THE EUROPEAN COLLECTIVE REDRESS DEBATE AFTER THE EUROPEAN COMMISSION'S RECOMMENDATION

One Step Forward, Two Steps Back?

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ABSTRACT

The paper examines, through the prism of the European Commission's Recommendation, the European approach on collective redress. First, it demonstrates that the introduction of collective redress in respect of small claims is necessary and the opt-out scheme is preferable. Second, it refutes the major arguments and fears against the opt-out system. Third, it demonstrates that the pivotal question of collective redress is financing and the law should provide a risk premium to the group representative.

Keywords: class action; collective redress; comparative law; EU law; legal transplants

§1. INTRODUCTION

On 11 June 2013, the European Commission published a Recommendation on collective redress (the Recommendation),[1] proposing that Member States adopt collective redress

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mechanisms for violations of EU law. The Recommendation adopted a conservative approach, expressing a strong preference towards the opt-in system.[2] This means that only those group members in a class action who expressly assented to the collective action are involved in it: contrary to the 'notice and opt-out' (hereafter, 'opt-out') system, where silence implies assent and those group members who do not want to get involved have to opt out.

The Recommendation seems to put an end to a decade-long European debate on collective redress, which – on the level of EU law – ignited in the context of competition law's private enforcement and then gradually also spread to other fields of law.

Collective redress is an extremely controversial issue, and its history in Europe is full of hesitation, scare-mongering and phobia of novel legal solutions.

By way of example, although Italy adopted a law on collective proceedings in 2007, the entry into force of this law was suspended for two years and, finally, a new act was adopted in 2009.[3] In Hungary, the President of the Republic vetoed an Act on class actions adopted by the Hungarian parliament in 2010 (the act followed the opt-out approach).[4] In July 2009, the conversion of the opt-in scheme into an opt-out system was refused in England and Wales.[5]

It is an interesting facet of the history of collective redress in Europe that proposals and conceptions elaborated by scholars and experts are torpedoed by intensive economic lobbying[6] and fail to get through the political filter: in some cases they were fully rejected

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1 Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, [2013] OJ L 201/60.

2 Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, para. 21 ('The claimant party should be formed on the basis of express consent of the natural or legal persons claiming to have been harmed ("opt-in" principle). Any exception to this principle, by law or by court order, should be duly justified by reasons of sound administration of justice.'). For a general overview on the Recommendation see S. Weber Waller, 'The Fall and Rise of the Antitrust Class Action', *SSRN* (2015), http://ssrn.com/abstract=2641867, p. 14–20.

3 See Act 244 of 24 December 2007 (*Legge 24 Dicembre 2007, n. 244*), Act 99 of 23 July 2009 (*Legge 23 Luglio 2009, n. 99*), www.tedioli.com/Italian_class_action_text_english_version.pdf; M. Siragusa and E. Guerri, 'Collective Actions in Italy: Too Much Noise for Nothing?', 1 *Global Competition Litig. Rev.* (2008), p. 32; R. Nashi, 'Italy's Class Action Experiment', 43 *Cornell Int'l L.J.* (2010), p. 147.

4 See Proposal No T/11332 on the Amendment of Act III of 1952 on the Civil Procedure (*T/11332. számú törvényjavaslat a polgári perrendtartásról szóló 1952. évi III. törvény módosításáról*). As noted above, the proposal was vetoed by the President of the Republic of Hungary. The Budapest Bar also expressed its concerns as to the text of the Proposal.

5 The Government's Response to the Civil Justice Council's Report, Improving Access to Justice through Collective Actions (2009), http://collections.europarchive.org/tna/20100208150045/http:/www.justice.gov.uk/about/docs/government-response-cjc-collective-actions.pdf. See C. Hodges, 'Collective Redress in Europe: The New Model', 29 *Civil Justice Q.* (2010), p. 370, 376–379; C. Hodges, 'From Class Actions to Collective Redress: A Revolution in Approach to Compensation', 28 *Civil Just. Q.* (2009), p. 41, 50–66.

6 'There is a strong, well-organized, well-funded and influential opposition to the proposal on class actions'. P.H. Lindblom, 'Grupptryck mot grupptalan' (Group Pressure against Group Action), *Svensk Juristtidning* (1996), p. 85, quoted in M. Välimäki, 'Introducing Class Actions in Finland – Lawmaking Without Economic Analysis', *SSRN* (2007), http://ssrn.com/abstract=1261623, p. 9, footnote 32. See M. Välimäki, 'Introducing Class Actions in Finland – Lawmaking Without Economic Analysis', *SSRN* (2007),

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(for example in England and Wales in 2009,[7] though recently the opt-out scheme was made available in competition law, subject to the Competition Appeal Tribunal's discretion).[8] In other cases, the initially progressive and effective proposal was emasculated, and the version that was finally adopted was deprived of all the virtues that could make the system workable and widespread (see Finland[9] or France).[10]

Unfortunately, the development of EU collective redress is not different from the above experience. In October 2009, the European Commission withdrew its proposal for an opt-out system[11] while it launched a public consultation on the matter 1.5 years later. And in June 2013, the Commission published the most recent Recommendation, which is, to put it mildly, a disappointing turnaround establishing a feeble and emasculated scheme. Of course, it would be unfair not to mention that the Commission shares the political responsibility with the European Parliament, which was the first to cave in to industry lobbying and to reject the opt-out system with arguments peculiar to phobia of foreign legal solutions.[12]

This paper examines, through the prism of the most recent Recommendation, the European approach on group organization costs and financing. The enforcement of collective claims, like the enforcement of individual claims, hinges on costs and financing. However, it is an important difference between individual and collective actions that, in the latter case, there are considerable organization costs, which, in certain matters, may prove to be prohibitive. Further, due to the involvement of a third party (group representative),[13] financing may become more complicated. An opt-out system

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http://ssrn.com/abstract=1261623, p. 1, 3; P.H. Lindblom, 'National Report: Group Litigation in Sweden', *The Globalization of Class Actions* (2007), http://globalclassactions.stanford.edu/sites/default/files/documents/Sweden_National_Report.pdf, p. 9, 31; P.H. Lindblom, 'National report: Group Litigation in Sweden, update paper sections 2.5 and 3', *Globalclassactions* (2008), http://globalclassactions.stanford.edu/sites/default/files/documents/Sweden_Update_paper_Nov%20–08.pdf, p. 14.

7 The Government's Response to the Civil Justice Council's Report, Improving Access to Justice through Collective Actions (2009).

8 The Competition Appeal Tribunal specifies in the collective proceedings order whether the procedure has to be carried out in the opt-in or the opt-out system. Sections 47A-49E of Competition Act 1998, inserted by Part 1 of Schedule 8 of the Consumer Rights Act 2015.

9 M. Välimäki, 'Introducing Class Actions in Finland – Lawmaking Without Economic Analysis', *SSRN* (2007), http://ssrn.com/abstract=1261623, p. 3.

10 The introduction of collective redress into French law had been examined by two professional committees in the era long before the adoption of the new provisions of the French Consumer Code (*Code de la consummation*) in 2014. Both committees proposed the introduction of a quasi-opt-out scheme. However, the legislator did not follow any of them. V. Magnier, 'Class actions, group litigation & other forms of collective litigation – France', *Globalclassactions* (2007), http://globalclassactions.stanford.edu/sites/default/files/documents/France_National_Report.pdf, p. 4.

11 The text is available in P. Lowe and M. Marquis (eds.), *European Competition Law Annual 2011: Integrating Public and Private Enforcement of Competition Law – Implications for Courts and Agencies* (Hart Publishing, 2014), p. 513. See M. Ioannidou, 'Enhancing the Consumers' Role in EU Private Competition Law Enforcement: A Normative and Practical Approach', 8 *Competition L. Rev.* (2011), p. 59, 78–80.

12 European Parliament resolution of 2 February 2012 on 'Towards a Coherent European Approach to Collective Redress', (2011/2089(INI)).

