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**THE COMPETITION LAW REVIEW**

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**Volume 8 Issue 1 pp 29-58****December 2011****Beyond the White Paper: Rethinking the Commission's Proposal on Private Antitrust Litigation***Jocelyn G Delatre\**

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This paper provides a comparative study of group actions in existence in a number of Member States, with a particular emphasis on the Danish, Portuguese, English, French and Dutch experience, comparing the different approaches taken and contrasting them with the propositions contained in the European Commission's White Paper on Damages Actions for Breach of Antitrust law and Green Paper on Consumer Collective Redress. It will focus on the way these procedures function, on the choices the jurisdictions have made and the issues at the heart of the debate. The case will be made that the opt-out group action model, based on the US class action has not been given sufficient consideration in the White Paper and the documents accompanying it, and has been dismissed, not because it was not the right model for the European Union, or because of its inherent defects, but for political reasons. To that end, focus will be placed on the European Commission's White Paper with a snapshot analysis of the differences and similarities between these experiences. This paper will show that the opt-out model is already present in various jurisdictions in Europe, and through a comparative study of opt-in and opt-out models of collective actions in Europe, will attempt to demonstrate that not only is the opt-out model effective, it may very well be superior in various ways to the models considered in the White Paper.

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**INTRODUCTION**

Class actions in competition law are common in the United States.<sup>1</sup> However, they are scarce in the European Union, where private enforcement has traditionally been overshadowed by a centralised public enforcement system, whether at national or European level. Yet, in the last two decades, a number of Member States have adopted legislation to allow for class actions. Such legislation has generally been enacted with a view to allowing consumers to better defend their rights. It may however also be seen as a means for promoting the private enforcement of law, whether it be consumer law or competition law. In 2008, the European Commission published a White Paper on Damages Action for Breach of EC Antitrust Rules<sup>2</sup> which suggested the introduction of collective action procedures in the Union. It makes the case for an effective system of private enforcement by means of damages actions.<sup>3</sup> The Commission insisted that

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<sup>1</sup> RH Lande, 'Benefits of Private Enforcement: Empirical Background' in A Foer and J Cuneo (eds), *The International Handbook of Private Enforcement of Competition Law* (Northampton, Edward Elgar, 2010) 4; TS Longman and J Ostoyich, 'US Private Enforcement' (2011) *The Antitrust Review of the Americas*.

<sup>2</sup> Commission, 'On Damages Actions for Breach of the EC Antitrust Rules' (White Paper) COM (2008) 165 Final.

<sup>3</sup> Ibid, 4.

the policy choices proposed in its White Paper consisted of balanced measures that were 'rooted in European legal culture and traditions.'<sup>4</sup>

This paper argues that in fact, the Commission's proposal,<sup>5</sup> by focusing on the dichotomy of group/representative action and rejecting the notion of an opt-out model through fear of a US-style class action, ignored the experience of a number of European jurisdictions in this area. A number of Member States have introduced actions which are radically different from the models proposed by the White Paper, while others have successfully introduced opt-out group action procedures which are closely modelled on the US class action. At the same time, it ignored the less than impressive track record of other Member States which had already introduced similar procedures to those recommended by the White Paper.

The Commission proposed that introducing an opt-in group action and, conjunctly, a representative action was the option which best adhered to European legal culture and tradition. Therefore, since this prevailing European experience is the basis for that policy choice, we need to look at the Member States which have introduced an opt-in group action and/or a representative action to assess how they have fared compared to those Member States which elected to introduce another type of procedure on the basis of criteria which were set by the Commission's White paper.

The opt-out model has been the subject of considerable attention during the public consultation held by the Commission on the topic of a coherent approach to collective redress.<sup>6</sup> As explained by Judge Jones in his contribution to the public hearing on collective redress held by the Commission on 5 April 2011,<sup>7</sup> the opt-out system presents undeniable advantages and must be examined, not from the perspective of American class action litigation, but from the perspective of European experience, with a view to devising a European mechanism for collective redress that will ensure access to justice and compensation, but which will present acceptable safeguards to prevent the excesses that have repeatedly been attributed to the US model.

To do so, this paper will focus on a number of Member States which have chosen to introduce, in one way or another, an opt-out group or representative action, namely Portugal, Denmark and the Netherlands. As a point of comparison, other Member States which have chosen an opt-in mechanism of collective redress, such as the UK and France, will also be considered. This examination of national collective procedures is intended to give a snapshot of development at national level in the area of collective redress, with a view to putting the Commission's proposal into perspective, and perhaps to rehabilitate the opt-out class action model, which appears to have suffered a beating it perhaps did not deserve, so it may be properly and fairly considered as a

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<sup>4</sup> Ibid.

<sup>5</sup> Ibid, 4.

<sup>6</sup> See Commission (EU) Public Hearing on Collective Redress, 5 April 2011. Recording of the sessions of the public hearing are available on the Commission's website at <[http://ec.europa.eu/competition/consultations/2011\\_collective\\_redress/index\\_en.html](http://ec.europa.eu/competition/consultations/2011_collective_redress/index_en.html)>.

<sup>7</sup> Ibid.

viable solution when the Commission takes its next steps in its approach to collective redress.<sup>8</sup>

## I. REVIEWING THE WHITE PAPER'S PROPOSALS ON DAMAGES ACTIONS

### A. Objectives of the White Paper

The stated objectives of the White Paper on Damages Actions for Breach of EC Antitrust Rules, broadly interpreted, are threefold. The first objective, which the Commission considered as the primary objective of the White Paper, was to ensure that victims of EU competition law infringements would be compensated fully. It aimed to achieve this by proposing measures which would ensure those victims would have access to effective redress mechanisms.<sup>9</sup> Arguably, there are two components to this objective: procuring an effective redress mechanism and ensuring that victims are compensated fully. Although closely linked, these two objectives are not necessarily mutually inclusive and should therefore be considered separately.<sup>10</sup>

According to the Commission, corrective justice is the main goal to be achieved by introducing collective litigation procedures. If concerns over enforcement and deterrence are later expressed by the White Paper, they do not predominate. In fact, they are merely acknowledged in passing, and are not considered an objective – even a secondary one – by the White Paper.<sup>11</sup> The second stated objective of the White Paper adopts a somewhat more pragmatic approach. The Commission assures that it:

‘followed the further guiding principle that the legal framework for more effective antitrust damages actions should be based on a genuinely European approach. The policy choices proposed ... consist of *balanced measures* that are rooted in *European legal culture and traditions*.’<sup>12</sup>

By referring to ‘balanced measures’ and ‘European legal culture and traditions’, two concepts which it has yet to define, one can clearly read the Commission’s implicit rejection of the US class action model and of what is now commonly, and quietly, referred to as its ‘excesses’. This could arguably be construed as a discrete acknowledgement of the unfavourable responses found within the public consultation launched by the Commission prior to the publication of the White Paper.<sup>13</sup> Rejection of

<sup>8</sup> ‘Towards a Coherent European Approach to Collective Redress: Next Steps’ Joint Information Note by Vice-President Viviane Reding, Vice-President Joaquín Almunia and Commissioner John Dalli SEC(2010) 1192 OJ 1932, 5 October 2010, available at <<http://ec.europa.eu/transparency/regdoc/rep/2/2010/EN/2-2010-1192-EN-1-0.Pdf>>.

<sup>9</sup> White Paper, op cit, n 2, 3.

<sup>10</sup> SMC Gibbons, ‘Group Litigation, Class Actions and Lord Woolf’s Three Objectives - A Critical Analysis’ (2008) 27 CJK 208.

<sup>11</sup> White Paper, op cit, n 2, 3.

<sup>12</sup> Ibid.

<sup>13</sup> See for example MEDEF, ‘Réponse du MEDEF au Livre Vert sur les Actions en Dommages-Intérêts pour infraction aux règles communautaires sur les ententes et abus de positions dominantes’, 3; CCIP, ‘les Actions en Dommages-Intérêts en matière de pratiques anticoncurrentielles – réaction de la CCIP’, 18; AFEC, ‘Réponse de l’AFEC au Livre Vert actions en dommages-intérêts pour infraction aux règles communautaires sur les ententes et les abus de position dominante’, 16; CEA, ‘Damages Actions for Breach of the EC

the US Class action was further confirmed by the Commission in the Joint Information Note<sup>14</sup> which preceded the consultation on Collective Redress which ended in April 2011. The note insisted that the Commission was 'firmly opposed to introducing a class action along the US model into the EU.'<sup>15</sup>

The impact assessment<sup>16</sup> of the proposed policies was carried out by assessing the capacity of each policy option to satisfy a number of specific objectives.<sup>17</sup> These objectives are defined in more detail than those referred to in the White Paper. The objectives are: providing full compensation for victims; increasing deterrence, enforcement and compliance; guaranteeing effective access to justice for all victims; ensuring appropriate and efficient use of the judicial system; and finally, establishing a level playing field and legal certainty for businesses. The opt-out procedures available in Europe must be assessed, independently from other mechanisms, and contrasted with other opt-in procedures on the basis of these criteria.

## **B. Proposals of the Commission's White Paper**

In its White Paper, the Commission suggests the introduction of a bundle of measures. It first suggests the introduction of two procedures: an opt-in collective action and a representative action led by consumers' associations.<sup>18</sup> The proposal also advocates a minimum level of disclosure *inter partes*. It recommends that access to evidence be based on fact pleading and subject to strict judicial control of the plausibility of the claim. The claimant would have to present all the facts and means of evidence available to him. These facts should show plausible grounds to believe that the claim is serious. The claimant should then demonstrate to the court that there is no other reasonable way to obtain the requested evidence, and that such disclosure is relevant, necessary and proportionate.<sup>19</sup>

The Commission also recommends that final decisions taken on the basis of Articles 101 and 102 TFEU by National Competition Authorities and the Commission be binding on follow-on actions, once all appeal avenues have been exhausted.<sup>20</sup> It also advocates strict liability for damages caused by the infringement of Articles 101 and 102 TFEU, unless the infringer can demonstrate the existence of an excusable error.<sup>21</sup>

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Antitrust Rules – CEA Response to the Green Paper', 3, available on the Commission's website at <[http://ec.europa.eu/competition/antitrust/actionsdamages/green\\_paper\\_comments.html](http://ec.europa.eu/competition/antitrust/actionsdamages/green_paper_comments.html)>.

