency with overall control over the level of compensation accepted. The reduced fine, following from the simplified procedure, would result in reduced public

[133] *Fine Guidelines* (n1).

[134] See n132 above. Temple Lang also proposed a similar inclusion in the Commission's Leniency Notice. See Temple Lang, 'European Community Competition Policy: How Far Does it Benefit Consumers?' (2004) 18 Boletin Latinoamericano de Competencia 128, 133. See Lever, 'Whether, and if so how, the EC Commission's 2006 Guidelines on Setting Fines for Infringements of Articles 81 and 82 of the EC Treaty are Fairly Subject to Serious Criticism' (Opinion)<http://www.bdi.eu/download_content/Publikation_BDI_Gutachten__Opinion__zu_EU_Bussgeldleitlinien.pdf> accessed 3 February 2012 for a proposal on a two-step approach on the imposition of fines, the first concerning the finding of liability and the second the imposition of fines and compensation offered by the undertaking; *Fine Guidelines* (n1) [29]. This has already been adopted in the Netherlands and Spain. See NMa Fining Code 2007, [49] <http://www.nmanet.nl/Images/NMa%20Fining%20Code%202007%20AMEW_tcm16-107358.pdf > accessed 3 February 2012(in Dutch); Spanish Competition Act 15/2007 of 3 July, Art 64(3)(c). In a similar vein in the UK, see *Macrory Report* (n7) 49.

compensation, as the latter is derived from the level of the fine. The incentives for undertakings to take the cartel settlement route would be retained, since they obtain a fine reduction plus a reduction on the compensatory remedy. Further, incorporating public compensation in settlement procedures could account for the alleged negative impact of cartel settlements on private enforcement, as the undertakings can make oral submissions,[135] the complainants' rights for access to the Commission file is limited,[136] and the final Commission settlement decision is usually very brief.[137] These characteristics of settlement proceedings can be linked to the discussion in chapter III which addressed issues with access to evidence. Provision of public compensation can account for the shortcomings of settlements in relation to private enforcement.

Finally, 'public compensation' could be incorporated in Article 9 Regulation 1/2003 *commitment proceedings*.[138] However, since the offering of compensation in the course of commitment proceedings remains a voluntary mechanism, it cannot be regulated in an effective manner. The obvious difficulty with this stems from the inability to quantify the compensation, since the procedure does not involve the finding of an infringement and the imposition of a fine. Compensation in such cases is bound to be subjected to agreement between the competition agency and parties and is different from the herein proposed public compensation in which the competition authority retains control of the compensatory remedy.

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[135] Regulation 773/2004 (n30) Article 12; Commission(EC), 'Notice on the Conduct of Settlement Procedures in View of the Adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in Cartel Cases' [2008] OJ C167/1 ('Notice on Settlements'), [38].

[136] See Article 6 Regulation 773/2004 as amended by Regulation by Regulation 622/2008 [2008] OJ L171/3. *Notice on Settlements* (n129), [35] on the complainants' limited access to file.

[137] Soltesz and Von Kockritz, 'EU Cartel Settlement in Practice – The Future of EU Cartel Law Enforcement?' (2011) ECLR 258, 263. See also Kon and Barcroft, 'Aspects of the Complementary Roles of Public and Private Enforcement of UK and EU Antitrust Law: An Enforcement Deficit?' (2008) 1 GCLR 11, 15-16. See Ortega Gonzales, 'The Cartel Settlement Procedure in Practice' (2011) ECLR 170, 175-176 for the opposite view, ie settlements as a trigger to private enforcement.

[138] See *Bourgeois and Strievi* (n85) 246-248.

7. Synopsis

In section III, proposals were advanced that could enhance the potential of public enforcement to advance the added value spectrum. The 'added value spectrum' applies, equally, to public enforcement mechanisms, pointing, yet again, to the complementary relationship between private and public enforcement. However, controversial issues may arise in different areas of the spectrum. For example, the formalisation of 'public compensation' underlies the debated compensatory potential of public enforcement and supplements its traditional deterrent function. Further, the complaints allocation mechanism and improvements in the EU market regime, ie sector inquiries and the introduction of super-complaints, could contribute to the ancillary aim of improving the public perception of competition policy. This is because these instruments indicate not only the link between competition policy and the consumer interest but also the importance attributed to this link in competition law analysis.

IV. Conclusions

In this chapter the current participation avenues open to consumers to become involved in public competition law enforcement, as well as their relevant shortcomings, have been assessed. A normative argument was put forward for suggesting certain changes in the respective public enforcement mechanisms (*section III*) as a result of highlighting the potential for consumer involvement to promote the 'added value spectrum', albeit in a re-defined form for the purposes of public enforcement (*section II*).

The proposed changes contribute to the overall deterrence potential of the enforcement system, and simultaneously advance the derivative aims. Even the proposal regarding the institutionalisation of the 'public compensation' approach, and the introduction of compensatory elements to public fines, is important, not only for promoting compensation but also for the advancement of deterrence and the derivative aims as well. The proposals to enhance public participation avenues are mutually reinforcing and complementary.

The system could function such that, a consumer or consumer organisation complaint is first launched to the Commission or a NCA. Second, the competition authority should seriously address the complaint and provide reasons for choosing to dismiss it, if it decides to do so. If the Commission rejects the complaint for lack of EU interest, it should forward the complaint to the most relevant NCA. If the complaint is examined and a fine is contemplated, the competition authority could, in addition to the fine, examine the possibility of imposing 'public compensation'. Also, the incumbent undertaking could consider the option of making an offer for compensation with a view to reducing the fine imposed. Consumer participation in public enforcement could, thus, strengthen the functioning of the enforcement system as a whole.

CHAPTER VI

OVERCOMING INSTITUTIONAL AND POLITICAL LIMITATIONS: APPROPRIATE INSTRUMENTS FOR THE INTRODUCTION OF EUROPEAN-WIDE MEASURES

I. Introduction

In this chapter, the EU framework and the constitutional division of power between the Union institutions and the Member States is examined with a view to determining whether the proposals articulated in chapters III-V can be introduced via an EU legislative instrument. First, the relevant proposals in the fields of private and public enforcement are briefly presented. Following this, the extent to which the current Treaty framework permits the adoption of the relevant measures mentioned in chapters III-V is explored. Further, attention is placed on the fact that, even if the legal hurdles of finding an adequate legal base are overcome, there remain important political limitations that impede the adoption of the measures. The analysis seeks the best possible solution, *de lege ferrenda,* for the introduction of proposals encouraging consumer involvement. At the same time, it points to the most workable solution under the current political and institutional environment.

II. Proposed measures in a nutshell

Consumer involvement in private competition law enforcement is the primary subject of the present research. At the same time, improvements to public participation avenues are explored. Public and private enforcement mechanisms are regarded as complementary routes enabling increased consumer participation, a desideratum justified by the added value of such participation.[1] They could both potentially provide incentives for consumer participation and address the problems related to the weak position of consumers in competition law compared with other market actors, such as competitors.

The proposals in private enforcement capable of advancing the 'added value spectrum' are the following:

1. Indirect purchasers should be granted standing, and passing on defence should be permitted with the concomitant alleviation of indirect purchasers' burden of proof through the adoption of a rebuttable presumption that the overcharge has been passed on. This echoes the Commission's proposal in its *WP*. From a normative perspective, it would have been preferable if passing on defence were excluded, although this is not in conformity with the current state of EU law.[2]

2. Special disclosure rules for stand-alone consumer damages claims should be introduced, as an exception to the general disclosure rule based on fact pleading. The court should order disclosure of the relevant documents provided that the claimant has presented a plausible claim concerning the existence of a competition law violation. The disclosure concerns

[1] See chapter II, text to n98-100 and chapter V, text to n1-13.

[2] See chapter III, text to n95-104.

categories of documents broadly defined, and the disclosed materials would be used solely for the purposes of private litigation.[3]

3. Non-disclosure of corporate statements; this category being construed narrowly, in follow-on damages actions.[4]

4. A more lenient approach towards disclosing Commission documents to consumer organisations should be adopted, provided that these documents are used strictly for the purposes of private litigation.[5]

5. Formulate opt-out collective actions to be brought by recognised consumer organisations.[6]

6. The conditions for authorisation of consumer organisations should be regulated at EU level.[7]

7. Recognised consumer organisations should obtain funding from three sources; their members, a consumer collective litigation fund, and public funds.[8]

8. A narrow plus approach should be adopted in regard to the distribution of the damages award, by distributing the award to consumers who claim their individual damages while the remaining sum reverts to the consumer organisation to be used for consumer-related purposes.[9]

Throughout the analysis of measures facilitating consumer involvement in private competition law enforcement, political constraints on the Commission often permeate the analysis, pointing to a gap between Commission aspirations and their actual potential to

[3] See chapter III, text to n129-131.

[4] Ibid text to n166-169.

[5] Ibid text to n149-158.

[6] See chapter IV, text to n172-189.

[7] Ibid text to n173-174.

[8] Ibid text to n193-196.

[9] Ibid text to n209-217.

necessitate change.[10] Therefore, examining available participation avenues in the field of public enforcement was seen as a solution to bridging this gap. To this end, the following proposals were formulated:

1. Introduce a consumer complaints allocation mechanism. If the Commission rejects a complaint made by a consumer/consumer organisation, it should allocate it to the most competent national competition authority.[11]

2. Launch sector inquiries in retail markets.

3. Actively seek consumer input when conducting sector inquiries.

4. Expressly point to the benefits that consumers derive from sector inquiries.

5. Change the sector inquiries regime so that the Commission can propose binding remedies.[12]

6. Introduce a procedure akin to that of the UK super-complaints at EU level. An EU super-complaints procedure could then, possibly, inspire the adoption of similar procedures at national level.[13]

7. Actively encourage consumer intervention in on-going Commission and judicial proceedings.[14]

8. Institutionalise the ‘pubic compensation’ approach.[15]

The remainder of the analysis in this chapter concentrates on whether the current institutional and political environment will permit the introduction of these proposals.

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[10] For a concise presentation of this problem see text to n42-43 below.

[11] See chapter V, text to n88-90.

[12] Ibid text to n91-96.

[13] Ibid text to n114-118.

[14] Ibid text to n119-120

[15] Ibid text to n121-124.

III. Discussing the building blocks of EU legislative competence

Some preliminary issues in regard to the approximation of national rules through EU legislative acts[16] will be addressed, before moving on to examine, in more detail, whether the above-mentioned measures can be introduced via EU legislative or soft-law instruments (see sections IV and V below). The analysis focuses on issues pertaining to EU competition law.

Guiding principles of European Union competence

The EU does not possess unlimited competence to harmonise national rules. Following the *principle of conferral*, it shall only act within the limits of its competence, as conferred upon it by the Member States, in order to attain EU objectives.[17] EU competences, once established, should be further exercised according to the *principles of subsidiarity* and *proportionality*. Following the subsidiarity principle, the EU shall act only if the action could be better achieved at EU level; the proportionality principle requires that the content of EU actions should not go further than necessary in order to attain the objectives of the Treaties.[18]

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[16] Dashwood considers the terms harmonisation and approximation as synonymous. Dashwood, 'The Relationship Between the Member States and the European Union/European Community' (2004) 41 CMLRev 355, 359 fn14. Indeed, it seems that these terms are synonymous, since the TFEU mentions them interchangeably. See, for example, Article 114(1) and (4) TFEU. Here, the term approximation is read wider, and also contains soft law instruments. See Storskrubb, *Civil Procedure and EU Law* 24 fn70.

