
EXPORTING CLASS ACTIONS TO THE EUROPEAN UNION

Tiana Leia Russell*

ABSTRACT

In this paper, I present the theoretical debates regarding the value of class action litigation,¹ with respect to both compensation and deterrence. I will begin by reviewing the class action litigation model in the United States. I then explore the current state of private antitrust enforcement in the European Union, with specific focus on the availability of class action litigation within Europe. I will discuss recent calls within the European Union for greater private enforcement of competition law and outline steps the European Commission has taken to address that need, including the recently published White Paper on Damages for Breach of EC Antitrust Rules. After exploring several of the issues raised in the Commission’s White Paper, I argue that the U.S. model of class action litigation provides a useful roadmap for private enforcement of competition law in the European Union. I also argue that the Commission’s White Paper places too high of an emphasis on compensation as opposed to deterrence, which ultimately distorts the optimal policy preference. I conclude by presenting what I believe to be the optimal policy prescription for introducing class action lawsuits to the European Union.

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* Associate at Arnold & Porter LLP; J.D. New York University; B.A. Duke University

¹ I will be using the term “class action” and “collective redress” interchangeably to refer to any procedure in which one or more plaintiffs seek a civil legal remedy in a national court or a procedure in which any such remedy may be sought on their behalf.

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I. INTRODUCTION

In the past, Europe has predominantly punished corporate misconduct with regulatory action, rather than through private enforcement. As the European Commission and European national authorities look for ways to deal with a growing enforcement workload, private litigation may take a more prominent role, particularly within the field of competition law. Within Europe, consensus is emerging that competition law requires private enforcement if it is to be effective. More European countries are interested in incentivizing private litigation in order to better deter potential corporate malfeasance and compensate victims' losses. With interest in private enforcement on the rise, the European Union is currently considering how best to encourage it. Central to this ongoing debate is the question of the proper role of class actions within the European Union. Proponents argue that class actions can significantly enhance a victims' ability to obtain compensation, contribute to the overall efficiency in the administration of justice, and provide a strong deterrent to corporate malfeasance.² However, class action litigation is not without its critics. Their possible introduction in the European Union has been met with arguments that they are an inefficient, costly and unproven way of achieving the twin public policy goals of compensation and deterrence. Class actions have not traditionally been part of Europe's legal landscape and many in Europe remain exceedingly wary of them due to the potential expense to both plaintiffs and defendants.³

² *Commission White Paper on Damages Actions for Breach of EC Antitrust Rules*, at 2-4, COM (2008) 165 final (Apr. 2, 2008) [hereinafter White Paper].

³ See, e.g., *Commission Staff Working Document: Impact Assessment Accompanying Document to the White Paper on Damages Actions for Breach of the*

Despite the above reservations, the European Union and its Member States are undoubtedly experiencing a shift towards increased collective litigation and are being influenced in various ways by the U.S. approach. The reformulation of U.S. class actions for the European market has increasingly attracted attention.⁴ While there is a great deal that Europe can learn from the U.S. experience, it must craft an effective regime of private enforcement in competition law well-suited to its own legal and cultural landscape. Towards that purpose, this paper will survey the theoretical debate on class actions, examine the state of U.S. class action litigation and provide policy prescriptions for the E.U. moving forward.

II. THE VALUE OF PRIVATE LITIGATION

The current discussion regarding class actions in the European Union is largely tied to a growing desire for more extensive private litigation in Europe, particularly within the area of competition law. Both the benefits and disadvantages of private litigation have been widely discussed within the theoretical literature. Private enforcement provides compensation for victims of breaches and added deterrence against violations of the rules. Proponents argue that private litigation provides a supplement to the political and resource constraints of public enforcement agencies.⁵ By enlisting those closest to violations in the enforcement process, it relieves enforcement pressure on public enforcement agencies and allows them to focus on more complicated or egregious cases. Many believe that significant private enforcement is of special importance to the success of antitrust and securities law. One commentator has suggested that:

[N]o antitrust regulation system has any realistic chance of success without it. Government antitrust authorities will never have the resources to prosecute all infringements which should be pursued and should not be in the business of awarding compensation . . . society . . . benefit[s] from the constraints to behavior which exist and are perceived to exist from the presence of a viable private enforcement system. To those who believe that private enforcement is

EC Antitrust Rules, at 16, SEC (2008) 405 (Apr. 2, 2008) (“antitrust cases, by nature, often require an unusually high level of very costly factual and economic analysis and . . . [these difficulties] deter many victims from bringing actions . . . [because] legal uncertainty exists at several levels”) [hereinafter *Commission Impact Assessment*]; Yu-Hsin Lin, *Modeling Securities Class Actions Outside the United States: The Role of Nonprofits in the Case of Taiwan*, 4 N.Y.U. J. L. & BUS. 143, 157-58 (2007) (“we see a general resistance from other countries to a U.S.-like litigious society”).

⁴ See, e.g., Centre for European Policy Studies et al., *Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios*, at 28, Contract DG Comp/2006/A3/012 final (Dec. 21, 2007) [hereinafter *Welfare Impact Report*] (comparing private antitrust actions in Europe to those in the United States).

⁵ Georg Berrisch, Eve Jordan & Rocio Salvador Roldan, *E.U. Competition and Private Actions for Damages*, 24 NW. J. INT’L L. & BUS. 585, 586 (2004).

wasteful, I reply that this is sometimes true, but it is better than the alternative of inadequate private enforcement. If we are to have private antitrust laws, we should have effective ones which are enforced.⁶

Still, private litigation is not without its faults. It can be wasteful and may deter public enforcement, whistle-blowing and leniency applications. Critics argue that private enforcement is unnecessary both as an additional mechanism for enforcement of the rules and as a mechanism for achieving corrective justice.⁷ The U.S., which hosts a very active private litigation culture, is often cited by those who believe that private enforcement has over-reached and needs to be curtailed.⁸

III. BENEFITS OF CLASS ACTION LITIGATION

While there are numerous ways to encourage private litigation, one of the most significant ways is providing individuals with the option to pursue class actions. Without that, private litigation is often simply too risky, too expensive and offers too little in the way of rewards to induce a private plaintiff to bring a case alone, particularly in areas such as antitrust and securities law. Within the theoretical literature,⁹ a general consensus exists as to the potential benefits of class action litigation.¹⁰ These benefits include deterrence and compensation. Generally, proponents focus

⁶ CLIFFORD A. JONES, *PRIVATE ENFORCEMENT OF ANTITRUST LAW IN THE EU, UK AND USA* xii (Oxford University Press 1999).

⁷ See, e.g., Wouter P.J. Wils, *Should Private Antitrust Enforcement be Encouraged in Europe?*, 26(3) W. COMP 473, 478 (2003) (“Deterrence is however not the only conceivable instrument to reduce the likelihood of antitrust violations taking place.”).

⁸ For example, Professor Herbert Hovenkamp writes that treble damages and attorney’s fees for victorious plaintiffs give plaintiffs too great an incentive to sue: “As a result many marginal and even frivolous antitrust cases are filed every year, and antitrust litigation is often used as a bargaining chip to strengthen the hands of plaintiffs who really have other complaints.” HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 59 (Harvard University Press 2005).

⁹ While a great deal of theoretical literature on the advantages and disadvantages of group litigation exists, there is unfortunately a paucity of empirical data. This lack of empirical data is largely a result of the difficulty of studying class actions given that no national registry exists as to when and why class actions are brought. As a result, much of the debate as to the benefits and disadvantages of class actions remains largely confined to the theoretical realm.

¹⁰ For a thoughtful analysis of collective litigation from different angles, which highlights the specific advantages and disadvantages of group litigation, see Stephen Yeazell, *Collective Litigation as Collective Action*, 1989 U. ILL. L. REV. 43 (1989). In Europe, Hans-Bernd Schaefer has described the positive and negative effects of group litigation in general and argues that the particular form of bundling similar interests has a decisive impact on the scope of these effects. See generally Hans-Bernd Schaefer, *The Bundling of Similar Interests in Litigation: The Incentives for*

on two main advantages of group litigation in achieving these ends: their potential to reduce costs (both costs of the court system and private legal costs)¹¹ and their potential to overcome the rational apathy problem.¹² As the U.S. Supreme Court pointed out, an individual consumer rarely has sufficient interest in bringing a damages antitrust case because the individual's damage may be comparatively low.¹³ By decreasing individual costs, it is easier to encourage victims to seek vindication of their rights and provide compensation for those plaintiffs.¹⁴

A. *The Deterrence Value of Class Action Litigation*

The logic of deterrence rests on the assumption that potential violators will engage in a cost/benefit analysis before deciding whether to break the law. If the costs exceed the benefits, the potential violator will refrain from illegal activity. Costs may include the probability of facing a criminal or monetary sanction, while benefits normally include monetary profits.¹⁵

The Optimal Deterrence Model traces its origins back to the seminal work of Nobel Prize winner Gary Becker, who researched optimal penalties and the probabilities of apprehension and conviction for criminal offenses.¹⁶ Becker posits that criminals act in their best interest based on

Class Action and Legal Actions Taken by Associations, 9 EUR. J. L. & ECON. 183 (2000).

¹¹ Professor Benjamin Kaplan, Reporter of the Civil Rules Advisory Committee, described the dual mission of the class action rules as "(1) to reduce units of litigation by bringing under one umbrella what might otherwise be many separate but duplicating actions; (2) even at the expense of increasing litigation to provide means of vindicating the rights of groups of people who individually would be without effective strength to bring their opponents into court at all." Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969).

¹² See, e.g., Harry Kalven & Maurice Rosenfeld, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 721 (1941); Schaefer, *supra* note 10; Hans-W. Micklitz & Astrid Stadler, *The Development of Collective Legal Actions in Europe, Especially in German Civil Procedure*, 17 EUR. BUS. L. REV. 1473 (2006).

¹³ See *Hanover Shoe, Inc. v. United Shoe Mach. Corp.* 392 U.S. 481, 494 (3d Cir. 1988) ("These ultimate consumers, in today's case the buyers of single pairs of shoes, would have only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them. Treble-damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness.").

¹⁴ A study which analyzed a set of U.S. class actions that settled found that individual costs of litigation and counseling decrease with an increasing number of participants in the group.

¹⁵ Wils, *supra* note 7, at 478.

¹⁶ See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 170 (1968).

what knowledge they have about the likelihood of apprehension, conviction and the severity of the penalty.¹⁷ Unfortunately, deterrence comes at a cost, and requires both public and private resources. Therefore, in order to impose optimal sanctions that enhance economic efficiency, Becker argues that sanctions should only condemn conduct when it would cost less than allowing the conduct to continue.¹⁸ It is important that corporations are neither “forc[ed] to internalize [the] costs that go beyond those inflicted upon society,” nor “allow[ed] to escape the full costs of their wrongdoing.”¹⁹ The optimal level of deterrence, therefore, is not necessarily one hundred percent enforcement, as complete enforcement may result in allocative inefficiency if the resources devoted to enforcement do not produce an equivalent societal benefit. Rather, enforcement should strive to equalize the marginal costs and marginal benefits of increased enforcement.²⁰

Since corporations are presumably rational actors, legal sanctions should be aimed at achieving optimal deterrence. “[A]pplication of [this] deterrence model to corporate misconduct relie[s] on four . . . assumptions in order to define the critical enforcement problem: “(1) corporations are fully informed utility maximizers; (2) legal statutes unambiguously define misbehavior; (3) legal punishment provides the primary incentive for corporate compliance; and (4) enforcement agencies optimally detect and punish misbehavior, given available resources.”²¹

“In theory, individual consumers and small businesses should be able to rely on public agencies charged with enforcing statutory law, such as the Securities and Exchange Commission (SEC), Federal Trade Commission (FTC), and state attorneys general, to take action against businesses that violate legal rules” and obtain the optimal deterrence level. “[I]n practice, [however] public agencies often lack sufficient financial resources to monitor and optimally detect all wrongdoing or to prosecute all legal violations.”²² In addition to these budgetary constraints, government agencies may be inhibited by an “undue fear of losing cases, a lack of awareness of industry conditions, . . . high turnover among government

¹⁷ *Id.* at 180-85.