13 Though the group representative may be a group member, he still qualifies as a third party as to the claims of the rest of the group.

lessens the group's organization costs significantly and makes collective redress possible in cases where such costs proved to be prohibitive. However, collective redress cannot be truly effective without appropriate funding; this does not mean that no cases would be brought to court: this means that the practical success of collective redress would be moderate (or more moderate than it should be).

First, this article demonstrates that the introduction of collective redress in respect of small claims is necessary and the opt-out scheme is preferable. The paper presents the hurdles which the enforcement of small claims encounters and demonstrates how collective redress makes these claims enforceable in practice. Although the group's organization costs can be reduced through different techniques (for instance, through easing adhesion), the most cost-effective method is the opt-out system, which is capable of reducing the costs to the minimum (albeit certainly not to zero).

Second, the paper refutes the major arguments and fears against the opt-out system. It examines the problem of 'representation without authorization' and demonstrates that this is not incompatible either with national constitutional requirements or with the European legal traditions. It also demonstrates that a collective redress system based on opt-out is feasible and would cause no litigation boom, and would create no blackmailing potential.

Third, the paper demonstrates that the pivotal question of collective redress is financing and that the law should provide a risk premium to the group representative. Group representatives are expected to take over the group's case and to invest in the business of someone else, without having a clear prospect of reward. Even if reasonable expenses are remunerated without a risk premium (compensating the representative for the risk he runs in the interest of group members), group representatives will be disinclined to undertake the burden of group representation. The Recommendation rejects those legal institutions of US law that afford a risk premium to group representatives and that make the US class action operational. On the other hand, it fails to suggest alternative measures that could handle this problem. Thus, not only does the Recommendation create a sluggish collective redress scheme (by not minimizing the organization costs), at the same time it also fails to oil it up to make it operational.

§2. WHY ARE SMALL CLAIMS NOT ENFORCED AND HOW CAN COLLECTIVE REDRESS MAKE THESE CLAIMS ENFORCEABLE IN PRACTICE?

'Rights which cannot be enforced in practice are worthless.'[14] Small claims face hurdles that may prevent individual enforcement and lead to sub-optimal law enforcement.[15]

14 European Commission Staff Working Document Public Consultation: Towards a coherent European approach to collective redress, SEC(2011) 173 final, para 1.1.

15 For a detailed elaboration of the analysis set forth in this section see C.I. Nagy, 'Comparative Collective Redress from a Law and Economics Perspective: Without Risk There Is No Reward!', 19 *Columbia Journal of European Law* (2013), p. 469–498.

First, non-recoverable legal costs may deter litigation. Although in Europe legal costs are, in principle and with some restrictions, borne by the losing party, the winning party cannot shift the legal costs in full. The proof and documentation of the legal costs may be difficult; the law may restrict the amount of the attorney's fee that can be shifted onto the losing party; the claim's enforcement may give rise to some practically unrecoverable expenses. Furthermore, certain expenses cannot be shifted onto the losing party (these costs are not legally shiftable). Examples are inconveniences related to the litigation and the time the claimant spends on the claim. Obviously, such expenses may emerge in any matter, but in respect of small claims these costs are comparably much higher given the small pecuniary value involved.

Second, the costs for the preliminary legal assessment may also dissuade the plaintiff. Although theoretically these may be regarded as shiftable expenses (as these emerge in relation to the litigation), information shortage pertains to such situations. The preliminary legal assessment occurs at a stage where the claimant has no information about his chances, so he has to take into account that he may have to pay even if there is no reason to sue.

Third, in the context of small claims, the value at stake is small and legal costs are, in comparison to the claim's value, very high – here, a relatively trivial probability of failure may make the balance of litigation negative. The higher the legal costs are in relation to the claim's value, the better this risk crops out. As a matter of practice, litigation inevitably involves some risk and almost all claims have immanent hazards.

All in all, in case of small-value claims it may be economically unreasonable to litigate (the expected costs may be higher than the expected value) even in well-founded cases of merit.

Collective redress has certain advantages that make the enforcement of small claims possible in cases where numerous persons are damaged by the same illegal act. Although damages are small for each individual (which may make litigation unreasonable), collective damages (the sum of various individuals' damages) are high. The merit of collective redress can be attributed to two virtues: economies of scale[16] and tackling the external economic effects (externalities).

Joint litigation may entail economies of scale and is susceptible to doing away with the external economic effects individual litigation may cause. This is due to the fact that the enforcement of individual small claims may have significant common costs.[17] Although it is true that this is a general advantage of joint litigation (that is, it may equally emerge in cases where the claims are not of small value), with small claims, the cost-savings are comparably higher than in the case of huge claims.

In related matters, litigation costs are often not commensurable to the number of the claimants, since certain expenses (testimonies, deliberation of liability, and so on)

16 See, e.g., T.S. Ulen, 'An Introduction to the Law and Economics of Class Action Litigation', 32 *Eur. J.L. & Econ.* (2011), p. 185, 187.

17 See R. Bone, *Civil Procedure: The Economics of Civil Procedure* (Foundation Press, 2003), p. 261–265.

emerge only once.[18] A substantial part of the legal costs may be fixed costs, which emerge independently of the number of the claimants, while the rest may be made up of variable costs, which are affected by the number of the claimants. If the loss is caused by the same wrong, there may be common (fixed) costs; and if these are significant in comparison to individual costs, collective redress may be cost-effective.

Individual litigation may entail positive external effects (externalities), conferring advantages on other class members they did not pay for. The difference between the expected costs and the expected value may be negative at the individual level but positive at the group (or social) level. Since the individual litigator does not benefit from the positive external economic effects enjoyed by other group members (that is, these benefits are not internalized), this may lead to sub-optimal litigation. Although one might argue that test cases might effectively substitute collective litigation, this is refuted by the fact that test cases may entail free-riding: non-active group members may free-ride on the efforts of the individual litigator who started the test case.[19]

After having demonstrated that collective litigation makes the enforcement of small claims a reality also in cases where individual litigation would not pay out, the question to be addressed is why collective litigation does not occur spontaneously? Why do group members not use the traditional legal tools (joinder of claims,[20] assignment of claims to an entity founded by group members)[21] to organize the group? The reason is the cost of group organization. These costs may be very high, in some cases even prohibitive,[22] and traditional legal tools are not tailored to the needs of collective litigation, thus increasing the costs of group management.[23]

All in all, the conclusion may be drawn that the enforcement of small claims, in certain cases, may be sub-optimal, and collective litigation may make litigation possible also in cases where individual enforcement would not be economically rational. Collective litigation may entail costs-savings due to economies of scale and may tackle the problem of positive externalities. Furthermore, in case of small claims, collective litigation necessitates regulatory intervention, since, due to the high organization costs, it would not work spontaneously. Hence, the law has to tackle the problem of organization costs so as to make the enforcement of these claims a reality.

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18 T.S. Ulen, 32 *Eur. J.L. & Econ.* (2011), p. 185, 187.

19 At the same moment, not only positive but also negative external effects may be present here. If group members sue on an individual basis and the defendant wins against the first plaintiff, this may have a negative impact on subsequent plaintiffs. Although the judgment given in the case of one of the group members has no res judicata effects in actions brought by other group members, the judgment in the first case may have precedential value or at least persuasive authority. Hence, the defendant may find it rational to invest much more in winning the early cases, because winning in these proceedings may discourage later litigation. T.S. Ulen, 32 *Eur. J.L. & Econ.* (2011), p. 185, 189.

20 C.I. Nagy, 'A Csoportos Igényérvényesítés Gazdaságtana és Lehetőségei a Magyar Jogban', 3 *Jogtudományi Közlöny* (2011), p. 163.

