Centre for Antitrust and Regulatory Studies

Maciej Gac

Group litigation as an instrument of competition law enforcement – analysis based on European, French and Polish experience

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Group litigation as an instrument of competition law enforcement – analysis based on European, French and Polish experience

Doctoral thesis prepared in the form of international cooperation between the Jagiellonian University and the University of Toulouse under the supervision of Professor Dr hab. Sławomir Dudzik and Professor Sylvaine Poillot-Peruzzetto.

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Abstract

The thesis undertakes the detailed analysis of the European system of competition law enforcement and aims to create theoretical basis required to answer the following questions:

1) How to establish a more effective system of antitrust law enforcement in Europe?
2) How to mitigate the problems of injured individuals claiming for compensation?
3) How to ensure an equilibrium between public and private methods of competition law enforcement?

In order to address the above issues, the thesis focuses on a group litigation mechanism, being in the author's opinion, a missing puzzle in the European regime of competition law enforcement, and a key factor required for the establishment of a modern and effective approach to the execution of competition law provisions. By comparison of different approaches to group litigation (European and American), as well through reference to the national experience in this area of legal practice (French and Polish), the thesis aims to formulate a model solution for the enforcement of antitrust law by the means of group litigation.

The main objective of undertaken research is to encourage the national and European legislator to undertake more decisive steps in the area of competition law enforcement, and to introduce solutions able to mitigate the problems of individuals injured by antitrust law infringements. Moreover, by formulating *de lege ferenda* proposals on group litigation, the thesis tries to establish solution able to overcome limitations of a current regime of competition law enforcement in Europe, and construe coherent, uniform and effective approach to collective redress within the European Union.

The thesis is divided into two Parts. Each Part is composed of three Chapters.

The first Part, entitled: *"Enforcement of competition law – from public to private method"*, aims to determine the relationship between public and private enforcement of antitrust law, and the role that each method plays in the execution of competition law provisions. Moreover, it tries to describe a general scheme for the enforcement of competition law provisions and create basis for the discussion on its further changes.

In Chapter 1 the author describes the fundamental distinction between public and private enforcement of antitrust law, as well as the main principles of execution of competition law provisions in the European Union.

In Chapter 2 the author undertakes the analysis of development of private enforcement doctrine in Europe. It evaluates its current state and determines possible ways of further development.

In Chapter 3 the author refers to the group litigation mechanism. He provides a general description of a concept of group litigation, describes its main characteristics, as well as the reasons for its development in the area of private enforcement. Moreover, he refers to the American experience in the area of group litigation, being a starting point for the discussion on group litigation in the area of antitrust law, and a possible source of inspiration for the solutions proposed within the European Union.

The second Part of thesis, entitled: *"Towards increased efficiency of competition law enforcement in Europe – a need of common European approach to collective redress"*, focuses on a group litigation mechanism, being in the author's opinion, a missing puzzle in the European regime of competition law enforcement. At the basis of general assessment of competition law enforcement regime conducted in Part I, the author tries to propose in the second part of thesis solutions able to increase the efficiency of competition law enforcement in Europe and enhance the protection of individuals against anticompetitive behaviours.

In Chapter 1 the author undertakes an analysis of a debate on collective redress conducted at the European level in the course of last decades. He provides a complex overview of current discussion on group litigation in Europe and evaluates its outcome.

In Chapter 2 the author refers to French and Polish experience in the area of group litigation, and tries to determine if the European debate on group litigation found its reflection at the national level. Moreover, the author wonders if national achievements in the area of group litigation may be a source of inspiration in the European discussion on collective redress.

Finally, in Chapter 3, the author formulates specific *de lege ferenda* proposals, which may be taken into consideration by the European and national legislator while discussing a model solution on collective redress. The main objective of proposed solutions is to find a balance between public and private enforcement of antitrust law, and to empower individuals with the effective mechanism of protection against competition law infringements.

Keywords: competition law; antitrust law; public enforcement; private enforcement; group litigation; collective redress; class actions; damages; compensation.

Contents – summary

Contents

Introduction

I. General description and research objectives

"European mechanisms for private actions need some form of kick-start – not only to ensure that wrongs are, as much possible, righted, but also to create a much-needed synergy between public enforcement and private actions. With dwindling enforcement, frankly both sides need all help they can get."[1]

This general assumption, evoked by P. Marsden during a discussion on future of competition law enforcement in Europe[2], is a good starting point for the analysis of changes which could be introduced at the European and national level in order to strengthen the protection of individuals against competition law infringements. While the debate on public and private enforcement of antitrust law has been conducted in Europe for over 10 years now, and allowed for the recognition of the usefulness of private actions for the execution of antitrust law provisions, the question that still remains unanswered is:

"How to establish a system of antitrust law enforcement able to mitigate the problems of injured individuals claiming for compensation?"

The need to answer the above question was recently recognised by the European legislator. By adopting a Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law

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1 P. Marsden, *Public-private partnerships for effective enforcement: some "hybrid" insights?*, in: P. Marsden, S.W. Waller, P. Fabbio, *Antitrust Marathon V: When in Rome Public and Private Enforcement of Competition Law*, European Competition Journal, Vol. 9, No. 3, December 2013, p. 510.