[17] See Article 5(1) and (2) TEU; Article 1(1) TFEU. Opinion 2/94 Accession by the Community to the ECHR [1996] ECR I-1759, [23-24]; On the division of competence between the EU and the Member States see amongst others De Búrca and De Witte, 'The Delimitation of Powers between the EU and its Member States' in Arnull and Wincott (eds), *Accountability and Legitimacy in the European Union* 201; Weatherill, 'Better Competence Monitoring' (2005) 30 ELRev 23; Weatherill, 'Competence Creep and Competence Control' (2004) 23 YEL 1; Schuetze, 'The European Community's Federal Order of Competence – A Retrospective Analysis' in Dougan and Currie (eds), *50 Years of the European Treaties* 63; Wyatt, 'Community competence to regulate the internal market' Dougan and Currie (eds), *50 Years of the European Treaties* 93; Schuetze, 'Organised Change Towards an "Ever Closer Union": Article 308 EC and the limits of the Community Legislative Competence'(2003) 22 YEL 79. On the CJEU imposed limits upon the principle of conferral see the seminal Case C-376/98 *Germany v European Parliament and Council* [2000] ECR I-8419 ('Tobacco Advertising'); cf C-58/08 *Vodafone and others v Secretary of State* [2010] ECR I-4999 ('Vodafone'), Opinion of AG Maduro, [18]. See Weatherill, 'The Limits of Legislative Harmonisation Ten Years After Tobacco Advertising: how the Court's Case Law has Become a "Drafting Guide" '(2011) 12 German LJ 827 for a critical review of the relevant case law that acts merely as a 'drafting guide' to the legislature instead of imposing limits.

Following the proportionality principle, measures adopted by EU institutions must not exceed what is appropriate and necessary to attain the objectives pursued.[19] Thus, subsidiarity answers the 'when', whereas proportionality addresses 'how' the EU should take action.[20]

Exclusive and Shared Competence: the case of EU competition law

Subsidiarity plays a role only in the area of shared EU competences.[21] The LT attempts to clarify the division between exclusive and shared EU competences and enlists different areas of EU policies under these two headings.[22] The distinguishing factor between the two categories of EU competences is the fact that, in the former, the power to legislate has been retained by the EU, unlike the latter, in which Member States may adopt legislation provided that the EU has not exercised its competence. In areas of exclusive EU competence, the

[18] Article 5(1), (3) and (4) TEU; 'Protocol on the Application of the Principles of Subsidiarity and Proportionality' [2004] OJ C310/207; Article 12 TEU enhancing national parliaments' role regarding the application of subsidiarity. For a criticism see Peters, 'National Parliaments and Subsidiarity: Think Twice' (2005) 1 EConLRev 68; On these principles see, amongst others, Toth, 'A Legal Analysis of Subsidiarity' in O Keeffe and Twomey (eds), *Legal Issues of the Maastricht Treaty* 37; Davies, 'Subsidiarity: The Wrong Idea, in the Wrong Place at the Wrong Time' (2006)43 CMLRev 63. Barber, 'The Limited Modesty of Subsidiarity' (2005) 11 ELJ 308. Estella de Noriega, *The EU Principle of Subsidiarity and its Critique*; Biondi, 'Subsidiarity in the Courtroom' in Biondi, Eeckhout and Ripley, *EU Law After Lisbon* 213; Emiliou, *The Principle of Proportionality in European Law* esp 134-142; *Weatherill, Competence Monitoring* (n17) 37-40; Bermann, 'Proportionality and Subsidiarity' in Barnard and Scott(eds), *The Law of the Single European Market* 75. *Weatherill, Drafting Guide*(n17) 843-847.

[19] See, for example, Case 15/83 *Denkavit Nederland BV v Hoofdproduktschap voor Akkerbouwprodukten* [1984] ECR 2171, [25].

[20] Chalmers, Davies and Monti, *European Union Law* 362.

[21] Article 5(3) TEU.

[22] See Articles 3(1) TFEU and Article 4(2) TFEU. 'Protocol on the Exercise of Shared Competence' [2007] OJ C 306/158. Apart from exclusive and shared competence, there is a third category of Union competence where the Union's role is supporting, coordinating or supplementing the actions of Member States. See Article 6 TFEU. See also Article 2(3) and Article 5 TFEU on the *sui generis* competence in the field of economic and employment policies. Generally on the Union competence after the LT see Craig, *The Lisbon Treaty: Law, Politics and the Treaty Reform,* ch 5. Craig also raises the point that, even after the clarification attempted by the LT, ambiguities remain; ibid 160-161. For the distinction between exclusive and shared competence before the LT see Schuetze, 'Dual Federalism Constitutionalised: the Emergence of Exclusive Competence in the EC Legal Order'(2007) ELRev 3, 6; Bernard, 'The Future of European Economic Law in the Light of the Principle of Subsidiarity' (1996) 33 CMLRev 633, 654-664.

Member States can only legislate in order to implement EU acts or if they are so empowered by the EU.[23]

Establishing competition rules necessary for the functioning of the internal market has now been listed as an area of exclusive competence, dispensing with the past controversy as to whether EU competition policy constitutes an exclusive or shared competence.[24] In fact, the ‘establishment’ of EU competition rules has been an area of exclusive competence all along. This can be deduced from the wording of Article 104 TFEU that expressly empowers Member States to ‘...rule on the admissibility of agreements [...] and on abuse of a dominant position in the internal market in accordance with the law of their country and with the provisions of Article 101, in particular paragraph 3, and of Article 102’, until the adoption of legislation pursuant to Article 103 TFEU. Following the above definition of exclusive competence contained in the LT,[25] in the area of establishing competition rules, only the EU legislates and Member States are empowered by the Treaty to apply national rules, so long as no EU rules are adopted based on Article 103 TFEU. After the adoption of Regulation 1/2003 based on Article 103 TFEU, Member States are empowered to apply national competition rules only in cases provided in Regulation 1/2003.[26]

[23] Article 2(1), (2) TFEU.

[24] See Case 14/68 *Walt Wilhelm and others v Bundeskartellamt* [1969] ECR 1; Dougan, *National Remedies Before the Court of Justice* 120-123 argues that competition policy constitutes an area of shared competence, although with characteristics of *de facto* exclusivity. See also Dougan, ‘The Convention’s Draft Constitutional Treaty: Bringing Europe closer to its lawyers’ (2003) 28 ELRev 763, 770; Konstadinides, *Division of Powers in European Union Law* 170-172, 236-237; *Schuetze* (n22)6 stated that exclusive powers were ‘discovered’ by the CJEU. It is true that the CJEU has not pronounced on the nature of EU competition law as exclusive competence, but this does not necessarily entails that EU competition policy is an area of shared competence; See also *Bernard* (n22) 656-659.

[25] See text to n23.

[26] See Council Regulation (EC)1/2003 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty [2003] OJ L1/1 (‘*Regulation 1/2003*’) Article 3.

Therefore, if the herein proposed measures are viewed as EU competition policy measures, 'giving effect to the principles set out in 101 and 102'[27] they should be based on Article 103 TFEU and the subsidiarity principle has no role to play.[28] However, if they are treated as measures promoting the internal market, consumer policy or access to justice, they fall under the EU's shared competences, so their compatibility with the EU's subsidiarity principle also needs to be checked.

Adopting EU Acts: Procedures and Instruments

The past decade has seen a commitment to better law-making on the part of EU institutions, who have pledged to adopt legislation only where this is necessary.[29] Following the LT, the majority of EU legislation is likely to be adopted following the ordinary legislative procedure that provides for the joint adoption of legislative acts by the Parliament and the Council on the Commission's proposal.[30] The Treaty enumerates the following legislative acts: regulations, directives and decisions.[31] Regulations do not require transposition and are directly binding in every Member State, whereas Directives are binding only in regard to the result to be achieved and need to be transposed into national legal orders.[32] Thus, the choice

[27] Article 103(1) TFEU.

[28] Conjoined reading of Articles 5(3) TEU and Article 3(1)(b) TFEU. However, the proportionality principle still applies. See Tridimas, *The General Principles of EU Law* 176 who points to the fact that the proportionality principle ensures that 'the [Union] respects the interests of Member States not only where it exercises concurrent competence but also where it exercises its exclusive competence' with further reference to Lenaerts and Van Ypersele, 'Le Principe de Subsidiarité et Son Contexte' (1994) 30 CDE 3.

[29] EP, Council and Commission , 'Institutional Agreement on Better Law Making' [2003] OJ C321/01, [16]. Commission(EC), 'Implementing the Community Lisbon Programme: A Strategy for the Simplification of the Regulatory Environment' COM(2005) 535, 2-3. Documents on Better Regulation are available at http://ec.europa.eu/governance/better_regulation/key_docs_en.htm#_br, accessed 5 February 2012. See also Weatherill (ed), *Better regulation*.

[30] Article 289(1) and 294 TFEU.

[31] Article 288 and 289(1) TFEU.

[32] Ibid.

between the use of the two is a question related to the desired degree of uniformity in the specific area of EU policy.

The LT also provides for special legislative procedures with different allocation of powers between the Council and the Parliament.[33] Legislative acts may be adopted following the ordinary, or a special, legislative procedure. However, the LT provides for a separate category of non-legislative acts adopted by the Commission following delegation in a legislative act, to supplement or amend certain non-essential elements of the legislative act.[34]

The distinction between legislative acts adopted according to a special legislative procedure, and non-legislative acts, is somewhat confusing when it comes to Article 103 TFEU. According to Article 103 (1) TFEU, the appropriate regulation or directives to give effect to the competition provisions shall be adopted only by the Council acting on the Commission's proposal and after consultation with the EP. Therefore, it seems that this procedure constitutes a type of special legislative procedure, as the EP has a consultative role. It has been argued that the status of the rules adopted following Article 103 TFEU is ambiguous and that these may not constitute legislative acts since, where the Treaty has sought to establish a special legislative procedure it has done so explicitly.[35] However, it is clear that the wording of Article 103 TFEU fits the category of legislative acts adopted following a special legislative procedure, as described in Article 289(2) TFEU.

[33] Article 289(2) TFEU.

[34] Article 290 (1) TFEU.

[35] *Craig* (n22) 257.

The Commission could also consider proposing soft law instruments, like notices or communications, in addition to the introduction of measures through legislative acts.[36] 'Soft law acts' have no legally binding force, however, they could potentially produce practical effects.[37] For example, the Commission has issued several notices in the field of competition law, that, despite not being legally binding, affect the Commission's practice and should, therefore, be taken into account by the Commission when dealing with individual cases.[38] However, these soft law instruments cannot impose obligations upon Member States.[39]

[36] In the field of EU competition law, soft law instruments are widely used. See Maher, 'Competition Law Modernization: An Evolutionary Tale?' in Craig and de Burca, *The Evolution of EU Law* 717, 734; Cosma and Whish, 'Soft Law in the Field of EU Competition Policy'(2003) 14 EBLR 25.

[37] Article 288 TFEU enlists recommendations and opinions as legal acts with no binding force. On soft law instruments as a means of increasing the effectiveness of EU law see Snyder, 'The Effectivenes of European Community Law: Institutions, Processes, Tools and Techniques' (1993) 56 MLR 19, 32-33; Beveridge and Nott, 'A Hard Look at Soft Law' in Craig and Harlow, *Lawmaking in the European Union* 285, 288, 290; Borchardt and Wellens, 'Soft Law in European Community Law' (1989) 14 ELRev 267,285, 320. For a definition see Senden, *Soft Law in European Community Law* 112. For a classification of the various soft law instruments see Senden and Prechal, 'Differentiation in and Through Community Soft Law' in De Witte, Hanf and Vos (eds), *The Many Faces of Differentiation in EU Law* 181, 187-190.