¹⁸ *Id.*

¹⁹ Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 106-08.

²⁰ See Amanda Kay Esquibel, *Protecting Competition: The Role of Compensation and Deterrence for Improved Antitrust Enforcement*, 41 FLA. L. REV. 153, 162 (1989) (“A better alternative would invest resources in enforcement only to the point at which marginal cost of enforcement equals resulting marginal benefit.”).

²¹ John T. Scholz, *Enforcement Policy and Corporate Misconduct: The Changing Perspective of Deterrence Theory*, 60 LAW & CONTEMP. PROBS. 253, 254 (1997).

²² See DEBORAH HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAINS 69 (RAND Institute for Civil Justice 2000), available at http://www.rand.org/pubs/monograph_reports/MR969/index.html.

attorneys,” or political motivations.²³ These constraints often prevent public agencies from achieving the optimal level of deterrence.

In light of this, the class action device has been lauded as a means to address the shortcomings of public enforcement and to achieve optimal deterrence, by allowing plaintiffs to take on the role of “private attorney general”. This view of the private class action was first advanced by Professors Kalven and Rosenfeld, who perceived class litigation as a:

[S]upplement to governmental regulation of large, diffuse markets . . . reflect[ing] a consensus that the old, ordinary forms of liability were not functioning to discipline their operations In [Kalven’s and Rosenfeld’s] view the representative suit would serve to supplement regulatory agencies both by requiring wrongdoers to give up their ill-gotten gains and by ferreting out instances of wrong that might have escaped the regulators’ observance.²⁴

This deterrence value theory of private class actions is supported by empirical data from the United States. A study analyzing the deterrent effect of forty successful private antitrust class action cases in the United States found that class actions have significant deterrent power.²⁵ The study found that “the amount recovered in private cases is substantially higher than the aggregate of the criminal antitrust fines imposed during the same period.”²⁶ Additionally, almost half of the underlying violations were first uncovered by private attorneys, rebutting criticisms that private actions have limited deterrence value because they most commonly “follow-on” public enforcement.²⁷ While deterrence can be hard to measure, these findings suggest that the effects of deterrence by private actions are substantial. The study concluded that private litigation likely does more

²³ Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. REV. 879, 906 (2008).

²⁴ STEPHEN C. YEAZELL, *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION* 232 (Yale University Press 1987) (citing Kalven & Rosenfeld, *supra* note 12).

²⁵ Lande & Davis, *supra* note 23, at 879-80.

²⁶ *Id.* at 893 (comparing the \$18.006 billion to \$19.639 billion (at a minimum) paid in private litigation to the \$4.232 billion paid in criminal fines).

²⁷ *Id.* at 905 (“[A]lmost half of the studied violations or alleged violations were uncovered solely by private counsel, and in many other cases, private counsel played a large role in uncovering and proving the offense.”); see also John C. Coffee, *Understanding the Plaintiff’s Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 681 n.36 (1986) (“Although the conventional wisdom has long been that class actions tend to ‘tag along’ on the heels of governmentally initiated suits, a recent study of antitrust litigation by Professors Kauper and Snyder has placed this figure at ‘[l]ess than 20% of private antitrust actions filed between 1976 and 1983.’” (citations omitted)).

to deter antitrust violations than all the fines and incarceration imposed as a result of criminal enforcement by the U.S. Department of Justice.²⁸

B. *The Compensation Value of Class Action Litigation*

The second commonly cited goal of antitrust enforcement is compensation, or the notion of corrective justice. “By aggregating potential claims that might not have [otherwise been] filed, the class action” device allows valid legal claims to be compensated.²⁹ Absent the class action device, “defendant corporations that clearly violated the law could not be sued effectively due to the excessive transaction costs of prosecuting a suit.”³⁰

IV. THEORETICAL CRITIQUES OF CLASS ACTION LITIGATION

Class action litigation is not without its critics. In recent years, the predominant scholarly and popular narratives have tended to focus on the device’s shortcomings. In general, the principle critiques of class action litigation can be reduced to two arguments: (1) the principal-agent problem; and (2) the risk of over-deterrence and frivolous suits.

A. *The Principal Agent Problem*

The principal-agency problem arises from “the limited ability of the represented party to monitor and control the conduct of the representing party as the number of represented parties increases”³¹ Scholars, who have critically examined the powerful financial incentives of entrepreneurial class action lawyers, have concluded that many of the problems in representative litigation result from a misalignment of interests between lawyers and the represented class.³² As set out by Professor John Coffee, these problems are that:

[C]lass action plaintiffs cannot efficiently monitor their attorneys, that common pool problems cause class action plaintiffs’ lawyers to underinvest in their work, that class action plaintiffs’ lawyers have conflicts of interest and asymmetric stakes problems causing them, in theory, to “sell out” members of their class when negotiating class

²⁸ See Lande & Davis, *supra* note 23, at 905 (“Indeed, the forty studied cases helped deter anticompetitive behavior more than all the criminal fines and prison sentences imposed in cases prosecuted by the DOJ during this period.”).

²⁹ Edward Brunet, *Two Phases of Class Action Thinking: The Dam Period is Replaced by the Present Coffee Improving Class Action Efficiency by Expanded Use of Parens Patriae Suits and Intervention*, 74 TUL. L. REV. 1919, 1926 (2000).

³⁰ *Id.* at 1926-27

³¹ Welfare Impact Report, *supra* note 4, at 279.

³² See Gilles & Friedman, *supra* note 19, at 113 n.35 (listing several scholarly works).

settlements, and that cost differential problems cause inaccurate and inefficient “strike-suit” settlements.³³

Critics believe that class action lawyers often turn into rent-seeking entrepreneurs who operate with total freedom and who make decisions based on their own self-interest rather than the interests of the class.³⁴ Because class actions are characterized by high agency costs, there is “a significant possibility that litigation decisions will be made in accordance with the lawyer’s economic interests rather than those of the class.”³⁵ One scholar put it this way: “the single most salient characteristic of class and derivative litigation is the existence of ‘entrepreneurial’ plaintiffs’ attorneys [who, because they] are not subject to monitoring by their putative clients . . . operate largely according to their own self-interest.”³⁶

Asymmetric stakes can divide the interests of the class action attorney from the client members of the class, as the class action attorney’s contingent fee stake is not congruent with that of his client. Accordingly, a class action “attorney may profit even if his clients do not,” and therefore, “sweetheart deal” settlements can arise.³⁷ Critics argue that “[c]oncerns about inadequate representation seem corroborated by findings that most class actions lead to settlements,”³⁸ a trend that appears to be playing out in Europe as well.³⁹ In the six cases that were brought under the Swedish Group Proceedings Act 2003 in its first three years, none resulted in a verdict.⁴⁰ That was to be expected, as the “absolute majority of group actions all over the world are settled.”⁴¹ The very low settlement participation rates for some recent class action settlements seem to bear out this

³³ Brunet, *supra* note 29, at 1920-21.

³⁴ See John Coffee, *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877 (1987) (positing that incentives lead attorneys and not clients to control litigation); see also HENSLER, *supra* note 22, at 6 (studying class action settlements that have resulted in gains to attorneys at the expense of the class in the U.S.).

³⁵ Gilles & Friedman, *supra* note 19, at 104 (quoting Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 536 (1991)).

³⁶ *Id.* (quoting Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 7-8 (1991)).

³⁷ Brunet, *supra* note 29, at 1929.

³⁸ See, e.g., Welfare Impact Report, *supra* note 4, at 279.

³⁹ However, the concern that most U.S. class actions lead to settlement is not as problematic as it may first seem. Settlement rates in class actions are, in fact, comparable to the settlement rates in other forms of litigation.

⁴⁰ Per Henrik Lindblom & Kenneth Nordback, *The Swedish Group Proceedings Act*, in KOLLEKTIVE RECHTSDURCHSETZUNG – CHANCEN UND RISIKEN: INTERNATIONALES SYMPOSIUM BAMBERG 191, 196-97 (2006), http://www.verbraucherrechtstage.bmelv.de/fileadmin/user_upload/2009Inhalt/Tagungsband.pdf.

⁴¹ Welfare Impact Report, *supra* note 4, at 280 (quoting *Id.* at 197).

criticism.⁴² Other oft-cited examples used to illustrate the principal-agent problem are the coupon settlements made famous by the United States, in which represented parties are awarded with coupons, while attorneys earn millions of dollars in fees.⁴³ Redemption rates in coupon settlements often amount to little more than the typical corporate-issued promotional coupon redemption rates of 1-3%.⁴⁴

B. *Frivolous, Follow-On and Non-Meritorious Claims*

A second common criticism of class action litigation focuses on the potential for ineffective or over-deterrence. Class actions can work as a form of extortion, in which plaintiffs' attorneys, with little risk to themselves, may coerce defendants into settlements on non-meritorious claims out of fear. Because:

[P]laintiffs and defendants have differing stakes, expertise, and risks in class suits[,] [t]hese differences create a situation in which defendants may settle for amounts having little to do with the merits of a case. When conditions for a "strike suit" are present, settlements could result that are inaccurate and inefficient.⁴⁵

Business representatives from diverse sectors of the economy argue that the liberal class action rules, in practice, enable large numbers of lawsuits about trivial or nonexistent violations of statutes and regulations that govern advertising, marketing, pricing and other business practices, and about trivial losses to individual consumers. Such suits, in reality, are often vehicles for enriching plaintiff class action attorneys, not mechanisms for ensuring that important legal rules are enforced or for compen-

⁴² See HENSLER ET AL., *supra* note 22, at 428-29. For example, in *Strong v. BellSouth Telecomms., Inc.*, 137 F.3d 844 (1998), the settlement provided class members with the option of either continuing under a service plan or canceling and receiving a credit. Although the settlement purportedly provided \$64 million in compensation, the credit requests submitted by class members amounted to less than \$1.8 million.

⁴³ On the heels of the Justice Department's pursuit of Microsoft for antitrust violations, class action attorneys filed cases on behalf of private consumers of Microsoft products in California. Plaintiffs' attorneys and Microsoft reached a \$1.1 billion voucher settlement. About fourteen million consumers and businesses that acquired certain Microsoft products between 1995 and 2001 for use in California can claim vouchers by filling out a claim form. Most of the vouchers are for small amounts of money, often no more than twenty dollars. Plaintiffs' lead counsel requested \$97 million in fees and costs for itself and another \$197 million for thirty-four other firms that worked on the case. This is about twenty-seven percent of \$1.1 billion, but as it is highly likely that less than the full fund will actually be distributed, the attorneys' recovery will be an even greater percentage of the fund.

⁴⁴ Backlash to these coupon settlements eventually spurred some of the reforms in the U.S., particularly the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005).

⁴⁵ Brunet, *supra* note 29, at 1929-30 (footnotes omitted).

sating consumers. Ultimately, consumers may pay for this litigation through increased product costs without receiving any commensurate benefits.⁴⁶ This can be best described as a problem of ineffective or over-deterrence, resulting from over-enforcement.⁴⁷

Another criticism is that private suits achieve little in the way of deterrence. “[M]any . . . securities and antitrust actions are ‘piggyback’ cases brought only on the heels of a government enforcement action.”⁴⁸ “[P]rivate attorney[s] can free-ride on [government] efforts, reaping the benefits of the government’s factual investigation and reducing their own investment in expensive fact discovery.”⁴⁹ Additionally, “nonmutual offensive issue preclusion provides a cheap and simple way to take advantage of any issues litigated and determined against the defendant.”⁵⁰ Under this view, “[t]he only *supplemental* function performed by the private attorney general is that of multiplying wrongdoers’ penalties: she provides no independent search skills, no special litigation savvy, and no nonpoliticized incentives.”⁵¹

Others argue that the transaction costs of class actions are astronomically high. The costs of class action litigation, including the total dollars earned by plaintiff class action attorneys, fuel the controversy over damages class actions. The transaction costs, as measured by cents on the

⁴⁶ HENSLER ET AL., *supra* note 22, at 50.