21 Ibid.

22 T.S. Ulen, 32 *Eur. J.L. & Econ.* (2011), p. 185, 191.

23 For a detailed analysis see C.I. Nagy, 19 *Columbia Journal of European Law* (2013), p. 469, 478–479.

There are various tools which can be used to handle the problem of organization costs. Some of them reduce these costs, while some of them tackle the risks attached to them. First, the opt-out system decreases organizational costs considerably,[24] although these expenses can be mitigated in the opt-in system. Second, effective cost-shifting can also mitigate the negative effects of the organizational costs problem: if the group representative can expect reimbursement for reasonable organizational costs he may be more inclined to incur them. For this reason, the 'loser pays' principle has to be extended to organizational costs. Third, the group representative should be granted a risk premium. The reason is that the group representative runs a risk (the risk of losing the case and, thus, his investment) in favour of the group members, and he has to be compensated for the risks he takes. Otherwise, the balance of the expected costs and expected value would be negative and it would be economically irrational for the group representative to take up the case.

In sum, collective litigation can be made effective only if regulatory measures are taken. First, organizational costs have to be reduced. Second, the group representative has to be compensated in the form of a risk premium for the risk he runs in favour of group members (that is, for the risk that he would lose the case and would not be reimbursed for the legal expenses, and that he would be held liable for the defendant's legal costs).

§3. WHY ARE THE MAJOR OBJECTIONS AND FEARS AGAINST THE OPT-OUT SYSTEM UNFOUNDED?

A. CONSTITUTIONAL CONCERNS: PRIVATE AUTONOMY AND TACIT ADHERENCE

The opt-out system may raise constitutional concerns, since 'representation without authorization' may impair a party's private autonomy, which consists in this context of the right to decide whether or not to enforce a claim and how to enforce it.[25] However, there are quite a few compelling arguments that suggest that the opt-out scheme, as far as small claims are concerned, should not be outright unconstitutional. Although collective redress may certainly be shaped in a manner that goes counter to constitutional requirements, the constitutional concerns relating to small claims are mainly an optical illusion.

First, in the absence of a collective redress mechanism, numerous small claims would not get to court, and the collective action confers solely benefits to group members

24 Compare J.G. Delatre, 'Beyond the White Paper: Rethinking the Commission's Proposal on Private Antitrust Litigation', 8 *Competition L. Rev.* (2011), p. 29, 38 (submitting that opt-out collective action would be sufficient 'on its own and without further incentives to lead to a substantial increase in the number of victims compensated').

25 Commission Communication Towards a European Horizontal Framework for Collective Redress, COM(2013) 401 final, p. 11.

(provided they do not run the risk of being liable for the defendant's legal costs in case the group representative fails to win the action). It would be perverse to refer to the impairment of private autonomy in a case characterized by obligee inertia,[26] where the law does not ensure the claim's practical enforceability.

Second, opt-out systems embed, by definition, the right to opt out. While mandatory representation (that is, when group members are compelled to be part of the group and cannot opt out) may obviously go counter to the right to private autonomy (that is, the right to decide whether to sue or not, and how to enforce the claim), there is no 'forced membership' in case of an opt-out system. Group members can leave the group without any further action ado. The opt-out scheme merely reverses the mechanism of adherence and infers assent from silence. In principle, a group member has to submit a declaration if he envisages being part of the action. In the opt-out system a group member has to submit a declaration if he does not want to be part of the claim. The group member makes the decision; and since experience shows that the vast majority of group members do not opt out, it is reasonable to reverse the mechanism of adherence.[27]

It has to be noted that the opt-out system is much more constitutional and preserves private autonomy much better than the Injunction Directive[28] covering thirteen consumer protection directives.[29] The Directive authorizes various entities to launch proceedings for a declaratory judgment or injunction on behalf of a class of unidentified

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26 See T. Eisenberg and G.P. Miller, 'The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues', 57 *Vanderbilt Law Review* (2004), p. 1529, 1532; S. Issacharoff and G.P. Miller, 'Will Aggregate Litigation Come to Europe?', 62 *Vanderbilt Law Review* (2009), p. 179, 203–206; S. Issachoroff and G.P. Miller, 'Will aggregate litigation come to Europe?', in G. Backhaus, A. Cassone and G.B. Ramello (eds.), *The Law and Economics of Class Actions in Europe: Lessons from America* (Edward Elgar, 2012), p. 37, 60.

27 See T. Eisenberg and G.P. Miller, 57 *Vanderbilt Law Review* (2004), p. 1529, 1532; S. Issacharoff and G.P. Miller, 62 *Vanderbilt Law Review* (2009), p. 179, 203–206; S. Issachoroff and G.P. Miller, in G. Backhaus, A. Cassone and G.B. Ramello (eds.), *The Law and Economics of Class Actions in Europe: Lessons from America*, p. 37, 60.

28 Directive 2009/22/EC on injunctions for the protection of consumers' interests, [2009] OJ L 110/30.

29 The Directive covers, among others, Directive 93/13/EEC on unfair terms in consumer contracts (Unfair Terms Directive), [1993] OJ L 95/29. The Court of Justice (CJEU) established in relation to the Unfair Terms Directive in Case C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt.*, ECLI:EU:C:2012:242, para. 43–44, that judgments rendered in collective actions launched on the basis of Article 7 of the Unfair Terms Directive may and shall have legal effects on all interested consumers. '[T]he national courts are required (…) to draw all the consequences provided for by national law in order to ensure that consumers who have concluded a contract to which those GBC [general business conditions] apply will not be bound by that term'; the Directive 'does not preclude the declaration of invalidity of an unfair term included in the GBC of consumer contracts in an action for an injunction (…) from producing, in accordance with that legislation, effects with regard to all consumers who concluded with the seller or supplier concerned a contract to which the same GBC apply, including with regard to those consumers who were not party to the injunction proceedings'; '*where the unfair nature of a term in the GBC has been acknowledged in such proceedings, national courts are required*, of their own motion, and also with regard to the future, *to take such action* thereon as is provided for by national law *in order to ensure that consumers who have concluded a contract with the seller or supplier to which those GBC apply will not be bound by that term*.' (emphasis added).

consumers without the need for any individual authorization or assent, and, theoretically, it does not make it possible for group members to leave the group. This means that group members cannot opt-out even if they want to; they are stuck in the group. Still, the constitutionality of the Injunction Directive has not been questioned.

Third, it has to be noted that while the right of disposition is constitutionally protected, access to justice is equally a constitutional right. The purpose of collective redress is to make practically unenforceable rights a reality.

Fourth, cases that can be raised from national constitutional laws, used as arguments that the opt-out scheme is irreconcilable with national constitutional requirements, can be distinguished from the enforcement of small pecuniary claims in an opt-out collective procedure. In fact, in 2014 the French Constitutional Council (*Conseil Constitutionnel*) confirmed the recently introduced French regulatory regime, which, in certain points, has salient opt-out features.

France introduced a collective redress mechanism for consumers in 2014,[30] and it was scrutinized and endorsed by the French Constitutional Council.[31]

The new French regulatory regime establishes a truly unique system (*action de groupe à la française*), which combines the elements of the opt-out and opt-in model. Even though French law retained the requirement that the consumer has to adhere through an express declaration, this declaration has to be submitted only after the judgment is made, when the consumer turns the award into cash.

The scheme appears to be a de facto opt-out system, although the consumer's right to opt-in is retained and can be exercised after the judgment is made. This is, to some extent, comparable to the opt-out system, since even there, at the end of the day, group members may have to act in order to receive their share of the award. At the same time, there is a real difference between the '*action de groupe à la française*' and opt-out class action. In the former case, the judgment's *res judicata* effect extends to the group member only if after having been duly informed he expressly accepts the judgment and the compensation. If a group member thinks that he can reach a more favourable award, he can enforce his claim individually. However, this seems to be a rather formal difference: it is highly unlikely that in the subsequent individual action the court would reach a different conclusion. Taking into account the rule that the consumer has to step in only in the last phase, after the legal situation has been fixed, and assuming that consumers will go their own way extremely rarely, this system could be qualified as a de facto opt-out scheme.

The French consumer code (*Code de la consommation*) establishes a standard group procedure and a simplified procedure. The simplified procedure[32] applies if the identity

30 Act 2014–344 of 17 March 2014 (*Loi n° 2014–344 du 17 mars 2014 relative à la consommation publiée au Journal Officiel du 18 mars 2014*).