[38] Joined Cases C-189/02P, C-202/02P, C-205-208/02P and C-213/02P *Dansk Rørindustri and Others v Commission* [2005] ECR I-5425, [211].

[39] *Snyder* (n37) 35-36. See also Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] OJ C 232/5, [23].

IV. Implementing the Proposals: Improvements in Private Competition Law Enforcement

1. Introduction

Introducing harmonised measures in private competition law enforcement presents a task of increased complexity that can be attributed to political and legal factors. In this section, the political obstacles to the introduction of harmonised measures are briefly discussed. One should recall that references to these obstacles were often made in the previous analysis, when discussing individual measures to enhance consumer participation in private competition law enforcement.[40] Thus, here only brief mention will be made of the political obstacles that will then serve as the springboard for the discussion on legal obstacles as related to the ambiguities surrounding EU competence in this field that is the main focus of this section. The analysis seeks to justify, in principle, the competition-specific approach and indicate the most appropriate legal base, as well as the most appropriate legislative instrument. The aim is to strike a balance between any possible 'competence creep', on the part of the EU, and the inadequate enforcement of EU competition law,[41] since an account of the legal obstacles could potentially also alleviate political objections.

2. Political obstacles

Proposals on enhancing private competition law enforcement have not been well received by two main groups of actors, the business lobby and a number of Member States as their comments to the GP, the WP and the recent public consultation on collective redress reveal.[42]

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[40] See for example chapter II, text to n87-90;chapter III, text to n59-64;chapter IV, text to n22.

[41] In line with the pronouncements in the European Council, 'Laeken Declaration on the Future of the European Union' (2001) <http://european-convention.eu.int/pdf/lknen.pdf> accessed 5 February 2012. On the problem of 'competence creep' see also *Weatherill, Competence Creep* (n17).

[42] See n40. Generally, comments on the GP<http://ec.europa.eu/competition/antitrust/actionsdamages/green_paper_comments.html>, accessed 5

These two groups depart from different standpoints, but they both oppose the adoption of private enforcement measures that could act as a deterrent to competition law violations.

Member States with a civil law tradition view the formulation of private enforcement measures based on the deterrence principle as contrary to their individualistic approach to tort law.[43] For example, proposals on opt-out collective actions and innovative ways to distribute damages awards, cannot be reconciled with these systems' prevailing principle of corrective justice. Thus, their main concern is not to jeopardise their national legal systems. Meanwhile, businesses, which often advance the same arguments as the Member States, are driven by their own concerns in regard to the dissuasive effects and costs that increased private competition litigation would entail.

These objections, voiced by the Member States, as the main actors in the EU, and by businesses with strong influence, indicate that the future of private competition law enforcement is not promising. Even if private competition law enforcement proceeds with the adoption of more modest proposals, it does not allow for the adoption of those measures that could actually provide for meaningful consumer involvement. However, the fact that the EU legal framework allows for the adoption of such measures could be used as an argument in bending these objections, and, ultimately, even if this is not possible, allow the Commission to make the necessary suggestions through appropriate soft law instruments.

3. Addressing the legal obstacles

February 2012; Comments on WP<http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments.html> accessed 5 February 2012; Comments on Public Consultation <http://ec.europa.eu/competition/consultations/2011_collective_redress/index_en.html>, accessed 5 February 2012.

[43] See chapter II, text to n93.

a. Categorisation of the proposed private enforcement measures: Of rights, remedies and procedures[44]

Before addressing the issue of EU competences, a preliminary point should be made. Following the CJEU pronouncements in *Courage* and *Manfredi*, as well as the general CJEU jurisprudence on EU rights and remedies, a considerable body of Union *acquis* concerning the right to damages in EU competition law already exists.[45] However, negative integration by the declaration of national procedural rules as incompatible with the principle of effectiveness, is not enough.[46] Positive harmonisation rules should also be adopted through the most appropriate legislative instrument. A distinction needs to be drawn between the *substantive conditions* of the right to damages, as pronounced by the CJEU and the *remedial and procedural rules* which seek to facilitate the enforcement of this right. The former category does not need to be harmonised since it forms part of EU law.

It is argued, here, that the nature of the proposed measure, that is, whether it is a substantive or procedural rule, affects the suitability of the relevant legislative instrument. Commission proposals in the field of private competition law enforcement have, so far, focused on measures facilitating damages claims, although without distinguishing between

[44] The title refers to the seminal article by Van Gerven, 'Of rights, Remedies and Procedures' (2000) 37 CMLRev 501.

[45] This has been codified in Commission (EC), 'Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules' SEC (2008) 404, 2 April 2008 ('WP SWP') , [310].

[46] Jacobs and Deisenhofer, 'Procedural Aspects of the Effective Private Enforcement of EC Competition Rules: A Community Perspective in Ehlermann and Atanasiu (eds), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* 188, 223. Kerse, *EC Antitrust Procedure* (4th ed, Sweet and Maxwell 1998) [10.23].In the same vein see Van Gerven, 'Substantive Remedies for the Private Enforcement of EC Antitrust Rules Before National Courts' in Ehlermann and Atanasiu (eds), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* 53, 86; Van Gerven, 'Harmonisation of Private Law: Do we need it?'(2004) 41 CMLRev 505, 524; See also Drake, 'Scope of Courage and the Principle of "Individual Liability" for Damages: Further Development of the Principle of Effective Judicial Protection by the Court of Justice' (2006) 31 ELRev 841, 862-863. *Dougan*(n24) 388-391. Contra Reich, 'Horizontal Liability in EC Law: Hybridization of Remedies for Compensation in Case of Breaches for EC Rights' (2007) 44 CMLRev 705, 738. For a criticism on the negative harmonisation see *Snyder* (n37) 50-51; Harlow, 'Voice of Difference in a Plural Community' in Beaumont, Lyons and Walker (eds), *Convergence and Divergence in European Public Law* 217; Brown, 'National Protection of Community Rights: Reconciling Autonomy and Effectiveness' in Lonbay and Biondi, *Remedies for Breach of EC Law* 67, 71.

substantive, remedial and procedural measures. This section attempts a distinction between them and a categorisation of the proposals enhancing consumer participation.

Van Gerven commented that it is a 'mission impossible' to distinguish between rights, remedies and procedures, although he attempted to give a definition of the relevant categories that is particularly helpful for the present research.[47] A 'right' constitutes a legal position that a person, recognised as such by law, may have and which can be enforced by that person by means of 'remedies' according to the relevant 'procedures' intended to make such remedies operational.[48] The distinction between rights and remedies has a common law flavour in the sense that, in civil law countries like Germany, once a person is granted a legal right, this also entails the power to pursue the enforcement of that right.[49] Remedies are inalienable from rights.[50] The category of procedural rules is narrower, and encompasses rules on judicial organisation, jurisdiction and the rules of procedure before the courts.[51]

An example, pointing to the close connection between rights and remedies and the difficulties to distinguish them from procedural rules, can be found in *Manfredi*. In this case

[47] *Van Gerven* (n44) 501. On the difficulties in distinguishing between procedural, remedial and substantive rules see also *Jacobs and Deisenhofer* (n46) 187, 188; The difficulties in distinguishing between rights and remedies are further aggravated by the different common and civil law approach. See Prechal, 'Does Direct Effect Still Matter?'(2000) 37 CMLRev 1047, 1053-1054.

[48] *Van Gerven* (n44) 502. See also *Tridimas* (n28) 500-501 where he notes that based on the 'ubi jus, ibi remedium' maxim, 'the value of a right is determined by the legal consequences which ensue from its violation, namely the remedies available from its enforcement'.

[49] Ruffert, 'Rights and Remedies in European Community Law: A Comparative view' (1997) 34 CMLRev 307, 332-33. As common law countries put the emphasis on remedies as rights protected by a cause of action they seem to arrive at the same conclusion. *Prechal* (n47) 1053-1054.

[50] See *Van Gerven* (n44) 503 in a similar vein, who points to the latin maxim *ubi ius, ibi remedium* as enshrined in the EU law principle of access to a court, which is also reflected in Articles 6 and 13 ECHR; Contra Delikostopoulos, 'Towards European Procedural Primacy in National Legal Systems' (2003) 9 ELJ 599, 611 arguing that '...the fact that remedial rights are often – but not always – determined not by their own nature but by the nature of right which they serve to protect does not lead to a conceptual identity between right and remedy...'.

[51] Tulibacka, 'Europeanization of Civil Procedures: In search of a Coherent Approach'(2009) 46 CMLRev 1527, 1532 with further references to Storme (ed), *Approximation of Judiciary Law in the European Union* 1; Jolowicz, *On Civil Procedure* 61.

the CJEU pronounced on the following conditions of the right to damages: standing, harm and causality between the competition law infringement and the harm.[52] However, the Court, by then suggesting that the causality condition is to be tested under the principle of equivalence and effectiveness, detracts from the practical significance of its previous statement on the conditions of the right as a matter of principle. The CJEU views causality as a substantive condition of the right to damages, but the manner in which this condition is proved (burden and standard of proof), absent EU law, is governed by national law, subject to the principles of equivalence and effectiveness.

The Court's approach in regard to the condition of causality in *Manfredi* is the more telling when compared with the Court's approach on the presumption of causality between the concerted practice and the market conduct of the participating undertakings in *T-Mobile*.[53] The referring court asked the CJEU whether it should treat the presumption of causality as intrinsic to the concept of concerted practice in Article 101(1) TFEU, that is, whether this should be treated as a substantive condition of the notion of concerted practice or as a procedural rule, subject to national law applied in accordance with the principles of equivalence and effectiveness. The Court treated the presumption of causality, which is essentially a rule on the reversal of the burden of proof, as a substantive condition. This approach is contrary to the Court's approach in *GT-Link* in which the Court regarded the burden of proof in an Article 102 TFEU case as a procedural condition.[54] The different

[52] Joined Cases C-295/04 to 298/04 *Vincenzo Manfredi and Others v Lloyd Adriatico Assicurazioni SpA and Others* [2006] ECR I-6619 ('Manfredi'), [61-64]. Nb that, in *Manfredi*, the CJEU does not refer to a direct causal link as was the situation in Cases C-46/93 and 48/93 *Brasserie du Pecheur SA v Federal Republic of Germany and The Queen v Secretary of State for Transport, ex parte Factortame Ltd and Others* [1996] ECR I-1029, [51], [65]. See also De Smijter and O'Sullivan, 'The Manfredi Judgment of the ECJ and How it Relates to the Commission's Initiative on EC Antitrust Damages Actions' (2006) (3) CPN 23.

[53] Case C-8/08 *T-Mobile Netherlands BV v Raad van Bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529 ('T-Mobile'), [44-53]. For a comment see Gerbrandy, 'Case C-8/08 T-Mobile Netherlands' (2010) 47 CMLRev 1199,1214-1219.

approaches adopted by the CJEU in *T-Mobile* and *GT-Link*, respectively, in regard to the burden of proof, reveals confusion in regard to distinguishing between substantive and procedural conditions.