<sup>14</sup> Joint Information Note, op cit, n 8.

<sup>15</sup> Ibid, 6.

<sup>16</sup> White Paper Impact Study 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios' DG COMP/2006/A3/012.

<sup>17</sup> Ibid, 23-25.

<sup>18</sup> White Paper, op cit, n 2, 4.

<sup>19</sup> Ibid, 5.

<sup>20</sup> Ibid, 5-6.

<sup>21</sup> Ibid, 6.

As regards damages calculation, it is indicated in the White Paper that the Commission intends to draw up a non-binding, guiding framework for the quantification of damages in antitrust cases.<sup>22</sup>

On the question of passed-on damage, the Commission suggests that defendants should be afforded the possibility of invoking the passing-on defence against a claim for compensation for overcharge, but also that a rebuttable presumption of passed-on illegal overcharge should be established, by which the damage is presumed to have been passed-on in its entirety unless proven otherwise.<sup>23</sup> It finally recommends a limitation period of 2 years to bring a follow-on action, starting from the date of the infringement decision.<sup>24</sup>

### C. Consideration and Rejection of the Opt-out Model by the Commission

#### 1. The Op-out Model of Policy Option 1

The White Paper impact assessment suggested 5 different policy options for consideration.<sup>25</sup> These options ranged from Option 1 suggesting bold legislative measures which would maximise the facilitation of claims and incentives for victims,<sup>26</sup> to Option 5, which in short, suggested the Commission should refrain from taking any action with regards to antitrust damages action.<sup>27</sup>

The only policy which considered the opt-out model was the first one. It suggested setting strong incentives for claimants to bring damages action, such as making double damages available, and providing an ‘opt-out’ class action, through which a small number of victims would be able to claim for the entire group they represent, with the exception of victims who would expressly decide not to be included.<sup>28</sup>

It recommended introducing double damages for all types of infringements of Articles 101 and 102 TFEU as an added incentive for consumers, and mandatory one-way fee shifting, providing that the claimant would never be liable for the defendant’s costs, except in cases of frivolous or vexatious suits. It also allows for broad access to evidence through rules of disclosure, allowing for any and all relevant documents to be produced by the defendant, on demand from the claimant. This Policy Option excludes the use of the passing-on defence. It allows, however, indirect purchasers to file a claim when they demonstrate causality between the harm suffered and the infringement.

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<sup>22</sup> This framework has since been drawn up in a document entitled ‘Quantifying Antitrust Damages – Towards Non-Binding Guidance for Courts’, elaborated by Oxera and a team led by AP Komninos, and published in December 2009, available at <[http://ec.europa.eu/competition/antitrust/actionsdamages/quantification\\_study.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf)>.

<sup>23</sup> White Paper, op cit, n 2, 7-8.

<sup>24</sup> Ibid, 8.

<sup>25</sup> Commission, ‘Commission Staff Working Paper Document - Accompanying Document the White Paper on Damages Actions for Breach of EC Antitrust Rules: Impact Assessment Report’ {COM(2008) 165 final} {SEC(2008) 404} {SEC(2008) 406}, 28.

<sup>26</sup> Ibid, 29.

<sup>27</sup> Ibid, 32.

<sup>28</sup> Ibid, 29-30.

Policy Option 1 suggests rendering the findings of any NCA in the EU binding on civil courts and imposing a strict liability rule for infringement of EU competition law once it has been established. However, contrary to the proposal contained in the White Paper, the option suggests a limitation period of 20 years, with a shorter period of five years if the plaintiff could reasonably have been aware of his right to compensation.

## 2. Understanding the Rationale for the Rejection of Policy Option 1

The White Paper, by expressly proposing an opt-in model, implicitly rejected the opt-out option adopted by Portugal, and, to a certain extent, by Norway and Denmark. The White Paper, in essence, opted for the second Policy Option set out in the Impact Assessment,<sup>29</sup> which kept the idea of the availability of double damages but suggested the creation of an opt-in class action, together with that of a representative action.

The White Paper does not give any indications as to the reasons which motivated this choice. However, the staff working paper<sup>30</sup> briefly addresses the issue, weighing the pros and cons of the opt-in versus opt-out solution. It explains that:

‘An opt-in collective action system would usually result in a smaller number of victims claiming damages than in an opt-out system, thereby limiting corrective justice, and would have as a consequence that some of the illicit gain may be retained by the infringers, thereby limiting the deterrent effect of the mechanism. By requiring the identification of the claimants (and the specification of their alleged harm suffered), an opt-in collective action may also render the litigation in some way more complex since it increases the defendant(s) possibility to dispute each victim’s harm. However, the analysis in the field of competition suggests that an opt-in collective action should be preferred to an opt-out collective action in which a person can bring an action on behalf of a class of unidentified persons. Combined with other features, such opt-out actions have in other jurisdictions been perceived to lead to excesses. In particular there is an increased risk that the claimants lose control of the proceedings and that the agent seeks his own interests in pursuing the claim (principal/agent problem). Opt-in mechanisms are more similar to traditional litigation, and would therefore be more easily implemented at national level.’<sup>31</sup>

The Impact Assessment Report, while considering Policy Option 1 – of which an opt-out class action was an essential component – dismissed this mechanism by referring to ‘certain negative effects of opt-out class actions’ without providing further explanation.<sup>32</sup> The Impact Assessment report further rejected all of Policy Option 1, declaring that:

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<sup>29</sup> Ibid, 30-31.

<sup>30</sup> Commission, ‘Commission Staff Working Paper accompanying the White Paper on Damages Actions for Breach of EC Antitrust Rules’ COM(2008) (Staff Working Paper) 165 final, available at <<http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>> accessed 30 November 2011.

<sup>31</sup> Ibid, 20-21.

<sup>32</sup> Impact Assessment Report, op cit, n 25, 52.

‘the Impact Study concludes that this scenario could lead to development of a litigation culture whose benefits, including in terms of its contribution to macro-economic variables, appear questionable, even compared with the *status quo*.’<sup>33</sup>

It is submitted that the debate on the opt-out class action model was not only evaded by the White Paper, as the opt-out model was never considered independently from the Policy Option 1 package, but effectively shunned and prevented through a vague reference to the allegedly inherent and undeniable ‘negative effects’<sup>34</sup> and ‘excesses’<sup>35</sup> it would bring in its wake, despite the fact that these alleged consequences were never described.

There are thus two conflicting concerns here. The Commission notes that the opt-out model could potentially better serve the notion of corrective justice, but yet rejects this option out of concern over the fact that an opt-out model will appear too aggressive compared to traditional litigation. This is interesting in two ways. First of all, the option was rejected because, in short, it would be difficult to convince Member States to adopt such an aggressive and risky procedure, not because the alternate opt-in model better serves the objectives set by the Commission. On the contrary, the Commission admits the opt-out model would be better in terms of corrective justice. Secondly, this decision was based on theoretical concerns over corrective justice, which is not the approach adopted by Member States which have introduced an opt-out model. Denmark and Norway, in particular, have adopted an opt-out model for purely practical issues because an opt-in model requiring complainants to expressly register was deemed impractical.<sup>36</sup> This notion is simply ignored by the White Paper. The rejection of the opt-out model by the Commission may have been understandable had it been based on a study of the US experience and its potential for abuse. However, the concern here is that the Commission did not consider the issue at all. Any criticism or debate over alleged excesses and negative effects concerned Policy Option 1 as a package.<sup>37</sup> The only document which considers the opt-in/opt-out debate is the impact study. It covers the topic in three pages of what can arguably be regarded as a shopping list of issues and concerns, shows a complete lack of empirical data and provides no analysis of any kind.<sup>38</sup>

This has led some commentators to argue that the White Paper’s arguments against the opt-out mechanism are contradicted by the national experiences of a number of

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<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid, 21.

<sup>36</sup> See K Viitanen, ‘Enforcement of Consumers’ Collective Interests by Regulatory Agencies in the Nordic Countries’ in W van Boom and M Loos (eds), *Collective Enforcement of Consumer Law: Securing Compliance in Europe through Private Group Action and Public Authority Intervention* (Groningen, Europa Law Publishing, 2007) 13; See also E Werlauff, ‘Class Actions in Denmark – From 2008’ (The Globalisation of Class Actions Conference, Oxford, December 2007) available at <[http://globalclassactions.stanford.edu/sites/default/files/documents/Demark\\_National\\_Report.pdf](http://globalclassactions.stanford.edu/sites/default/files/documents/Demark_National_Report.pdf)> accessed 30 November 2011.

<sup>37</sup> Impact Assessment Report, op cit, n 25, 29-30, 38-39.

<sup>38</sup> White Paper Impact Study, op cit, n 16, 286-288.

jurisdictions<sup>39</sup>, namely Portugal, The Netherlands, Norway and Denmark. Gaudet also argues that ‘On the topic of opt-outs, the White Paper may have been out-dated as soon as it was released.’<sup>40</sup> This conclusion is debatable. The conclusion that can be drawn, if any, from national developments on collective redress concerning the issue of the opt-out model is that it is mostly discarded, and when it is not, it is expressly limited in scope.<sup>41</sup> Furthermore, in some cases, the opt-out option appears out of the question. French law, for example, prohibits actions by proxy in which the claimant is not identified, under the principle ‘nul ne plaide par procureur’.<sup>42</sup> This has led commentators to suggest that if the introduction of an opt-in group action in which claimants are identified would be possible under French law, an opt-out procedure would not.<sup>43</sup> Therefore, the White Paper did not ignore the experience of Member States which adopted an opt-out approach, but, arguably, gave precedence to the experience of Member States which did not.

Nevertheless, the Commission, at some point during the drafting of the White Paper, appears to have lost track of its own objectives – effective enforcement and corrective justice – and substituted them for the concern which has been voiced over alleged excesses. It should be recalled that the objective set in the White Paper was to ensure that ‘all victims of infringements of EU competition law have access to effective redress mechanisms so that they can be fully compensated for the harm they suffered.’<sup>44</sup> The question thus becomes: is the creation of an opt-in group action and a representative action procedure the best way to ensure that all victims of these infringements will be fully compensated?