2 See in more details a discussion led by P. Marsden, S.W. Waller, P. Fabbio, *Antitrust Marathon V: When in Rome Public and Private Enforcement of Competition Law*, European Competition Journal, Vol. 9, No. 3, December 2013, pp. 503–22.

for infringements of the competition law provisions of the Member States and of the European Union[3] (hereinafter "Damages Directive"), and by encouraging the Member States to develop a group litigation mechanism within their national legal orders[4], the European legislator aimed to ensure that one of the main problems of a current system of competition law enforcement in Europe, i.e. lack of effective compensation of victims of competition law infringements, will be finally overcome[5]. While such an attempt shall be appraised, and may be regarded as another step towards establishment of a fully effective system of competition law enforcement in Europe, this thesis will try to prove that there is still a lot of work to be done, before we can claim that the European consumers and enterprises are empowered with effective means of protection against antitrust law infringements.

In view of this initial assumption, the thesis will aim to create theoretical basis required to answer the following questions:

1) How to establish a more effective system of antitrust law enforcement in Europe?
2) How to mitigate the problems of injured individuals claiming for compensation?
3) How to ensure an equilibrium between public and private methods of competition law enforcement?

In order to address the above issues, the thesis will focus on a group litigation mechanism[6], being in the author's opinion, a missing puzzle in the European regime of competition law enforcement, and a key factor required for the establishment of a modern and effective approach to the execution

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

4 See 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, OJ L 201, 26.7.2013, p. 60–65.

5 As the Commission estimates, annually between 13 and 37 billion euros of direct costs caused by illegal cartels are suffered by EU consumers and other victims of competition law infringements, see on this issue EC's Impact Assessment Report, Damages actions for breach of the EU antitrust rules, Accompanying the proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, SWD(2013) 203 final, pt. 64.

6 The group litigation mechanism will be understood within this thesis as any mechanism that may accomplish the cessation, prevention of unlawful business practices which affect a multitude of claimants or the compensation for the harm caused by such practices.

of competition law provisions. By comparison of different approaches to group litigation (European and American), as well through reference to the national experience in this area of legal practice (French and Polish), the thesis will aim to formulate a model solution for the enforcement of antitrust law by the means of group litigation.

The main objective of undertaken research will be to encourage the national and European legislator to undertake more decisive steps in the area of competition law enforcement, and to introduce solutions able to mitigate the problems of individuals injured by antitrust law infringements. Moreover, by formulating *de lege ferenda* proposals on group litigation, the thesis will try to establish solution able to overcome limitations of a current regime of competition law enforcement in Europe, and construe coherent, uniform and effective approach to collective redress within the whole Union.

The thesis is based on the legal and factual situation as of 31 December 2016.

II. Thesis overview and main scientific hypothesis

The thesis will be divided into two Parts, forming together a complex approach to the issue of group litigation and competition law enforcement.

The first Part of the thesis will start with the general analysis of the system of law enforcement currently existing in the European Union (hereinafter "EU" or "Union"). The main objective of Part I will be to determine the relationship between public and private enforcement of antitrust law, and the role that each method plays in the execution of competition law provisions. Furthermore, the goal of analysis conducted in Part I will be to describe a general scheme for the enforcement of competition law provisions in Europe, and to create basis for the discussion on its further changes.

Because of such complex approach to the issue of competition law enforcement included in Part I, the thesis will be able to determine, already at the initial stage of reasoning, which areas of competition law enforcement would require further improvement. Moreover, it will ensure that *de lege ferenda* proposals included in the second part of thesis, will construe the solutions able to respond to current limitations of competition law enforcement in Europe.

The first Part of the thesis will try to prove, while the two methods of competition law enforcement (public and private) may be distinguished, the system of antitrust law enforcement currently existing in Europe foresees a dominant role of public authorities in the execution of competition law

provisions. Numerous legal acts existing at the European and national level, *inter alia* the Damages Directive and the 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 (hereinafter "Recommendation" or "Recommendation on collective redress"), aim to grant the main responsibility for the enforcement of competition law provisions to the European Commission (hereinafter "Commission") and the National Competition Authorities (hereinafter "NCAs"). In consequence, higher level of predictability and clarity concerning the issue of enforcement is guaranteed. Moreover, due to such construction, the main responsibility for the enforcement of competition law provisions is granted to highly qualified entities, possessing knowledge, competencies and mechanisms required for the appropriate application of competition law rules.

Nevertheless, while in the author's opinion such construction offers several benefits to the general system of law enforcement, e.g. greater detection, deterrence and punishment of anticompetitive behaviours, it will be also argued within the thesis that the model of competition law enforcement currently existing in Europe significantly limits the role of private parties in discovering antitrust law violations. Moreover, the Part I of the thesis will try to prove, the system of competition law enforcement dominated by public method, often discourages victims of anticompetitive behaviours from undertaking court actions, and thus, deprives them of a due compensation.

The consequence of the above scenario is on one hand, restrained protection of individuals against competition law violations, and on the other, limited efficiency of competition law enforcement regime. It is especially visible in case of small competition law infringements which if left without prosecution, may lead to harm of a great number of individuals and disturbance of competition at the important part of the market. It is also confirmed by the empirical data provided by the Commission, which ascertains that due to the lack of effective compensation mechanisms between 13 and 37 billion euros of direct costs caused by illegal cartels are suffered annually by EU consumers and other victims of competition law infringements[7].

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[7] See EC's Impact Assessment Report, Damages actions for breach of the EU antitrust rules, Accompanying the proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, SWD(2013) 203 final, pt. 64.