⁴⁷ To illustrate, the Antitrust Modernization Commission noted: “[S]ome have argued that treble damages, along with other remedies, can over-deter some conduct that may not be anticompetitive and result in duplicative recovery. No actual cases or evidence or systematic over-deterrence were presented to the Commission, however.” Antitrust Modernization Comm’n, Report and Recommendations 247 (Apr. 2007) (footnotes omitted), *available at* http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

⁴⁸ William B. Rubenstein, *On What a “Private Attorney General” is – and Why it Matters*, 57 VAND. L. REV. 2129, 2150 (2004). John C. Coffee, Jr., at one point, subscribed to this view. See John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working*, 42 MD. L. REV. 215, 223, 225 (1983). Coffee later concluded, however, that the evidence was to the contrary in antitrust cases. *Understanding the Plaintiff’s Attorney*, *supra* note 27, *Understanding the Plaintiff’s Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 681 n.36 (1986) (“Although the conventional wisdom has long been that class actions tend to ‘tag along’ on the heels of governmentally initiated suits, a recent study of antitrust litigation by Professors Kauper and Snyder has placed this figure at ‘less than 20% of private antitrust actions filed between 1976 and 1983.’”) (citations omitted).

⁴⁹ Rubenstein, *supra* note 48, at 2150-51.

⁵⁰ *Id.* at 2151.

⁵¹ *Id.*; see also *id.* at 2150-52 (noting that empirical evidence shows that securities class actions do not significantly exceed SEC enforcement actions, but private litigants help ensure compliance and “generate more innovations than a monopolistic government enforcer [alone] would produce”).

dollar received, can range anywhere between twenty to eighty percent.⁵² However, these criticisms are often overstated and more grounded in anecdotal stories than empirical data. While significant obstacles exist regarding the empirical assessment of benefits and costs of class actions, due largely to the lack of information on settled cases, several empirical studies suggest that class actions are not nearly as inefficient as critics believe. One study found that for every dollar recovered in a common fund class action, 18.4 cents went towards attorneys' fees and other costs and the remaining 81.6 cents went to the class members.⁵³ By this measure, class actions provide a fairly efficient means of compensating plaintiffs. Another study conducted on forty of the largest successful class actions in the U.S. found that antitrust recoveries were in fact quite substantial.⁵⁴ These studies suggest that problems with the U.S. class action system may be overstated.⁵⁵

V. GOALS OF CLASS ACTIONS

The extent to which one finds the aforementioned criticisms convincing likely depends on one's views as to the appropriate goals of class actions. How one assesses the cost-benefit ratio of these class actions depends on how one assesses the merits of these actions, the value of the settlement to class members in the aggregate and individually, the deterrence value of the litigation, and the value to our democracy of providing access to the justice system for individuals with small, as well as large, grievances. A consensus has not yet been reached as to the appropriate purpose of class action litigation. Without a consensus as to what the social utility of class actions *should* be, there can be no consensus on how to weigh the social benefits of class actions against their costs. In order to determine the optimal policy preference, it is important that we first establish appropriate goals.⁵⁶ Are class actions for damages primarily a means of providing compensation to wronged citizens? Or are they primarily a means of enabling private litigation in pursuit of larger social goals, such as enforcing government regulations and deterring unsafe or unfair business practices? Clashing views as to the primary objectives of class actions are at

⁵² HENSLER ET AL., *supra* note 22, at 440.

⁵³ See Gilles & Friedman, *supra* note 19, at 131 (citing *Attorney Fee Awards in Common Fund Class Actions*, 24 Class Action Reps. 167 (2003)).

⁵⁴ Lande & Davis, *supra* note 23, at 893.

⁵⁵ *Id.* at 908.

⁵⁶ HENSLER ET AL., *supra* note 22, at 6-7 ("Damage class actions have significant capacity to achieve public goals: to compensate those who have been wrongfully injured, to deter wrongful behavior, and to provide individuals with a sense that justice has prevailed [F]inancial incentives produce significant opportunities for lawyers to make mischief . . . that does not serve a useful social purpose. How to respond to this dilemma is the central question for public policy.").

the heart of past and present controversies regarding class action litigation.⁵⁷

Currently, scholarly and popular criticisms of class actions based on compensational objectives appear to be driving both the larger debate and policy reforms. Legislative reforms in the United States such as the Class Action Fairness Act of 2005 (“CAFA”) have been explicit in their criticisms of the perceived deficiencies in compensation within class actions and their intent to provide more meaningful class member compensation.⁵⁸ The Federal Trade Commission has also focused its attention on class compensation and reducing attorney’s fees, stating:

Excessive class action attorney fee awards represent a substantial source of consumer harm. Such fee awards are not a costless windfall to lawyers but rather serve to diminish the total compensation available to injured consumers. To the extent that such fees no longer accurately reflect the amount of work performed by the lawyer, or the value of the settlement to the class, they may also create distorted incentives, thereby promoting litigation that is not only contrary to the interests of the class, but unnecessarily raises the cost of goods and services to consumers generally.⁵⁹

One United States Circuit Court judge lamented that “[a]ctual monetary compensation rarely reaches the class members. Concurrently, and perhaps coincidentally, such settlements are virtually always accompanied by munificent grants of or requests for attorneys’ fees for class counsel.”⁶⁰

The concern over compensation appears to be largely motivated by the striking disparities between the compensation awarded to class members and their lawyers. Witnessing class plaintiffs’ attorney windfalls juxtaposed to small individual settlements in the United States is undoubtedly jarring. To many, it seems fundamentally unjust that lawyers directly benefit from corporate malfeasance, while victims often recover next to nothing. The class action debate has become preoccupied with these discrepancies in compensation, and consequently with compensation in gen-

⁵⁷ *Id.* at 7 n.22 (“These changes are part of a larger controversy about the impact of civil litigation on the U.S. economy. Analysts have different opinions about the factual basis for such assertions.” (citations omitted)).

⁵⁸ Gilles & Friedman, *supra* note 19, at 124 (“[S]upporters of the CAFA . . . were explicit in their intent to protect class members’ wallets from avaricious plaintiff’s lawyers . . .”).

⁵⁹ R. Ted Cruz, Director, Office of Policy Planning, Fed. Trade Comm’n, Remarks before the Antitrust Section of the American Bar Association: Friend of the Court: The Federal Trade Commission’s *Amicus* Program (Dec. 12, 2002), *available at* <http://www.ftc.gov/speeches/other/tcamicus>.

⁶⁰ Gilles & Friedman, *supra* note 19, at 129 (quoting *Davis v. Carl Cannon Chevrolet-Olds, Inc.*, 182 F.3d 792, 798 (11th Cir. 1999) (Nangle, J., concurring)).

eral. John Frank reflected this preoccupation with compensation, stating that:

[t]he disproportion of the returns to members of the class and the returns to the lawyers who represent them is often grotesque. In many cases, the individual members of the class are entitled to receive at most a dollar or two, while the attorney who secured this benefaction for them can retire on his share of the victory.⁶¹

There has been a heightened focus in the public sphere “on the ‘negative outcomes’ of reduced class compensation and high attorneys’ fees.”⁶² This focus may largely be the result of the media’s focus on the glaring disparities between the compensation of class action attorneys versus the individuals they represent.⁶³ As I will explain below, this primary focus on compensation is misguided.

Gilles posits four reasons why compensation should not be an important goal when formulating policy:

(1) many consumer class actions concern a trifling per-plaintiff sum, which most class members do not care very much about recouping; (2) if the amount at issue is worth chasing, the plaintiff may opt out of the class; (3) the right to be represented as a . . . class member . . . is not one to which parties attach any meaningful value to at the time of contracting; and (4) compensating individual small-claims class members is simply not what opt-out class actions do well.⁶⁴

“In reality, there is generally no legitimate utilitarian reason to care whether class members with small claims get compensated at all.”⁶⁵ Accordingly, Gilles argues that “class member compensation is irrelevant to the formulation of sound class action policy.”⁶⁶

⁶¹ *Id.* at 114.

⁶² *Id.* at 115 (citations omitted).

⁶³ *Id.* at 129 (“the popular media have focused on the misalignment of interests and class member compensation”). This belief has been summarized by Professor Edward Cavanagh: “Many class action suits generate substantial fees for counsel but produce little, if any, benefit to the alleged victims of the wrongdoing. Coupon settlements, wherein plaintiffs settle for ‘cents off’ coupons while their attorneys are paid their full fees in cash fall within this category. . . . In such situations, it is difficult to justify paying attorneys their full fees in cash, instead of in kind.” Edward Cavanagh, *Antitrust Remedies Revisited*, 84 OR. L. REV. 147, 214 (2005) (citations omitted).

⁶⁴ Gilles & Friedman, *supra* note 19, at 105-06.

⁶⁵ *Id.* at 105.

⁶⁶ *Id.* at 106. Kenneth W. Dam discusses the virtues and pitfalls of collective litigation as means to achieve the goals of administrative and overall efficiency in litigation, compensation and deterrence. According to Dam, administrative cost savings are achieved only when a number of class members would otherwise have filed individual suits, so that the increased efficiency of the court system does not materialize in every class action. Moreover, compensation of some class members in

The U.S. experience supports Gilles' arguments that compensation should not be the paramount goal of class actions, particularly in the areas of antitrust and securities law, for several reasons. First, the vast majority of consumer class actions involve low-value claims. In class actions with many small individual claims, direct compensation is often not feasible or practical. The costs of locating class members, notifying them, evaluating their proofs of claim, and distributing payments may be so large relative to the size of the individual claim as to result in a claim of little practical compensatory value. Additionally, the U.S. experience reveals that very few people exercise their right to opt-out of class actions, evidencing their small interest in the litigation. Two different studies found that the opt-out rate in consumer class actions was, on average, less than one percent of total class membership.⁶⁷ Even after settlements have been awarded, many class plaintiffs fail to recover funds from class actions that have settled. Actual monetary compensation often does not reach class members because of their own apathy, not because of greedy lawyers. For example:

The lack of participation by institutional investors in U.S. securities class-action lawsuits has left nearly \$12 billion in unclaimed funds on the table, according to a study conducted by Global Operations & Administration (Goal), a U.K.-based withholding tax reclamation and class-action services specialist. According to Goal, "\$8.4 billion have not been claimed by U.S. investors, \$3.6 billion by Europeans. More than 25 percent of claims that could be filed by institutions are not because of operational difficulties"⁶⁸

When this happens, the left-over fund is often simply distributed pro rata among those class members who have filed claims, reverted back to the defendants, or deployed towards some other end according to a *cy pres* approach. Given the small value of the recovery amount in a great

the class proceeding may come at the expense of other plaintiffs, filed suits may be delayed, future claims barred. As class actions therefore may not be the optimal means to achieve the goals of efficiency or compensatory justice, the contributions of class actions to deterrence come into the picture. He provides arguments for *parens patriae* and fluid recovery procedures as attractive alternatives to class actions and continues that optimal deterrence can better be achieved by strengthening public enforcement, whereas private enforcement should remain subordinate to public enforcement. See generally Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47 (1975).

⁶⁷ See Gilles & Friedman, *supra* note 19, at 133. Even if one argues that some plaintiffs may not be aware of their opt-out rights, that only strengthens the arguments that their stakes are so low that they lack the requisite incentive to inform themselves.

⁶⁸ Chris Kentouris, *Institutions Leave \$12 Billion in Class-Action Funds Unclaimed*, Service Industry News: Breaking News February 19, 2008, <http://www.securitiesindustry.com/news/22042-1.html>.

deal of these settlements, as well as the fact that parties place relatively little value on their recovery as evidenced by the low levels of opt-outs and collection within class actions, it seems misguided to place the goal of compensation at the fore.