It is submitted that, arguably, the compensation of all victims of EU competition law infringement is impossible. The concern is therefore to ensure that as many victims as possible will be compensated for the harm they suffered. In this context, the choice of which type of procedure should be developed – opt-in or opt-out – is fundamental. The question which should thus be asked goes to which procedures will ensure the largest participation, i.e. the highest number of claimants.

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<sup>39</sup> R Gaudet, ‘Turning a Blind Eye: The Commission’s Rejection of Opt-Out Class Actions Overlooks Swedish, Norwegian, Danish and Dutch Experience’ (2008) 30(3) ECLR 107, 116.

<sup>40</sup> Ibid, 116-117.

<sup>41</sup> Portugal may appear as an exception, but in reality, since the entire group action is limited in scope, the opt-out option need not be specifically limited.

<sup>42</sup> Cass. Civ. 2e, 21 November 2001. See F Caballero, ‘Plaidons par procureur! De l’archaïsme procédural à l’action de groupe’, RTDciv 1985, 247.

<sup>43</sup> See V Magnier, ‘Class Actions, Group Litigation & Other Forms of Collective Litigation Protocol for National Reporters – Country Report France’ (The Globalisation of Class Actions Conference, Oxford, December 2007) available at <[http://globalclassactions.stanford.edu/sites/default/files/documents/France\\_National\\_Report.pdf](http://globalclassactions.stanford.edu/sites/default/files/documents/France_National_Report.pdf)> accessed 30 November 2011; See also Former French Chief Justice G Canivet, ‘Des Obstacles Juridiques à L’action de Groupe’ paper delivered at the conference on 10 November 2005 on the topic ‘Pour de Véritables Actions de Groupe: un accès efficace et démocratique à la justice’.

<sup>44</sup> White Paper, op cit, n 2, 2-3.



## II. THE EUROPEAN EXPERIENCE WITH COLLECTIVE REDRESS

### A. Redefining the Notion of European Experience

As explained above, the White paper on Damages Actions for Breach of EC Antitrust Rules proposes a policy which is rooted in European legal culture and tradition. This was one of the main purposes of the public consultation on collective redress launched in October 2010. The joint information note which launched the consultation insists that ‘The objective is to ensure from the outset that any further proposal in this field... fits well into the EU legal tradition and into the set of procedural remedies already available for the enforcement of EU law.’<sup>45</sup>

The reality is that, although some similarities exist, a close examination of the collective redress mechanisms available in Europe shows a complete lack of discernable pattern on which to base a proposal. There is a lack of homogeneity in procedural law and the widest range of mechanisms available to European consumers. Those mechanisms range from the far reaching Portuguese popular action, the closest equivalent in Europe to the US class action, to mechanisms with a strictly limited scope, whether procedurally or substantively, such as the Dutch and German procedure. These last two procedures may also be seen as atypical, in the sense that they very different from the models by the Commission’s White Paper, which limited itself to suggesting an opt-in group action and a representative action. Furthermore, the European landscape in the area of collective redress is not frozen, and new developments should always be expected. A recent example is that of the Italian class action, available to consumers since 1 January 2010.<sup>46</sup> Beyond the fact that there is such a diversity of collective redress mechanisms available in Europe, there are still a number of countries which have not yet introduced such a mechanism, have no intention to, and have yet to accept the very notion of collective redress. This reality is well known by the Commission which, in its joint information note, admitted that mechanisms to compensate groups of victims varied greatly in the EU, and that every Member State’s compensatory redress system was unique.<sup>47</sup>

In the words of the Ashurst study on the condition of claims for damages in case of infringement of EU Competition Law:

‘The level of diversity in this area means that any attempt at categorisation looks very much like shoe-horning and is moreover often inadequate due to the non-equivalence of terms in the different Community languages.’<sup>48</sup>

It is submitted that, in reality, this lack of homogeneity, the presence of this patchwork of solutions in which most researchers struggle to find a discernable pattern and identify a trend, and the overall novelty of these developments exclude the existence of

<sup>45</sup> Joint Information Note, op cit, n 8, 5.

<sup>46</sup> Article 140-*bis* Italian Consumer Code.

<sup>47</sup> Joint Information Note, op cit, n 8, 4.

<sup>48</sup> D Waelbroeck, D Slater and G Even-Shoshan, ‘Comparative Report’ in *Study on the condition of claims for damages in case of Infringement of EC Competition Law* by Ashurst, 31 August 2004, 2.

a European legal tradition in the area. It must be admitted that, if no European-wide pattern is detectable, there may be, in some cases, regional patterns. The best example of such a pattern can be found in the Nordic experience. Norway, Denmark and Finland have largely been influenced by their Swedish neighbour when elaborating their own collective procedure, to such a point that it is possible to talk of a Nordic Model<sup>49</sup> of collective redress. This pattern does not extend, however, to the rest of Europe and other countries appear to have followed their own path with little or no concern for their neighbours' experience. Therefore, at best, one may refer to a European experience in collective redress, not to a legal tradition, of which none is discernable.

It is also submitted that the only discernable trend or pattern, if any, in this European experience is the presence of mechanisms aimed at preventing any potential tendency to misuse collective redress mechanisms by bringing groundless actions or frivolous claims. The first mechanism is what Fairgrieve and Howells define as 'gate-keepers'<sup>50</sup>, whereby an entity, public or private, is put in place to counteract any potential tendency to misuse the procedure by bringing groundless actions. These gate-keepers can roughly be divided into two categories: public consumer ombudsmen, notably in the case of Nordic countries, but also England and Wales,<sup>51</sup> and private consumer associations in the case of representative actions such as that of Italy and France.<sup>52</sup> Another mechanism is the multi-phase procedure, such as the Danish approval stage and especially the German Test case procedure. As noted by Fairgrieve and Howells, these mechanisms all take radically different forms but all stem from the same concern over the misuse of the procedure.<sup>53</sup> This last aspect could qualify as proof of good planning on the part of Member States which, drawing useful conclusions from other countries' experience in collective actions, chose to prevent any overflow before it even happened. However, this could also be an indication that Member States are generally uncomfortable with, and somewhat afraid of, the procedure they created and insist on limiting its scope and potency. Thus, another aspect of collective redress in Europe appears to be that generally wherever a collective action has been put into place, it has systematically been restricted and limited in scope.

Nevertheless, it is impossible to readily exclude a model of collective redress on the ground that it would not be consistent with the European experience on the topic. Essentially every model of collective litigation may be found in Europe, and the somewhat controversial opt-out class action does not constitute an exception. If the procedures available in Europe take various shapes and forms, it can be argued that overall, most countries which have adopted a collective redress mechanism have chosen a mechanism which, in one way or another, requires claimants to come forward

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<sup>49</sup> See K Viitanen, *op cit*, n 36; See also C Hodges, *The Reform of Class and Representative Actions in European Legal Systems* (Oxford, Studies of the Oxford Institute of European and Comparative Law, 2009) 27-37.

<sup>50</sup> D Fairgrieve and G Howells, 'Collective Redress Procedures – European Debates' (2009) 58 *International and Comparative Justice Quarterly* 379, 400.

<sup>51</sup> C Hodges, *op cit*, n 49, 16.

<sup>52</sup> *Ibid*, 37-43.

<sup>53</sup> D Fairgrieve and G Howells, n 50, 401.

to affirm their right and join a proceeding.<sup>54</sup> This requirement is present in a large number of procedures in Europe and the opt-in model is thus a dominant one. However, it is not unique.

The opt-out mechanism is present – albeit in various forms – in four major European countries. It is as much part of this European experience as any other model. Therefore, there is no clear indication of what an ideal class action model could be in terms of compliance with the European experience, and therefore no indication that an opt-in model is more in line with this experience than an opt-out one. In any case, stating that opt-out class actions would not comply with European legal tradition is a groundless statement which is not empirically supported and represents an unwelcome academic shortcut to an important current debate.

## **B. Reviewing the Opt-out Mechanisms Available for Consideration in Europe**

Four European countries have introduced four different types of opt-out actions, which must be studied in order to re-focus the debate on this European experience and dispel fears prompted by American litigation culture and experience.

### **1. The Portuguese Popular Action**

#### **(a) Mechanism**

Portuguese legislation on group actions is viewed, in theory, as the most liberal in Europe.<sup>55</sup> There is only one collective redress mechanism in Portugal that may provide for damages as a remedy. It is not specifically directed at consumers, although consumer rights are one of the explicitly listed groups of interest to which the mechanism is addressed. The action is called '*acção popular*', which translates as 'popular action' or 'collective action'. It has been given an important place in Portuguese law, having been expressed as a right in the Portuguese Constitution in 1989.<sup>56</sup>

The first stage of the procedure is the presentation of a petition to a court, which must respect the general requirements of the Portuguese Civil Code,<sup>57</sup> by providing information relating to the forum, the parties, the form of the procedure to be followed, the facts and legal arguments supporting the claim, the claim itself and its monetary value. There is no certification stage comparable to that of the US class action.<sup>58</sup>

In the second stage, other parties which have an interest in the action are summoned to participate in the action – within a time frame determined by the court – through advertisements published in the media. Interested parties are invited either to join the

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<sup>54</sup> C Hodges, n 49, 119.

<sup>55</sup> Ibid, 387.

<sup>56</sup> Constitutional Law 1/89 of July 8<sup>th</sup> 1989.

<sup>57</sup> Article 467, Portuguese Civil Code.

<sup>58</sup> T Arantes Fontes and João Pimentel, 'The International Comparative Legal Guide to: Class & Group Actions 2011 – A practical cross-border insight into Class and Group Actions work' Global Legal Group, Chapter 20.

action or to opt-out expressly. There is a presumption of participation in the group. That is to say that parties which have opted-in will be formally identified as parties to the action, but that potentially affected parties who chose to take no action will also be considered members of the group or class. Only the parties which availed of their right to opt-out of the action will not be considered members of the group. This right to opt-out is conserved by interested parties until the end of the period during which evidence will be collected.<sup>59</sup>

Anyone may bring and lead the proceedings, whether they are individuals, associations or foundations defending specific and relevant interests, local authorities, the Public Prosecutor and the Directorate-General for Consumers.<sup>60</sup> As such, the action will either take the form of an opt-out group action or of an opt-out representative action, depending on the status of the class leader.