In view of the above, the initial scientific hypothesis may be formulated: *"The system of competition law enforcement, that currently exists in Europe, based on a dominant role of public authorities in the enforcement of competition law rules, leads to the restrained protection of individuals against antitrust law violations and limited efficiency in discovering and prosecuting anticompetitive behaviours."*

The above scientific hypothesis determines further development of reasoning. Therefore, the goal of the following points of thesis will be to answer: *"How to establish a more effective system of antitrust law enforcement in Europe?"*

The initial assessment of this question, based mostly on the analysis of legal doctrine, European and national case law, as well as legislative changes introduced in different legal systems (European Union, France, Poland), gives us grounds to claim that for the appropriate functioning of competition, respecting the antitrust law rules and well-founded interests of individuals, it is required to develop mechanisms ensuring higher level of participation of consumers and business entities in the application of competition law provisions. The existence of such mechanisms may guarantee on one hand, full compensation of victims of competition law infringements, and on the other, greater detection and deterrence of anticompetitive behaviours. Therefore, the overall efficiency of competition law may be strengthened, if private methods of its execution are established.

The aforementioned assessment does not seem to raise controversies. It also mirrors the European debate on competition law enforcement which for more than a decade has been recognising the particular importance of private actions for the execution of antitrust law provisions. Nevertheless, while the thesis does not bring important novelty as far as the importance of private method is concerned, it will try to go a step further, and deal with the issue of a relationship between public and private enforcement. The goal will be to answer: *"How to ensure an equilibrium between public and private methods of competition law enforcement?"*

The importance of addressing this question seems to be crucial each time we are dealing with the issue of private enforcement of antitrust law. That is because, increasing the role of individuals in the enforcement of competition law provisions, will inevitably lead to greater interference between public and private mechanisms of law enforcement. As a result, it may raise tension between these two techniques, and run a risk of their mutual incoherence.

Having this in mind, the thesis will try to determine, what is the role, place and significance of private method in the currently existing system

of competition law enforcement in Europe. Such an analysis will be crucial not only to determine the mutual relationship between public and private method, but mainly to assess the possibility of further changes in this area of legal practice. The thesis will argue that in order to ensure greater efficiency of competition law enforcement and provide a balance between public and private method, it is required to establish a hybrid model of competition law enforcement in which public and private mechanism will have a complementary nature[8].

In view of the aforementioned, the second scientific hypothesis may be formulated:

„In order to increase the efficiency of competition law, private methods of its execution shall be developed at the European and national level, and shall constitute a complement to the hybrid (public-private) system of competition law enforcement."

Following the second scientific hypothesis, the subsequent reasoning will focus on increasing the role of private method within the hybrid model of competition law enforcement. It will try to determine, what may be the consequences of recent steps undertaken by the European legislator in the area of private enforcement, i.e. adoption of "private enforcement package"[9], and what are the other possible ways able to ensure greater efficiency of private antitrust actions in Europe.

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8 For the similar reasoning see: A. Jurkowska-Gomułka, *Publiczne i prywatne egzekwowanie zakazów praktyk ograniczających konkurencję*, Warszawa 2013, pp. 431–444; R. Molski, *Prywatnoprawna ochrona konkurencji w amerykańskim prawie antytrustowym*, Kwartalnik Prawa Prywatnego 2005, z. 3, p. 807; R. Stefanicki, *Ochrona konsumenta w prawie konkurencji (wybrane zagadnienia)*, in: M.B. Król (ed.), *Wzmocnienie roli obywateli. Polityka Unii Europejskiej dotycząca ochrony konsumentów*, Fundacja dla Uniwersytetu Jagiellońskiego, Kraków 2012, pp. 18–19; P. Marsden, *Public-private partnerships for effective enforcement: some "hybrid" insights?*, European Competition Law Journal, Vol. 9, No. 3, December 2013, pp. 509–539; S. W. Waller, *Towards a Constructive Public-Private Partnership to Enforce Competition Law*, World Competition 2006, Vol. 29(3), pp. 367–368; J. Kloub, *White Paper on Damage Actions For Breach of the EC Antitrust Rules: Plea For a More Holistic Approach to Antitrust Enforcement*, European Competition Journal 2009, Vol. 5(2), pp. 515–547; J.P. Terhechte, *Enforcing European Competition Law – Harmonizing Private and Public Approaches in a More Differentitated Enforcement Model*, in: J. Basedow, J.P. Terhechte, L. Tichy (eds.), *Private enforcement of competition law*, Nomos, 2010.

9 As the elements of "private enforcement package", which will be analysed in details afterwards, the following thesis considers: Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, p. 1–19; Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory

At this point it shall be noticed that while the author appraises different solutions proposed in the Damages Directive, such as introduction of more liberal rules on access to evidence by private parties claiming for compensation or establishment of a binding force of competition authorities rulings on courts deciding in private antitrust claims, he is of the opinion that in order to increase the significance of private actions in the area of antitrust law, it is necessary to develop wide and effective mechanism of group litigation.

As the thesis will argue, by reason of such features as cost-efficiency, wider access to proofs of violations, reduction of asymmetry between the claimant and the law perpetrator, and increase of a pressure on undertakings committing the anticompetitive practices, the group litigation mechanism construes a perfect response to the needs of private enforcement in the area of antitrust law, and may effectively mitigate numerous problems of individuals claiming for compensation, e.g. limited access to proofs, lack of specialised knowledge, financial constraints in initiating court action. Moreover, the group litigation mechanism seems to perfectly correspond with the specificities of antitrust law infringements, often covering numerous victims at various levels of economical chain.

Therefore, as the thesis will try to prove, the existence of an effective measure of aggregation of claims constitutes an essential element of a modern regime of competition law enforcement, and is crucial in order to strengthen the position of private method within the hybrid construction.

In view of the above, the third scientific hypothesis may be formulated:

"With a view of guaranteeing higher efficiency of antitrust law and proper protection of individuals against competition law violations, it is required to develop more flexible and innovative private methods of competition law enforcement, especially a group litigation mechanism."