The true social utility of the class action mechanism lies in its deterrent power, in its ability to force “the defendant-wrongdoer to internalize the social costs of its actions.”⁶⁹ Even though it may be impractical to compensate class members directly, it is still often possible to prove defendants’ liability to the class.⁷⁰ In these cases

[T]he important public policy goals of disgorgement and deterrence should be satisfied. It is a basic principle of equity that wrongdoers should not profit from their wrongdoing. Society benefits, even if the victims do not, when courts devise remedies that force defendants to relinquish ill-gotten gains. Wrongdoers will be less likely to engage in future illegal acts if the incentive of unjust enrichment is eliminated. If future transgressions—and litigation—can be reduced, then ensuring deterrence is a valuable long-run application of judicial resources, even in cases where class members cannot feasibly be compensated directly.⁷¹

“[T]he true allocative-justice purposes of class actions are served by forcing companies to internalize the costs of their actions, and . . . the distribution of damages to individual claimants is entirely incidental.”⁷²

In *Economic Analysis of the Law*, Richard Posner concludes that the most important goal of class actions, from an economic perspective, is to force wrongdoers to confront the costs of their wrongdoing. In terms of the allocative purposes of the suit, this Posner argues further that damages are an inadequate motivation for most injured parties to bring suit, since damages are most often too small to merit the costs of obtaining legal redress.⁷³ Additionally, the more effective policies are in achieving deterrence, the more unnecessary compensation becomes.

Class actions should therefore be viewed as a mechanism through which lawyers are compensated for protecting semi-public rights. Class actions incentivize lawyers to bring suits which may otherwise not be brought because the costs of suit would outweigh any one victim’s particular stake in the outcome. When turned into a class action, the appropriate legal skill and time may be invested in pursuing the claim. Class actions are a means of redressing public wrongs through a semi-public

⁶⁹ Gilles & Friedman, *supra* note 19, at 105.

⁷⁰ Kerry Barnett, *Equitable Trusts: An Effective Remedy in Consumer Class Actions*, 96 YALE L.J. 1591, 1595 (1987).

⁷¹ *Id.*

⁷² Gilles & Friedman, *supra* note 19, at 107.

⁷³ *Id.* at 111 (citing RICHARD POSNER, *ECONOMIC ANALYSIS OF THE LAW* 349-50 (1972) (citations omitted)).

remedy administered by private attorneys.”⁷⁴ Judith Resnik has explained the evolution of this semi-public remedy in the following fashion:

By the 1960s, lawyers, judges, academics and legislators began to conceive of civil justice as having characteristics readily associated with criminal justice and administrative systems: that it had the potential to serve as a venue for enforcement of public norms. . . . Creating incentives for entrepreneurial private actors to use the civil justice system to partake in the work of public norm enforcement offered an alternative to centralizing power exclusively within the government.⁷⁵

In formulating class action policies, the primary focus should therefore be on obtaining an optimal level of deterrence, not compensation. “Once the appropriate lens of deterrence is applied and the objective of internalization understood, the scholarly view of many of these rules and practices will change dramatically.”⁷⁶ John Coffee states that in most small claims contexts, “commentators largely have agreed that deterrence, not compensation, should be the rationale of the class action, and they have doubted that compensation is likely to be achieved.”⁷⁷ Therefore, in fashioning policies, legislatures “should weigh the manageability of small claim consumer class actions against the goals of disgorgement and deterrence, instead of against the traditional goal of compensation.”⁷⁸

Having concluded that deterrence is the paramount goal of class action litigation, we are left to grapple with what form of class actions are the most efficient method of achieving that goal. How can we shape class actions so as to obtain the optimal level of deterrence? A central dilemma involves keeping expansionary forces from producing significant amounts of non-meritorious litigation. Over time, we might expect to see that predatory class action filings and collusive settlement practices would produce increasing numbers of cases whose merits are either dubious or not well known, because they were not prosecuted to the fullest. They may well create a climate of cynicism about the objectives of plaintiff attorneys and the value of class actions generally. When courts reward litigation with little to no legal or factual merit, its potential to effectively deter is wasted.⁷⁹ Furthermore, although public officials are often reluc-

⁷⁴ *Id.* at 109 (quoting Harry Kalven & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 717 n.14 (1941)).

⁷⁵ *Id.* at 109 (quoting Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2144-46 (2000)).

⁷⁶ *Id.* at 105.

⁷⁷ John C. Coffee, *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1355 (citations omitted).

⁷⁸ Barnett, *supra* note 70, at 1593 (citations omitted).

⁷⁹ HENSLER ET AL., *supra* note 22, at 119.

tant to bring suit due to financial and political constraints, “private attorney generals” are often too happy to pursue non-meritorious litigation in their own pursuit of financial gain. The key objective must then be to correctly incentivize private attorneys to avoid these problems. “The goal of class action law should be to balance attorneys’ private incentives and the public purposes of class actions.”⁸⁰

VI. CLASS ACTION LITIGATION IN THE UNITED STATES

Because the U.S. is well-known for its highly developed class action system, a great deal of scholarly criticism has been leveled at the perceived deficiencies in the U.S. system. Unfortunately, a lack of empirical evidence and a confounding of different factors often results in poorly informed critiques of the United States class action system.⁸¹

To properly understand criticisms leveled at the United States class action litigation model, it is helpful to first review a brief history and summary of class actions in the United States. Numerous factors encourage private litigation in the United States, including a cultural background sympathetic to private enforcement,⁸² broad discovery rules, jury trials, contingency fees and the class action rules themselves. Early on, the United States Congress recognized that the government alone would not have the resources to adequately handle enforcement, so it enlisted the support of its public to serve as “private attorney general” by providing incentives to pursue private litigation in the public interest.⁸³ This early acceptance of private enforcement gave rise to many of the procedural and legal aspects which have encouraged a private litigation culture in the United States. In contrast, European countries have tended to be more wary of loosening the state’s monopoly on regulation. One German

⁸⁰ *Id.*

⁸¹ See Commission Impact Assessment, *supra* note 3, at 277 (“Unfortunately, both critics and proponents of the American-style class action do not always clearly distinguish between effects that stem merely from group action and effects that are caused by other procedural features, such as the financing of class actions (contingency fees), discovery rules, requirements of certification or the existence of jury trials.”).

⁸² One of the key differences between the U.S. and E.U. are different cultural attitudes towards private enforcement. Ideas of a state monopoly on regulation and punishment are not as deeply embedded in U.S. culture and cultural attitudes within the U.S. generally seem more comfortable with the idea of private enforcement. This may in part be due to cultural conceptions within Europe that regulation and punishment should be the monopoly of the state, as compared to a more accepting attitude towards private enforcement found in the U.S.

⁸³ The federal antitrust laws permit a private right of action and award treble damages to successful plaintiffs. 15 U.S.C. §15 (2006). By establishing this framework these laws create “private [A]ttorneys [G]eneral,” providing incentives to pursue private litigation in the public interest. See *Cargill v. Monfort of Colorado*, 479 U.S. 104, 129 (1986); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972).

scholar attributed Europeans' distaste for the lawyer-entrepreneur model to cultural reasons, explaining that, according to European tradition, Europeans "entrust the public interest to public institutions rather than to private law enforcers."⁸⁴

One of the most significant factors incentivizing private litigation in the United States is the procedural rules providing for class action lawsuits.⁸⁵ The U.S. class action was originally an "invention of equity, allowing certain groups of individuals with common interests to enforce their rights in a single suit."⁸⁶ When the Federal Rules of Civil Procedure ("FRCP") were first adopted in 1938, the class action was extended to all actions in federal courts. Originally, the FRCP provided for three kinds of class actions, depending on the nature of the rights asserted, and under all three categories, individuals had to choose to opt in to the litigation. Only those who opted in were allowed to participate in an eventual recovery.

In 1966, Congress amended the FRCP and introduced Rule 23(b)(3) which was markedly different from its predecessors. The revised FRCP allowed the court to certify the plaintiff class of a Rule 23(b)(3) class action without the consent of the plaintiffs. A Rule 23(b)(3) class became available when a "court finds that questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."⁸⁷ After

⁸⁴ Harald Koch, *Non-Class Group Litigation Under EU and German Law*, 11 DUKE J. COMP. & INT'L L. 355, 357-58 (2001) ("[T]here is no method of self-appointment of an individual champion (plaintiff) and no concept of an individual private Attorney General, whose initiative is fostered by fee incentives or by an alluring contingency fee arrangement. To be sure, this may be well-deserved because of the risk assumed and the attorney's hard work; however, in the European tradition . . . we must put up with all of the problems of a poorly-motivated, cumbersome, and perhaps understaffed bureaucracy, as well as the question of legitimacy of representation. Under such a system, the interests of individual victims of unlawful behavior tend to be neglected in larger and more autonomous organizations.").

⁸⁵ FED. R. CIV. P. 23(a). Federal Rule of Civil Procedure 23 governs class actions in U.S. federal courts. The prerequisites for bringing a federal class action include numerosity, commonality, typicality, and adequacy. *See* FED. R. CIV. P. (a)(1)-(4) (listing prerequisites to class certification – joinder must be impracticable, and there must be a common question of law/fact, typicality within a class, and adequate protection of class interests). Prior to certification of the class, the plaintiff must also meet the notice and opportunity to opt-out of a Rule 23(b)(3) proceeding.

⁸⁶ Edward F. Sherman, *American Class Actions: Significant Features and Developing Alternatives in Foreign Legal Systems*, 215 F.R.D. 130, 132 (2003); *see also* STEPHEN YEAZELL, *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION* 232 (Yale University Press 1987) (noting that the class action "[b]ecomes a roving agent of compliance with socially defined right").

⁸⁷ FED. R. CIV. P. 23(b)(3).

the Rule 23(b)(3) class has been certified, class members must be given “the best notice . . . practicable” and be notified of their right to “opt-out” of the class.⁸⁸ For those who fail to “opt-out,” the final judgment is binding on them.

This “opt-out” provision is one of the unique attributes of American class action proceedings and has had a dramatic effect on the litigation landscape in the United States. From 1938 to 1966, class actions were relatively few and far between.⁸⁹ Since the introduction of the “opt-out” device, the number of class actions in the U.S. has exploded. As opposed to opt-in class actions, in which all members of a class desiring to share in the recovery must come forward, opt-out class actions automatically include all members unless they affirmatively ask to be excluded (i.e. ‘opt out’). Under this revised rule classes “were almost certain to be larger – and the sum of their potential damages, therefore, much larger – than classes certified under the old rule.”⁹⁰ Because the incentives for so excluding oneself are often modest or non-existent, both the classes certified under the “opt-out” mechanism and therefore the sum of their potential damages are almost certain to be larger than classes certified under the original rules.⁹¹

This increase in the scope of the class has dramatically increased the scope and potential financial worth of class action suits.⁹² The dramatic growth in class actions since the FRCP were amended has met with a mounting wave of criticism. After the 1966 amendment, some scholars argued that the new “opt out” system exacerbated already existing principal-agent problems, by permitting lawyers to speak for immense phantom classes of people who have not selected them, and who may, in fact, be entirely unaware that they are parties to a lawsuit.⁹³ This scenario allows class counsel, rather than the class members, to drive the litigation and automatically gives counsel substantial bargaining power. Because the interests of attorneys may differ from those of the represented parties, the principle-agent problem may result in inadequate representation. Much of the current controversy, both within the U.S. and around the world, centers on these “opt out” suits for monetary damages. Since their introduction, several powerful narratives of greedy lawyers, ‘legal blackmail’, and exponentially high agency costs have arisen.⁹⁴ According to

⁸⁸ FED. R. CIV. P. 23(c)(2)(B).

⁸⁹ See Sherman, *supra* note 86, at 133 (“From 1938 until the class actions rules were amended in 1966, class actions were few and far between.”).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ See, e.g., Gilles & Friedman, *supra* note 19, at 112-13.