31 Decision 2014–690 of 13 March 2014 (*Le 14 novembre 2014, JORF n°0065 du 18 mars 2014, Texte n° 2, Décision n° 2014–690 DC du 13 mars 2014*).

32 Article L423–10 of the French Consumer Code.

and the number of the injured consumers are known and they sustained either a harm of the same amount, of the same amount per a given service or of the same amount for a given period. According to these criteria, the court may establish the defendant's liability and order it to compensate group members directly and individually within the deadline set by the court. The only element which obscures the opt-out nature of this procedure is the rule providing that the consumer can be compensated only after accepting to be compensated according to the terms of the judgment. The simplified procedure has the strongest opt-out features. From the perspective of *res judicata* effects, this rule preserves, indeed, the opt-in nature of the procedure, since if the consumer is not content with the judgment, he may take the route of individual litigation. However, notwithstanding the lack of *res judicata* effects, as noted above, it is highly unrealistic that the court would come to a different conclusion in the subsequent individual litigation. Furthermore, as a matter of fact, the simplified procedure does not make express adherence a pre-condition of the procedure and the judgment. Further, it does not require much more activity from the consumer than opt-out systems would require: the consumer would have to act at the payment or enforcement stage anyway (for example, contact the group representative or the court, initiate the enforcement of the judgment).

The standard procedure follows the same logic.[33] In the first phase, the judge – as a result of the group representative's action – decides on the merits of the case, insofar this is possible. It establishes the defendant's liability, defines the group and establishes the applicable criteria, determines the harms that can be compensated in respect of all consumers or all categories of consumers, including the amount and the elements, which permit the evaluation of the harm. Furthermore, the court establishes the measures that have to be adopted to inform group members and fixes a deadline for adherence. In the second, out-of-court phase, group members are informed and have to decide whether they want to be covered by the judgment. In the ideal case, the defendant pays compensation to them. Should this not happen, the action moves to the third phase. In this phase, the court decides on the eventual difficulties of enforcement and on individual cases where the defendant refused to pay. Accordingly, the court already decides on the merits of the case in the first phase, at this stage, the consumers' express adherence is not required, and consumers have to decide whether they want to be compensated. The third stage is left for fine-tuning and individual aspects. Again, the judgment's *res judicata* effect is conditional on the consumer's acceptance of the judgment. However, this appears to be a rather formal difference from the opt-out system: as noted above, it seems to be highly unrealistic that the court would come to a different conclusion in the subsequent individual litigation than in the collective action.

It appears that for the French Constitutional Council it was decisive that the *res judicata* effect of the court's judgment in collective actions covers solely those group

33 Articles L423–3 to L423–9 of the French Consumer Code.

members who received compensation at the end of the procedure.[34] It seems that the circumstances that only benefits accrue to group members and that the judgment's *res judicata* effect covers only those group members who assented to it (since compensation can be paid only if the group member accepts it), were sufficient to extinguish the constitutional concerns.

Before the adoption of the above-mentioned decision, the French Constitutional Council had been referred to as an authority to justify the unconstitutionality of the opt-out system, citing its famous decision of 1989,[35] which dealt with a law that authorized trade unions to launch any action ('*toutes actions*') on behalf of the employee, including claims of unfair dismissal.[36] This case can be distinguished from the use of the opt-out system in small-claims procedures (although this question became academic, the 1989 decision was overruled by the 2014 decision). Pecuniary small claims can be clearly distinguished from employment law claims at large, especially unfair dismissal matters: the latter normally involve higher stakes, higher monetary value and may lead to the employee's readmission (which entails personal consequences). Furthermore, the French Constitutional Council did not hold that representation without authorization or inference of the right of representation from the employee's silence would be unconstitutional. Quite the contrary, it held that if the employee fails to object to the trade union's procedure, he can be regarded as adhering to it.[37] The French Constitutional Council treated this case rather as an issue of notice: the employee has to be informed by registered mail and actual notice has to be ensured.[38] Accordingly, the requirement established by the French Constitutional Council concerning opt-out regimes was proper notice. It has to be taken into consideration that the French statute's opt-out scheme covered the whole spectrum of employment claims and the constitutional requirements concerning the means of notice may be less stringent in case of small pecuniary claims.

The French rules adopted in 2014 seem to have gone beyond the constitutional requirements of the decision of 1989, since, although at the end of the procedure, they require the group members' express acceptance of the award, they do not content themselves with tacit adherence.

The Hungarian Constitutional Court (*Alkotmánybíróság*) examined the problem of 'representation without authorization' in a few cases. In the early 1990s Hungarian law contained certain rules that authorized trade unions and the attorney-general to launch actions without authorization from the party.[39] These laws had a very peculiar

34 Decision 2014–690 of 13 March 2014 (*Le 14 novembre 2014, JORF n°0065 du 18 mars 2014, Texte n° 2, Décision n° 2014–690 DC du 13 mars 2014*), para. 10 and 16.

35 Decision 2014–690 of 25 July 1989 (*Décision n° 89–257 DC du 25 juillet 1989*).

36 Ibid., para. 25.

37 Ibid., para. 25–26.

38 Ibid., para. 26.

39 Constitutional Court Decision No. 8/1990 (April, 23) (trade unions); Constitutional Court Decision No. 1/1994 (January, 7) (attorney general).

feature: the right of representation of these entities was general and mandatory, that is, they not only lacked the party's authorization, but the represented person could not opt out and terminate his own action. These rules were struck down by the Constitutional Court. However, the court also established that, if justified, 'representation without authorization' can be constitutional. It found that it is in line with the constitutional requirements, if the attorney-general is authorized to proceed in case the obligee is not able to protect his rights for whatever reason, considering this to be an inevitable restriction of the right of disposition. The Court also established that it is the state's constitutional duty to safeguard the rights of persons who cannot enforce or protect their rights and the state does have to ensure that one of its entities proceeds to protect the rights of individuals.

In sum, although opt-out collective redress may entail constitutional concerns in some EU Member States, the above arguments and jurisprudence suggest that it is far from irreconcilable with the constitutional traditions common to the Member States of the EU.

B. OPT-OUT COLLECTIVE REDRESS IS ALIEN TO CONTINENTAL LEGAL TRADITIONS

This statement is, in fact, not true (it may have been true some decades ago). EU law itself contains a very important and popular opt-out mechanism that permits representation without authorization (Injunction Directive), and there is a number of Member States that enable the enforcement of pecuniary claims in an opt-out system (as will be discussed below).

The Injunction Directive covers 13 consumer protection directives and empowers various entities to launch proceedings for a declaratory judgment or injunction on behalf of a class of unidentified consumers, without a need for any individual authorization or assent. What is more, this procedure is, literally speaking, not an opt-out scheme (in fact, it is 'worse'), since it does not make it possible for group members to leave the group: that is, group members cannot opt out even if they want to – they are stuck in the group. Although pecuniary claims cannot be enforced by means of this mechanism, from the perspective of legal tradition this should make no difference, since both pecuniary and non-pecuniary claims are, legally speaking, claims. It seems that there is no legitimate reason to accept the opt-out system for declaratory judgments and injunctions and to pronounce this alien for pecuniary claims.

Although the opt-out system does qualify as a minority position in Europe, it is far from being unknown in the Old World. Currently, in the European Union there are nine Member States where it is possible to enforce pecuniary claims in an opt-out system:

Bulgaria,[40] Belgium,[41] Denmark[42] and Norway,[43] Hungary,[44] Portugal,[45] Spain[46] and the United Kingdom.[47] As illustrated above, although French law adopted a unique pattern, which formally retained the requirement of an opt-in, the French system can be characterized as a de facto opt-out system. This means that approximately one-third of the Member States has an opt-out system in place. So if opt-out collective redress is alien to (continental) Europe, then the aliens are among us.[48]

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40 Chapter 33, Sections 379–388 of the Bulgarian Code of Civil Procedure, for the English version of the statutory text see the Bulgarian Supreme Court's website, www.vks.bg/english/vksen_p04_02.htm#Chapter_Thirty-Three. See A. Katzarsky and G. Georgiev, 'Chapter 11: Bulgaria', in I. Dodds-Smith and A. Brown (eds.), *The International Comparative Legal Guide to Class & Group Actions 20 opt-in, the French system can be characterized as a de facto opt-out systemor the opt-out model* (Global Legal Group, 2012), www.georg-tod.com/documents/news/1362581962-CA13%20Chapter%2011%20Bulgaria.pdf, p. 64.