The complex assessment of the European regime of competition law enforcement conducted in Part I, will open a path for the formulation of solutions able to increase the efficiency of execution of antitrust law provisions in the European Union and its Members States (hereinafter "MS"). The second Part of thesis will focus on a group litigation mechanism, being in the author's opinion, a missing puzzle in the European regime of competition law enforcement, and the element essential for the establishment of an effective, hybrid model of competition law enforcement in Europe.

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collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, OJ L 201, 26.7.2013, p. 60–65; Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, C(2013) 3440, 11.6.2013.

Part II of the thesis will start with the analysis of current development of group litigation in the EU. At this point it shall be stated, that while the author apprises the most recent attempt of European legislator to address the issue of private enforcement and group litigation, i.e. adoption of "private enforcement package", he does not consider it as a final step in the European debate on the enforcement of antitrust law.

First, it is a consequence of a limited scope of the Damages Directive and the Recommendation. By leaving many questions unanswered, and transferring great burden to MS dealing with the issue of private enforcement and collective redress, the EU legislator created a risk of limited efficiency of "private enforcement" package.

Secondly, it results from the exclusion of a group litigation mechanism from the Damages Directive, and adoption of a soft law instrument in order to deal with the question of collective redress. By proposing a non-binding instrument in the area of group litigation, the Commission created a risk that the proposed mechanism will not be implemented at the national level, and that the current divergence between national approaches to collective redress will be preserved.

Finally, the negative assessment of current European approach to the issue of group litigation is a consequence of the Recommendation's content. In contradiction to its title ("Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States …"), it does not propose common principles for collective redress that could be adopted by Member States, but rather contains a legislative toolbox which can hardly lead to development of a coherent approach to group litigation in Europe[10].

In view of the above, the fourth scientific hypothesis may be formulated:

"The current approach of European Commission to the issue of collective redress does not ensure establishment of an effective mechanism of group litigation in Europe and further steps are required in order to change this scenario."

Following the assessment of European discussion on collective redress, the thesis will refer to the national experience in the area of group litigation. The goal will be to determine how the European debate on group litigation influenced a national legal practice. The comparative analysis of the EU approach to group litigation, and the national experience in this matter, will

[10] See also on this issue B. Hess, *European perspectives on collective litigation*, in: V. Harsagi, C.H. van Rhee (eds.), *Multi-Party Redress Mechanisms in Europe: Squeaking Mice?*, Intersentia 2014, p. 7.

be essential to answer if the Recommendation on collective redress is able to increase the individuals' protection against antitrust law infringements, and create a "group litigation culture" in Europe. Moreover, by reference to the national experience on collective redress, the Commission's proposal may be fully assessed, and possible improvements to the current regime of group litigation in Europe may be proposed.

The thesis will undertake detailed analysis of two legal systems, i.e. French and Polish, being regarded as the opposed approaches to the issue of group litigation.

While the French system is characterised by a very long and complex debate on the issue of group litigation, which in the course of last 30 years led to thorough assessment of collective redress in France, the Polish approach to group litigation may be regarded as a straightforward[11]. Therefore, while the deep discussion on group litigation was missing in Poland, the French system provides us with a case study on the discussion that is being waged, or that will be waged in future, in jurisdictions that do not currently possess a group litigation procedure. It brings together all possible advantages and drawbacks of the analysed instrument, and gives grounds for a critical assessment of the group litigation mechanism. The analysis of French experience in the area of collective redress seems to be the best way to understand what kind of difficulties may be expected while proposing a collective redress procedure at the European level. It may also help us to look at the issue of group litigation from a different angle, i.e. not limited to its positive influence on individuals and the law enforcement, but taking into consideration constitutional, economical and legal problems connected with its introduction.

The comparison of French and Polish approach to group litigation may also allow us to confront two different attitudes towards the issue of collective redress. While the French legislator decided to adopt rather conservative mechanism of group litigation, characterised by a need of ensuring a balance between the interests of injured individuals and accused undertakings, the Polish legislator argued in favour of more innovative solution, intended to increase individuals' access to justice and strengthen their position in disputes with the law perpetrators. By such an approach to the issue of collective redress the Polish legislator confirmed that even if group litigation is considered as a new and foreign legal phenomenon in certain jurisdictions, greater openness towards this mechanism of law

[11] The debate on group litigation was initiated in Poland in 2007, and already in December 2009 it led to introduction of a law on group litigation.

enforcement may lead to introduction of more innovative and effective solutions.

Finally, once the French and Polish approach to group litigation is compared, it may be noticed that while the former is strongly rooted in the national legal tradition, the later is rather determined by the recent European discussion on collective redress. The reasons for such an outcome are two-folded.

First, it results from different experience in the area of group litigation. While the Polish discussion on collective redress started in 2007, and already two years later led to introduction of the law on group litigation, the French debate on collective redress dates back to the beginning of the 80. During this time, an important national case law on group litigation evolved, and numerous scholars, politicians and legal practitioners evoked potential conflict between the collective redress instrument and the national constitutional principles.

Secondly, divergent origins of the French and Polish debate on group litigation resulted from a different level of influence of the European discussion on group litigation on the national legal practice. While the French debate on collective redress was initiated at the beginning of the 80, and for a very long time had purely national dimension, the Polish discussion on group litigation has developed in the new legal environment. Once the issue of collective redress was discussed in Poland, the questions such as private enforcement of antitrust law and group litigation were already at the table of European debate, what significantly influenced the course of discussion on collective redress in Poland.