⁹⁴ See, e.g., HENSLER ET AL., *supra* note 22, at 15-18.

polls, a majority of Americans believe class actions are not socially useful.⁹⁵

However, Congress appears to have been fully aware of the effects Rule 23(b)(3) would have on the legal landscape. “Forty years ago, when it approved the current version of Rule 23, Congress was exposed to the idea that the rule could generate small claims cases unlikely to be initiated by private plaintiffs nor to result in any significant compensation for class members. The federal class certification rule explicitly requires courts to examine, ‘the interest of members of the class in individually controlling the prosecution or defense of separate actions.’”⁹⁶ The clear implication of this inquiry is that there will be cases in which individuals have scant interest in initiating or controlling the action, namely those cases where their individual interest is minute, and that this is a factor that cuts in favor of class certification. The Advisory Committee Notes emphasize the point, stating:

The interest of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action. On the other hand, these interests may be theoretical rather than practical; the class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, or the amounts at stake for individuals may be so small that separate suits would be impracticable.⁹⁷

Since 1966, Congress has rewritten the procedural rules for key areas of federal law in clear reaction to and hence with knowledge of the relationships between small claimants and class action attorneys. In the securities field, Congress reacted to the absence of client control of class actions by requiring that the largest intervening investor be presumptively appointed as lead plaintiff.⁹⁸ In the antitrust field, Congress reacted to the absence of client control and compensation by creating power in state attorneys general to pursue compensatory *parens patriae* actions on behalf of consumers.⁹⁹ Despite Congress’s seeming awareness that small claims class actions are not generally initiated by individual claimants and often do not result in compensation for them, Congress has not attempted to preclude the filing of such cases. Congress has authorized causes of action for small consumer, securities, and antitrust viola-

⁹⁵ Gilles & Friedman, *supra* note 19, at 130.

⁹⁶ Rubenstein, *supra* note 48, at 2148, n.70 (citing FED. R. CIV. P. 23(b)(3)(A)).

⁹⁷ See FED. R. CIV. P. 23 advisory committee’s note (discussing 1966 amendment).

⁹⁸ See Private Securities Litigation Reform Act of 1995, Pub. L. No. 194-67, 109 Stat. 737 (1995) (codified at 15 U.S.C. §§ 77a, k(f), t, z, z-2, 78a, j-1, u-4, u-5, 771 and 18 U.S.C. § 1964(c)) (implementing measures to reduce the number of frivolous lawsuits).

⁹⁹ See 15 U.S.C. §15(c) (2006) (“[a]ny attorney general of a State may bring a civil action in the name of such State, as *parens patriae* on behalf of natural persons residing in such State”).

tions, knowing full well these were small claims and authorized representative and other forms of litigation to vindicate these rights. This suggests that the policy decisions were largely focused on the deterrence value of such suits.

A. *The Role of Class Actions in U.S. Antitrust Enforcement*

Class actions play a particularly important role within antitrust enforcement. In the U.S., antitrust enforcement is divided up between a number of different parties, both public and private. Three governmental bodies have the power to enforce federal antitrust laws: the Department of Justice, the Federal Trade Commission, and the Attorney Generals of the various states. The jurisdictions of these enforcement agencies overlap to some extent.

At the same time, the U.S. has a well-developed and vibrant private litigation landscape within the field of antitrust law. Approximately 90% of antitrust law enforcement in the U.S. is generated by private rights of action.¹⁰⁰ “The number of private antitrust actions in the U.S. dwarfs the number of government actions, in some years by as much as a factor of 20.”¹⁰¹ In the U.S., 1,165 antitrust cases were commenced in federal courts in 2006 and beginning of 2007.¹⁰² Of leading antitrust cases decided before 1977, twelve were private and twenty-seven were government.¹⁰³ By contrast, of the leading cases decided 1977 or later, thirty were private cases and only fifteen government cases.¹⁰⁴

Professor Calkins concluded:

Today what is known as U.S. antitrust law no longer is exclusively or even principally the consequence of Justice Department enforcement. The leading modern cases on monopolization, attempted monopolization, joint ventures, proof of agreement; boycott; other horizontal restraints of trade, resale price maintenance, territorial restraints, vertical boycott claims, tying, price discrimination, juris-

¹⁰⁰ Alison Jones & Brenda Sufrin, *EC COMPETITION LAW: TEXTS, CASES AND MATERIALS*, Oxford University Press 1306 (2007).

¹⁰¹ Gordon Schnell, *Class Action Madness in Europe – A Call for a More Balanced Debate*, 28 *EUR. COMPETITION. L. REV.* 617, 617 (2007).

¹⁰² Administrative Office of the United States Courts, Federal Judicial Caseload Statistics: March 31, 2008, Table C-2: U.S. District Courts – Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit 42-45 (2008), available at <http://www.uscourts.gov/caseload2008/tables/C02Mar08.pdf>.

¹⁰³ See Stephen Calkins, *Coming to Praise Criminal Antitrust Enforcement, in European Competition Law Annual: 2006*, 343, 354 (Hart Publishing, Claus-Dieter Ehlermann & Isabela Atanasiu eds. 2007) (see graph: “Leading Cases Decided Before 1977”).

¹⁰⁴ See *id.* at 356 (see graph: “Leading Cases Decided 1977 and After”).

diction, and exemptions are almost all the result of litigation brought by someone other than the Justice Department.¹⁰⁵

The U.S. experience highlights the fact that the “opt out” class action device has been extremely successful with respect to the goal of deterrence of antitrust violations. One study concluded that private enforcement has done more to deter antitrust violations than all the fines and incarceration imposed as a result of criminal enforcement by the U.S. Department of Justice.¹⁰⁶

Class actions have been especially effective in achieving deterrence within the field of antitrust law, because of their interaction with the substantive antitrust law. In order to understand the interplay between class action procedural rules and U.S. antitrust law, it is important to understand the substantive antitrust rules. In 1890, Congress passed the Sherman Antitrust Act in response to public discontent with monopolistic business practices. Section 1 of the Sherman Act declares illegal “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce.”¹⁰⁷ Section two makes it unlawful to “monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of trade or commerce”¹⁰⁸ The Clayton Antitrust Act¹⁰⁹ was passed in 1914 and added even further substance to the U.S. antitrust law regime by establishing the right to prevent activity in its incipiency which may tend to restrain trade,¹¹⁰ and by authorizing private rights of action:

[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor[e] in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.¹¹¹

Additionally, the Clayton Act allowed private actions to follow on the decisions of public enforcement agencies, making final judgments or decrees in any civil or criminal suit brought by the United States under the antitrust laws “prima facie evidence . . . as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto.”¹¹²

¹⁰⁵ *Id.* at 355-56.

¹⁰⁶ Lande & Davis, *supra* note 23, at 897 (“it is safe to conclude that private enforcement is significantly more effective at deterring illegal behavior than DOJ criminal antitrust suits”).

¹⁰⁷ Sherman Antitrust Act, 15 U.S.C. § 1 (2006).

¹⁰⁸ *Id.* §2.

¹⁰⁹ Clayton Antitrust Act 15 U.S.C. §§ 12-27 (2006).

¹¹⁰ *See id.*

¹¹¹ *Id.* §15(a).

¹¹² *Id.* §16(a).

Detractors of class actions have less to fear in terms of abuse from “opt-out” class actions in antitrust cases. Risks of frivolous lawsuits and over-deterrence are less a concern in the area of antitrust law as a result of the substantive law, including the difficult pleading requirements and the difficulty of proving economic theories.¹¹³ The complexity of antitrust cases discourages frivolous class action litigation.¹¹⁴ Plaintiffs must survive motions to dismiss, oppositions to class certification and motions for summary judgment before they can even think about settling,¹¹⁵ and within the antitrust context, it is often difficult for a case to get by these hurdles.¹¹⁶ There are also narrow per se antitrust liability and heightened pleading requirements for antitrust conspiracy cases.¹¹⁷ Therefore, private class actions are more likely to lead to an optimal level of deterrence of antitrust rules.

VII. THE HISTORY OF PRIVATE ENFORCEMENT IN THE EUROPEAN UNION

In the past, there has been relatively little private enforcement of competition law within the European Union. According to one study, approximately only sixty cases for damages awards have been adjudicated in Europe and of these, only twenty-eight have resulted in a reward of damages.¹¹⁸ These figures illustrate that antitrust enforcement in the E.U. continues to predominantly rest in the public sector. However, in recent years, the E.U. and several of its Member States have begun to suspect that the public sector is not wholly up to the task of providing an effective “competition culture” and has attempted to encourage private litigation through a variety of measures. The development of private enforcement within the E.U. has a long history.

E.U. competition law is set forth in Articles 81 and 82 of the Treaty Establishing a European Community (‘EC Treaty’).¹¹⁹ No provision in the EC Treaty allows for an action before an E.U. Court by a private party against another private party for a violation of E.U. law; nor does any provision in the EC Treaty set out the conditions under which private parties may sue each other before national courts for violations of E.U. law. However, in the early years of the European Economic Community, the European Court of Justice (“ECJ”) held that rights conferred by

¹¹³ Schnell, *supra* note 101, at 618.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

¹¹⁸ Ashurst LLP, *Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules: Comparative Report*, (Aug. 31, 2004), http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf.

¹¹⁹ Treaty Establishing the European Community, Nov. 10, 1997, 1997 O.J. (C 340) arts. 81-82 [hereinafter EC Treaty].

Community law can be relied upon in proceedings before national courts.¹²⁰ Any private actions before national courts are governed by the relevant national procedural rules¹²¹ and community law has made no attempts to create new remedies in Member states.¹²² However, the E.U. has steadily sought to encourage private enforcement of competition rules through a variety of actions.

There are two important limitations to the application of national procedural rules in the E.U.: equivalence and effectiveness.¹²³ According to the principle of equivalence, infringements of Community competition rules must be sanctioned by national courts in the same way as equivalent infringements of domestic law.¹²⁴ Under the principle of effectiveness, national courts may not make it impossible or excessively difficult for parties to exercise rights derived from E.U. Law.¹²⁵

The principle of effectiveness was central to the European Court of Justice's decision in *Courage v. Crehan*, a ruling which held that national courts are bound to ensure the effectiveness of Community law and the direct effect of Articles 81 and 82.¹²⁶ In *Courage v. Crehan*, the ECJ held that as a matter of Community law, the possibility of claiming compensation must be open to any individual who suffers harm as the result of an infringement of Community competition laws.¹²⁷ The Court emphasized the importance of private enforcement in ensuring the full effectiveness of the competition rules, stating that "actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community."¹²⁸ The "full effectiveness of Article 85 of the Treaty and, in particular, the practical effect of the prohibition laid down in Article 85(1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition."¹²⁹ The deci-

¹²⁰ Case 26/62, *Van Gend en Loos v. Netherlands Inland Revenue Admin.*, 1963 E.C.R. 5.

¹²¹ Georg Berrisch, Eve Jordan & Rocio Salvador Roldan, *E.U. Competition and Private Actions for Damages*, 24 NW. J. INT'L L. & BUS. 585, 587 (2004).

¹²² Case 33/76, *Rewe v. Landwirtschaftskammer Saarland*, 1976 E.C.R. 1989, ¶ 5.

¹²³ *Id.*

¹²⁴ Notice on Cooperation between National Courts and the Commission in Applying Articles 85 and 86 of EEC Treaty, 1993 O.J. (C 39) 6, ¶ 2.10.

¹²⁵ *Id.*

¹²⁶ Case C-453/99, *Courage Ltd. v. Crehan*, 2001 ECR I-6297, ¶ 23 (holding that under UK law a pub owner challenging an anticompetitive restriction in a contract could not claim damages because pub owner did not have clean hands. The ECJ subsequently overturned the decision.).

¹²⁷ *Id.* ¶ 25.

¹²⁸ *Id.* ¶ 27.

¹²⁹ *Id.* ¶ 26. To date, it has not been argued before the Community courts that the non-recognition of class actions in a Member State prevents the effective enforcement of Community rights, nor have the Community courts mentioned that such remedies

sion in *Courage* was significant in recognizing the importance of private enforcement of Community law.