41 The Belgian system leaves it to the judge to decide whether the action should be conducted according to the opt-in or the opt-out model. Law Inserting a Title 2 on 'Collective Compensation Action' in Book XVII 'Special Jurisdictional Procedures' of the Code of Economic Law, Mar. 28, 2014, Moniteur Belge (M.B.) (Official Gazette of Belgium (Mar. 29, 2014) (*Loi portant insertion d'un titre 2 'De l'action en réparation collective' au livre XVII 'Procédures juridictionnelles particulières' du Code de droit économique et portant insertion des définitions propres au livre XVII dans le livre 1er du Code de droit économique*).

42 In Denmark, it is up to the court to decide whether the proceeding has to be conducted in the opt-in or the opt-out system. Sections 254a-254e of the Administration of Justice Act (*Lov om rettens pleje*). The rules on collective redress were inserted through Act no. 181 of February 28, 2007. See D. Frølich and M. Schwartz Nielsen, 'Chapter 14: Denmark', in I. Dodds-Smith and A. Brown (eds.), *The International Comparative Legal Guide to Class & Group Actions 20 opt-in, the French system can be characterized as a de facto opt-out systemor the opt-out model* (Global Legal Group, 2012), www.lundelmersandager.dk/sfs.php?fid=caam, p. 89.

43 In Norway, it is up to the court to decide whether the proceeding has to be carried out in the opt-in or the opt-out system. Chapter 35 of Act of 17 June 2005 no. 90 relating to mediation and procedure in civil disputes (The Dispute Act) (*Lov om mekling og rettergang i sivile tvister (tvisteloven)*). See P. Kiurunen and N. Lindström, 'Chapter 9: Norway', in P.G. Karlsgodt (ed.), *World Class Actions: A Guide to Group and Representative Actions Around the Globe* (OUP, 2012), p. 234.

44 Section 92 of Hungarian Competition Act (*1996. évi LVII. törvény a tisztességtelen piaci magatartás és a versenykorlátozás tilalmáról*); Sections 38–38/A of Hungarian Consumer Protection Act (Act CLV of 1997) (*1997. évi CLV. törvény a fogyasztóvédelemről*).

45 Act 83/95 on Procedural Participation and Popular Action (*Lei n.º 83/95, de 31 de Agosto, Direito de Participação Procedimental e de Acção Popular*).

46 Section 11 of Spanish Code on Civil Procedure (*Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil*).

47 Part 19.6 (Representative parties with same interest) of Civil Procedure Rules (CPR). See N. Andrews, 'Multi-party proceedings in England: representative and group actions', 11 *Duke Journal of Comparative and International Law* (2001), p. 251–252; E.F. Sherman, 'Group litigation under foreign legal systems: variations and alternatives to American class action', 52 *DePaul Law Review* (2002), p. 401–432. In the mechanism recently introduced in competition law, the Competition Appeal Tribunal decides, in the collective proceedings order, on whether the procedure has to be carried out in the opt-in or the opt-out system, Sections 47A-49E of Competition Act 1998, inserted by Part 1 of Schedule 8 of the Consumer Rights Act 2015. See S. Weber Waller, 'The Fall and Rise of the Antitrust Class Action', *SSRN* (2015), http://ssrn.com/abstract=2641867, p. 21–24.

48 C.I. Nagy, 'A csoportos igényérvényesítés összehasonlító jogi modelljei II. A csoportos igényérvényesítés európai modelljei és az összehasonlító jogi modellek tanulságai', 54 *Külgazdaság Jogi Melléklete* (2010), p. 138–143.

Finally, it appears to be perverse to use tradition as a blocking argument when drafting a new scheme. It hardly seems to be reasonable to reject a new regulatory solution simply on the basis that it is new. The opt-out scheme is, indeed, a novel regulatory solution in continental Europe, however, it can be judged only after a full-blown analysis, taking into account its merits and drawbacks. It would be truly perverse to say, in the course of searching for the regulatory solution to be adopted, that a new regulatory concept should not be adopted simply because it is new and not part of the law (the law which is considered for reform).

The innovation of today is the tradition of tomorrow. Although its roots can be traced back to equity,[49] the institution of class action was inserted into US federal procedural law only in 1938. And this regime was profoundly revised in 1966 and subjected to some minor changes in 2003.[50] It can be established that the US system of class action was finalized in 1966, since it was the 1966 reform that made the wide-spread use of class actions possible.[51] Today, this regulation is regarded as the 'American tradition', contrary to the continental tradition.

C. IT IS VERY DIFFICULT TO IDENTIFY THE MEMBERS OF THE GROUP AND TO PROVE GROUP MEMBERSHIP

The Recommendation suggests that in opt-out systems group members do not (or normally do not) get their money and the benefits of opt-out actions (that is, the money awarded) go to the group representatives. The Recommendation contends that 'an "opt-out" system may not be consistent with the central aim of collective redress, which is to obtain compensation for harm suffered, since such persons are not identified, and *so the award will not be distributed to them*'.[52]

The above assertion is based on a fatal misunderstanding. Just as opt-in systems, opt-out collective redress mechanisms aim to provide recovery to group members; and in the opt-out systems, as a general rule, the award is normally distributed to group members and they really get the money.[53] Although in certain systems 'fluid recovery' or '*cy pres*'

49 *Montgomery Ward & Co. v Langer*, 168 F2d 182, 187 (1948).

50 S.P. Dumain, 'Recent amendments to Rule 23', in Practising Law Institute, *Current Developments in Federal Civil Practice 2005* (Litigation and Administrative Practice Course Handbook Series) (Practising Law Institute Litigation 2005), p. 221–248; C.H. Edward, 'Federal class action reform in the United States: past and future and where next?', 69 *Defense Counsel Journal* (2002), p. 432–440.

51 See e.g. N.M. Pace, 'Class actions in the United States of America: an overview of the process and the empirical literature', *Globalclassaction* (2008), http://globalclassactions.stanford.edu/sites/default/files/documents/USA__National_Report.pdf, p. 2.

52 Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, p. 12, emphasis added.

53 On claims administration see K. Kinsella and S. Wheatman, 'Chapter 14 – Class notice and claims administration', in A.A. Foer and J.W. Cuneo (eds.), *The International Handbook on Private Enforcement of Competition Law* (Edward Elgar, 2010), p. 273–274; K. Kinsella and S. Wheatman, 'Chapter 13 – Class

is available,[54] this does not have to be necessarily adopted along with the introduction of collective redress (though it is advisable).

Obviously, it is much simpler to allot the award in an opt-in system, since here group members are easily identified by coming forward to join a legal action. However, the award can be distributed to group members also in the opt-out system, if group members are identifiable. It is a regulatory choice whether the availability of collective redress should be limited to cases where group members are clearly identifiable and how precise 'identifiability' should be required. However, in numerous cases, the court judgment can define the group properly: by way of example, the subscribers of a dominant cable television company between January 1 and December 31, 2014; or those persons who had to pay a higher vehicle registration tax, which proved to be contrary to the rules of the internal market; or those EU citizens who had to pay a discriminatory tuition fee for the year of 2014. Such a definition would make group members easily identifiable.

Although it is true that in certain cases it is difficult or even impossible to create a definition for identifying group members, this can be accomplished in numerous other cases. As a legislative option, identifiability could be made a pre-requisite of collective redress. However, it would be perverse to argue that since the opt-out scheme would not work in certain cases, due to the lack of identifiability, it should be abandoned also in cases where it would work, since group members are identifiable.