In view of the above we can claim, that French and Polish experience in the area of group litigation may be regarded as the important points of reference. Their comparative analysis may give us a chance to look at the same issue from a different angle, and assess the specific elements of collective redress from divergent perspectives. Such approach is especially important in the current European discussion on group litigation which with a view of proposing a model and uniform solution in the area of collective redress, has to take into consideration different national legal traditions and various approaches to the issue of group litigation. While the analysis of jurisdictions of all Member States seems to be too burdensome, the reference to two of the aforementioned legal systems, representing opposed approaches to group litigation, may lead us to the conclusions important from the European perspective. Moreover, the empirical evaluation of collective proceedings initiated recently in both of the aforementioned jurisdictions,

may help us to determine, what difficulties the claimants may face while referring to the collective method of competition law enforcement.

As the conducted analysis will try to show, despite which approach to group litigation is chosen at the national level, i.e. innovative or conservative, based on the EU proposal or purely national, the number of group actions brought in case of competition law infringements is still far from satisfactory. Moreover, as the analysis of French and Polish approach to collective redress will try to confirm, despite similar objectives, i.e. increasing access to justice and ensuring greater enforcement of legal provisions, the national solutions on group litigation may strongly diverge. Therefore, as the thesis will try to prove, the recent proposal of the Commission in the area of group litigation, i.e. Recommendation on collective redress, due to its non-binding nature and limited character of proposed solutions, will not bring important added value to the current European regime of group litigation.

The final hypothesis formulated at this point of reasoning will be as follows:

"National solutions on group litigation does not ensure effective protection of individuals against competition law infringements, and if not empowered with a coherent and binding approach to collective redress at the EU level, may lead to limited and unequal protection of EU citizens against competition law infringements."

The last part of thesis will be an attempt to propose, at the basis of preceding reasoning, specific solutions aimed to guarantee higher efficiency of competition law enforcement. At this stage of reasoning, the main attention will be given to the possibility of introduction of a directive on collective redress, being in the author's opinion, the most effective tool for the establishment of a coherent and effective regime of competition law enforcement in Europe. By the use of comparative method, and reference to the American and European solutions on collective redress, the thesis will aim to develop a model solution which could be a source of inspiration for the European and national legislators.

The main goal of last stage of reasoning will be to answer a question asked at the beginning of thesis: *"How to establish a system of antitrust law enforcement able to mitigate the problems of injured individuals claiming for compensation?",* and formulate *de lege ferenda* proposals able to respond to the currently existing limitations of the European and national regimes of competition law enforcement.

III. Significance of research (scientific and social relevance)

The actual state of legal knowledge in the analysed area of law shows a lack of complex and comprehensive analysis of a system of competition law enforcement which would put the main emphasis on a group litigation mechanism[12]. Despite the existence of some publications in Polish and French literature concerning the issue of private enforcement of antitrust law[13], and several books on a group litigation mechanism[14], there is a lack of work undertaking an attempt to critically evaluate currently existing system of competition law enforcement, and propose a model solution based on the experience of different national jurisdictions. In consequence, any attempt to modernise the European system of competition law enforcement, with a view of guaranteeing its higher efficiency, is made on a case by case basis, and is limited to the introduction of specific solutions responding only to particular problems. As a result, several difficulties appear while the introduced solutions are being implemented. Since guaranteeing coherence of a competition law enforcement regime developed in such manner turns

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12 As the most complex approach to the above issue published in the European Union we can consider the following book: B. Rodger, *Competition Law. Comparative Private Enforcement Collective Redress across the EU*, Wolters Kluwer, 2014.

13 See in particular in Poland: A. Jurkowska-Gomułka, *Publiczne i prywatne…*; R. Stefanicki, *Prywatnoprawne środki dochodzenia roszczeń z tytułu naruszenia reguł konkurencji*, C.H. Beck, Warszawa 2014; and in France: L. Idot, C. Prieto (eds.), *Les entreprises face au nouveau droit des pratiques anticoncurrentielles: Le règlement 1/2003 modifie-t-il les stratégies contentieuses?*, Bruylant 2006; M. Chagny, *La place des dommages-intérêts dans le contentieux des pratiques anticoncurrentielles*, Revue Lamy de la concurrence, 2005, No. 4; J. Riffault-Silk, *Les actions privées en droit de la concurrence: obstacles de procédure et de fond*, Revue Lamy de la concurrence, January/March 2006, No. 6; M.C. Boutard-Labarde, G. Canivet, E. Claudel, J. Vialens, *L'application en France du droit des pratiques anticoncurrentielles*, LGDJ, 2008.

14 See in particular in Poland: T. Jaworski, P. Radzimierski, *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym. Komentarz,* C. H. Beck, Warszawa 2010; M. Niedużak, *Postępowanie grupowe. Prawo i ekonomia,* C. H. Beck, Warszawa 2014; M. Rejdak, P. Pietkiewicz, *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym. Komentarz,* Warszawa 2011; M. Sieradzka, *Pozew grupowy jako instrument prywatnoprawnej ochrony interesów konsumentów z tytułu naruszenia reguł konkurencji,* Warszawa 2012; M. Sieradzka, *Dochodzenie roszczeń w postępowaniu grupowym. Komentarz,* Warszawa 2015; and in France: A. Du Chastel, *Les class actions et la procédure civil française*, thesis, Paris I, 2006; S. Brunengo-Basso, *L'émergence de l'action de groupe, processus de fertilisation croisée*, Presses Universitaires d'Aix-Marseilles, 2010; M. Leclerc, *Les class actions, du droit américain au droit européen. Propos illustrés au regard du droit de la concurrence*, Brussels 2012; S. Pietrini, *L'action collective en droit des pratiques anticoncurrentielles. Perspectives nationale, européenne et internationale*, Brussels 2012.

out to be a difficult task. It is especially visible in the European scenario, combined of public and private methods of antitrust law enforcement, and different national approaches to the execution of competition law provisions.