The E.U. took another step to encourage private enforcement by passing European Union Directive 98/27/EC¹³⁰ which governs injunctions for the protection of consumers' interests. The directive required all Member States to implement laws for collective litigation by the year 2000. Under the directive, aggrieved consumers may seek civil relief from wrongdoings that fall within the ambit of the law, but may only do so in an action commenced by a "qualified entity" as defined in Article 3 of the directive.¹³¹ The directive only provides for injunctive relief, not damages (except in the event that a losing defendant does not comply with the injunction).¹³² The directive consists of the minimal methodology whereby a class action procedure exists in all E.U. member countries as part of the overall E.U. program of consumer protection and antitrust enforcement. Though this collective redress mechanism exists in the E.U., the inability of private individuals to seek reimbursement through the collective litigation hinders the incentive for consumers to engage in collective actions and hinders the potential for a strong deterrent effect. Nonetheless, the directive comprises one more effort by the E.U. to encourage private litigation.

On May 1, 2004, European Community Regulation 1/2003 was implemented, a significant development within the E.U.'s private litigation landscape. The key objective of Regulation 1/2003 was to encourage decentralized, effective and uniform application of European Competition Law in an enlarged and integrated market and to strengthen the possibility for individuals to seek and obtain effective relief before national courts. E.C. Regulation 1/2003 ushered in a fundamental change to European competition law as the Commission decentralized the enforcement of Community competition rules.¹³³ Prior to Modernization Regu-

must be made available. Therefore, as a matter of Community law, Member States do not have to make class actions available for violations of Community Law, unless they already exist for the violation of national competition rules.

¹³⁰ Council Directive 98/27, 1998 O.J. (L 166) (EC).

¹³¹ *Id.* at art. 3 (defining "entities qualified to bring an action" as follows: For the purposes of this Directive, a "qualified entity" means any body or organization which, being properly constituted according to the law of a Member State, has a legitimate interest in ensuring that the provisions referred to in Article I are complied with, in particular: (a) one or more independent public bodies, specifically responsible for protecting the interests referred to in Article 1, in Member States in which such bodies exist and/or (b) organizations whose purpose is to protect the interests referred to in Article 1, in accordance with the criteria laid down by their national law).

¹³² *Id.* art. (2)(1)(c).

¹³³ See Mario Hilgenfeld, *Private Antitrust Enforcement: Towards a Harmonised European Model or a "Patchwork" of Various Member States' Rules?*, 14 INT. T.L.R. (2) 39, 41 (2008).

lation 1/2003, only the Commission could decide whether agreements that fell afoul of Article 81(1) could be exempted under Article 81(3).¹³⁴ The European Court of Justice exercised exclusive jurisdiction to hear preliminary references under Article 234 of the Treaty. Under the previous system, the Commission was inundated with notification requests. Regulation 1/2003 abolished both the notification requirement and the need to apply for individual exemptions, and made Articles 81 and 82 directly effective in their entirety, leaving the Commission free to focus on “hard core” abuses, such as price-fixing and cartels.¹³⁵ National Competition Authorities may now apply articles 81 and 82 in their entirety, and also have the power to order that infringements be brought to an end, to order interim measures, to accept commitments and to impose fines and penalties in accordance with their national procedural law. National courts possess several advantages over E.U. courts including the ability to award damages, rule on claims of contract when they are related to Article 81, more effectively sever and null contracts under national law, grant interim measures, combine claims, grant damages and award legal costs. The two key objectives of Regulation 1/2003 were to decentralize the enforcement of EC Competition law and to strengthen the possibility for individuals to seek and obtain effective relief before national courts. While the Modernization Package marks a significant step towards achieving these objectives, much remains to be done.

Despite the above developments and the ECJ’s acknowledgements that “the right to damages is necessary to guarantee the useful effect of the EC competition rules”¹³⁶ numerous barriers to private litigation still exist. These include, among other things, the cost and risk of litigation, unfavorable discovery rules, uncertainty as to whether plaintiffs can rely on Commission documents and Commission decisions in national proceedings, uncertainty over how national rules on damages and injunctions apply, uncertainty as to who can sue (Competitors, Direct Purchasers, Indirect Purchasers), and the possibility of dual enforcement (National Courts have an obligation to ensure that their decisions do not conflict with any decisions given at the Community level, so national courts may in certain circumstances have to stay proceedings).¹³⁷ Additionally, the traditional tort rules of the Member States, either of a legal or procedural nature, are often inadequate for actions for damages in the field of competition law, due to the specificities of the actions in this field. The different approaches can lead to legal uncertainty for victims and defendants. Lastly, and most significantly, there are still relatively few E.U. Member

¹³⁴ Council Regulation 1/2003, On the Implementation of the Rules on Competition Laid Down in Articles 81 & 82 of the Treaty, 2003 O.J. (L 1) (EC) [hereinafter Regulation 1/2003].

¹³⁵ *Id.* ¶ 4.

¹³⁶ Commission Impact Assessment, *supra* note 3, ¶ 5.

¹³⁷ *Id.*

States that provide any collective action mechanisms. Given the small and diffused nature of many competition law claims, this significantly hinders any hopes of an active private enforcement landscape.

VIII. COLLECTIVE ACTION LITIGATION IN THE EUROPEAN UNION

Currently, collective actions do not exist in most continental European legal systems,¹³⁸ and until recently most Member States only allowed joinder, or in some cases, representative actions.¹³⁹ In recent years, however, the E.U. has witnessed a move towards collective actions in many of its Member States. Developments within the Member States of the E.U. are of particular interest to the discussion on collective actions within the E.U. as a whole. Various forms of group litigation are increasingly available within E.U. Member States. The practice of allowing collective actions is developing in E.U. Member States, particularly in the areas of consumer protection, product liability, discrimination, environmental pollution and litigation arising from certain capital market transactions. Several European jurisdictions have either implemented legislation that makes it easier for claimants to bring group or class actions, or are currently considering implementing legislation, especially in the consumer protection context.

While there have been recent developments in a number of European jurisdictions (e.g. France, Germany, Italy, Sweden, United Kingdom), the legislation introduced has varied widely. Some countries, like the Netherlands, have provided for very broad class action rules, while others, such as Germany, have provided for group litigation only in a few substantive law areas and limit the remedy to injunctive relief.¹⁴⁰ Several Member States now have class action procedures that more closely resemble those available in the U.S. In 2002, the Swedish Parliament passed the Group Proceeding Act¹⁴¹ to make private group actions available in all areas of civil law. The Dutch Parliament recently passed the Collective Settlement of Mass Damages Act in 2004, being the first European country to adopt the “opt-out” provision of U.S. style class actions.¹⁴² In England, representative actions and joinder of claims have long been available, but the recent Enterprise Act 2002 introduced an amendment to the Competition Act expressly granting the right of dam-

¹³⁸ However, in most European countries, a group of plaintiffs with similar claims can form an association to represent them.

¹³⁹ Class actions for consumer groups are allowed in England, France, Italy, the Netherlands and Spain. Consumer group class actions are not usually filed seeking monetary damages but rather remedies such as injunctions.

¹⁴⁰ Koch, *supra* note 84, at 358.

¹⁴¹ Lag om grupprättegång (Svensk författningssamling [SFS] 2002:599) (Swed.) (May 30, 2002).

¹⁴² See, e.g., Ashurst LLP, The Availability of “Class Actions” in Europe, at 15 (Dec. 2007) [hereinafter Ashurst Report]; Lin, *supra* note 3, at 146.

ages to include group consumer claims before the CAT.¹⁴³ Following in the footsteps of the above countries, more and more European countries are considering adopting new group litigation laws.¹⁴⁴ France, Ireland, Italy, and Finland are all considering legislation facilitating group actions.¹⁴⁵

IX. RECENT STEPS TAKEN TOWARDS COLLECTIVE ACTIONS WITHIN THE E.U.

Despite the recent developments within many Member States, significant barriers to collective actions still exist. Many Member States still lack the procedural devices to bring collective actions, and even in Member States with the requisite procedural devices, the lack of funding often poses an impediment to effective collective actions. Generally, the rules for litigation financing in the E.U. do not encourage class actions. Additionally, many in Europe remain wary of the perceived excesses of the U.S. class action litigation system. Lastly, because of the varied approaches adopted by the E.U. Member States, there are significant uniformity problems.

The inconsistent and piecemeal attempts by Member States to introduce collective actions highlight the need for a community-wide response from the E.U.¹⁴⁶ Recognizing the need for a community action, a recently issued Commission Study argues that “Member States cannot be expected to be capable of effectively and fully remedying the root causes of the problem. First, there is no indication that any sizeable number of other Member States are likely to introduce, in the foreseeable future, legislative changes that will ensure an effective legal framework for damages actions brought by victims of antitrust infringements. Second, by nature, isolated initiatives by Member States cannot ensure that a consistent minimum level of effective protection of victims’ entitlement to damages under Articles 81 and 82 will be achieved in every Member State.”¹⁴⁷ In light of this belief, the E.U. is considering implementing a more uniform approach to collective actions, particularly within the realm of competition law, suggesting that the E.U. is heading towards a “single set of

¹⁴³ Enterprise Act, 2002, c. 40 (Eng.).

¹⁴⁴ See Stefano M. Grace, *Strengthening Investor Confidence in Europe: U.S.-Style Securities Class Actions and the Acquis Communautaire*, 15 J. TRANSNAT’L L. & POL’Y 281, 292-300.

¹⁴⁵ Welfare Impact Report, *supra* note 4, at 293-95 (citing Leuven Study) (“An extensive overview of existing systems of group litigation in different Member States, including legal rules on standing and funding suits.”).

¹⁴⁶ Ashurst Report, *supra* note 142, at 9 (“The interaction of measures facilitating actions for damages with various aspects of public enforcement needs to be addressed, and individual action by Member States is not sufficiently capable of achieving this in any consistent manner.”).

¹⁴⁷ Commission Impact Assessment, *supra* note 3, ¶ 54.

consumer rights and obligations” with an effective and efficient enforcement system. Some argue that improving means of consumer redress needs to be seen in the context of the wider phenomenon of the creation of the new face of European consumer law. They believe that if E.U. rights are to be meaningful, there must be some consistency in remedial approaches.

In light of this, the E.U. has increasingly been turning its attention towards collective actions. In March 2007, the Commission launched two studies on collective redress. The first of these studies evaluates the effectiveness and efficiency of national collective redress systems that currently exist in E.U. Member States, assess whether consumers suffer a detriment in those Member States where collective redress mechanisms are not available, and examine the existence of negative effects for the Single Market and distortions of competition.¹⁴⁸ The second study analyzes in detail the problems faced by consumers in obtaining redress for mass claims, as well as the economic consequences of such problems for consumers, enterprises and the market.¹⁴⁹ The Commission published a Green Paper on Consumer Collective Redress in December 2008.¹⁵⁰ Following consultation on the Green Paper, the Commission will consider whether and to what extent an initiative on consumer collective redress is necessary at the E.U. level.

In addition to the above studies, the E.U. has specifically focused its attention on the introduction of collective actions within the realm of E.U. competition law. Collective redress for victims of EC antitrust law infringements poses special issues because of the “specific nature of anti-trust law and the wider scope of victims.”¹⁵¹ The E.U. has recently published both a Green Paper and a White Paper on Damages Actions for Breach of the EC Antitrust Rules which both extensively discuss the possible introduction of collective action devices within E.U. competition law. The Commission adopted a Green Paper and a Commission Staff Working Document on Damages actions for breach of the EC antitrust rules in December 2005, accompanied by a Comparative Study undertaken by the law firm Ashurst (hereinafter “Comparative Study”).¹⁵² The Comparative Study found levels of private enforcement of damages

¹⁴⁸ European Commission DG SANCO Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union Final Report, available at http://ec.europa.eu/consumers/redress_cons/finalreportevaluationstudy/part1-final2008-11-26.pdf.

¹⁴⁹ European Commission Report on Consumer Redress in the European Union: Consumer Experiences, Perceptions and Choices (Aug. 2009), available at http://ec.europa.eu/consumers/redress_cons/docs/cons_redress_EU_qual_study_report_en.pdf.