Regrettably, it seems that the CJEU only went as far as recognising an EU right in damages that is to be enforced through a remedy in damages before national courts.[55] However, the conditions for the exercise of that remedy are governed by national law in accordance with the principle of equivalence and effectiveness.[56] If the civil law approach in regard to the alienability of rights and remedies were to be adopted, it would be easier for the CJEU to argue that the conditions for the right and, therefore, for the remedy are to be governed by EU law. One would arrive at a similar conclusion if Van Gerven's distinction on 'constitutive' and 'executive' conditions of the remedy were to be adopted; the former being the same as the substantive conditions of the right to damages, whereas the latter are subject to a stricter adequacy test. [57]

The present research focuses on both remedial and procedural proposals that facilitate consumer involvement in private competition law enforcement. First, it is proposed that the recognition of standing be given to authorised consumer organisations. In as much as the

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[54] Case C-242/95 *GT-Link A/S v De Danske Statsbaner* [1997] ECR I-4449, [22-27].

[55] In *Courage* the Court pronounced on the remedy in damages as a matter of EU law. This seems to be supported by the Opinion of AG Jacobs in Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband v Ichthyol-Geselschaft Cordes* [2004] ECR-I 2493, Opinion of AG Jakobs, [104].

[56] Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2001] ECR I-6297, [29].

[57] *Van Gerven, Harmonisation of Private Law* (n46) 524-526; see also Komninos, 'New Prospects for Private Enforcement of EC Competition Law: Courage v Crehan and the Community Right to Damages'(2002) 39 CMLRev 447, 470 in which, by interpreting the case law on State liability argues that the executive remedial conditions are subject to the principle of effectiveness test. *Komninos* argues that in *Manfredi* the CJEU has adopted the distinction between constitutive and executive remedial conditions, on the one hand, and procedural rules, on the other. Komninos, 'Civil Antitrust Remedies Between Community and National Law' in Barnard and Odudu (eds) *The Outer Limits of European Union Law* 363, 389–391. However, in as much as the CJEU has subjected causation to the principle of equivalence and effectiveness test rather than treating as a substantive condition of the right to damages (or as a constitutive condition of the damages remedy) this does not seem to be true.

CJEU has pronounced on an EU right to damages, the conditions of this right that also correspond to the 'constitutive conditions' of the remedy to damages, are a matter of EU law. Recognition of the bearer of the right constitutes an important condition of the right to damages.[58] In the case of collective actions brought by consumer organisations, a distinction needs to be drawn between the bearer of the right, that is, the consumers who have been affected, and the standing granted to the organisations that exercise the right to damages on behalf of consumers.

Standing concerns the 'right' granted to consumer organisations to initiate proceedings on behalf of consumers. Following the civil law tradition, the bearer of the right also has standing to bring a claim if his/her right is breached.[59] However, the situation is different if standing is accorded to an intermediary acting on behalf of the rightholder. In this case, *standing* seems to be a *procedural condition*, since:

(a) it concerns the enforcement of someone else's right, and

(b) it has to be specifically regulated, and does not follow from the conditions of the right itself and, therefore, it needs to be introduced via a legislative instrument.

The opt-out structure of the respective action should also be viewed as a procedural condition, since it is not related to the conditions of the right to damages as such, but only constitutes a policy choice as to the way in which the respective claims reach the courts. The same is true in regard to the funding mechanism for the authorised consumer organisations. Further, the distribution of damages mechanisms fall under the procedural conditions, to the

[58] Milutinović, 'Private Enforcement' in Amato and Ehlermann (eds), *EC Competition Law: A Critical Assessment* 725, 734; In this vein Komninos, *EC Private Antitrust Enforcement* 192.

[59] See text to n49 above. See also Tzakas, 'Effective Collective Redress in Antitrust and Consumer Protection Matters: A Panacea or a Chimera?' (2011) 48 CMLRev 1125, 1170 fn223 stating that 'Standing describes the plaintiff's right to commence and conduct proceedings in his own name. The right to sue illustrates the existence of a subjective right or legal interest in the person of the claimant that allows him to commence judicial proceedings'.

extent that they constitute a mechanism facilitating the distribution of the already-awarded damages.

However, the issue of passing on defence seems to be closer to the constitutive conditions of the remedy to damages.[60] Granted, EU law does not provide for the existence of the passing on defence; however, passing on can be regarded as the first condition of the unjust enrichment defence, that the CJEU has treated as a matter of EU law.[61] Still, passing on is related to one important element of the right to damages, that is, the harm caused by the anticompetitive conduct, and can, therefore, be treated as a constitutive element of the remedy in damages. However, the reversal of the burden of proof, being a policy choice facilitating the claimant, constitutes a procedural rule. Lastly, rules on access to evidence constitute procedural rules.[62] In short, the majority of measures facilitating consumer participation in private competition law enforcement discussed in the present research concern the adoption of procedural rules, an observation that, as will be shown below (see section IV d), impacts on the nature of the appropriate legislative instruments.

b. Should a competition specific harmonisation of procedural rules be adopted?

The Commission has repeatedly stressed that its initiative on private competition law enforcement is not about unnecessarily harmonising national tort and civil procedure rules but, rather, making EU rights more effective, and thereby harmonising these rules to the extent that they present obstacles to the effective enforcement of EU substantive rights in accordance with the principles of subsidiarity and proportionality.[63]

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[60] See Cumming and Freudenthal, *Civil Procedure in EU Competition Cases before the English and Dutch Courts* 3 fn11 for the nature of the defences discussed in the *WP* as substantive issues.

[61] See chapter III, 123-124.

[62] This is also supported by the Court's ruling in *Pfleiderer*. See *Pfleiderer* (n39),[30-31].

[63] Kroes, 'Reinforcing the Fight Against Cartels and Developing Private Antitrust Damages Actions: Two Tools for a More Competitive Europe' (Commission/IBA Joint Conference on Competition Policy, Brussels, 8 March

Arguments in favour of a sectoral harmonisation in competition law can be drawn from the existing harmonisation brought about by Regulation 1/2003. Regulation 1/2003 not only changed the administrative enforcement of competition rules by the Commission and national competition authorities, but also brought about changes that affect the enforcement of private competition law.[64] Regulation 1/2003 harmonises the burden of proof[65] between undertakings and the public authority, or between private parties, thereby going a step further than the CJEU in *GT Link*, in which it stated that, in the absence of Union rules, national rules on the burden of proof apply, subject to the principles of equivalence and effectiveness.[66] Thus, a sectoral harmonisation of procedural rules in EU competition law has already occurred, pointing to the possible adoption of other harmonised measures, provided they meet existing need. The analysis presented in chapter II on the 'added value spectrum' of consumer involvement provided five normative reasons which point to the respective need and supporting harmonisation. In addition, the Commission documents issued to date all point to the very large damages flowing from EU competition law violations and to the low number of damages actions, thus calling for a change in the *status quo*.[67]

2007) (Speech/07/128). The issue of subsidiarity and proportionality is also addressed in the Draft Damages Directive. See Commission(EC), 'Proposal for a Council Directive governing actions for damages for infringements of Article 81 and 82 of the Treaty' Draft Damages Directive (Document withdrawn before publication – on file with the author), Explanatory Memorandum [3.2], [3.3] and Recital 23. However, in as much as Article [103 TFEU] was the selected legal base for the Draft Damages Directive and EU competition policy falls under the area of exclusive Union competence no justification in light of the subsidiarity principle was necessary; see text to n21 above. It might, however, be seen as an attempt to persuade the objecting Member States. In addition, at the time the *Draft Damages Directive* was issued, the nature of EU competition policy as exclusive Union competence was not clarified. See text to n24.

[64] On the changes brought about by Regulation 1/2003 and their respective assessment see Commission(EC), 'Report on the Functioning of Regulation 1/2003' (Communication) COM(2009) 206 final.

[65] See Regulation 1/2003 (n26) recital 5 and Article 2. Note, though, that the harmonisation concerns only the burden, and not the standard, of proof that is still subject to national rules as long as they are compatible with general principles of EU law. On implying that the burden of proof is a procedural issue see *Storme* (n51) 65. In this vein *GT-Link* (n54), [22-27]. Contra *T-Mobile* (n53), Opinion of AG Kokkot, [77].

[66] *GT-Link* ibid.

Further, EU competition law constitutes the prime example of an EU law sector in which a high degree of substantive harmonisation is achieved.[68] Many commentators have highlighted this potential sectoral approach, and rightly so, since harmonised substantive competition rules could more easily justify a further harmonisation of the respective procedural rules.[69]

A further argument in favour of a sectoral harmonisation of private competition law enforcement could be drawn from the existing sectoral instruments in the field of public procurement,[70] consumer law,[71] environmental liability[72] and intellectual property.[73] Thus, when the need for improving the enforcement of EU rights was recognised, the sectoral approach was the solution adopted in the past.

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[67] See, for example, Commission (EC), 'Staff Working Document-Accompanying Document to the White Paper on Damages Actions for Breach of the EC Antitrust Rules' (Impact Assessment) SEC (2008) 405 (Brussels, 02/04/08) ('WP IAR'), [31-46].

[68] See Regulation 1/2003 (n26) Article 3. Cf s60 CA.

[69] *Dougan* (n24) 202-203; On the sectoral approach to remedies see Weatherill, 'Addressing Problems of Imbalanced Implementation in EC Law: Remedies in an Institutional Perspective' in Kilpatrick, Novitz and Skidmore(eds), *The Future of Remedies in Europe* 87, 108; Leczykiewicz, 'Private Party Liability in EU Law: In Search of the General Regime' in Barnard and Odudu (eds), *The Cambridge Yearbook of European Legal Studies – Volume 12, 2009-2010*, 257, 280. Beard and Jones, 'Co-contractors, Damages and Article 81: the ECJ finally speaks' (2002) 23 ECLR 246, 255. For an analogy with public procurement rules in which the EU 'Remedies Directive' reinforces the harmonised substantive public procurement rules see C-15/04 *Koppensteiner GmbH v Bundesimmobiliengesellschaft mbH* [2005] ECR-I-4855, Opinion of AG Stix Sackl , [47].

[70] Council Directive 2007/66/EC amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts [2007] OJ L335/31 ('Public Procurement Directive').

[71] Council Directive 1999/34/EC amending Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability of defective products ('Product Liability Directive'). Commission(EC), 'Proposal for a Council Directive on Consumer Rights' COM(2008) 614 final.

[72] Council Directive 2004/35 EC on environmental liability with regard to the prevention and remedying of environmental damage [2004] OJ L143/56 ('Environmental Liability Directive').

[73] Council Directive 2004/48 EC on the enforcement of intellectual property rights [2004] OJ L 195/16 ('Enforcement of IP Rights Directive').

Further, the EU has also adopted legislative instruments for the harmonisation of specific procedural rules.[74] However, when the Commission attempted to carry out grand legislative projects for the possible harmonisation of civil procedure rules, the outcome was rather unsatisfactory. Attempts to approximate the procedural rules in the EU that resulted in the mere pronouncement of general principles prove this fact.[75] If the basic distinction in European legal systems between adversarial and inquisitorial models is so deeply embedded in the Member States' legal cultures as to render harmonisation practically impossible,[76] then a sectoral harmonisation in fields in which there is an existing need, presents itself as a more realistic option. In fact, despite the EP being in favour of a horizontal approach to the harmonisation of procedural rules, it has itself acknowledged that:

> ...*the more advanced analysis of civil competition law redress and the advanced framework for competition authorities*, including the European Competition Network, and that, at least in regard to some issues, this justifies moving forward rapidly, taking into account that some of the measures envisaged could be extended to non-competition law sectors;

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[74] See, for example, Council Regulation 44/2001 on Jurisdiction and Recognition and Enforcement of Judgements in Civil and Commercial Matters [2001] OJ L12/1; Council Regulation 1206/2001 on Cooperation between Courts of the Member States in the Taking of Evidence in Civil and Commercial Matters [2001] OJ L174/1; Council Directive 2002/8/EC of 27 January 2003 to Improve Access to Justice in Cross-border Disputes by Establishing Minimum Common Rules Relating to Legal Aid for Such Disputes [2003] OJ L 26/41; Regulation 861/2007 on the European Small Claims Procedure [2007] OJ L199/1 ('European Small Claims Procedure'). For an analysis of these instruments see *Storskrubb* (n16) esp 114-152, 169-180, 220-232.