According to Antunes, the key issue here relates to the protection of diffuse interests and collective interests, which he defines as ‘supra-individual’ (i.e. above the individual), together with homogeneous individual (i.e. fragmented) interests or rights.<sup>61</sup> These interests are dealt with through *res judicata*, binding all members of the class who have not expressly exercised their right to opt-out.<sup>62</sup>

All types of damages are recoverable,<sup>63</sup> consumers being able to claim for material and non-material damages, as well as for compensation.<sup>64</sup> However, under Portuguese Law, punitive and exemplary damages, as well as double/treble damages, are not available.<sup>65</sup>

#### (b) Cost

The cost depends on whether the action is successful or not. If the claimant wins, the ‘loser pays’ rule applies and the claimant is exempt from paying the court fees. If the action is unsuccessful, the claimant may be forced to pay a portion of the court fees, between 10% and 50%, at the court’s discretion. In any case, the defendant is expected to pay the court fees regardless of the result.

*Quota litis* is prohibited by the Portuguese Bar Association and therefore conditional or contingency fees are not available. However, legal aid may be available, provided the plaintiff(s) demonstrate they are in a state of economic need.<sup>66</sup>

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<sup>59</sup> L Tortell, ‘Evaluation of the Effectiveness and Efficiency of Collective Redress Mechanisms in the European Union – Country Report Portugal’, 6, available at <[http://ec.europa.eu/comm/competition/antitrust/others/actions\\_for\\_damages/study.html](http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/study.html)> accessed 30 November 2011.

<sup>60</sup> Article 52(3)(a) of the Portuguese Constitution; Article 2(1) of Law 83/95 – Participation and Popular Action Law.

<sup>61</sup> HS Antunes, ‘Class actions, Group Litigation and other forms of Collective Litigation (Portuguese Report)’ (The Globalisation of Class Actions Conference, Oxford, December 2007) 6 <[http://www.law.stanford.edu/display/images/dynamic/events\\_media/Portugal\\_National\\_Report.pdf](http://www.law.stanford.edu/display/images/dynamic/events_media/Portugal_National_Report.pdf)> accessed 30 November 2011.

<sup>62</sup> Ibid.

<sup>63</sup> T Arantes Fontes and João Pimentel, *op cit*, n 58, 125.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid.

### (c) Feedback

According to Tortell,<sup>67</sup> the mechanism has been little used in practice.<sup>68</sup> She believes the reason for this is that the landscape of Portuguese consumer law is dominated by non-judicial and conciliatory mechanisms and bodies. In Tortell's opinion, the collective redress mechanism fills a void by attempting to provide a remedy for notoriously difficult mass cases, but admits that there are doubts as to whether it has achieved that aim in the best possible way.<sup>69</sup>

Nevertheless, Tortell believes there are indications that it is becoming increasingly relevant, at least insofar as the understanding of the mechanism is increasing among the legal community. In Tortell's opinion, it appears that there has already been considerable development in the use of this procedure, which is still considered a relatively new procedure given that it was only introduced in 1995.<sup>70</sup>

Tortell further argues that the introduction of this collective redress action appears to have resulted in a greater understanding of consumer law among lawyers and judges, as well as an enhanced role for the most important consumer organisation, DECO. Despite this, DECO appears to have remained a rather small organisation with limited resources. It follows that the use of the popular action mechanism rests on the dedicated time and effort of experienced lawyers. There appears to have been a shift in more recent years to an approach that prioritises the quality of legal representation, but the effectiveness of the organisation is still hampered by its general lack of resources. The existence of the mechanism also appears to have had an important impact in terms of the knowledge among companies of case law development and there is a general sense that these cases have had a degree of deterrent effect. Tortell concludes that:

‘The mechanism is potentially important, and has proven to be an interesting way of bringing cases that are likely to have otherwise occurred within the ordinary rules of procedure. Having said that, there have been an extremely small number of cases in total, and a number of them have been unsuccessful. Clearly there is a problem with the effectiveness of the mechanism. In particular, this seems to be associated with general factors to do with the Portuguese judicial system: its relative slowness, high cost and lack of predictability in comparison with the non-judicial solutions.’<sup>71</sup>

## 2. The Norwegian Representative Litigation

Nordic countries have been at the forefront of European developments in this field. The Swedish group action was introduced in 2003. Following this reform, group action legislation was introduced in Denmark<sup>72</sup> and Finland.<sup>73</sup> The Swedish model, which was

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<sup>66</sup> Ibid.

<sup>67</sup> L Tortell, *op cit*, n 59.

<sup>68</sup> Ibid, 2.

<sup>69</sup> Ibid, 191.

<sup>70</sup> Ibid, 3.

<sup>71</sup> Ibid.

<sup>72</sup> Danish Class Action Act 2007.

the first to be introduced, has inspired the other Nordic reforms on group actions. Sweden, however, has chosen not to adopt an opt-out alternative. However, Denmark and Norway have chosen to add an opt-out alternative to the opt-in procedure.

Norway provided for opt-in and opt-out actions with the Norwegian Dispute Act.<sup>74</sup> A class action may be brought by or directed against a class in relation to disputes with an identical or substantially similar factual and legal basis, and which is approved by the court as a class action. The plaintiffs indicate whether they intend the action to be an opt-in or opt-out one. It is, however, ultimately up to the court to decide whether the opt-in or opt-out alternatives best suit the action. The court also has the option to reject both solutions, refuse to aggregate the claims altogether and order the lawsuit to proceed as individual claims.

The opt-in procedure is the principal mechanism, the opt-out solution is an alternative, available in specific circumstances in which individual court actions are not sensible, notably due to the fact that the claims involve amounts or interests that are so low it must be assumed that a vast majority of potential claimants would not have enough incentive to bring them as individual actions.

### 3. The Danish Group Action

The Danish Group action (*Gruppesøgsmål*) was instituted by an amendment to the Administration of Justice Act.<sup>75</sup> This procedure is, in principle, an opt-in group action. The Act has a solely procedural aspect and leaves rules on substantive matters unchanged. The group action may indeed be brought in three ways:

- i. by an individual, natural or legal person: that person must have a claim which is subject to the action, that is to say that the individual must be a member of the class;
- ii. by consumer associations, if the case falls within the purview of the association;
- iii. by a Public Authority: the action is brought by an independent body authorised by law to act as group representative. So far, only the Consumer Ombudsman has been authorised to act as group representative in cases which fall within the scope of his remit.

The action is introduced like a normal civil action. However, the writ, in addition to the information usually required, must also contain information pertaining to the group, its description, the way group members may be identified and notified, and a suggestion for a group representative.

As explained above, the Danish Group action is based on an opt-in model. The legislation, however, does allow for an opt-out approach, which may only be adopted following a court decision. The group representative will request that the group include all members which do not expressly opt-out of it. This option is restricted by two

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<sup>73</sup> Act on Class Actions, *Ryhmäkannelaki*, 444/2007.

<sup>74</sup> Act Relating to Mediation and Procedure in Civil disputes, 17 June 2005, no. 90, effective January 2008.

<sup>75</sup> Chapter 23a (§§ 254 a-254 k) of the Administration of Justice Act, as amended by Act 181/2008 (effective from 1 January 2008).

conditions. First of all, it may only concern cases in which the action relates to claims of such a small amount, which cannot be expected to be furthered in individual proceedings.<sup>76</sup> Secondly, the opt-in action must be deemed an inefficient way of handling the group, in particular with regards to its size, the administration of which would require disproportionate resources.<sup>77</sup>

On 1 January 2008, new rules governing group actions were introduced in Denmark, which introduced an approval stage somewhat similar to the US Class Action certification.<sup>78</sup> The court approval stage is designed to allow for the filtering-out of claims which are deemed unsuitable for the group action procedure,<sup>79</sup> thus aiming at diminishing the potential for abuse of the procedure.<sup>80</sup>

If the action is approved by the court, the group members must be notified, and given the option to opt in or out. The form and substance of this notification is decided by the court on a case by case basis and can take the form of individual notices or public advertisement.

#### 4. The Dutch Collective Settlement Procedure

One of the best-known collective redress procedures is the Dutch settlement mechanism.<sup>81</sup> This procedure is rather unusual as it only deals with the settlement aspect of a multi-party claim. Two important points must be understood here: first, as far as the action is concerned, claimants are on their own. Individual claims will only be aggregated during the settlement phase. Second, as the procedure deals with settlement only, it appears that the Dutch legislator actually expects claimants to settle.<sup>82</sup> Hodges explains that this has stemmed from a specific need to provide a mechanism for the court to deal with and resolve unusual cases by providing a way to bind as many people with similar claims as possible to a settlement reached by parties to a case settled on similar grounds.<sup>83</sup>

The case from which this procedure emerged is called the DES Case.<sup>84</sup> In this case, a number of women brought an action in 1986 against 13 manufacturers of pharmaceutical products for harm caused by a drug linked with cervical cancer and other injuries. The court required that DES users register in order to preserve their rights. Within six weeks of the decision's publication, 18,000 people had registered (out of an estimated 440,000 potential victims). The pharmaceutical industry and its insurers

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<sup>76</sup> C Hodges, *op cit*, n 49, 34.

<sup>77</sup> P Møgelvang-Hansen, 'Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union - Country Report Denmark' 1 August 2008, 4-5, available at <[http://ec.europa.eu/consumers/redress\\_cons/da-country-report-final.pdf](http://ec.europa.eu/consumers/redress_cons/da-country-report-final.pdf)> accessed 30 November 2011.

<sup>78</sup> Act No 181 of 28 February 2007.

<sup>79</sup> D Fairgrieve and G Howells, *op cit*, n 50, 383.

<sup>80</sup> C Hodges, *op cit*, n 49, 28.

<sup>81</sup> D Fairgrieve and G Howells, *op cit*, n 50, 388.