Contrary to the Recommendation's assertion, in case of opt-out collective redress, the biggest trouble is not that group members are not identified – since identifiability can be made a pre-requisite. An important problem is that in certain cases group members are legally identifiable but not in practice. For instance, assume that taxi drivers fix prices, thus overcharging customers.[55] Although the violation of antitrust law is proven and

notice and claims administration', in A.A. Foer and R.M. Stutz (eds.), *Private Enforcement of Antitrust Law in the United States* (Edward Elgar, 2012), p. 338–348.

54 See J.C. Alexander, 'An introduction to class action procedure in the United States', Paper for Conference *Debates over group litigation in comparative perspective* (2000), http://law.duke.edu/grouplit/papers/classactionalexander.pdf, p. 16; A.A. Foer, 'Chapter 14 – Cy pres as a remedy in private antitrust litigation', in A.A. Foer and R.M. Stutz (eds.), *Private Enforcement of Antitrust Law in the United States* (Edward Elgar 2012), p. 349–364 ('The normal remedies in a private antitrust case are a combination of injunctions and treble damages that are paid to the victim or victims of the anticompetitive activity. When an aggregate amount of damages is established, the primary objective is to distribute the damages to those who were injured. In antitrust class action litigation, however, it is often impossible or impracticable to compensate all victims. Administrative concerns may work against payments to individual plaintiffs, as in the case of an extremely large class where the fund is not sufficient to justify the transaction costs of distribution to individual claimants. Consequently, in some cases, there is money left over in the form of unclaimed funds. In such cases, courts sometimes employ the doctrine of "cy pres" to put the unclaimed funds to "the next best use," which may include awarding funds to public interest organizations or charities for purposes related to the case.').

55 J.C. Alexander, 'An introduction to class action procedure in the United States', Paper for Conference *Debates over group litigation in comparative perspective* (2000), http://law.duke.edu/grouplit/papers/classactionalexander.pdf, p. 16.

group members are legally identifiable, it is assumed that the vast majority of the victims would not be able to prove their membership, since they usually do not keep the receipts.

Nonetheless, even if group members cannot turn the award into cash, this does not necessarily entail that their share is paid out by the defendant (although it is easy to argue that the wrongdoer should not keep the windfall of his mischief). Collective litigation does not necessarily imply collective enforcement. Although it is submitted that collective redress should encompass collective enforcement (and it is a major shortcoming of the Recommendation that it ignores that, the purpose of the action, as far as pecuniary claims are concerned, is not a judgment but money), there is no indication in the Recommendation that collective redress would extend to enforcement as well.

Finally, it is submitted that while it is not inevitable that the share of non-identifiable group members is paid out to the group representative, it would be reasonable to oblige wrongdoers to pay compensation also for legally or practically non-identifiable group members. The law cannot leave the enrichment earned through an illegal conduct with the wrongdoer. From a social perspective, it is better to give a windfall to the group representative than to leave an illegal enrichment with the wrongdoer (it is to be noted that this would not even amount to a windfall, taking into account that the group representative does invest a lot in the enforcement of the claim). It is tempting to argue that this non-distributable money should be spent on a public interest purpose, like funding collective actions.

It is to be noted that an effective collective redress mechanism yields the highest benefits not when it is used but when it is not; collective redress may make practically unavailable civil recovery a reality. While in the absence of collective redress several rules and rights established by the law are regarded as practically non-existent (or unenforceable), effective collective redress makes the violation of these rules extremely risky and prompts enterprises to respect them.

D. OPT-OUT COLLECTIVE REDRESS WOULD LEAD TO A LITIGATION BOOM AND WOULD CREATE A BLACK-MAILING POTENTIAL FOR GROUP REPRESENTATIVES

Perhaps the most popular misunderstanding in respect of opt-out collective redress is that, similarly to US law, it would lead to a litigation boom and would enable group representatives, who aggregate a mass of claims, to blackmail defendants and to wring illegitimate settlements from them. These fears are completely unfounded.

There is no causality between the opt-out system and the alleged American litigation boom and blackmailing potential. In the US, the number of class actions and the defendants' inclination to settle are not due to the opt-out rule but to the regulatory and social environment that surrounds this model.[56] Namely, US law contains a set of

[56] For a detailed presentation of the statistical data see C.I. Nagy, 19 *Columbia Journal of European Law* (2013), p. 490–495.

rules that are unrelated to class actions but catalyze their operation. By way of example, under US law, generous punitive damages are available and certain statutes provide for treble damages;[57] the 'American rule' on attorney's fees does not follow the 'loser pays' principle (that is, the parties pay their attorney irrespective of the action's outcome);[58] certain statutes (for example the Sherman Act, the Magnuson-Moss Warranty Act) provide for one-way cost-shifting: if the claimant wins, he is entitled to compensation for his reasonable attorney's fees but this does not work the other way around; statistics demonstrate that the American society is much more litigious than the European;[59] the operation of litigators is normally based on contingency fees and law firms work according to an entrepreneurial model,[60] where the law-firm invests money and working hours in the action, thus – in exchange for an appropriate risk premium – takes over the risks of litigation from the parties; finally, jury trials and extensive pre-trial discovery smooth things down for the claimant and reinforce these factors. Taking this into account, it is easy to see that the alleged litigation boom and black-mailing potential (provided they exist) are as much peculiar to individual actions as to class actions. These are general features of the US system and not a specific characteristic of the class action.

The above is reinforced by practical experiments. The opt-out system is available in nine EU Member States. Most of these systems do not have a long history of its application, but none saw a 'litigation boom' (not even a 'litigation pop').[61] In a continental legal and social environment, the opt-out system operates in a completely different manner than in the US. The experience in Australia[62] and Canada[63] are also informative. In these countries, opt-out class action was introduced (at federal and state level) and no

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57 *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589 (1996); *Cooper Indus. v. Leatherman Tool*, 532 U.S. 424, 432, 121 S.Ct. 1678, 1683 (2001).

58 C.I. Nagy, 54 *Külgazdaság Jogi Melléklete* (2010), p. 96–98.

59 See M. Gryphon, 'Assessing the Effects of a "Loser Pays" Rule on the American Legal System: An Economic Analysis and Proposal for Reform', 8 *Rutgers Journal of Law & Public Policy* (2011), p. 567; B.J. Rodger, 'Editorial – Private Enforcement and Collective Redress: The Benefits of Empirical Research and Comparative Approaches', 8 *Competition Law Review* (2011).

60 J.C. Alexander, 'An introduction to class action procedure in the United States', Paper for Conference *Debates over group litigation in comparative perspective* (2000), http://law.duke.edu/grouplit/papers/classactionalexander.pdf, p. 12. Although attorney commercials are prohibited or restricted in several EU Member States, recently these prohibitions were eliminated or softened in quite of few legal systems. See Commission Report on Competition in Professional Services, COM/2004/83 finalm p. 14; F.H. Stephen and J.H. Love, *Regulation of the Legal Profession*, in B. Boudewijn and G. de Geest (eds.), *Encyclopedia of Law and Economics Vol. III.* (Cheltenham, 2000), p. 987–1017.

61 C.I. Nagy, 19 *Columbia Journal of European Law* (2013), p. 490–493.

62 In Australia, the institution of collective redress was introduced into federal law in 1992. Federal Court of Australia Amendment Act 1991 (No. 181 of 1991). See S. Stuart Clark and C. Harris, 'Multi-plaintiff litigation in Australia: a comparative perspective', 11 *Duke Journal of Comparative and International Law* (2001), p. 289–320.