[75] *Storme* (n51). By way of analogy general initiatives in the field of contract and tort law also prove this point. See, for example, the formulation of general principles on European private law in the Draft Common Frame of Reference available at http://ec.europa.eu/justice/contract/files/european-private-law_en.pdf accessed 5 February 2012. For a concise presentation of other initiatives in the field of private law see Moellers and Heinemann (eds), *The Enforcement of Competition Law in Europe* 425-429. Marcos and Graells seem to suggest that the fact that these initiatives have not yet yielded results is indicative of the dangers entailed in a piecemeal harmonisation of procedural rules. However, their argument can run both ways, ie point to the need for this piecemeal harmonisation, especially where there is a strong case in favour of such harmonisation. Marcos and Graells, 'Towards a European Tort Law? Damages Actions for Breach of the EC Antitrust Rules: Harmonising Tort Law Through the Back Door? (2006) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1028963> accessed 5 February 2012, 3-4. Arguing in favour of a sectoral harmonisation of national tort laws see Van Boom, 'European Tort Law: an Integrated or Compartmentalized Approach' in Vaquer(ed), *European Private Law Beyond the Common Frame of Reference* 133, 142, 148-149.

[76] *Harlow* (n46)202 pointing to this conclusion in the *Storme*(n51).

> *takes the view that such sectoral measures could already be proposed* with regard to the *particular complexities and difficulties encountered by victims of breaches of the EC competition*...[77]

Thus, it seems that the EP to a certain extent accepts a sectoral approach to harmonisation in the field of EU competition law,[78] given the existing complexities in this sector, while acknowledging that such harmonisation could have beneficial spill-over effects in other sectors as well.

c. In search of an adequate legal base

i. Choosing between a plethora of potential legal bases: why does it matter?

The analysis presented above suggests that a sectoral harmonisation of consumer damages actions for competition law violations is appropriate.[79] The question now turns to the most appropriate legal base. The Commission's policy documents on improving private competition law enforcement, while not questioning EU competence to adopt legislative measures,[80] have been restricted to making rather delphic pronouncements regarding the appropriate legal base. [81]

The sectoral instruments on improving the enforcement of EU rights mentioned above,[82] were all based on [Article 114 TFEU] (former 95 TEC), with the exception of the

[77] EP, 'Non legislative Resolution on the White Paper on damages actions' (2008/2154(INI)) ('EP Resolution on WP'), [6], emphasis added.

[78] Cf EP, Resolution on 'Towards a Coherent European Approach to Collective Redress' (2011/2089(INI)) (2 February 2012) [17].

[79] See *Tulibacka* (n51) 1546, 1547, for an opposite view, although she acknowledges that Member States may be more prone to accepting sectoral harmonisation.

[80] This is how Commission reference to the CJEU having 'indirectly confirmed' EU competence to act should be read. See *WP SWP* (n45) fn164.

[81] *EP Resolution on WP* (n77), [2], [4]. It has to be pointed out that the first time the Commission mentions an appropriate legal base is in its withdrawn Damages Directive. The preferred legal base is [Article 103 TFEU], contrary to the Parliament viewing this Article as an inappropriate legal base. See text to n91.

Environmental Liability Directive that was based on [192(1) TFEU] (former 175(1) TEC). Further the instruments harmonising certain procedural rules[83] are all based on [Article 81 TFEU] (former 65TEC) Following from the measures so far adopted at EU level, as well as the aim of the measures proposed here, that is, enhancing the enforcement of consumer rights for competition law violations, the potential legal bases seem to be Articles 81 TFEU, 103 TFEU, 114 TFEU, 169(2) TFEU and 352 TFEU.

Choosing the correct legal base has political and institutional significance,[84] since the EU enjoys only conferred powers. If a legislative measure is based on an incorrect legal base, it could be invalidated,[85] following a challenge brought either by an EU institution or a Member State.[86] From a practical perspective, the choice between competing legal bases matters only if they entail different methods for adopting legislative measures.[87] The degree of involvement of EU institutions differs according to the adopted legislative procedures. Thus, if Article 81 TFEU, 114 or 169(2) TFEU is preferred, the ordinary legislative procedure will be followed,[88] thereby preserving the prerogatives of the Union institutions. On the contrary, the EP may object to the choice of Article 352 TFEU as the appropriate legal base, since this Article provides for measures to be adopted by 'the Council, acting

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[82] See text to n70-73.

[83] See text to n74.

[84] Barents, 'The Internal Market Unlimited: Some Observations on the Legal Basis Of Community Legislation'(1993) 30 CMLRev 85, 89.

[85] Opinion 2/00 (Cartagena Protocol) [2001] ECR I-9713, [5]. On the principle of conferral see text to n17.

[86] The issue of an incorrect legal base can also be raised in the course of a preliminary ruling. See, for example, Case C-331/88 FEDESA [1990] ECR 4023, [22-28]. See *Chalmers, Davies and Monti* (n20) 95 arguing that both EU institutions and Member states have vigorously litigated the choice of legal base. Further reference to Cullen and Charlesworth, 'Diplomacy by other Means: The Use of Legal Basis Litigation as a Political Strategy by the European Parliament and Member States' (1999) 36 CMLRev 1243.

[87] Weatherill, *Cases and Materials on EU Law* 47.

[88] See text to n30.

unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament'. Thus, here instead of the joint adoption of the legislative measure, only the consent of the EP is required.[89]

If measures are based on Article 103 TFEU, the EP's role is diminished to a mere consultative function.[90] Since the EP only has a consultative role for legislative measures adopted under Article 103 (1) TFEU, it urged the Commission to adopt any future collective redress mechanisms according to the ordinary legislative procedure.[91] This, in turn, raises the risk, that if Article 103(1) TFEU is preferred as the legal base, the EP may challenge the measures that harmonise national procedural rules before the CJEU. Equally, the choice of the legal base matters for the legislative measures may be challenged by an objecting Member State before the CJEU.[92]

The choice of a legal base is influenced by the following judge-made rules. First, it should be based on *objective factors*, amenable to judicial review. These factors include, in particular, the *aim and content* of the measure.[93] Second, if the adopted measure pursues more than one purpose, the *predominance purpose* test is to be followed; namely the preferred legal base should be the one corresponding to the measure's predominant purpose.[94]

[89] See, for example, Case C-436/03 *Parliament v Council* [2006] ECR I-3733, [12-15]; See also Rutgers, 'European Competence and a European Civil Code, a Common Frame of Reference or an Optional Instrument' in Hartkamp and Von Bar (eds), *Towards a European Civil Code* 311, 316.

[90] See text to n35.

[91] *EP Resolution on WP* (n77), paras [5], [23].

[92] This is not the case for measures adopted following Article 352 TFEU, in as much as unanimity in Council is required.

[93] See, for example, Case 45/84 *Commission v Council* [1987] ECR 1493, [11]; Case C-300/89 *Commission v Council* [1991] ECR I-2867, [10]; Case C-268/94 *Portugal v Council* [1996] ECR I-617, [22];*Opinion 2/00* (n85) [22]; Case C-338/01 *Commission v Council* [2004] ECR I-4829, [54]; Case C-94/03 *Commission v Council* [2006] ECR I-1, [34]; *C-436/03* (n89) [35].

[94] Case C-36/98 *Spain v Council* [2001] ECR I-779, [59]; *C-338/01* (n93), [55]; *C-94/03* (n93), [35]; Case C-155/07 *Parliament v Council* [2008] ECR I-7879, [68].

Third, if no predominant purpose is identified, the measure can be based on more than one legal base, with the caveat that the procedures laid down by each legal base should be compatible with each other.[95] The possible legal bases are examined in detail in this section in order to find the most appropriate one for the adoption of the relevant proposals enhancing consumer participation in private competition law enforcement.

ii. Article 81 TFEU

The LT has brought changes in the field of judicial cooperation in civil matters that could potentially affect EU competence to adopt legislative measures based on Article 81 TFEU.[96] Article 81 (2) TFEU now provides that:

> For the purposes of paragraph 1,[97] the European Parliament and the Council, acting in accordance with the *ordinary legislative procedure*, shall adopt measures, *particularly when necessary for the proper functioning of the internal market*, aimed at ensuring: ... (e) *effective access to justice*; (f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States... (*emphasis added*)

In Article 81 TFEU the internal market link has been somewhat weakened in as much as now the EU shall adopt measures *particularly* when necessary and not '*in so far as necessary*'[98] for the proper functioning of the internal market.[99] In addition, the LT has expanded the aims of the adopted measures by including the broad category of measures

[95] Case C-336/00 *Republik Oesterreich v Martin Huber* [2002] ECR I-7699, [31]; *C-338/01* (n93), [56]; *C-94/03* (n93), [36]; *C-155/07* (n94) [75].

[96] The former Article 65 TEC. For a historical account of the development of Union competence in the field of civil justice as well the latest changes brought by the LT See Storskrubb, 'Civil Justice – A Newcomer and an Unstoppable Wave?' in Craig and de Burca, *The Evolution of EU Law* 299, 302-307.

[97] That is, the 'development of judicial cooperation in civil matters having cross border implications'.

[98] As was the wording in Article 65 TEC.

[99] Tulibacka explains that this change could be seen in light of the prominence attributed to fundamental rights, that is, access to justice and due process post LT. See *Tulibacka* (n51) 1535.

aiming at ensuring effective access to justice. However, the condition that the measures should alleviate matters having cross-border implications has been retained.

The fact that the Commission in its *Action Plan Implementing the Stockholm Programme* mentions the consultation on collective redress instruments in EU legislation,[100] indicates that Article 81 TFEU could be the potential legal base for the proposed measures. However, since Article 81 TFEU seeks to improve 'judicial cooperation in civil matters',[101] it mainly concerns the approximation of procedural and private international law rules.[102] This conclusion can be also supported by the fact that all EU measures in the field of remedies were adopted based on Article 114 TFEU,[103] whereas the procedural measures so far adopted were based on 81 TFEU. It follows that Article 81 TFEU is not a valid legal base for the approximation of remedial EU rules. Arguably, though, the inclusion of the 'access to justice' category may enable the adoption of wider remedial and substantive rules based on this Article. However, even if this hurdle is overcome, the problem with the cross-border nature of the claims remains.

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[100] Commission(EU), 'Delivering an Area of Freedom, Security and Justice for Europe's Citizens- Action Plan Implementing the Stockholm Programme' (Communication) COM(2010) 171 final, 19.

[101] See *Storskrubb* (n96) 309 on this notion.