<sup>82</sup> C Hodges, *op cit*, n 49, 70.

<sup>83</sup> *Ibid.*

<sup>84</sup> HR (October 1992, NJ 1994/535 (DES)).

initiated negotiations to reach a settlement, which was reached seven years later, in 1999, with the creation of a €35 million fund on the condition that the settlement be final, which implied that as many people as possible needed to be bound by the settlement if they ever were to be compensated. The existing law on collective redress at the time required victims to opt-in.<sup>85</sup> This was deemed unworkable. The Ministry of Justice thus introduced a bill containing an opt-out procedure which came into force in July 2005 and enabled this 20 year-long litigation to be settled.<sup>86</sup>

The Act on Collective Settlement of Mass Damages 2005<sup>87</sup> provides for the court approval of collective settlements where a settlement has previously been reached between an infringing party and a claimant, an association or foundation, which must be sufficiently representative of the interests of those for the benefit of whom the agreement was concluded.<sup>88</sup> On the parties' request, the Amsterdam Court of Appeal declares the settlement fair and binding even on non-parties to the agreement, after reviewing whether the amount of compensation agreed is reasonable.<sup>89</sup> Following the court's approval, any individual entitled to compensation becomes party to the settlement, with the exception of those individuals who have expressly chosen to opt-out of it.

Compensation is awarded to claimants on the basis of the characteristics of the class/group of which they are a member and not on the basis of their personal characteristics.<sup>90</sup> Fairgrieve and Howells explain that this approach, named 'Damage Scheduling', was adopted in order to make it possible for a 'tailor-made' settlement to be reached.<sup>91</sup> Any individual which has not opted-out is deemed to be bound to the settlement regardless of whether that person was even aware of the settlement at the time. This individual may nevertheless opt-out at a later time.<sup>92</sup>

### III. REVISITING THE WHITE PAPER'S FINDINGS

#### A. Reassessing the Respective Impacts of the Opt-in and Opt-out Models on Consumer Participation

In their book 'Nudge'<sup>93</sup>, Thaler and Sunstein discuss and explain the way people make choices in life, and in particular, how they are influenced in making these choices. The authors refer in particular to the importance of what they call '*choice architects*', a person who has the responsibility for organising the context in which people make their

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<sup>85</sup> Dutch Civil Code, Art 3:305 a-c.

<sup>86</sup> C Hodges, op cit, n 49, 70-71.

<sup>87</sup> Dutch Civil Code, Arts 7:907-7:910 of.

<sup>88</sup> C Hodges, op cit, n 49, 71.

<sup>89</sup> D Fairgrieve and G Howells, op cit, n 50, 388.

<sup>90</sup> Ibid.

<sup>91</sup> Ibid, 389.

<sup>92</sup> C Hodges, op cit, n 49, 71.

<sup>93</sup> RH Thaler and CR Sunstein, 'Nudge: Improving Decisions about Health, Wealth and Happiness' (Yale, Yale University Press, 2008).



decisions, which they refer to as choice architecture.<sup>94</sup> They argue that there is no such thing as a neutral design and that even small details may have a major impact on people's behaviour. Furthermore, that choice architects regularly use these small details to influence the decisions of others.<sup>95</sup> The less intrusive way to do so is by using what the authors refer to as a 'nudge', which they define as 'any aspect of the choice architecture that alters people's behaviour in a predictable way without forbidding any options or significantly changing their economic incentive. To count as a mere nudge, the intervention must be easy and cheap to avoid.'<sup>96</sup>

A class action mechanism can be viewed as such a 'choice architecture', in which opt-in or opt-out options are in fact 'nudges'. In the opt-in mechanism, the potential victim of an infringement is expected to actively join and potentially participate in the action, but is allowed not to, which implies remaining passive. This is called active-consent. It will require at least some, if not considerable, effort on the victim's part. The victim will therefore have to surmount a number of obstacles every step of the way, one of which is simply his or her own reluctance to participate in something as serious as a lawsuit. In the opt-out model, the potential victim is automatically opted-in, and is expected to remain passive – although nothing forbids him or her from taking a more active role in the action – but is authorised to expressly opt-out. This is called passive consent. In the former, action allows one to join the procedure, whereas in the latter, inaction allows one to remain part of the procedure.

The rate of passive consent is naturally higher than that of active consent. To illustrate this point Hensler and Rowe quote research carried out on parental behaviour towards school forms, comparing the result between parents who are asked to return a school form to authorise their child to take part in an activity (active consent) and those who are asked to sign a form saying they refuse to let their child participate, a lack of response in this case implying tacit acceptance (passive consent).<sup>97</sup> Participation rates are much higher under a passive-consent regime because, typically, relatively small numbers come forward to object.

The obvious incentive is always not to do anything, to remain passive. This is referred to as rational apathy. This potential for apathy was factored in by the White Paper which admitted that 'opt-out class actions and the various incentives [in Policy Option 1] lead to a large increase in number of victims compensated.'<sup>98</sup> This is because this mechanism feeds into that natural apathy, nudging it into passive consent.

The Danish opt-out alternative for small claims, for example, was introduced for this very reason. It specifically addresses those claims which are so small that they cannot objectively be expected to be brought in individual actions, because the risk of

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<sup>94</sup> Ibid, 4.

<sup>95</sup> Ibid, 5.

<sup>96</sup> Ibid, 6.

<sup>97</sup> D Hensler and T Rowe, 'Beyond "It just ain't worth it": Alternative Strategies for Damages Class Action Reform' (2001) 64 *Law and Contemporary Problems* 137, 146.

<sup>98</sup> White Paper Impact Assessment Report, op cit, n 25, 38.

individual litigation is deemed to be disproportionate to the potential – uncertain – outcome of the action.<sup>99</sup>

### 1. Lack of Attractiveness of the Opt-in Mechanism

The opt-in system may be perceived as eliminating the fear or reluctance of bringing an individual claim for victims. The idea that one is not alone may be comforting enough. Nevertheless, opting-in, requiring active consent, requires affirmative action. This need to opt-in can often appear difficult to surmount for victims, which some might even compare to that of bringing an individual claim. There may exist a number of compelling economic, psychological or social barriers preventing affirmative action being taken to opt-in.<sup>100</sup> This is particularly true with small claims, in which many victims consider the amount of damages awarded not worth overcoming these barriers,<sup>101</sup> or simply not worth their time and effort.<sup>102</sup>

This is the downside of the *in terrorem* effect of filing an opt-in class action. The opt-in mechanism allegedly acts as a deterrent against unmeritorious lawsuits, promotes meritorious claims and encourages defendants to contest unmeritorious ones.<sup>103</sup> In actual fact, this effect is so potent that it tends to backfire by deterring meritorious claims and complainants. In this particular context, the opt-in class action ceases to be neutral and actually becomes a deterrent rather than an incentive.

The benefit of the opt-in class action therefore is only truly felt when there is a widely shared perception that the alleged wrongdoing is significant and that the potential remedies are worth pursuing. This implies a more or less direct loss, of a substantial size. In these large claims, where rational apathy is very low, the incentive to join an action which already exists will be fuelled by the added incentive of the class action discussed above. In the case of small claims, however, there is very little incentive for victims to bring an action to begin with. The incentive of joining a suit will not overcome the rational apathy. On the contrary, it may very well fuel it and deter claimants.

These small claims are of particular interest from a regulatory point of view. They concern infringements which have created a loss which has been passed-on several times over, is fragmented and largely spread among economic operators and consumers. They typically involve a small harm caused to a large number of victims and can secure large benefits to the infringer.<sup>104</sup> In any case, they may be, and often are of substantial interest from a regulatory enforcement point of view, ensuring enforcement where a NCA might choose not to act. However, they are of very little interest to consumers from a financial or economic point of view and are typically extremely

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<sup>99</sup> P Møgelvang-Hansen, op cit, n 77, 4-5.

<sup>100</sup> Leuven Study, 289.

<sup>101</sup> Ibid, 31.

<sup>102</sup> D Hensler and T Rowe, op cit, n 97, 141.

<sup>103</sup> White Paper Impact Study, op cit, n 16, 287.

<sup>104</sup> D Hensler and T Rowe, op cit, n 97, 146.

difficult to detect and prove. This is a situation which is expressed by a typically low participation in opt-in group and representative actions at large.

The European experience is further proof of this, as it shows the rate of participation to these types of actions is typically low. For example, in the case of *Altroconsumo v Parmalat* in Italy, 3,000 class members opted in, from a class of hundreds of thousands of investors. Another compelling example can be found in the Action in Joint Representation, an opt-in representative action, brought in France by *UFC-Que Choisir*, a consumer's association, against the three main French mobile providers *Orange France*, *SFR* (Vodafone) and *Boygues Telecom*. This was a follow-on action, after the three companies were fined €534 million for collusive behaviour by the *Conseil de la Concurrence*, France's national competition regulator. This was at the time the highest fine ever imposed in France in a competition law case. Following *UFC-Que Choisir* filed the initial claim. 12,521 consumers registered with *UFC-Que Choisir*. Here again, this was a record, with the highest rate of participation in a lawsuit in the history of the Republic. However, this was out of a class of 20 million mobile phone subscribers which would potentially have qualified as victims.<sup>105</sup> This brings the rate of participation in this action to a mere 0.03%.<sup>106</sup>

In her study of opt-in group and representative actions in Europe, Mulheron considers that, overall, the rate of participation in opt-in actions is on average lower than 1%.<sup>107</sup>

## 2. Very Large Participation in Opt-out Actions

On the other hand, by invoking rational apathy, and relying on passive consent, an opt-out configuration will ensure a high level of participation whether or not the original incentive is strong. Studies tend to show that the rate of participation in opt-out actions is considerably higher than participation in opt-in actions. Mulheron in her study on collective redress determined that while opt-in regimes attract a lower degree of participation,<sup>108</sup> rates of participation under opt-out regimes were typically very high.<sup>109</sup> Mulheron's conclusions show that where empirical data is available, opt-out rates may be as low as 0.1% and, in any case, are never higher than 13% of claimants.<sup>110</sup>

In Europe specifically, Mulheron considered the case of the opt-out procedures in Portugal and the Netherlands.<sup>111</sup> In the Dutch case *Dexia WCAM*<sup>112</sup>, Dexia, its subsidiary Legio Lease and several other companies were sued by a large number of

<sup>105</sup> Information available on the Consumer's Association's website <<http://www.cartelmobile.org/>>.