In view of the above it shall be stated, that an attempt to undertake evaluation of a current regime of competition law enforcement existing in Europe, with a view of determining its advantages, drawbacks, existing limits, as well as ways of possible development, seems to be highly desirable. Only such examination can lead to the proposal of more effective solutions which could be introduced without causing difficulties to the currently existing regime. Moreover, due to the fact that the thesis aims to propose specific solutions concerning private enforcement and group litigation, it may bring new elements to the European, French and Polish discussion on development of more efficient mechanism of individuals' protection. As it will be argued within this thesis, the debate started by Court of Justice of the European Union (hereinafter "Court" or "CJEU") at the beginning of 21st century, has still not led to introduction of effective mechanism of protection of individuals against competition law violations, and further steps are required in order to overcome this negative scenario.

Referring to the nature of thesis, it shall be stated that both its goals as well as the methods of their achievement can be regarded as innovative.

First of all, the thesis concentrates on the issue which is widely discussed in the European and national legal doctrine. However, its goal is not only to determine the actual state of development in the area of competition law enforcement, but to define its limitations and possible ways of evolution.

Secondly, the thesis aims to undertake complex and thorough analysis, based on the experience of different national legal systems.

Finally, the applied methods of research (comparative, dogmatic and historical) increase substantial quality of thesis, and guarantee better and up to date response to the currently existing problems of the European and national competition law enforcement regimes.

Analysing the thesis from a social perspective, it shall be also stated that it can bring several benefits for market participants.

First of all, it can be a consequence of proposed solutions which aim to increase the level of protection of individuals against competition law violations.

Secondly, it concerns the problematic undertaken within the thesis. If widely spread, it may lead to the increase in the level of individuals' knowledge on available rights, as well as the means of their protection in case of competition law infringement.

Finally, by placing an individual in a centre of attention, the thesis may lead to increase in the level of social awareness on the issue of competition

law and its possible infringements. Through such construction it may allow to increase a level of social deterrence of competition law violations, as well as permit individuals for a better protection of their rights.

In view of the above we can claim, that preparation of the thesis and its eventual publication would bring numerous benefits to the general system of law enforcement, and to the individuals injured by anticompetitive practices.

IV. Research methodology

The basic research methods used within the thesis are comparative method, dogmatic method and historical method.

The first method allows to precisely analyse the problem of competition law enforcement and propose solutions based on the experience of different legal systems. The research focuses on European, French and Polish experience in the area of private enforcement and collective redress. Moreover, the analysis is enriched by a reference to the American model of antitrust law enforcement, being often opposed to the European concept. Comparative method, apart from its great substantial value, gives also a chance for a critical approach to the issue of group litigation and competition law enforcement, and the objective evaluation of issues analysed within the thesis.

The second research method used within the thesis, i.e. dogmatic method, is indispensable to properly evaluate specific legal mechanisms, and determine its significance for the particular system of law enforcement. It is also important in the context of comparative work, since it allows to determine the relevance of different legal mechanism for specific national legal orders.

The last method, i.e. historic method, allows for the assessment of competition law enforcement and group litigation from a historical perspective. Such analysis is crucial in order to determine how the issue of group litigation evolved in the course of time, and what is its current place in the system of competition law enforcement. Moreover, historical analysis may show the general direction of European discussion on competition law enforcement, and help us to determine the possible ways of its further development.

V. Main limitations

As the main limitations of conducted research we shall evoke a complexity of subject matter and limited number of case law concerning private enforcement of antitrust law, especially in the form of collective redress.

The first limitation results from the general construction of European regime of competition law enforcement. As it was already evoked, it is based on the public enforcement of antitrust law by the European Commission and NCAs, additionally reinforced by the decentralised application of competition law provisions by national courts. In such a regime, the full assessment of competition law enforcement and its specific mechanisms, would require detailed analysis of all 28 national jurisdictions. Since such analysis seems to be too broad and exhaustive, the thesis tries to mitigate this limitation by reference to two national jurisdictions, i.e. French and Polish, which may be considered as models for the whole European Union.

The first legal system, i.e. French, may be regarded as well-established and having a long legal tradition in the enforcement of competition law provisions. Moreover, the French legislator has recently introduced a group litigation mechanism, being a result of long and complex debate on collective redress in the area of consumer and antitrust law. The French discussion on collective redress, as well as the proposed instrument of group litigation, may be regarded as a perfect example of an attempt to find a balance between public and private enforcement, as well as between different members of modern society (consumers, enterprises and public authorities).

The second legal system analysed within this thesis, i.e. Polish, may be considered as a new approach to the enforcement of competition law provisions, strongly based on the regime developed at the European level. Despite its shorter experience in the enforcement of competition law provisions, the Polish jurisdiction shows to be one of the pioneering in the area of Central and Eastern Europe. Moreover, the mechanism of group litigation recently adopted in Poland, construes an innovative approach to the issue of collective redress, and an interesting attempt to adapt foreign concept of collective actions to the European legal reality.

In view of the above it can be stated, that while the author recognises the problem of exclusion of many national legal systems from the scope of analysis conducted within this thesis, it tries to mitigate these difficulties by detailed evaluation of two aforementioned jurisdictions, being examples of different approaches to the issue of competition law enforcement and collective redress.