[102] The private international law aspect falls outwith the scope of this thesis. Van Gerven points to the wide articulation of procedural rules by the CJEU and points out that, following the insertion of competence on civil procedure by the Treaty of Amsterdam, the Court of Justice might have to reconsider which rules could be characterised as procedural thereby suggesting that Article 81 TFEU encompasses only the approximation of procedural rules stricto *sensu*. See *Van Gerven* (n44) fn114. However, the fact that projects on possible future harmonisation of contract law now fall under the sphere of civil justice could suggest that Article 81 TFEU is not only confined to procedural matters. See http://ec.europa.eu/justice/contract/index_en.htm, accessed 6 February 2012, on the relevant documents. *Craig* (n22) 360. On the scope of Article 81 TFEU see also Hartnell, 'A Cinderella Story: "Judicial Cooperation in Civil Matters" Meets the Prince. Review of Eva Storskrubb, Civil Procedure and EU Law: A Policy Area Uncovered' (2010) YEL 483, 485-486.

[103] With the exception of the *Environmental Liability Directive* (n72). Also, the *Product Liability Directive* (n71) was adopted before the Treaty of Amsterdam that brought civil justice in the area of Community competence.

It has been argued that EU collective action measures will not prove to be effective if limited to cross-border claims.[104] This is mainly because the problems of defining the group, notifying possible victims of anticompetitive practices and distributing damages will be aggravated in the cross–border context. Therefore, it would be even more difficult for consumer organisations to bring cases, so rendering any adopted measure redundant. This explains why consumer organisations call for both national and cross-border collective redress procedures.[105]

In effect, as there is a need for the adoption of both national and cross border procedures, it seems that the textual interpretation of Article 81 TFEU precludes the adoption of these measures on this legal base.[106] Despite the Commission's efforts to give wide interpretation to the cross-border element in its proposal for a small claims procedure,[107] this did not succeed, as the final adoption of the Small Claims Procedure reveals.[108]

<u>iii. 114 TFEU[109]</u>

Initially in *Rewe* and *Comet*, and then repeating the same statement in a number of cases, the CJEU acknowledged that:

[104] Stuyck, 'Class Actions in Europe? To Opt-in or to Opt-out, that is the Question' [2009] EBLR 483, 499.

[105] See --, 'Summary of Interventions' (15 November 2010, ECOSOC Brussels)(BEUC/Test Achats Joint Conference – Group Action: A necessity for consumers) 8 <http://www.groupaction4consumers.eu/docs/minutes/BEUC_TA_151110-Summary.pdf> accessed 6 February 2012. See also Test Achats and Test Aankoop, 'Towards a Coherent Approach to Collective Redress – Response' 4 <http://ec.europa.eu/competition/consultations/2011_collective_redress/testaankoop_en.pdf> accessed 9 December 2011.

[106] In the same vein see *Tulibacka* (n51) 1562-1563.

[107] Commission (EC), 'Proposal for a Council Regulation Establishing a European Small Claims Procedure' COM(2005) 87 final, Explanatory Memorandum, [2.2.1].

[108] *European Small Claims Procedure* (n74) Article 1 and Article 2(1).

[109] Article 115 TFEU (former 94 TEC) allows the adoption of directives '...for the approximation of such laws... of the Member States as directly affect the establishment or functioning of the internal market'. This Article is not examined here since it is unlikely that this provision is used instead of Article 114 TFEU, since it requires unanimity in Council for the adoption of harmonised measures.

> *in the absence of any relevant [Union] rules*, it is for the national legal order of each Member State [...] to lay down *the procedural rules for proceedings designed to ensure the protection of the rights* which individuals acquire through the direct effect of [Union] law ...[Articles 114-115, 117 and 352 TFEU] enable the appropriate steps to be taken as necessary, to eliminate differences between the provisions laid down in such matters by law [...] in Member States *if these differences are found to be such as to cause distortion or to affect the functioning of the common market*...[110]

The CJEU has made similar pronouncements in *Courage* and *Manfredi*,[111] although without making any references to the possible adoption of EU harmonised measures. However, the fact that the CJEU does not mention a legal base in *Courage* and *Manfredi* does not mean that the EU does not have competence to act in this area. The similar wording in these cases, and the fact that they all deal with 'procedural rules',[112] seems to suggest that Article 114 TFEU could act as the appropriate legal base to harmonise national procedural rules, provided that the conditions set forth in this Article are fulfilled. So, the question then is, are they fulfilled for rules increasing consumer involvement in private competition law enforcement?

Harmonisation measures based on Article 114 TFEU must have, as their object, the establishment and functioning of the internal market (defined in Article 26 TFEU).[113] However, a mere finding of disparities between national laws, and of an abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition, does not suffice to establish the necessary internal market making link.[114] Rather, the measures should

[110] Case 33/76 *Rewe v Landwirtschaftskammer fuer das Saarland* [1976] ECR 1989, [5]; Case 45/76 *Comet v Produktschap voor Siergewassen* [1976] ECR 2043, [13-14], (emphasis added).

[111] *Courage* (n56), [29]; *Manfredi*(n52), [62].

[112] The CJEU attributes a wider content to the term 'procedural', as it comprises both procedural and remedial rules. See *Komninos*, *Outer Limits* (n57) 372.

[113] *Vodafone* (n17), [32].

either seek to eliminate obstacles to the free movement of goods or the freedom to provide services, either existing or likely to exist in the future, or seek to remove appreciable distortion of competition.[115]

The *Enforcement of the IP Rights Directive* based on Article 114 TFEU is illustrative as to the manner in which EU legislature is satisfied that the measures make an adequate contribution to the internal market.[116] In Recital 3 it states that:

> It is therefore necessary to ensure that the substantive law on intellectual property, which is nowadays largely part of the *acquis communautaire*,is applied effectively in the Community. In this respect, the means of enforcing intellectual property rights are of paramount importance for the success of the internal market.[117]

The same can be said about private competition law enforcement and consumer participation. It has been argued in this thesis that the primary aim of the measures seeking to increase consumer involvement in private competition law enforcement should be to deter competition law violations, since this primary aim not only corresponds to the CJEU case law but also allows for the adoption of effective measures enhancing consumer involvement. The Commission's Impact Assessment Report for its *WP* suggests that there is an existing

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[114] *Tobacco Advertising* (n17), [84]. See *Tobacco Advertising* (n17) Opinion of AG Fennelly, [83] stating that '...the internal market is not a value free synonym of general economic governance...'. See also Joined Cases C-154/04 and C-155/04 *The Queen, on the application of Alliance for Natural Health and Nutri-Link Ltd v Secretary of State for Health and The Queen, on the application of National Association of Health Stores and Health Food Manufacturers Ltd v Secretary of State for Health and National Assembly for Wales* [2005] ECR I-6451 ('Alliance For Natural Health'), [28]. *Vodafone* (n17) [32-33].

[115] *Tobacco Advertising* (n17), [86], [96], [108]; *Alliance for Natural Health* (n114), [29]; Case C-350/92 *Spain v Council* [1995] ECR I-1985, [35]. *Vodafone* (n17), [32-33]. On the possibility of future obstacles to trade from the diverse national approaches to collective redress see Civic Consulting, 'Evaluation of the Effectiveness and Efficiency of Collective Redress Mechanisms in the European Union' (Final Report prepared for DG SANCO, 26 August 2008) http://ec.europa.eu/consumers/redress_cons/finalreportevaluationstudypart1-final2008-11-26.pdf accessed 8 June 2011,134. On the inadequate judicial control over policing the limits of EU competence and the case law's function as a mere 'drafting guide' for the legislature see *Weatherill, Drafting Guide*(n17) esp 841-849. See also *Vodafone* (n17), Opinion of AG Maduro,[18] that contrary to the CJEU, did not think that the threshold for harmonisation based on Article [114 TFEU] for eliminating future obstacles to trade was met.

[116] *Enforcement of IP Rights Directive* (n73). See *Tulibacka* (n51) 1546-1549, 1563 for a criticism of this Directive and selection of [Article 114 TFEU] as the legal base.

[117] See also *Enforcement of IP Rights Directive* (n73) Recitals 8 and 9.

problem causing 'appreciable' distortions to competition.[118] Further, this provision, unlike Article 81 TFEU, is not limited to cross-border situations. However, the CJEU formulated test is rather vague, and a more specific legal base for the adoption of these measures exists, namely Article103 TFEU, so there is no need to resort to Article 114 TFEU.[119]

iv. Article 103 TFEU

After a period of reflection, Article 103 TFEU appeared as the chosen legal base for the Draft Damages Directive,[120] which is rather surprising in light of the following considerations. First, the EP expressly asked to be involved through the co-decision procedure.[121] Choosing Article 103 TFEU directly contradicts the Parliament's request, since it excludes the EP from the decision-making process.[122]

Second, the Commission's emphasis on the compensatory objective of damages actions precludes Article 103 TFEU as the possible legal base. The Commission has tried to overcome this obstacle by arguing that the Draft Damages Directive should be based on Article 103 TFEU '*because its provisions and its main objective are to give effect to the principles set out in Articles [101] and [102] of the Treaty'.* Raising damages claims and enforcing substantive EU rights cannot be said to be one of the principles of the competition provisions. On the contrary sustaining competitive markets through the deterrence of

[118] *WP IAR* (n67),[40-46]. See Rizzuto, 'EC Harmonisation of Antitrust National Procedural Rules' [2009] GCLR 29, 45. For a criticism of the Commission Impact Assessment see *Cumming and Freudenthal* (n60) 17-21. On Impact Assessment Reports as a way to check that the Union adopts harmonised measures within the limits of its competence see Craig and de Burca, *EU Law: Text, Cases and Materials* 93 ; *Craig* (n22) 188-192.

[119] In the same vein, see Milutinovic, *The 'Right to Damages' under EU Competition Law* 318. On the other hand, the Storme Report that concerned the approximation of judiciary law in EU seems to suggest that Article 114 TFEU could act as the potential legal base. See *Storme Report* (n51) 45, 59.

[120] *Draft Damages Directive* (n63) Explanatory Memorandum, [3.1].

[121] EP Resolution on the WP (n77), [5], [23].

[122] On the different legislative procedures and the role of the EU institutions involved see text to n87-92.

competition law violations and promoting consumer welfare serves as a principle of the said provisions.[123]

Further, the Commission has suggested that '*the proposal aims at defining the relationship between national rules on civil liability and the application of Articles [101] and [102] of the Treaty*', pointing to Article 103(2)(e) as the category under which the proposed measures fall. However, the Commission's proposal cannot be accommodated by the wording of this provision, which stipulates that the regulatory measures shall be designed to determine the relationship between national laws and the competition provisions. Evidently, this category refers to substantive national competition laws; including national rules on civil liability seems like a far-fetched reading of the relevant category.[124]

On the other hand, Article 103 TFEU was the wrong legal base in light of the above considerations that are related to the manner in which the Commission has formulated its final proposals.[125] In principle, Article 103 TFEU can serve as the appropriate legal base for measures facilitating private competition law enforcement, as well as the measures suggested in the present research for improving consumer participation in competition law enforcement.[126] The measures herein proposed pursue primarily to increase deterrence of competition law violations and benefit consumers as the ultimate beneficiaries of competition

[123] See, for example, Regulation 1/2003 (n26) Recital 9.

[124] This conclusion is also supported by Recital 8 and Article 3 Regulation 1/2003 (n26), since evidently they refer to substantive competition rules. Contra *Rizzuto* (n118) 41.

[125] This again reinforces the argument, that deterrence rather than compensation is the Commission's primary aim.