<sup>106</sup> R Mulheron, 'Reform of Collective Redress in England and Wales: A Perspective of Need' 7 Civil Justice Council, 152.

<sup>107</sup> Ibid, 154.

<sup>108</sup> Ibid, 154-156.

<sup>109</sup> Ibid, 147-153.

<sup>110</sup> Ibid, 147.

<sup>111</sup> Mulheron indicates that, at the time of writing, there was no empirical study available on opt-out rate in Portugal and the Netherlands. The figures presented therefore were gathered through individual case data on a small case sample.

<sup>112</sup> LJN: AZ 7033.

Dutch investors which had suffered losses resulting from misleading or inadequate information about a securities lease product offered by Dexia's subsidiary and the risks attached to it. A settlement agreement was reached in April 2005. The settlement agreement was later declared collectively binding upon request, with the possibility for parties to opt-out<sup>113</sup>, based on the new rules on Mass Settlement<sup>114</sup> introduced in August 2005.<sup>115</sup> The total class size was approximately 715,000 consumers.<sup>116</sup> With a total number of opt-outs of 24,700<sup>117</sup>, the rate of participation in the settlement was approximately 97%.<sup>118</sup>

With regards to the Portuguese popular action, Mulheron's study considers three cases through which the rate of participation in group actions in Portugal can be assessed.<sup>119</sup> In *DECO v Portugal Telecom*, a case was brought alleging that Portugal Telecom had over-charged almost 2 million customers a total of €120 million. The average claim per customer was therefore around €60 each.<sup>120</sup> Only 5 people opted out of the action.<sup>121</sup> In *DECO v Academia Opening*, the class consisted of about 1,200 to 1,500 people. There were no known opt-outs. Finally in *DECO v Water provider company*, the class consisted of about 1,000–2,000 persons. As in *DECO v Academia Opening*, there were no known opt-outs in this case either. Therefore, taking all three cases together, Mulheron estimates the rate of participation to opt-out class actions in Portugal to be close to 100%.<sup>122</sup>

Here again, this is particularly interesting for small claims which, with a very low incentive to bring a claim or participate in an opt-in class action, benefit from the opt-out mechanisms' 'nudge'. It is argued that the opt-out mechanism is sufficient on its own and without further incentives to lead to a substantial increase in the number of victims compensated. On the whole, statistics show that an overwhelming number of victims do not opt-out. On the other hand, statistics also show that an overwhelming majority of potential victims tend not to opt-in. In the Portuguese case, the incentives relating to the cost of the action and the level of damages present in Policy Option 1 did not exist as damages were awarded on a purely compensatory basis, whereas cost, at least in part, is born by the plaintiff when the action fails. Nonetheless, the rate of opt-outs is close to 0%.

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<sup>113</sup> BEUC, 'Private Group Actions – Taking Europe Forward', 8 October 2007, 15.

<sup>114</sup> Dutch Civil Code, Art. 7:907-910 and Dutch Code of Civil Procedure, Art. 1013-1018.

<sup>115</sup> I Tzankova, 'Netherlands National Reports, Part 1' (The Globalisation of Class Actions Conference, Oxford, December 2007) 3, available at <[http://globalclassactions.stanford.edu/sites/default/files/documents/Demark\\_National\\_Report.pdf](http://globalclassactions.stanford.edu/sites/default/files/documents/Demark_National_Report.pdf)> accessed 30 November 2011.

<sup>116</sup> R Mulheron, op cit, n 106, 152.

<sup>117</sup> I Tzankova, op cit, n 115, 15.

<sup>118</sup> R Mulheron, op cit, n 106, 153.

<sup>119</sup> Ibid, 152.

<sup>120</sup> C Hodges, op cit, n 49, 40.

<sup>121</sup> R Mulheron, op cit, n 106, 152.

<sup>122</sup> Ibid.

It is therefore submitted that, in a bundle of similar incentives regarding the cost of the action, damages and legal fees, the opt-out arrangement of a class action invariably includes more participants than the alternate opt-in arrangement, as for equal incentives, the rate of rational apathy of victims will always be higher than the rate of victims who opt-in. In fact, one could even go as far as to theorise that an opt-out mechanism is an incentive in itself, as it allows victims to remain inactive, while an opt-in mechanism is a disincentive in itself, as it forces victims to act.

## **B. Revaluating the Alleged Excesses of the Opt-out Model**

During the public consultation on the White Paper on Damages Actions for Breach of Antitrust Rules, opposition to the opt-out option for collective redress mechanisms has been strong, and references to the potential danger of introducing an opt-out group action mechanism are widespread.<sup>123</sup> This is due to the widely-held perception that opt-out actions can lead to excesses.<sup>124</sup> That opt-out mechanisms, by themselves, engender litigation excesses is usually considered a given, and rarely grounded by empirical evidence, other than a vague reference to the US class action.<sup>125</sup>

This tends to somewhat shift the burden of proof. The issue ceases to be whether opt-out class actions are beneficial, but instead, to determine that they are not detrimental to a system. The mechanism is presumed guilty, and proving a negative is always extremely difficult. It is particularly difficult when one cannot address a clear and definite set of concerns or criticism, but instead, one has to attempt to repel general hostility and fear. It is therefore necessary to first determine a list of objections against the opt-out model, which unfortunately, for these same reasons, cannot be exhaustive, in order to present an argument against this notion that opt-in actions lead to excesses. The White Paper's impact study and the Leuven Report help shed some light on the nature of these potential excesses.

### **1. On the Question of the Cost of Opt-out Actions**

One of the main criticisms of the opt-out mechanism is its alleged cost.

'Opt-out class actions can lead to economies of scale but they are normally expensive to litigate due to high court (and often lawyer's) fees, principal agent

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<sup>123</sup> See Association des Avocats Pratiquant le Droit de la Concurrence (APDC) « Observations sur le « Livre Blanc sur les actions en dommages et intérêts pour infraction aux règles communautaires sur les ententes et les abus de position dominante » ; Confederation of British Industry (CBI) « DAMAGES ACTIONS FOR BREACH OF THE EC ANTITRUST RULES - CBI response to Commission White Paper » 11 July 2008, 3; Mouvement des Entreprises de France (MEDEF) « White Paper on damages actions for breach of the Community rules concerning cartels and abuses of a dominant position - MEDEF's Observations » July 2008, 4 ; Confederation of Finnish Industries (EK) « Contribution to the public consultation on the White paper on Damages actions for breach of EC antitrust rules » 3-4 ; Confederation of Swedish Enterprises 'Comments on the White paper on Damages actions for breach of EC antitrust rules', 14 July 2008, 3-4 available on the European Commission's website at <[http://ec.europa.eu/competition/antitrust/actionsdamages/white\\_paper\\_comments.html](http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments.html)> accessed 30 November 2011.

<sup>124</sup> White Paper Staff Working Paper, op cit, n 25, 20-21.

<sup>125</sup> Ibid.

problems, costs linked to the certification of the class, high costs of distribution of damages, etc. These costs might in some cases outweigh the economies of scale'.<sup>126</sup>

There is little in terms of explanation or justification to substantiate that statement in the White Paper. In particular, how an opt-out mechanism specifically would engender high lawyers' fees or court fees is not elaborated upon. Gaudet sees in this statement a reference to the principal-agent problems in contingency fees arrangements.<sup>127</sup> Contingency and conditional fees would undeniably increase the cost of litigation. However, three points should be noted about them. First of all, by nature, they are conditional upon the success of the suit. They increase the cost in victory, not in general. Second, contingency or conditional fees are not linked to the opt-out model, but exist independently and are available, when permitted, in individual claims as well as opt-in class actions or any other action for that matter. Finally, they are banned in most countries in Europe, and in any case, they are prohibited in the four countries up for consideration here.<sup>128</sup> Conversely, even in countries in which these fees exist, they can be prohibited in class actions if the concern is shown to be empirically supported. Therefore, when specifically relating to the opt-out mechanism, this particular point is moot.

Similarly, the cost linked to the certification of the class can be linked to any type of collective redress mechanism and is not specifically attached to the opt-out model. It is unclear how an opt-out class action certification would involve a higher cost than an opt-in one. In any case, it should be noted that this certification phase, although found in most procedures in the world, is not a *sine qua non* condition to filing a class action. The Portuguese law on class actions, for example, does not provide for a mechanism of preliminary certification regarding the entitlement to take action, and the legislator does not appear to want to change this situation for the time being.<sup>129</sup>

On the other hand, it must also be understood that opt-in class actions come at a cost as well. Handling and processing a great number of individual claims is an extremely difficult, time consuming operation and also potentially very costly one. Gaëlle Patetta, the head of the legal department of the consumers' association *UFC-Que Choisir* which led the French mobile phone cartel case<sup>130</sup>, explained that it took 21 lawyers, 3 m<sup>3</sup> (106 ft<sup>3</sup>) of paper and €500,000 simply to handle the complaints.<sup>131</sup> Retrospectively, Patetta considers that this operation perfectly illustrates the impossibility for consumer associations to bear the economic and human weight of having to manage several

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<sup>126</sup> White Paper Impact Study, op cit, n 16, 570.

<sup>127</sup> Gaudet, op cit, n 39, 2.

<sup>128</sup> D Waelbroeck, D Slater and G Even-Shoshan (n 48) 94; C Bernt-Hamre, 'Class Actions, Group Litigation & Other Forms of Collective Litigation in the Norwegian Courts' (The Globalisation of Class Actions Conference, Oxford, December 2007) 17.

<sup>129</sup> T Arantes Fontes and João Pimentel, op cit, n 58, 123.

<sup>130</sup> See above at III (A) (1).