¹⁵⁰ *Commission Green Paper on Consumer Collective Redress*, COM (2008) 794 final (Nov. 11, 2008).

¹⁵¹ *Id.* at 3.

¹⁵² Commission Impact Assessment, *supra* note 3, ¶ 3 (citing Ashurst Comparative Study (Aug. 31, 2004)) available at <http://ec.europa.eu/comm/competition/antitrust/>

actions for breach of EC competition law to be in “total underdevelopment” and found “astonishing diversity” in the approaches taken by the Member States.¹⁵³

Recognizing that “significant obstacles exist in the different Member States to the effective operation of damages actions for infringement of Community antitrust law,” the Green Paper endeavored to address some of the biggest obstacles.¹⁵⁴ The main obstacles identified include access to evidence, calculating damages, passing-on defenses, the treatment of indirect purchasers, coordinating private and public enforcement, what substantive law to be applied, and the availability of collective actions.¹⁵⁵ “In addressing these concerns, the Green Paper offers some fascinating glimpses into what the future may hold for the interplay between ‘federal’ procedural law and ‘state’ substantive law in Europe.”¹⁵⁶

The adoption of the Green Paper opened a period of public consultation which ended in April of 2006. Submissions highlighted the difficulties involved in bringing damages actions and focused on how to create an adequate legal framework for such actions. Many strongly felt there was a need to allow consumer claims to be aggregated in some way, in particular to reduce the difference between the cost of the action and the minimal damages. However, other “respondents opposed any initiative which would facilitate collective redress. The[se] objections focus[ed] principally on the potential costs of collective redress mechanisms for society, and on the risk of multiple recoveries from infringers. Those opposing any initiative in that field evoke[d] the U.S. system in their argumentation, mentioning the excesses [the U.S.] system has led to, and the resulting costs for business and society as a whole.”¹⁵⁷

X. WHITE PAPER ON DAMAGES ACTIONS FOR BREACH OF THE EC ANTITRUST RULES

After significant consultation, the White Paper on Damages Actions for Breach of the EC Antitrust Rules was issued in 2008 to further focus ongoing discussion, along with a Commission Impact Assessment. The White Paper sets out concrete measures aimed at creating an effective private enforcement system in Europe and in doing so, deals with a broad range of topics, including: standing; access to evidence; applicable law;

others/actions_for_damages/study.html [hereinafter Comparative Study]. “Page numbers cited in this paper refer to the electronic version of the Comparative Study.”

¹⁵³ *Id.* ¶ 7 (citing Comparative Study, *supra* note 152, at 1).

¹⁵⁴ Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules, at 4, COM (2005) 672 final (Dec. 19, 2005).

¹⁵⁵ *Id.*

¹⁵⁶ Louis Degos & Geoffrey v. Morson, *The Reforms of Class Action Laws in Europe Are as Varied as the Nations Themselves*, 29 L.A. LAW 32, 37 (Nov. 2006).

¹⁵⁷ Commission Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules, ¶ 16, SEC (2008) 405 (Apr. 2, 2008).

fault requirements; damages; passing-on defenses; funding arrangements; and collective redress mechanisms.

The Commission Impact Assessment accompanying the White Paper found the level of the uncompensated damages in the field of competition law to be “particularly big”, in part due to “a number of particular characteristics of actions for damages for competition infringements. . . [including] the very complex factual and economic analysis required, the frequent inaccessibility and concealment of crucial evidence in the hands of defendants and the often unfavourable risk/reward balance for claimants.”¹⁵⁸ Since antitrust infringements usually involve damages which are spread widely among a large number of victims, the victims of these infringements are often reluctant to file suit due to the costs of litigation in relation to their potential pay-outs, procedural difficulties within the E.U. and the complicated analyses often required in antitrust cases.¹⁵⁹ Consequently, the Comparative Impact Assessment found “a clear deficit in terms of corrective justice” after identifying only a very limited number of successful damages awards for breach of E.C. antitrust rules.¹⁶⁰ This lack of private remedies was found to have negative effects on deterrence as well, as “the lack of an effectively functioning legal framework for anti-trust damages actions also precludes other beneficial effects of private enforcement of Treaty rights, namely the deterrence of future infringements inherent in effective compensation mechanisms.”¹⁶¹ Finding that traditional legal mechanisms are not working effectively in the specific context of antitrust damages claims, the Comparative Impact Assessment concluded that it is very difficult to exercise the right to antitrust damages and that very few victims are compensated.¹⁶²

Given the immense and diffuse nature of damages arising from many competition claims, the possible introduction of collective actions in the E.U. offers one of the best chances of increasing private enforcement. Nonetheless, collective redress mechanisms still meet with a great deal of resistance in Europe, likely due to the perceived excesses within the U.S.

¹⁵⁸ *Commission Impact Assessment*, *supra* note 3, at 13 ¶ 31.

¹⁵⁹ *Id.* at 15 ¶ 2.3.51.

¹⁶⁰ *Id.* ¶ 37.

¹⁶¹ *Id.* ¶ 38.

¹⁶² *Id.* ¶ 47 (“the ineffectiveness of the legal framework for antitrust damages is due to a set of different causes and drivers: it is partly the result of the high degree of legal uncertainty that potential claimants, but also defendants, face. It is also due to a range of legal and procedural hurdles in the traditional rules of the Member States. These factors, combined with the fact that antitrust cases, by nature, often require an unusually high level of very costly factual and economic analysis and present specific difficulties for claimants when it comes to access to crucial pieces of evidence often kept secret in the hands of the defendants, deter many victims from bringing actions as they consider the risk/reward balance to be negative.”).

system.¹⁶³ However, Europe's fears of importing the U.S. brand of class actions are largely unfounded. The fears of U.S. class actions, particularly in the field of antitrust, are greatly hyperbolized.¹⁶⁴ If Europe seriously hopes to promote private enforcement, particularly in competition law, there is little doubt that they will need to institute some mechanism for bringing collective actions.

Additionally, the overall legal framework in the U.S., which goes well beyond the mere class action mechanism, is very different from that in Europe. There are cultural differences between the U.S. and the E.U., as well as different procedural and legal frameworks.¹⁶⁵ In addition to a cultural reliance on governmental, not judicial, regulation, Europe has a range of legal procedures that differ fundamentally from those available in the U.S. As explained in the White Paper:

The overall impact, i.e., the actual size of advantages and disadvantages realized by a specific legislation concerning group litigation will not only depend on the regulations that directly concern the group litigation mechanism, but also on related law of civil procedure and the way regulations are interpreted and legal standards are applied by the courts.¹⁶⁶

U.S. class action litigation is characterized by a combination of features very specific to the U.S., including jury trials, one way shifting of costs, treble damages wide pre-trial discovery, and contingency fees agreements. Instituting the same collective actions in Europe as currently exist in the U.S. may result in markedly different outcomes given Europe's different legal and procedural backgrounds.¹⁶⁷ The E.U. should consider carefully how proposed mechanisms for collective actions will interact with the existing E.U. legal and procedural framework.

¹⁶³ See, e.g., Lin, *supra* note 3; see also Corinne Bergen, *Generating Extra Wind in the Sails of the EU Antitrust Enforcement Boat*, 5 J. INT'L BUS. & L. 203, 203 (2007).

¹⁶⁴ Lande & Davis, *supra* note 23, at 887 (arguing that perceived flaws of private antitrust enforcement are often supported by nothing more than anecdotal evidence, rather than reliable and rigorous data).

¹⁶⁵ Commission Impact Assessment, *supra* note 3, at 17 n.24 ("the overall legal context in the US, which goes well beyond the mere class action mechanism, is very different from the one in Europe. US class actions in antitrust cases are characterized by a combination of features that is very specific to the US The introduction in Europe of features similar to one or some of these features may not produce the same effects.").

¹⁶⁶ Welfare Impact Report, *supra* note 4, at 284.

¹⁶⁷ As an example, Canada and Australia have similar class action regimes to the U.S. but have different procedural rules and regulations. With respect to antitrust cases, Canada has opt-out procedures that are very similar to those in the U.S., but so far class actions have only been certified on consent and in connection with settlements. Another difference arises with respect to the use of jury trials in Canada and the U.S.: while allowed in Canada, plaintiff's lawyers consider antitrust cases too complex to be heard by a jury.

Nonetheless, the E.U. has responded to criticisms of the U.S. system and attempted to distance itself from the U.S. approach by emphasizing the importance of preserving the central role of the public authorities in the overall enforcement of EC competition rules. In keeping with this theme, the White Paper makes clear that its aim is not to substitute public enforcement,¹⁶⁸ repeatedly noting that the E.U. and U.S. systems have different fundamental objectives. In attempting to achieve a balance, the White Paper focuses on: a) the obstacles to private enforcement; b) preserving strong public enforcement; and c) the interaction between public enforcement and actions for damages.

In light of these considerations, the White Paper considers various policy options to determine the most appropriate form of collective actions. The White Paper focuses on four different collective redress mechanisms: joinder, representative actions, opt-in collective actions and opt-out collective actions. In assessing these four policy options, the Commission focuses on the goals of information, deterrence, compensation and uniformity. The goal of information loosely translates to transparency – including access to information regarding infringements. The Commission notes that retrieving such information for victims becomes more costly when the business relationship between victim and infringer is weak (compare direct and indirect customer), the establishment of an infringement is complex, and the victim is less sophisticated. With respect to the goal of deterrence, the White Paper observes that stand-alone cases generate greater beneficial effects than follow-on cases as far as detection. The White Paper notes that deterrence “may remain far from optimal due to three remaining problems: the rational apathy on the side of individual victims (in particular, those who suffered trifle damage), problems to finance the law suit and the risk of free-riding, which may equally reduce the number of claims brought below the efficient level.”¹⁶⁹ On the other hand, the White Paper expresses concerns about over-deterrence resulting from private damages. The White Paper is quick to point out however that “given the common assumption that current public fines are much too low to achieve efficient deterrence, additional expected compensation payments would not necessarily lead to over-deterrence.”¹⁷⁰ The goal of uniformity within the internal market is also stressed. The current system of decentralized enforcement under Regulation 1/2003 allows for significant variations in procedural laws. This has resulted in substantial differences between countries with respect to the possibility of group litigation.¹⁷¹ Competition between different enforcement regimes may generate negative interstate externalities and may result in a “race to the bottom” in which countries attempt to attract busi-

¹⁶⁸ Commission Impact Assessment, *supra* note 3.

¹⁶⁹ Welfare Impact Report, *supra* note 4, at 301.

¹⁷⁰ *Id.* at 302.

¹⁷¹ *Id.* at 304.

ness to their jurisdictions. The White Paper hopes to minimize differences so as to create a ‘level playing field’ for industry in Europe.¹⁷² Finally, the White Paper discusses the goal of compensation.

Arguably due to its focus on balancing strong public enforcement with private damages, the Commission emphatically prioritizes compensation over deterrence in its policy analysis. The White Paper explains that “since the primary objective pursued is full compensation of victims, the damages to be awarded should not influence the level of fines imposed by competition authorities in their public enforcement activities, nor under any future framework of enhanced private actions.”¹⁷³ “Public fines and purely compensatory damages serve two distinct objectives that are complementary: the main objective of public fines (and of potential criminal sanctions) is to deter not only the undertakings concerned (specific deterrence) but also other undertakings (general deterrence) from engaging or persisting in behaviour contrary to Articles 81 and 82. The main objective of private damages is to foster corrective justice by repairing harm caused to individuals or businesses. Of course, as mentioned earlier, this by no means precludes that effective systems for provision of damages also have positive side-effects on deterrence.”¹⁷⁴ “Achieving this objective of more effective compensation will ensure that the costs of infringements of competition law are borne by the infringers, and not by the victims, by compliant businesses and, indirectly, by society as a whole.”¹⁷⁵

The Commission explicitly prioritizes compensation over deterrence, stating, “since full compensation in the greatest possible number of cases is the first and foremost objective, good scores on achieving the goal of full compensation will weigh heavily in the impact analysis and in identification of the Preferred Option.”¹⁷⁶ By contrast, the White Paper explains that “because increasing deterrence is not one of the primary objectives, in the final stage of comparing Policy Options and determining the Preferred Option less weight will be given to positive scores on deterrence, particularly compared with good scores on the central objective of compensation.”¹⁷⁷

While this emphasis on compensation may be understandable in light of Europe’s hyperbolized fears of following the U.S.’s lead, it is still problematic. The United States experience highlights the fact that antitrust class actions are extremely effective in terms of deterrence, and less so with respect to compensation. In formulating policy recommendations, the E.U.’s decision to prioritize compensation over deterrence will lead to less than optimal results. The White Paper fails to give significant

¹⁷² *Id.* at 305.