[126] See Whish, 'The Enforcement of EC Competition Law in the Domestic Courts of Member States' in Gormley(ed), *Current and Future Perspectives on EC Competition Law* 73, 83 for an early account favouring Article 103 TFEU as the appropriate Treaty base for harmonizing national rules for enforcing competition norms. See also *Van Gerven, Substantive Remedies* (n46) 81. In the same vein Eilmansberger, 'The Green Paper on Damages Actions for Breach of the EC Antitrust Rules and Beyond: Reflections on the Utility and Feasibility of Stimulating Private Enforcement Through Legislative Action' (2007) 44 CMLRev 431, 440-441.

policy. Therefore it can be said that they 'give effect to the principles set out in Articles 101 and 102' as stipulated in Article 103(1) TFEU. Further, the measures for increasing consumer involvement proposed in the present research do not fall under any of the subject matters of Article 103(2) TFEU. However, in as much as this list is indicative since the Article expressly mentions 'in particular', the relevant measures could fall under a modified Article 103(2)(a) category since they seek to ensure compliance with the competition law prohibition by making consumer damages actions available for competition law violations.[127]

The choice of Article 103 TFEU as the legal base for the proposed measures has the additional practical advantage that it permits the adoption of measures not limited to cross-border situations. However, this does not imply that the adoption of measures at EU level should apply to purely internal situations, that is, in situations dealt with under national competition law only. They should only be invoked when EU competition law applies, that is, in situations in which the effect on inter-state trade requirement is satisfied.

Despite Article 103 TFEU being the most appropriate legal base for the relevant measures, the fact that the EP objects to favouring this legal base might trigger a future challenge to the legislative measures adopted.[128] However, since a strong case can be made in favour of Article 103 TFEU, the CJEU, as the ultimate arbiter, will not annul the measures. The possible criticism against the Commission's exclusive competence as affecting the legitimacy of the EU is not well founded in this case since Article 103 TFEU is, indeed, the correct legal base. Legal bases play a guarantee function in the Treaty scheme.[129] As long as the correct legal base is chosen, the fact that one institution has more power over the other, or

[127] An analogy can be drawn here with the Case C-176/03 *Commission v Council* [2005] ECR I-7879, [48] where the CJEU accepted the harmonisation of national laws in order to render environmental protection fully effective. Thus, the CJEU is prone to accept EU competence to harmonise the 'means' in order to protect Union 'ends' even in criminal law, where at the time the EU did not have competence to act.

[128] See text to n90-92.

[129] *Barents* (n84) 92.

the EP is not involved in the process should not raise legitimacy concerns, since this was the intention of the signatories of the Treaty.

v. 169 TFEU

Article 169 TFEU allows the adoption of harmonised measures ‘in order to promote the interests of consumers and to ensure a high level of consumer protection’ either ‘pursuant to Article 114 TFEU’ or following the ordinary legislative procedure for measures which ‘support, supplement and monitor the policy pursued by Member States’. The analysis on Article 114 TFEU applies, equally, to the former (Article 169(2)a) whereas it can be said that only the second category comprises pure consumer policy measures, in the sense that no market making link need be present (Article 169(2)b).

Indeed, it is very unlikely that measures facilitating consumer involvement in private competition law enforcement will be based on Article 169(2)b, given that it has been scarcely employed.[130] In addition, Article 169(2) b cannot serve as the appropriate legal base for the proposed measures here, since their primary aim is to enhance deterrence of violations of EU competition law. Consumer interests in the form of compensation are served incidentally, and do not form the primary aim of the proposed measures.

vi. 352 TFEU

Article 352 TFEU constitutes a residual legal base and is mentioned briefly here for the sake of completeness. It provides for the adoption of measures in which ‘...action by the Union should prove necessary, *within the framework of the policies defined in the Treaties*, to attain one of the *objectives* set out in the Treaties, and *the Treaties have not provided the necessary powers*...’ (emphasis added). Since the Treaty provides more specific legal bases in the case

[130] Weatherill, ‘Consumer Policy’ in Craig and de Burca, *The Evolution of EU Law* 837, 838; Weatherill, *EU Consumer Law and Policy* 18, 19. *Stuyck* (n104) 501 pointing only to one Directive adopted on this base so far. See Council Directive 98/6 EC on Consumer Protection in the Indication of Prices of Products Offered to Consumers [1998] OJ L80/27.

of consumer involvement in private competition law enforcement, Article 352 TFEU cannot act as the appropriate legal base.[131]

d. In search of the most appropriate legislative instrument in relation to the concrete proposals enabling consumer involvement in private competition law enforcement

The discussion presented above suggests that the proposed measures enhancing consumer involvement in private competition law enforcement should be adopted based on Article 103 TFEU. This section deals with the most appropriate legislative instrument for the introduction of those measures.

Van Gerven, already in 2001, suggested that a Regulation on the substantive law aspects of private remedies before national courts should be introduced.[132] In Article 9 he proposes the introduction of collective claims procedure. Many of the issues dealt with by Van Gerven in his proposed Draft Regulation (the remedies of nullity, restitution, compensation and interim relief) built on the pronouncements of the CJEU and, since they present a codification of the CJEU's case law, they could be introduced via a Regulation.

On the contrary, Van Gerven's suggestion on collective claims could not be possibly introduced via a Regulation given the existing diversity on this issue in national legal orders. As Craig and de Burca observe '...the direct applicability of Regulations means that they have to be capable of being "parachuted" into the legal systems of all the Member States just as they are...'.[133] Therefore, in light of the multitude of existing national models,[134] it seems that the proposed measures on collective actions cannot be introduced via a Regulation.[135]

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[131] See Opinion 2/94 (n17), [29]; Joined Cases *C-402/05P and C-415/05P Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-6351, [211]. On the function and risks of Artice 352 TFEU as an instrument ensuring 'a continuous process of constitutional adaptation and updating' see *Schuetze, Organised Change* (n17) 80 . On the changes to Article [352]TFEU brought by the LT See Weatherill, *Cases & Materials on EU Law* 35-36; *Craig and de Burca* (n118) 91-92.

[132] *Van Gerven, Substantive Remedies* (n46) 90.

[133] *Craig and de Burca* (n118) 106

The Commission, in its IAR, identifies the following factors influencing the choice of the most appropriate legislative instrument(s): the contents of the proposals, the legal, economic and political environment at the time when the proposal is made,[136] and the desired degree of a level playing field in Europe.[137] In part 3a, above, it is suggested that the majority of the proposals constitute procedural rules. Thus, given the diverse national landscapes on this issue, a level playing field brought about by uniform Regulation rules is not feasible at this point.

The best way forward would be to adopt the measures proposed in this thesis, by means of a Directive setting common standards and maximum rather than minimum harmonisation should be the preferred legislative technique. Minimum harmonisation permits the setting of more stringent rules by Member States, thus allowing the preservation of a form of national diversity, whereas the Treaty framework acts as the upper limit.[138] In this case, Member States should conform to the proposed measures but could enact different rules as well, so long as they comply with the general principles of EU law; namely the principles of equivalence and effectiveness. The choice of minimum harmonisation as the appropriate technique is supported by the Commission's documents on private enforcement[139] but this could be seen as an attempt to gain Member States' support for this initiative.

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[134] See chapter IV, text to n111-155.

[135] Only the passing on defence, since it forms a codification of the CJEU case law, could potentially be introduced via a Regulation. See text to n60-61.

[136] See also *Storme Report* (n51) 61.

[137] *WP IAR* (n67) fn70.

[138] Prechal, *Directive in EC Law* 44. On different methods of harmonisation see Slot, 'Harmonisation' (1996) 21 ELRev 378, 382-387.

[139] See Draft Damages Directive (n63) Explanatory Memorandum, [1.2] stating that 'the Directive is designed to establish ...common minimum guarantees on antitrust damages actions...'. See also ibid [3.4]; *WP SWP* (n45)

Article 103 TFEU is put forward as the preferred legal base for a Directive on consumer damages actions in the field of competition law; this provision accords to the EU an exclusive competence and does not contain a minimum harmonisation clause, thus excluding the adoption of a measure of minimum harmonisation without defeating its very purpose of adoption in the first place.

[316] stating that '...the list of suggestions should rather be regarded as what the Commission considers to be the minimum necessary to achieve that objective'. However, in [321] the Commission states that 'Depending on the degree to which a level playing field in Europe is required to ensure the effectiveness of antitrust damages actions, a choice will have to be made between the available instruments for Community legislative action. While some of the issues enumerated below could thus be the subject of an EC Regulation, other may be more suited for an EC Directive'. Thus, arguably, an EU Regulation could be more suitable for remedial rules.

V. Implementation of the Proposals in Public Competition Law Enforcement

The proposed changes to facilitate consumer participation in public enforcement do not present complex issues of identifying the appropriate legal base. Some of the proposals related to Commission practice in sector inquiries, to encouraging consumer intervention in the course of on-going procedures and to the provision of compensation to affected consumers in the course of public enforcement procedures, could be introduced by a mere change in the Commission's current practice and the issuance of soft law instruments, such as Commission Guidance or Notice.[140]

The remaining proposals require the adoption of harmonised measures. Since they aim to increase compliance with EU competition rules, thereby giving effect to the principles laid down in Articles 101 and 102 TFEU, Article 103 TFEU is the appropriate legal base. This is supported by the EU legislative instruments adopted in the field of competition law to date.

Regulation 1/2003 was based on Article 103 TFEU. Since the Treaty provides a specific legal basis for the adoption of legislative measures giving effect to competition law provisions, adopting Regulation 1/2003 based on 103 TFEU would appear to be uncontroversial. This is not the case, however, in regard to the European Merger Regulation ('EUMR') that was adopted based on Articles 103 and 352 TFEU.[141]

[140] See chapter V, text to n91-95, n119-120 and n133-138.

[141] Council Regulation (EC) No. 139/2004 on the Control of Concentrations Between Undertakings [2004] OJ L24/1 Recital 7. The fact that the EUMR is based on two legal bases suggests that its purpose is two-fold; giving effect to principles set out in Articles 101 and 102 TFEU, as well as furthering the Treaty objective of ensuring that competition in the internal market is not distorted, as stated in the former Article 3(1) (g). See ibid recitals 2-3, 5-7. It seems odd that the Regulation itself nominates Article 352 TFEU as its principal legal base. If that is the case, then why Article 103 TFEU need also be chosen as a legal base? Further to the 'predominant purpose' test, Article 352 TFEU should suffice. See text to n94.

Article 103 TFEU is the most appropriate legal base for the proposals that enhance consumer participation in public competition law enforcement, in light of their predominant aim and context. Thus, it could be argued that, given that Regulation 1/2003 is based on 103 TFEU and pursues the same aim, the most effective manner for the introduction of the relevant proposals, namely establishing a consumer complaints allocation mechanism, an EU 'super–complaints' mechanism, and strengthening the Commission role in sector inquiries by imposing binding remedies, is through an amendment to Regulation 1/2003 or its implementing Regulation 773/2004.

The consumer complaints allocation mechanism could, for example, be included as a separate paragraph in Article 11 Regulation 1/2003 on the cooperation between the Commission and the NCAs and provide that 'in the event of a rejection of a consumer complaint for lack of Union interest, the Commission shall forward the relevant complaint to the competent competition authorities of the Member States'. Alternatively, it could be added as an amendment to Article 7 Regulation 773/2004 on 'Rejection of Complaints'. The latter has the additional advantage that it can be introduced only by a Commission proposal following Article 33 Regulation 773/2004.[142]

The proposed super-complaints mechanism could be inserted as a separate Article in Regulation 1/2003 under chapter IV and provide that:

'1. A recognised consumer organisation can complain to the Commission that any feature, or combination of features, of a market in the EU for goods or services is, or appears to be, significantly harming the interests of consumers;

'2. The Commission shall within 90 days, after the day on which it receives the complaint, publish a response stating how it proposes to deal with the complaint, and, in particular:

[142] This was the case for the cartel settlement procedure introduced as an amendment to Regulation 773/2004 rather to Regulation 1/2003.