<sup>131</sup> G Patetta, 'Opportunité du choix de l'opt-in/opt-out – Le point de vue de l'UFC-Que Choisir' in A Legendre (ed), *L'action de Collective ou action de groupe – Se préparer à son introduction en droit français et en droit belge* (Brussels, Larcier, 2010).

thousand complaints.<sup>132</sup> Jeuland considers that, ultimately, it is the cost of the French representative action, squarely resting on the consumer association's shoulder, which was the cause of its failure.<sup>133</sup>

## 2. The Principal-agent Problem and the Right to a Day in Court

Concerns have also been voiced over the principal-agent relationship in class actions,<sup>134</sup> based on the limited ability of the represented parties to monitor and control the conduct of the lead plaintiff or the lawyers as the number of represented parties increases. There may be conflicts of interest between the lead plaintiff and/or the lawyers and the other, more passive plaintiffs, which may result in inadequate representation.<sup>135</sup> These conflicts may notably concern the opportunity or the value of a potential settlement, which is particularly problematic considering the high rate of class action settlements.<sup>136</sup>

However, this is a general concern over class actions, as depicted in the White Paper Impact study. With opt-out class actions, the concern goes to the opportunity for a claimant to opt-out of an undesirable settlement in order to pursue an individual action. The concern is double: claimants may not be able to opt-out at that stage of the proceedings, and in any case, claimants who may be unaware that they are involved in a lawsuit may not be able to avail of that opportunity when it is possible. This goes to the right of a party to a claim to her 'day in court'. In essence, this is the right for a claimant to be heard and her right to disposition, which, in this situation, would allegedly be denied or seriously compromised by the class action mechanism. This right exists, in various forms, in many European member states. Issues were notably raised regarding the German constitutional rights which guarantee the freedom of disposition (*Dispositionsfreiheit*) and the right to a 'day in court' (*rechtliches Gehör*)<sup>137</sup> or the French constitutional prohibition of actions by proxy.<sup>138</sup>

The first issue could be solved by providing for the possibility to opt-out of a settlement. This could be done while the settlement is considered by the court or after the court's decision, during a reflection period set by the judge. This solution is inapplicable under Portuguese law, as plaintiffs are only allowed to opt-out up until the

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<sup>132</sup> Ibid.

<sup>133</sup> E. Jeuland, 'Experience Nationale: La France' in J-M Baudel and J. Fourvel (eds), *Les Recours Collectifs : Étude Comparée* (Paris, Société de législation comparée, 2006).

<sup>134</sup> White Paper Impact Study, op cit, n 16, 279.

<sup>135</sup> Ibid.

<sup>136</sup> F. Cafaggi and H-W Micklitz, 'Administrative and Judicial Collective Enforcement of Consumer Law in the US and the European Community', EUI Working paper LAW No.2007/22, European University Institute, San Domenico di Fiesole, 2007, 10; PH Lindblom and K Nordback, 'The Swedish Group Proceedings Act' in Bundesministerium für Ernährung, Landwirtschaft und Verbraucherschutz (ed), *Kollektive Rechtsdurchsetzung – Chancen und Risiken*, Bamberg, 2006, 197.

<sup>137</sup> White Paper Impact Study, op cit, n 16, 288.

<sup>138</sup> 'Nul ne plaide par procureur'. See Cass. Civ. 2<sup>e</sup>, 29 November 2001, Bulletin 2001 II N° 175, 120. See also F. Caballero, 'Plaidons par procureur! De l'archaïsme procédural à l'action de groupe' RTDciv 1985, 247; V. Magnier, op cit, n 43, 19.

end of the production of evidence phase.<sup>139</sup> However, this option is made available in the Netherlands. Under Dutch law, after the settlement is declared binding, the court will fix a term for plaintiffs to opt-out of the settlement. Those who do not opt-out will be bound by it.<sup>140</sup>

The second issue could simply be solved by adequate notification to all potential participants. However, this option could present serious problems in terms of cost and effectiveness. A possible alternative would be to impose a clear burden of care upon, and ensure strict control of, the class representative. A form of this option can be found in all 4 procedures considered. In the Norwegian class action, the class representative has an obligation to safeguard the rights and obligations of the class in the action.<sup>141</sup> If this obligation is not respected, or the class representative cannot properly safeguard the rights of the class, the court can revoke his appointment and designate a new class representative.<sup>142</sup> The duty of care of the class representative in the Danish opt-in class action is similar. However, the Danish law provided a supplementary safety mechanism for its opt-out alternative: the class representative must be a public independent authority, such as the Consumer Ombudsman.<sup>143</sup>

In the Dutch mass settlement procedure, any participant who does not agree with the settlement project, but nevertheless does not wish to opt-out of the procedure may raise his opposition in writing to the court.<sup>144</sup> In the Royal Dutch Shell settlement agreement<sup>145</sup>, further protection was offered to the class members. Each class member could file a claim form to help determine the amount of money he or she was entitled to recover.<sup>146</sup> The forms are reviewed and the amount the claimant should recover is determined by administrators.<sup>147</sup> If a dispute arose between a class member and an administrator concerning the administrator's rejection of his claim or his evaluation of the amount to be allocated to the class member, the class member could submit the dispute to a court or tribunal within 30 days.<sup>148</sup> For the purpose of this particular action, the class member acted as an individual, with all the advantages and costs attached to such an endeavour.<sup>149</sup>

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<sup>139</sup> Article 15(4) Law 83/95.

<sup>140</sup> Article 7:908(2) of the Dutch Civil Code.

<sup>141</sup> Norwegian Dispute Act, Ch 35, § 35-9 (1).

<sup>142</sup> Ibid, Ch 35, § 35-9 (3).

<sup>143</sup> K Viitanen (n 36) 13.

<sup>144</sup> Article 1014 of the Dutch Code of Civil Procedure. See M Loos, 'Country Report The Netherlands' Civic Consulting *Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union*, 18 July 2007, available at <[http://ec.europa.eu/consumers/redress\\_cons/nl-country-report-final.pdf](http://ec.europa.eu/consumers/redress_cons/nl-country-report-final.pdf)> accessed 30 November 2011.

<sup>145</sup> Royal Dutch Shell Settlement Agreement, available at <<https://www.royaldutchshellsettlement.com/>>.

<sup>146</sup> Ibid, 15.

<sup>147</sup> Ibid, 16.

<sup>148</sup> Ibid.

<sup>149</sup> Ibid, 17.



The notion that an opt-out system prevents claimants from pursuing an action on their own remains a rather theoretical issue for academic debate. However, as the Leuven study points out, an overwhelming majority of victims would not have filed a claim in the first place if it were not for the opt-out action.<sup>150</sup> This is demonstrated by the low rate of participation to opt-in class action overall.<sup>151</sup>

Lindblom, responding to concerns that the Swedish class action would be contrary to Swedish constitutional rights, argues that ‘Even with an opt-out regime, the members of the class are not deprived of their day in court. They get notice and may opt-out. There are many special safeguards (superiority, counsel, adequacy of representation, notice, settlement check up etc.) in group proceedings taking care of their interests. And if the claims are individually not recoverable for the group members, the alternative to a class action is not an individual action but no access to justice at all.’<sup>152</sup>

### 3. On the Tendency of Opt-out Actions to Promote Unmeritorious Lawsuits

Another perceived risk attached to the opt-out mechanism is that it may increase the number of unmeritorious lawsuits. These cases would have little to no chance of reaching the final stage of the action, but would only be filed to extract a settlement as a form of blackmail, and would tend to clog the courts’ processes. The claim would arguably have no merit but considering the size of the class and possible length of the action, it would be cheaper, from a commercial point of view, for the defendant to simply settle. This perception is as popular<sup>153</sup> as it is contested.<sup>154</sup>

First of all, it is unclear why the threat of facing an opt-out class action would force defendants to settle more than an opt-in one. If the size of the class is certainly an issue, this is not to say that an opt-in action, even with fewer claimants, would not have the same effect. Second, there are here again methods by which to limit the risk of abuse. A strong control over cases by courts, notably during the certification period, in which the plaintiffs have to demonstrate the merit of their case, is a classic example.<sup>155</sup>

Another possibility is to let the court decide which form the action should take, opt-in or opt-out. This mechanism can be found in both Norwegian and Danish procedures, in which the court, after hearing the plaintiffs and ruling on the merit of the case, will decide which form the action should take.

A third possibility is to ensure that the court is required to control and approve settlements. In the Dutch Mass Settlement procedure, the settlement agreement must be presented to the court for approval. It must contain:<sup>156</sup>

<sup>150</sup> Leuven Study, 291.

<sup>151</sup> See above at III (A) (1).

<sup>152</sup> Gaudet, op cit, n 39, 3.

<sup>153</sup> HB Schäfer, ‘The bundling of similar interests in Litigation. The Incentives for Class Action and legal Actions taken by Associations’ (2000) 9(3) *European Journal of Law and Economics* 183.

<sup>154</sup> C Silver, ‘We’re Scared to Death: Class Certification and Blackmail’ (2003) 78 NYU L Rev 1357.

<sup>155</sup> C Hodges, op cit, n 49, 119.

<sup>156</sup> Article 7:907 – 2 of the Dutch Civil Code.

- a) description of the group or groups of persons on whose behalf the agreement was concluded, according to the nature and the seriousness of their loss;
- b) the most accurate indication possible of the number of persons belonging to the group or groups;
- c) the compensation that will be awarded to these persons;
- d) the conditions which these persons must meet to qualify for the compensation;
- e) the procedure by which the compensation will be established and can be obtained;
- f) the name and domicile of the person to whom the written notification referred to in Article 7:908, paragraph 2 and 3, can be sent.