¹⁷³ Commission Impact Assessment, *supra* note 3, ¶ 61.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* ¶ 60.

¹⁷⁶ *Id.* ¶ 95.

¹⁷⁷ *Id.* ¶ 99.

weight to what should be the paramount goal of private actions, deterrence.

XI. POLICY RECOMMENDATIONS FOR THE INTRODUCTION OF COMPETITION LAW CLASS ACTIONS

In analyzing the four collective action policy options, the White Paper balances its stated goals (with emphasis on compensation) against the following costs: litigation costs, administrative burdens, error costs and costs of harmonization.¹⁷⁸ Of the four policy options, the White Paper ultimately recommends two collective redress mechanisms: representative actions brought by qualified entities and opt-in collective actions (which will be discussed below). However, these policies are not optimal because of the White Paper's failure to properly emphasize deterrence. In the field of antitrust law, a more aggressive form of collective redress mechanism, such as an "opt out" action, is necessary to achieve an optimal level of deterrence.

A. *Representative Actions*

Representative Actions are actions initiated by an *ex ante* authorized representative body on behalf of a specific group of victims. Although representative actions currently exist in Italy, Spain, UK¹⁷⁹, The Netherlands, Greece and Germany, they are still, for the most part, rare in the E.U.

Representative actions may be initiated by consumer associations, associations of traders or by a public body. Associations may claim damages on behalf of their members either because they generally represent their interests or because the association is established with the particular aim to represent the claims of its members in specific cases, as was done in the *Skandia Case* in Sweden.¹⁸⁰ While representative actions for damages may be an appropriate way to encourage greater private enforcement of competition cases, procedures for representative bodies to bring this type of action on behalf of the victims they represent are, for the

¹⁷⁸ Welfare Impact Report, *supra* note 4, 306-11.

¹⁷⁹ In the UK, a representative action may be brought in the CAT after the establishment of an infringement by the Office of Fair Trading (OFT), a concurrent regulator or the European Commission. Enterprise Act, 2002, c. 40 (Eng.).

¹⁸⁰ Welfare Impact Report, *supra* note 4, at 271 n.441 ("The *Skandia* case concerned the illegal transfer of money between the parent company Scandia AB and other subsidiaries to the detriment of 1.2 million private insurance policy holders of the subsidiary Scandia Liv. To make the procedure manageable the association Foereningen Gruppptalan mot Skandia was founded. In the first six months already 15,000 victims became members and paid a small membership fee. The fees were used to partially finance the class action, in combination with a risk contract with the lawyers.").

most part, either not currently available under national law or not fully suitable.

The advantages of representative suits include increased access to information, more evenly matched opponents, greater detection of competition law infringements, less rational apathy, and easier financing through fees. Representative actions by associations also offer more possibilities to curb principal-agent problems than do other forms of class actions.¹⁸¹ Moreover, representative actions are arguably more in line with the existing legal systems in Europe.

Representative actions are not without their problems. One of the main obstacles to representative actions is funding. One potential solution is the creation of a “partially publicly financed fund . . . in which revenues (for example, proceeds from disgorgement procedures) are used to cross-finance damages claims. Such a fund may also be made accessible for representative actions.”¹⁸² While “[p]ublic subsidies may . . . be considered . . . this moves private enforcement closer to the domain of public enforcement and makes associations dependent on their financiers.”¹⁸³ Another option is the creation of professional litigation companies. Professional litigation companies “may also be held to higher accountability standards and be less directly motivated by monetary profits, as these gains can generally only be used for achieving the purpose of the organisation and not for private purposes.”¹⁸⁴

The expansion of representative actions would undoubtedly offer a significant step in encouraging private enforcement. However, representative actions alone do not adequately address the shortcomings of private enforcement in EC competition law. A more aggressive form of collective action litigation is required if the E.U. hopes to possess an active private enforcement landscape in the field of competition law.

B. *Comparison of Opt-in and Opt-Out Collective Actions*

After considering representative actions, the Commission considers opt-in and opt-out collective actions. The White Paper ultimately asserts a preference for opt-in collective actions. The White Paper justifies its choice of opt-in collective actions over opt-out collective action by pointing out that “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).”¹⁸⁵

The White Paper’s preference for opt-in collective action is misguided. Compared to opt-in schemes, opt-out collective actions possess significant

¹⁸¹ *Id.* at 291, 322-26.

¹⁸² *Id.* at 321.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ Commission Impact Assessment, *supra* note 3, ¶58.

advantages. Opt-in collective actions provide more incentives for lawyers to monitor a firm's behavior and initiate proceedings, when their expected fees are linked to the size of the group or the total value of the claim. Consequently, the likelihood that an action will be brought is higher than with opt-ins.¹⁸⁶ The number of victims reached will be larger, making possible better risk sharing and larger cost savings. The rational apathy problem will be better overcome than under opt-ins and the problem of pre-financing the law suit may become less pressing because of the larger expected gain. All of this will lead to a better level of deterrence within competition law, which should be the ultimate goal of the E.U.

"Since an opt-out scheme encompasses a larger number of victims than an opt-in scheme, the goal of corrective justice will be reached for a larger group of victims."¹⁸⁷ "An opt-out scheme may more effectively enforce the right of individuals to claim damages for competition law infringements. Accordingly, opt-out schemes may significantly contribute to the creation of a competition culture in Europe."¹⁸⁸ Given the above factors, an opt-out collective action is the best policy prescription in the area of E.C. competition law.

That is not to say that the implementation of "opt-out" class actions in the E.U. will be easy. While opt-outs potentially offer higher benefits in terms of deterrence, corrective justice and the internal market, there are still significant obstacles to their adoption. There would be greater harmonization costs, since "[n]o Member State [has] so far introduced a pure opt-out collective action into its legal system."¹⁸⁹ Litigation costs would also be greater because opt-out schemes require active involvement of lawyers and judges to manage the collective action. Additionally, opt-out collective actions raise difficult issues as to how to notify all victims, how to finance the procedure and how to distribute the damages.

In addition to the above concerns, there are other significant problems with opt-out collective actions. Perhaps, most significant is the fact that opt-outs violate deeply held beliefs in the Member States that parties should be present in actions concerning them, as evidenced by constitutional problems with opt-outs. For example, the German constitution strictly limits the capability of an individual to be bound by a judgment rendered in a proceeding in which he did not take part or in which he never had the possibility to intervene.¹⁹⁰ Opt-in mechanisms come closest to the traditional E.U. legal principle that the outcome of a case is binding only *inter partes*. Opt-outs have an impact on the rights of individual parties unless they become active and declare not to be willingly bound by the judgment or the settlement. It is therefore one step further

¹⁸⁶ Welfare Impact Report, *supra* note 4, at 312.

¹⁸⁷ *Id.* at 313.

¹⁸⁸ *Id.* at 315.

¹⁸⁹ *Id.* at 316.

¹⁹⁰ *Id.*

removed from the concept of *inter partes* litigation. It carries the risk that individuals who were not aware of the proceeding may be bound by the resulting verdict.¹⁹¹ The possibility that “members of the group who were never [made] aware of the proceeding may be bound by the outcome . . . creates conflicts with constitutional rights.”¹⁹² As a result, “introducing opt-out collective actions would require substantially larger changes than other forms of group litigation in many legal systems.”¹⁹³

Nonetheless, the benefits that would be achieved in terms of deterrence within E.C. competition law are well worth the costs involved in implementing an opt-out class action mechanism over the continent.

XII. REMAINING OBSTACLES TO CLASS ACTIONS

A. *Financing of Collective Action Litigation*

Whatever type of group litigation the E.U. ultimately institutes will face significant problems if the E.U. does not consider how to appropriately finance it. The Commission’s White Paper does not significantly consider the funding of class actions, which ultimately leaves potential plaintiffs significantly constrained. Any collective redress mechanism will be significantly hamstrung if there is not an efficient means of financing it. “The Ashurst Report (2004) reveal[s] that in all Member States legal costs have to be paid upfront and in all but two Member States the loser-pays rule applies.”¹⁹⁴ In most of Europe, a losing party is usually responsible for a substantial portion of the winning adversary’s reasonable legal fees, and contingency fee arrangements between plaintiffs and their attorneys are generally not acceptable.¹⁹⁵ This system discourages a plaintiff from bringing any cause of action, especially competition law violations against powerful corporations who will likely have substantial litigation costs. Without a change in the traditional funding rules, it may be that private rights of actions in the E.U. will not flourish. If Europe truly hopes to make class actions available, they will have to rethink their current system of financing.

Several alternative ways of funding group litigation are available, and, in some cases, have already been adopted in different jurisdictions within Europe. Contingency fees are one way to overcome the obstacles of financing litigation when the liquidity of plaintiffs is constrained. However, contingency fees are currently not permitted in the E.U. Member

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 177.

¹⁹⁵ Thomas D. Rowe, Jr., *Shift Happens: Pressure on Foreign Attorney-fee Paradigms from Class Actions*, 13 DUKE J. COMP. & INT’L L. 125, 128 (2003). For current state of contingency fee practice in European countries, see Grace, *supra* note 144, at 289.

States. Another option is to introduce one-way fee-shifting rules for private antitrust litigation such as that introduced by the U.S. Clayton Act.¹⁹⁶ The British have found a way around the ban on contingency fees in the form of professional litigation funders. Funders are companies or individuals—anyone but a licensed lawyer—who contract with plaintiffs to sponsor their lawsuit. In exchange they take a percentage of the award if the plaintiffs prevail, or nothing if they lose. Another option available as a means to facilitate private litigation is the creation of Contingency Legal Aid Funds for damages actions, especially in cartel cases.¹⁹⁷ CLAFs are currently operated in Canada, Australia and Hong Kong.¹⁹⁸ However, creating similar funds at an E.U. level would create problems of initial funding, eligibility and ownership.¹⁹⁹ Another option is to use the pool of money from unclaimed rewards to finance litigation. “Indirect mechanisms to compensate injured parties may be used, such as *fluid recovery* or *cy pres*, which may also be implemented by the state. . . . In many jurisdictions that have established systems of class actions, aggregate assessments of damages of the group as a whole are provided for.”²⁰⁰

XIII. CONCLUSION

Predicting what may ultimately lie in store for class actions in Europe is fraught with difficulty and uncertainty.²⁰¹ Undoubtedly, whatever policy the E.U. decides upon, the process of legal and procedural harmonization it will entail will be long, complex, and the outcome is as yet uncertain. The E.U.’s decisions in the area of competition law are especially significant, given that whether or not the introduction of collective actions into competition law in the E.U. is successful may pave the road for class action litigation in other areas of law in Europe.

¹⁹⁶ *Id.* at 182 (citing Harold J. Krent, *Explaining One Way Fee-Shifting*, 79 VA. L. REV. 2039, 2045-75 (1993)).

¹⁹⁷ See Alan Riley & John Peysner, *Damages in EC Antitrust Actions: Who Pays the Piper?*, 31 EUR. L. REV. 748 (2006).

¹⁹⁸ Welfare Impact Report, *supra* note 4, at 286. Annex 1 of this report contains a more detailed description of these instruments.

¹⁹⁹ *Id.* at 286, Ann. 1.

²⁰⁰ *Id.* at 289.

²⁰¹ *Id.* at 10, 155.