‘i. whether it has decided to take any action or to take no action in response to the complaint,

‘ii. if it has decided to take action, the nature of the relevant action, and

‘iii. if it has decided to forward the complaint to the competent national competition authority’.[143]

A Notice on EU super-complaints needs to be published as well, in order to clarify the function of the respective procedure. For example, the notion of the recognised consumer organisation needs clarification, as does the notion of the ‘market in the EU’ in relation to the ‘effect on trade’ requirement for the Commission to take action, the possible Commission actions and the proposed manner that, following a Commission referral, NCAs are to handle a super-complaint. Devising a super-complaint mechanism at EU level could spur the adoption of similar national mechanisms, as was the case, for example, with the adoption of leniency programmes in individual Member States.[144]

Finally, the proposal on imposing binding remedies in sector inquiries can be introduced by an amendment to Article 17 Regulation 1/2003.

[143] This draft Article is modelled upon EA 2002, Section 11 (1).

[144] On the ECN model leniency programme spurring *de facto* harmonisation see AG Mazak in *Pfleiderer* (n39), Opinion of AG Mazak paras 26, 33.

VI. Conclusions: Reviewing the proposals in the light of the necessary political pragmatism

After briefly alluding to the political objections voiced against Commission efforts in private competition law enforcement, the analysis in this chapter has shown that the EU possesses competence to adopt both a Directive on consumer involvement in private competition law enforcement and the necessary measures in the field of public enforcement, either through amendment of existing legislative instruments (Regulation 1/2003 and Regulation 773/2004) or through soft law instruments.

Regrettably, despite the existence of EU competence in adopting a Directive on consumer involvement in private competition law enforcement, the political opposition of Member States impedes the adoption of any effective measures. The Directive on consumer involvement could have formed part of a wider legislative package of instruments encouraging private enforcement of EU competition law.[145] This could, for example, include a Directive on Damages Actions along the lines of the Commission's previous proposals. However, having a specific Directive for consumer claims addresses the special characteristics of this category of claims.

The Commission would have to satisfy the objections raised by Member States first in order to adopt any meaningful instrument enhancing consumer participation. This means that the Commission might have to undertake a new round of consultations with interested stakeholders and present a separate Impact Assessment on this issue. Alternatively, this discussion could be incorporated into the Commission's Communication on consumer

[145] Alternatively, consumer collective redress mechanisms for competition law violations could be introduced as an exception to the horizontal instrument on collective redress.

collective redress.[146] The Communication aspires to provide common principles for collective redress procedures. The Commission could, potentially, opt for the adoption of common principles but also adopt the necessary exceptions applying to competition law claims.

So far, the Commission has over-looked the need for devising special collective actions for competition law violations. Specific collective actions for the competition law field could, indeed, be the first step in the Commission's efforts to enhance collective redress mechanisms for violations of EU law. EU competition law is uniquely placed for the adoption of harmonised measures; not only has the CJEU pronounced on the existence of a directly-effective right to damages but also a large degree of substantive uniformity exists as well. However, in order for the Commission to attain the necessary political support, a new, more focused, round of discussions is warranted.

In the meantime the Commission can advocate in favour of a distinct competition law approach, based on the evidence it has collected so far, and issue recommendations with proposals that Member States could potentially adopt in order to encourage consumer claims. In the Commission's recommendations, a distinction needs to be drawn between those proposals that already form part of the Union *acquis*, and are thereby binding to the Member States, and the remainder that would be desirable to be adopted at national level.

Member States could then choose whether or not to adopt these rules building on the Commission's recommendations. This soft law approach, despite its shortcomings, seems, for the time being, to be the only plausible way forward. True, it cannot achieve the desired legal certainty in regard to the remedial and procedural rules governing collective actions in individual Member States, nor can it convince objecting Member States to adopt the relevant

[146] On the Commission consultation see chapter IV, text to n19.

proposals.[147] On the other hand, it is the only way open to the Commission in order to put forward proposals consistent with the CJEU case law on effective competition law enforcement and its own policy pronouncements on the importance of consumer interests in EU competition policy. Further, despite existing objections by some Member States, other Member States appear to be more prone to proposals of this type.[148] A soft law approach may also satisfy those who view national systems of civil procedure as being deeply embedded in national traditions.[149]

Furthermore, the Commission could at the same time opt for the adoption of facilitating measures in the field of public enforcement, in which, arguably, it has more latitude to act. Increased consumer involvement in public enforcement of competition law may improve the participation rate in private enforcement, in which, at present, the only option open at the EU level is the adoption of soft-law instruments.

[147] *Eilmansberger* (n126) 438.

[148] See for example the proposals by the OFT and the CJC in the UK. See chapter IV, text to n123.

[149] See Van Rhee, 'Civil Procedure: A European Ius Commune?' (2000) 4 ERPL 589, 598-599 with references to proponents of this view. Soft law approach is suitable in areas closely connected with national identity and culture. See Secretariat of the European Convention, 'Coordination of National Policies: The Open Method of Coordination' (Brussels, 26 September 2002) WG VI WD015, 15-16.

CONCLUDING REMARKS

The debate on EU private competition law enforcement and EU collective redress mechanisms is still ongoing. Interesting developments are to be expected in the very near future, according to Commission statements.[1] At the same time, almost twenty years after its alleged completion,[2] there is a revival of efforts to promote the internal market project and increase its popularity in the eyes of European citizens.[3] Consumer participation in EU private competition law enforcement can serve both initiatives. Yet any such role remains a theoretical matter as consumers cannot be considered to be active players in the enforcement field. This situation is the more deplorable in light of the increased presence of references to the consumer interest in EU competition law rhetoric.

This thesis has examined the theoretical and practical challenges of realising consumer participation in EU competition law enforcement and has aspired to unravel EU competition law's relevance for the final consumers, a topic that often escapes EU policy makers' attention.[4] First, in seeking to address arguments against the private enforcement

[1] See, for example, Almunia, 'Competition Policy: Work Programme for 2012'(Presentation at ECON, European Parliament, 22 November 2011, Speech 11/785). The Commission Work Programme 2012 includes an initiative on collective redress for the fourth semester, though it is not clear that this concerns a legislative initiative, as well as a legislative initiative in the field of competition law for the second semester, presented as a follow-up to the Commission WP. See Commission(EU), 'Annex to the Commission Work Programme 2012' (Communication) COM(2011) 777 final, No 7 and 110. For the proposed timeframe see Commission(EU), 'Commission actions expected to be adopted - 19/01/2012 - 31/12/2012' <http://ec.europa.eu/atwork/programmes/docs/forward_programming_2012.pdf> accessed 27 February 2012.

[2] Commission(EC), 'Completing the Internal Market' (White Paper) COM(85) 310 final, Brussels, 14 June 1985.

[3] See, for example, Monti, 'A New Strategy for the Single Market' (Report to the President of the European Commission, 9 May 2010) <http://ec.europa.eu/bepa/pdf/monti_report_final_10_05_2010_en.pdf> accessed 28 January 2012, which launches three sets of initiatives: building a stronger single market, reinforcing consensus on the single market project and delivering a stronger single market. Ibid 7. EP, 'Report on Delivering a Single Market to Consumers and Citizens' (2010/2011 (INI)) (Committee on the Internal Market and Consumer Protection, Louis Grech Rapporteur) (3/5/2010) esp [31-38]. Commission (EU), 'Single Market Act – Twelve Levers to Boost Growth and Strengthen Confidence' (Communication) COM (2011) 206 final on the Commission Proposals.

[4] See, for example, Commission (EU), 'Consumer Empowerment in the EU' SEC(2011) 469 final, Brussels, 07.04.2011 which focuses only on consumer law issues.

initiative and the relevant consumer involvement therein, it focused on developing the 'added value spectrum', offering normative justifications for the desirability of consumer involvement. The 'added value spectrum' can further justify the distinctive competition law approach to collective redress advocated in this thesis. Appropriate mechanisms advancing the collective consumer interest in the field of competition law can serve as pioneers in re-shaping the approach towards the protection of consumer interests in general.

Second, the analysis in this thesis has developed concrete proposals on standing, the passing on defence, and on collective claims that could be adopted at EU level, tackling existing obstacles in national legal systems. Ultimately, the proposed measures for enhancing the consumer role in competition law enforcement need to strike a delicate balance between the following, sometimes contradictory, elements: general principles of tort law pertaining in individual Member States that accord priority to the compensatory rationale of damages actions; second, effective protection of the right to damages as recognised by the CJEU (in the sense of providing compensation to the victims of antitrust infringements) and third, effective enforcement of competition rules, this being the main aim of the right to damages according to the interpretation of the respective CJEU jurisprudence employed here. From a pragmatic perspective, due account needs to be given to the minor nature of consumer claims in the context of competition law that can tip the balance in favour of the third element identified above.

Regardless of any Commission proposals in this field, in the near or distant future, the practical proposals advanced in this thesis are theoretically grounded and can serve as useful points of comparison. Throughout the analysis, the objections to the Commission's efforts raised both by the Member States as well as the business community, were underlined. In fact, these objections are of different force and content. They range from an outright rejection of any legislative initiative to supporting the Commission's efforts as long as they are modest and in line with the national traditions. What they do have in common, is the fact that they impede the adoption of effective and functional measures in the consumer interest. In this thesis, it has been argued that the shifting from a competition law-only approach, that even if unsuccessful to date, has at least led to certain concrete proposals, thereby provoking further discussion, to an all inclusive discussion of principles of collective redress could be viewed as the Commission yielding to political pressures and dooms any collective redress initiative to fail.

The expressed opposition to functional private enforcement mechanisms has been very accurately described with regard to effective collective actions as the 'tale of two monsters'.[5] Ultimately, many citizens would prefer the adoption of a US type class action system (being labelled as a Frankenstein monster) to the adoption of an ineffective collective redress mechanism (labelled as a Loch Ness monster), existent in theory but absent in reality. This thesis submits that neither option is acceptable and puts forward concrete middle ground proposals to steer EU policy makers away from these extremes. The competence of the EU to adopt these proposals is assessed and it is concluded that the Treaty framework, does indeed permit the adoption of these measures at the EU level.

At the same time being aware of the exerted political pressures, which impede the adoption of these proposals, as well as the importance of consumer involvement in competition law enforcement, this thesis examined further alternatives enabling such participation in the field of public competition law enforcement and put forward further proposals that could ameliorate the present situation. Interestingly, the Commission enjoys more latitude to act in the field of public enforcement, and many of the suggested proposals

[5] Mulheron, 'The Case for an Opt-Out Class Action for European Member States: a Legal and Empirical Analysis'(2009) 15 Colum J Eur L 409, 452-453.

could be adopted by a mere change in the Commission's current practice, without any legislative amendment. In light of the tangible benefits for consumers, the Commission is advised to change its practice in this direction, especially given the difficulties of adopting effective collective redress measures. In light of the current economic crisis, re-invigorating consumer confidence in the internal market is essential. The proposals advanced in this thesis are a contribution in this direction.

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