The second shortcoming of conducted research, concerns limited development in the area of private enforcement of antitrust law in Europe. It results in a low number of cases brought before national courts, especially in the form of collective redress. The restricted empirical experience in private enforcement of antitrust law in Europe, makes it particularly difficult to assess the practical efficiency of the adopted solutions, as well as the obstacles faced by individuals claiming for compensation in case of suffering antitrust injury.

In order to mitigate this problem, and provide additional empirical background for the assessment of collective redress in the area of antitrust law, the thesis refers to the American experience with private enforcement of antitrust law. Through such a reference, the author aims to determine a significance of group litigation mechanism for the enforcement of competition law provisions, as well as possible risks and limitations which may be caused by the application of group actions in this area of legal practice.

VI. Structure

The thesis is divided into two Parts. Each Part is composed of three Chapters.

The first Part, entitled: *"Enforcement of competition law – from public to private method"*, aims to determine the relationship between public and private enforcement of antitrust law, and the role that each method plays in the execution of competition law provisions. Moreover, it tries to describe a general scheme for the enforcement of competition law provisions and create basis for the discussion on its further changes.

In Chapter 1 the author describes the fundamental distinction between public and private enforcement of antitrust law, as well as the main principles of execution of competition law provisions in the European Union.

In Chapter 2 the author undertakes the analysis of development of private enforcement doctrine in Europe. It evaluates its current state and determines possible ways of further development.

In Chapter 3 the author refers to the group litigation mechanism. He provides a general description of a concept of group litigation, describes its main characteristics, as well as the reasons for its development in the area of private enforcement. Moreover, he refers to the American experience in the area of group litigation, being a starting point for the discussion

on group litigation in the area of antitrust law, and a possible source of inspiration for the solutions proposed within the European Union.

The second Part of thesis, entitled: *"Towards increased efficiency of competition law enforcement in Europe – a need of common European approach to collective redress"*, concentrates on a group litigation mechanism, being in the author's opinion, a missing puzzle in the European regime of competition law enforcement. At the basis of general assessment of competition law enforcement regime conducted in Part I, the author tries to propose in the second part of thesis, solutions able to increase the efficiency of competition law enforcement in Europe and increase protection of individuals against anticompetitive behaviours.

In Chapter 1 the author undertakes an analysis of a debate on collective redress conducted at the European level in the course of last decades. He provides a complex overview of current discussion on group litigation in Europe and evaluates its outcome.

In Chapter 2 the author refers to French and Polish experience in the area of group litigation, and tries to determine if the European debate on group litigation found its reflection at the national level. Moreover, the authors wonders if national achievements in the area of group litigation may be a source of inspiration in the European discussion on collective redress.

Finally, in Chapter 3, the author formulates specific *de lege ferenda* proposals which may be taken into consideration by the European and national legislator while discussing a model solution on collective redress. The main objective of proposed solutions is to find a balance between public and private enforcement of antitrust law, and to empower individuals with the effective mechanism of protection against competition law infringements.

PART I

ENFORCEMENT OF COMPETITION LAW – FROM PUBLIC TO PRIVATE METHOD

The first part of the thesis aims to determine the relationship between public and private enforcement of competition law, as well as the role that each method plays in the execution of antitrust law provisions. By the evaluation of a public mechanism of competition law enforcement, the Part I tries to specify these areas of the enforcement process which require further development. Moreover, the Part I tries to answer which limitations of a current regime of competition law enforcement in Europe, could be effectively mitigated by the use of private method, in particular the group litigation mechanism.

Such complex approach to the issue of competition law enforcement included in the first part of thesis, aims to create strong theoretical basis for further discussion on the ways and methods of its further development. Only in such manner, the specific proposals on group litigation, included in the second part of thesis, may respond to the needs of the enforcement process and constitute a coherent and well-adapted solution to the actual limitations of the European approach to the enforcement of competition law provisions.

The Part I comprises of three chapters, constituting a gradual reasoning on the enforcement of antitrust law. It starts by defining the notion of enforcement, its specific elements, as well as the methods of law enforcement in the area of antitrust law (Chapter 1). Afterwards, it focuses on the issue of private enforcement, its development in Europe, and the relationship between public and private method of competition law enforcement (Chapter 2). Finally, the Part I refers to the group litigation mechanism, being in the author's opinion a key element of the modern system of competition law enforcement, and the important complement of the enforcement regime described in the first two chapters (Chapter 3).

The analysis conducted in Part I aims to draw a complex picture of competition law enforcement in Europe which in the author's opinion has to be supplemented by the still missing puzzle in the execution of antitrust law provisions, i.e. group litigation mechanism. Moreover, by undertaking a general discussion on competition law enforcement in Europe, the Part I tries to prove that still a lot has be done, before a fully effective regime, ensuring greater detection of anticompetitive behaviours and appropriate protection of individuals injured by competition law violations, may be established within the EU.

Chapter 1

Between Public and Private Enforcement – Inconsistency or Mutual Complementing?

The goal of Chapter 1 is to describe the fundamental distinction between public and private enforcement of antitrust law, as well as the main principles of execution of competition law provisions in the European Union. Through such an analysis Chapter 1 is trying to prove that for the appropriate functioning of antitrust law, the existence of a hybrid (public-private) system of its enforcement is crucial. By the initial assessment of the public method of competition law enforcement, Chapter 1 aims to confirm that while the public method shall form the basis of a system of competition law enforcement in Europe, its full efficiency cannot be achieved if the public method is not strengthened by the effective means of execution of competition law provisions by private parties.