63 Several provinces of Canada introduced the institution of collective redress, such as British Columbia, Class Proceeding Act 1995, S.B.C. ch 21 (1995), Ontario, Class Proceeding Act 1992, S.O. ch 6 (1992), Quebec, Quebec Civil Code, Book IX., Newfoundland & Labrador, Class Actions Act, S.N.L., ch. C-18.1 (2001) (Newfoundland & Labrador), és Saskatchewan, The Class Actions Act, S.S., ch. C-12.01 (2001)

litigation boom occurred.[64] Finally, it should not be disregarded that Europe is not the only region of the world where collective redress had to be accommodated in a civil-law environment: this happened in a number of Latin-American countries.[65]

According to European fears, the group representative can create an aggregate of claims through bunching a vast number of demands and can force out an unfair settlement with the defendant even in frivolous cases.[66] However, this blackmailing potential is an illusion. A group representative enforcing a € 1 billion claim-aggregate has exactly the same blackmailing potential as the representative of a € 1 billion individual claim. If European eyes see a black-mailing potential in the US system, this is not due to the US class action system but to those principles and rules of general application which characterize the US system at large. For instance, because of the 'American rule' on attorney's fees, for the defendant, a settlement is a more attractive alternative, even if the plaintiff's case is weak, since the defendant has to bear the attorney's fees, even if he wins the case and the claimant's claim proves to be frivolous. If the defendant enters a settlement, he can save the attorney's fees. Furthermore, punitive damages and treble damages may multiply the expected costs of the action.

Assume that the legal costs attached to the action are € 200,000–200,000 for the claimant and the defendant, respectively; they have to bear these expenses irrespective of the outcome of the action. The claim's value is € 1,000,000 and the claimant has a very weak case with a minuscule 10% chance to win. The claimant sues for the breach of antitrust rules, thus, under the Sherman Act, he is entitled to treble damages; furthermore, as an exception to the general 'American rule', he can claim reimbursement for his reasonable attorney's fees in case he wins (that is, cost-shifting is one-way).[67]

Accordingly, (if disregarding court fees, inflation and the procedure's length) a rational plaintiff would take a decision on whether to sue on the basis of the following calculation. On the expected costs side, the expenses run to € 200,000. The expected income is the product of the claim's value and the reimbursement for legal costs and the chance of success: € 320,000 = (€ 1,000,000 x 3 + € 200,000) x 10%. As a corollary, it is rational for the plaintiff to sue, the balance of the law-suit is positive: € 320,000 – € 200,000 = € 120,000.

The defendant, on the expenses side, also faces attorney's fees in value of € 200,000 (which are not recoverable) and there is 10% chance that he will have to pay 3 x € 1,000,000

(Saskatchewan). The institution of class action is also part of the Federal Court Rules, Federal Court Rules, Part 4, 299.1–42.

64 For a detailed presentation of the statistical data see C.I. Nagy, 19 *Columbia Journal of European Law* (2013), p. 493–495.

65 See A. Gidi, 'Class Actions in Brazil – A Model for Civil Law Countries', 51 *American Journal of Comparative Law* (2003), p. 311–408; A. Gidi, 'The Recognition of U.S. Class Action Judgments Abroad: the Case of Latin America', 37 *Brooklyn Journal of International Law* (2012), p. 901–940.

66 Commission Communication Towards a European Horizontal Framework for Collective Redress, COM(2013) 401 final, p. 7–8.

67 15 U.S.C. §15.

as damages and € 200,000 as reimbursement for the plaintiff's reasonable attorney's fees: (€ 1,000,000 x 3 + € 200,000) x 10% + € 200,000 = € 520,000. On the other hand, he cannot expect any income, since even if he wins, the only 'return' is that he does not have to pay damages (the expected income is € 0). Accordingly, the defendant's balance is negative (€ -520,000 = € -200,000 + € -320,000). The defendant's expected loss attached to the action is very significant in comparison to the claim's value, although he has 90% chance to win.

Under such circumstances, the parties will endeavor to reach a settlement, where the plaintiff does not accept less than € 120,000 and the defendant is not willing pay more than € 520,000. The precise amount will depend on the parties' bargaining skills. It is noteworthy that in the above case it is rational for the defendant to pay a sum that is higher than 50% of the claim's value, while the chance that the plaintiff wins is only 10%.

If we put the above case in a continental legal environment, it would not be rational for the plaintiff to sue due to the low chance of success. For the plaintiff, the action's expected income is € 100,000 (€ 1,000,000 x 10%), while there is 90% chance that he will have to bear both his and the winning defendant's legal costs (€ 400,000 x 90% = € 360,000). Accordingly, the plaintiff's balance is negative (€ 100,000 – € 360,000 = € -260,000); this is due to the lack of treble damages and the European approach on legal costs (two-way cost shifting).

§4. FUNDING AND PROCEDURAL SAFEGUARDS (THE 'LOSER PAYS' PRINCIPLE, NO CONTINGENCY FEES AND PUNITIVE DAMAGES, REPRESENTATION LIMITED TO NON-PROFIT ENTITIES)

The Recommendation introduces safeguards in order to obviate the incentives to abuse the mechanism of collective redress: it makes the use of the 'loser pays' principle mandatory,[68] excludes, at least in principle, contingency fees[69] and prohibits punitive damages.[70] Furthermore, it restricts group representation to non-profit entities.[71]

These safeguards appear to be excessive, taking into account that the Recommendation explains the choice of the 'opt-in' system with the consideration of obviating abusive practices. The Recommendation's insistence on not adopting legal concepts peculiar to the US regulatory environment surrounding the operation of the US class action

68 Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, para 13.

69 Ibid. para. 29–30. According to the Recommendation, contingency fees can be permitted only exceptionally. ('The Member States that exceptionally allow for contingency fees should provide for appropriate national regulation of those fees in collective redress cases, taking into account in particular the right to full compensation of the members of the claimant party.').

70 Ibid., para. 31.

71 Ibid., para. 4.

suggests that, on the other side of the Atlantic, it is not the opt-out system but its legal environment that may be responsible for the alleged plethora of class actions. Furthermore, contingency fees and punitive (or exemplary) damages are available in some Member States. Contingency fees are actually lawful in quite of few Member States.[72] Albeit that the amount of exemplary damages awarded in European common law systems is tiny (as compared to US punitive awards), this concept is a solid part of Anglo-Saxon legal systems.[73]

The biggest trouble is, however, that the Recommendation, in essence, interdicts the risk premium devices of US law, which are rather unpopular in Europe, anyway, while it fails to offer any surrogate. The function and effects of contingency fees and punitive damages are to provide a risk premium to group representatives, in order to compensate them for the risk they run in favour of group members. The Recommendation, as a general principle, prohibits these tools, while it fails to offer anything in exchange to tackle the problem of risk premium.

It is economically rational for group representatives to enforce the claims of group members if all the costs related to the collective action can be shifted on the losing defendant and group representatives are granted a risk premium, that is, if they win they get a reimbursement higher than their actual costs in order to compensate them for the risk they ran when instituting the proceeding.[74] The 'American rule' on attorney's fees, contingency fees and punitive damages are meant to be a risk premium, or simply have such an unintended effect. The purpose of the 'American rule' is to shift some of the risks attached to the plaintiff's or group representative's failure onto the defendant.[75] Super-compensatory damages are clearly risk premiums; punitive and treble damages are meant to incite the plaintiff to litigate through compensating him for the risks he runs due to the litigation.[76] Contingency fees may also be regarded as risk premiums, since they are admittedly higher than the attorney's fees charged in case of no risk.[77]

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72 See S.M. Grace, 'Strengthening Investor Confidence in Europe: U.S.style Securities Class Actions and the ac quis communautaire', 15 *J. Transnat'l L. & Pol'y* (2006), p. 281, 287–288; 'Comparative report', in D. Waelbroeck, D. Slater and G. Even-Shoshan (eds.), *Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules* (Ashurst, 2004), http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf, p. 93–94, 116–17; C. Leskinen, 'Collective Actions: Rethinking Funding and National Cost Rules', 8 *Competition L. Rev.* (2011), p. 87, 98–105.

73 V. Wilcox, 'Punitive Damages in England', in H. Koziol and V. Wilcox (eds.), *Punitive Damages: Common Law and Civil Law Perspectives* (Springer, 2009), p. 7–54.