Each claim is evaluated by court-appointed administrators. In any case, the court will have the obligation to reject the settlement if:

- a) the agreement does not comply with the provisions of paragraph 2;
- b) the amount of the compensation awarded is not reasonable having regard, *inter alia*, to the extent of the damage, the ease and speed with which the compensation can be obtained and the possible causes of the damage;
- c) insufficient security is provided for the payment of the claims of persons on whose behalf the agreement was concluded;
- d) the agreement does not provide for the independent assessment of the compensation to be paid pursuant to the agreement;
- e) the interests of the persons on whose behalf the agreement was concluded are otherwise not adequately safeguarded;
- f) the foundation or association referred to in paragraph 1 is not sufficiently representative with regard to the interests of persons on whose behalf the agreement was concluded;
- g) the group of persons on whose behalf the agreement was concluded is not large enough to justify a declaration by the court that the agreement is binding;
- h) there is a legal person who will provide the compensation pursuant to the agreement and he is not a party to the agreement.<sup>157</sup>

As a supplementary safety net, the court could be given the right to evaluate and approve the settlement, amongst other factors, on the basis of its fairness, its merit and the financial and economic effect this settlement could have on the plaintiff and/or the general economy of the country.<sup>158</sup>

While it is difficult to obtain definite figures on the topic, the European experience does not appear to vindicate this fear. Overall, in the four countries which have introduced opt-out class actions, very few cases have been brought. Three cases were brought under the Portuguese Popular action.<sup>159</sup> While three private opt-in actions have

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<sup>157</sup> Article 7:907 – 3 of the Dutch Civil Code.

<sup>158</sup> C Hodges, *op cit*, n 49, 120.

<sup>159</sup> R Mulheron, *op cit*, n 106, 152.

been brought in Denmark since the law on Group action came into force, the Danish opt-out alternative has, to date, never been used.<sup>160</sup>

In fact, this limited number of cases is, paradoxically, the cause of another criticism of collective redress, according to which a limited number of group actions would tend to show that introducing a collective redress mechanism is not necessary, as these mechanisms are rarely used in member states in which they have been introduced. Another way of looking at this would be to note that the low level of collective actions may mean that no infringement has resulted in harm which was sufficiently widespread amongst consumers to justify the use of a collective action. This may indeed demonstrate that market operators comply with the law, or resolve their differences through alternative dispute resolution procedures, which, ultimately, is *inter alia* what the Commission hopes to accomplish by introducing collective redress as a mechanism for private competition law enforcement.

In any case, it appears that from the perspective of the European experience with opt-out actions, the fear of an onslaught of unmeritorious lawsuits is generally not supported by available empirical evidence.

### C. Compensating for the Limitations of Opt-in Actions

Considering the lower incentive provided by the opt-in model compared to the opt-out model, a regulator is faced with two options: the first option is to simply accept that an opt-in mechanism will typically attract a very low level of claimants, and that, on average, a large majority of victims will not be compensated. This would however go against the objective of the white paper to compensate all victims.

The second option consists in compensating for the lack of attractiveness of an opt-in action. To ensure a higher rate of participation in an opt-in group action, legislators will have to compensate for the lack of incentive an opt-in mechanism presents to potential claimants by providing other incentives. This can be done by adopting a more liberal approach to the other aspects of the action, as suggested in the Commission's impact assessment paper Policy Option 2. These incentives can relate to the cost of the action, the level of damages recoverable, etc.

Opt-in collective actions do reduce the rational apathy problem to an extent, as it is clear that a large majority of victims will be more willing to participate in a lawsuit when they are not the only claimant,<sup>161</sup> but, as seen above, it far from eliminates it. A reason for this is the *pro rata* of cost which every participant will have to bear in a loser-pays litigation system. To circumvent this problem, the White Paper suggests that courts should be able to derogate from the rule, in certain cases, through a cost order. This is by far the most reasonable way of circumventing the issue, and limits the added incentive to bring unmeritorious suits. Typically, in representative actions, the cost for

<sup>160</sup>Communication with Katrine de Neergaard, Chief Advisor at the Danish Consumer Ombudsman, 05.04.2011. Copy with the author.

<sup>161</sup>EU average of 79%, and 41% of Hungarian consumers in 2010. See Flash Eurobarometer 299 'Consumer attitudes towards cross-border trade and consumer protection', March 2011, 8, available at <[http://ec.europa.eu/public\\_opinion/flash/fl\\_299\\_en.pdf](http://ec.europa.eu/public_opinion/flash/fl_299_en.pdf)> accessed 30 November 2011.

each individual plaintiff is zero as the representative – usually a consumer association – is regarded as the loser.

In any case, it should be noted that the definite number of class members whom will share the costs will only be known after the expiration of the opt-in period. Until then, the potential lead plaintiff – the named plaintiff – may remain reluctant to initiate proceedings, unless the risk associated with losing is borne by another party, such as a lawyer working on a contingency fee basis, an after-the-event insurance or a professional financier.

#### **D. Reviewing the Options for Introducing an Opt-out Class Action Mechanism**

The opt-out mechanisms introduced in Portugal, Norway, Denmark and The Netherlands can be regarded as different stages, or levels of opt-out group or class action.

The Portuguese Popular Action is an all out opt-out class action with no real procedural mechanism to limit or restrain the action, other than those already pre-existing in Portuguese procedural law. It also admits two forms of action, Group and Representative actions, rather like the Commission's proposal in the White Paper.

The Norwegian system contains what could constitute a primary limitation to the opt-out mechanism. Where the victims' claims are substantial, no extra incentive for victims to bring their claim would be necessary. Victims are expected to make the effort to join the action to get compensation, and therefore an opt-in action is sufficient. The lack of attractiveness of the mechanism compared to the opt-out action is expected to be compensated by the natural incentive to seek compensation. In the case of small claims, where the opt-in action does not constitute enough of an incentive for consumers to join the action, and where no amount of added incentive will likely be strong enough to attract a large number of claimants, the opt-out mechanism would be the surest and most cost-effective mechanism to ensure a high participation in the action.

A second level of limitation can be found in the Danish action. On top of the small claims limitation which can be found in the Norwegian action, Danish law puts a public authority in charge of the opt-out action. This ensures supervision from a well-funded body, and limits the principal-agent problem. It strongly reduces the risk of inadequate representation by ensuring that the class representative will not be tempted to put its own interest above that of the class. It also widely limits the risk of a settlement detrimental to the class.

Finally, a third limitation option may be found in the Dutch Mass Settlement procedure. This mechanism leaves the action itself entirely in the hands of individual consumers. The issue of whether opt-out actions promote unmeritorious lawsuits simply vanishes here. Preoccupied solely with the amiable resolution of the dispute, it only ensures that as many claimants as possible can benefit from ongoing settlement negotiations, while ensuring that those who do not want to take part in it will have their 'day in court'.

These are rationalised, experienced, ‘field-tested’ procedures, which are undeniably ‘European’. They offer a panel of options for the introduction of an opt-out class or representative action in Europe. Considering the reluctance of many Member States and a number of respondents to the DG Competition public consultation regarding the opt-out mechanism, it would appear that the Norwegian and Dutch models offer the best compromise.

The Portuguese model, although it has, to date, not led to any of the excesses commonly attributed to the opt-out class action, remains perhaps too broad in its scope. The Dutch Mass Settlement procedure on the other hand may be considered too restrictive in this regard.

Therefore, a new proposal on damages actions for breach of EU antitrust rules could put forward an opt-out mechanism for small claims, which could be led by individuals, a public authority, or perhaps also a consumers’ association, as an option. If this proposal was ever to take the form of an EU directive, this mechanism could be made optional, and Member States could be given discretion in implementing it in whichever form they prefer, or of rejecting it, and instead implementing an opt-in only procedure. This solution would allow Member States to reap the benefit of the most appropriate and feasible opt-out model, while allowing the most reluctant Member State to simply opt-out.

## CONCLUSION

It is unclear why these options were not put forward by the White Paper on Damages Actions for Breach of EU Antitrust Rules. More surprising still is the fact that the options appear not to have been considered at all by the Commission. As argued above, considering the European experience with collective redress mechanisms, and opt-out actions in particular, the reality is that the debate on the opt-out class action never truly took place.

This is the perfect time to revisit this topic and the proposals submitted by the White Paper. During the public hearing on collective redress held by the European Commission on 5 April 2011,<sup>162</sup> the presentation by the first panellist, Monique Goyens, entitled ‘Lost in Consultation’, appeared to be a success among the participants. A number of panellists and participants during their intervention reminded the Commission that the time for conversation, debate and consultation on the need to introduce a mechanism for collective redress in the EU had elapsed. They insisted that it was in fact time for the Commission to make up its mind on this topic, and to proceed to the far more pressing debate on the details of the mechanism which would eventually, perhaps inevitably, be introduced. This article seeks to make a contribution to this debate. As a number of national competition authorities continue to view private enforcement as an important tool towards a more competitive economy, and while a number of Member states have introduced or envisage introducing reforms on

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<sup>162</sup>Commission (EU) Public Hearing on Collective Redress, op cit, n 6.

collective redress,<sup>163</sup> the opt-out model should remain an important element in the debate on access to justice and consumer redress. This debate should not evade any issue or reject any option out of hand. Every path should be thoroughly evaluated if this debate is to produce the best proposal for collective redress and private enforcement. Achievability is a factor, undeniably, and the fact that some Member States still consider the issue of collective redress with great reluctance should not be forgotten. However, this issue should not force scholars or regulators into a middle-ground mindset which precludes them from considering certain options because they were deemed too extreme, particularly when these options present undeniable advantages.

The opt-out mechanism for class or representative actions is such an option, set aside, perhaps too quickly, without really being given a chance, due to the fear of its alleged excesses. These excesses need to be avoided, but if indeed they exist, they have arguably more to do with the American litigation system than the opt-out mechanism of its class action. The European experience shows that these excesses are not simply a by-product of the opt-out class action. It shows that they can be contained, prevented even, and that opt-out actions are a credible option, not a path to a litigation society.

While the debate on collective redress is still ongoing, it is important to consider all alternatives objectively and without preconceptions. If the objective of collective redress is truly to ensure the full compensation of all victims of infringements, then the opt-out class action model appears to be one of the most effective private enforcement mechanisms available to regulators, which could greatly improve access to justice for consumers, particularly in situations in which they are least likely to seek justice.

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<sup>163</sup> Italy has allowed for consumers to file class actions since 1 January 2010. See R Comolli, MDE Santis and F Lo Passo, 'Italian Class Action Eight Months In: The Driving Forces' Nera Economic Consulting, available at <[http://www.nera.com/nera-files/pub\\_italian\\_class\\_actions\\_1110\\_pdf.pdf](http://www.nera.com/nera-files/pub_italian_class_actions_1110_pdf.pdf)> accessed 30 November 2011.