74 C.I. Nagy, 19 *Columbia Journal of European Law* (2013), p. 495–497.

75 See M. Gryphon, 8 *Rutgers Journal of Law & Public Policy* (2011), p. 569.

76 V. Behr, 'Punitive Damages in American and German Law – Tendencies Towards Approximation of Apparently Irreconcilable Concepts', 78 *Chi.-Kent L. Rev.* (2003), p. 105, 120–121; L.T. Visscher, 'Economic Analysis of Punitive Damages', *Punitive Damages: Common Law and Civil Law Perspectives* (Springer, 2009), p. 224; H. Koziol, 'Punitive Damages: Admission into the Seventh Legal Heaven or Eternal Damnation? Comparative Report and Conclusions', in in H. Koziol and V. Wilcox (eds.), *Punitive Damages: Common Law and Civil Law Perspectives* (Springer, 2009), p. 304.

77 C. István Nagy, 19 *Columbia Journal of European Law* (2013), p. 495–496.

The Recommendation prohibits the use of these legal institutions (which are, by the way, normally not used in Europe) without offering anything in exchange in order to tackle the problem of risk premium. As demonstrated above, the repercussions and the plethora of opt-out collective litigation (US class action) would not emerge, when putting this regulatory mechanism in the current European environment. At the same time, it has to be noted that in US law it is the provision of generous risk premiums that made the operation of the US class action so intensive.[78] Ironically, the measures that could make collective litigation effective would move the European regulatory environment towards US law. All the measures the absence of which explained why Europe should not fear the opt-out class action are actually the functional equivalents of a risk premium, even if they are of general application and are not specific to class actions. On the other hand, without an appropriate risk premium the European system could not be made really wide-spread.[79]

It would be an exaggeration to say that this is a vicious circle; it is not, it is a trade-off. The legislators (EU and national) have to find the point of balance. The determination of the risk premium does allow fine-tuning.

Furthermore, the fact that the risk premium may entail risks certainly does not refute the thesis that in Europe the opt-out class action would not entail the same consequences it brings forth in the US. The introduction of the opt-out class action would be reasonable also in case the law affords no risk premium to the group representative. The group representative may take up the case for various non-economic reasons; and the limited European experience suggests that civil non-profit organizations may be inclined to protect the rights of group members even in case this, from an economic perspective, does not pay out.

All in all, the Recommendation's main flaw is that, in essence, it interdicts the risk premium devices of US law, while it fails offer any surrogate. In the absence of an adequate risk premium it will not pay out for the group representative to take up the case; and even if the group representative is a non-profit organization, the entity's expected costs and expected income have to be in balance to make the system sustainable.

§5. CONCLUSIONS

The debate in Europe on 'whether to opt out or not to opt out' has become fairly repetitious and after the Commission's Recommendation it appears that Europe is where it was a decade ago. The scholarship is replete with pieces supporting the introduction of the opt-out model in Europe and, disregarding the misconceived references to legal tradition and the phobia of foreign legal solutions, one can rarely find any analysis that

78 Ibid., p. 489, 497.
79 C.I. Nagy, 19 *Columbia Journal of European Law* (2013), p. 496.

would demonstrate in a convincing manner that the introduction of the opt-out model in Europe would lead to a litigation boom, settlements forced out by black-mailing and abuses. If someone sees these in the US system, he also has to see that in class action cases group representatives have the very same black-mailing potential (if any) as the plaintiff in an individual action. The US litigation landscape is shaped by legal institutions like punitive and treble damages, the 'American rule' on attorney's fee and one-way-cost shifting in certain cases, contingency fees, entrepreneurial law firms and litigious attitudes. This regulatory and social environment, which is responsible for what many Europeans attribute to class actions, is completely missing in Europe.

It seems that the Commission could not avoid falling in the 'ice-cream-murder' fallacy. Studies show that the consumption of ice cream and murders are positively correlated: the more ice cream is sold, the more homicides are committed; and vice versa, the less ice cream is consumed, the less people are killed. Is there correlation between the two? Yes, of course. Would it be reasonable to draw the conclusion that there is causation? No, of course, it would not. Both ice cream consumption and murders increase in the summertime, when people stay out later. Correlation does not mean causation. The Commission perceived that there is correlation between the US class action and certain allegedly abusive practices. However, it appears to have failed to have a closer look at class actions to see whether there is causation between the two or it is simple correlation.

Be it as it may, it is especially disappointing to see that the European debate, as mirrored in the Commission's Recommendation, is still stuck in the question of whether an opt-out or an opt-in system were preferable. Although this is a truly important issue, it seems to be outdated in a certain sense and is losing weight in the online age where group members can simply 'click in'. The success of collective redress hinges on funding, including the question of the allocation of a risk premium. An opt-out system does lessen the group's organization costs significantly and makes collective redress possible in cases where such costs proved to be prohibitive. However, collective redress cannot be truly effective without appropriate funding. This does not mean that no cases would be brought to court; this means that the practical success of collective redress would not be as considerable as it should be. This is underpinned by both economics analysis and experience: in Europe, there are (relatively) successful opt-in and unsuccessful opt-out systems. Without slighting the relevance of the opt-out-opt-in controversy, it seems that, as a matter of fact, the pivotal question of collective redress is funding. It is not a co-incidence (that is, not a mere correlation but causation) that the most successful class action mechanism provides for appropriate funding in the form of a variety of legal institutions (for example, punitive damages, treble damages, one-way cost shifting).

However, it has to be stressed that the need for a risk premium is certainly not an argument against the introduction of an opt-out system, especially, because the group representative may espouse the collective proceeding also for different non-economic reasons. Collective redress can work without a risk-premium but its intensity will be lower than it could be.

Notwithstanding this, the Commission's Recommendation sanctions the phobia of foreign legal solutions prevailing in Europe. The Recommendation is most disappointing, taking into account that although it applies only to 'mass harm situations caused by violations of rights granted under Union law'[80], it may have a chilling effect on European opt-out systems and on those national proposals that envisaged an opt-out scheme.

The Recommendation is rather disappointing, as some years ago the Commission had a progressive proposal for an opt-out system, which was finally withdrawn in October 2009,[81] demonstrating how effective the blend of intensive industry lobbying and the phobia of foreign legal solutions can be. It is noteworthy that numerous examples can be mentioned where unbiased national proposals for an opt-out system fell prey to powerful industry lobbying, which used legal traditionalism as a successful marketing weapon.[82]

The classical litigation system proceeds from the sample situation where Gaius sues Julius because of two casks of acetified wine. Both of them are Roman citizens, are equal both in terms of money and capacity, have unlimited free time and happily visit the praetor to present their case. The reality of the 21st century is, however, not this. The age of masses is characterized by standardized contracts and standardized cases, and the law, long since, does not content itself with providing justice to Roman citizens only but wants to give justice for all. And it is rather common that individual entities face masses. The projection of the mass economy has already appeared in substantive law: the regime on unfair terms in standardized consumer contracts is based on the recognition of the fact that in the mass economy individual enterprises face masses. It would be highest time to recognize this also in procedural law.

This scenario is particularly frequent in matters involving the application of EU law (the Recommendation's scope of application): in a huge part of these cases a mass of individuals encounters the state because the latter, by way of example, restricted free movement or adopted discriminatory measures. There are numerous famous European cases, which deal with fundamental issues of EU law and have an enormous social relevance; still, due to the miniscule individual stakes involved, it is not comprehensible why it paid out for the individual plaintiff to enter into a lengthy court action and to top this up with a preliminary ruling procedure, entailing further considerable delay. All these cases suggest that a workable collective redress mechanism could significantly increase the effectiveness of the application of EU law.

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80 Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, para. 1.

81 See M. Ioannidou, 8 *Competition L. Rev.* (2011), p. 59, 78–80.

82 As to England and Wales, see The Government's Response to the Civil Justice Council's Report, Improving Access to Justice through Collective Actions, (2008); as to Finland, see M. Välimäki, 'Introducing Class Actions in Finland – Lawmaking Without Economic Analysis 3', *SSRN* (2007), http://ssrn.com/abstract=1261623; as to France, see V. Magnier, 'Class actions, group litigation & other forms of collective litigation – France', *Globalclassactions* (2007), http://globalclassactions.stanford.edu/sites/default/files/documents/France_National_Report.pdf, p. 4.