I. Competition law and its enforcement

1. Notion of enforcement

The notion of "enforcement" is often defined as an act of compelling observance of something or obedience to something[1]. Such a definition allows us to assume that the enforcement requires existence of at least three elements for its effective functioning. First, there must be a subject of enforcement. Secondly, it is necessary to determine a person or institution guaranteeing that the subject of enforcement will be achieved. Finally, it shall be specified who is obliged to act in accordance with certain requirement.

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1 *Webster's Dictionary*, Landoll Inc., Ashland Ohio, 1997, p. 110.

Applying the above definition to the area of legal practice, we can state that the enforcement of law must be regarded as a specific process with an aim to guarantee compliance with legal provisions. Such process requires to determine the group of persons being bound by the legal provisions and to create a mechanism ensuring compliance with law. Most often this mechanism comprises of a complex institutional structure and a system of sanctions which are intended to ensure that the legal provisions are observed and the eventual law infringements are detected and punished.

Apart from these three classical elements of law enforcement, i.e. subject of enforcement, person of enforcer and a person obliged, certain authors rightly observe that the notion of enforcement in the legal context shall be interpreted more broadly, and take into consideration also the interests of victims of illegal behaviours. In other words, it is argued that the law enforcement shall not be limited only to the detection, punishment and deterrence of law infringements, i.e. the relationship between the enforcer and the potential infringer, but shall also take into consideration the legitimate interest of persons directly or indirectly injured by the illegal behaviours. Because as R. Posner states, creating incentives to comply with law is not enough, since in all enforcement scenarios the victims of law infringements will occur[2]. The goal shall be rather to ensure, at reasonable cost, a reasonable degree of compliance with law, than to create a theoretical system of enforcement working hardly in practice[3].

In view of the above it may be stated, that the notion of enforcement, once analysed from the legal perspective, shall be interpreted broadly, without its limiting only to the process of ensuring compliance with law, but including also the protection of victims of law violations. Undoubtedly, such definition of enforcement assumes *per se* that the legal system cannot guarantee full obedience to law, and that the victims of illegal conduct will exist. However, as the practice of law enforcement shows, only such scenario may be currently observed in all legal systems.

2. Enforcement in the area of competition law

Once we try to apply the above described notion of enforcement to the area of antitrust law, we need to refer to the objectives of competition law enforcement. As A.P. Komninos explains, it fulfils not only general goals of antitrust law, i.e. guaranteeing economic efficiency of the market,

2 R. Posner, *Antitrust law*, The University of Chicago Press, Second Edition, 2001, p. 266.
3 *Ibidem*, p. 266.

protecting freedom to compete and protecting consumers' welfare, but pursues also three different purposes: injunctive, punitive and restorative (compensatory)[4].

The injunctive objective of competition law enforcement concerns bringing an infringement to an end. This classical goal of enforcement is usually achieved by the introduction of specific sanctions (negative measures) which are intended to force a violator to abstain from the illegal behaviour. Moreover, as A. P. Komninos underlines, apart from these negative measures, being the basic instrument in the achievement of injunctive objective, the positive measures may be also distinguished[5]. It concerns cease and desist orders or injunctions which can be applied by the courts in order to bring a violation to an end.

The second objective of competition law enforcement, i.e. punitive, is closely connected to the previous one. Its aim is to punish the perpetrator of illegal act and to deter the potential violators from committing infringements in the future. This double nature of punitive objective, i.e. punishment and deterrence, is most often achieved by the imposition of fines on the wrongdoers. However, as it is also argued, the full achievement of punitive objective may be significantly supported by the award of damages by civil courts dealing with private claims. That is because, the existence of private actions may increase the financial risks for the wrongdoer (stronger deterrence) and raise the overall value of the imposed sanctions (higher punishment)[6].

The last objective of antitrust law enforcement is compensation. It foresees that each law infringement causing an injury to the individual shall lead to compensation of a person harmed by the anticompetitive practice. The restorative goal of competition law enforcement complements two

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4 A.P. Komninos, *Public and private antitrust enforcement in Europe: Complement? Overlap?*, Competition Law Review, December 2006, Vol. 3, Issue 1, pp. 5–6; see also at this point R. Stefanicki, *Prywatnoprawne środki dochodzenia roszczeń…*, pp. 1–38; A. Jurkowska-Gomułka, *Publiczne i prywatne…*, pp. 33–34; D. Miąsik, *Controlled Chaos with Consumer Welfare as the Winner – a Study of the Goals of Polish Antitrust Law*, Yearbook of Antitrust and Regulatory Studies 2008, vol. 1(1), pp. 34–43.

5 A.P. Komninos, *The Relationship between Public and Private Enforcement: quod Dei Deo, quod Caesaris Caesari*. In: P. Lowe, M. Marquis (eds.), *Integrating Public and Private Enforcement. Implications for Courts and Agencies*, European Competition Law Annual 2011, Hart Publishing 2014, pp. 141–142.

6 *Ibidem,* p. 143; see also European Commission, Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM(2005) 672 final, pt. 1.1; European Commission Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules, SEC(2008) 404, pt. 15 and 20.

aforementioned objectives, and ensures that the wrongdoers will not benefit from their illegal behaviour. It also guarantees that the victims of antitrust law violations will be put in a position as if the infringement has never occurred. As it will be described in details afterwards, the compensatory objective is achieved mainly by the private claims, however, the public enforcement has important role to play in this matter as well.

In view of the aforementioned analysis of the goals of competition law enforcement it can be stated, that the broad definition of law enforcement, proposed in Point I(1), finds its confirmation in the area of antitrust law. The enforcement of competition law is not limited only to ensuring compliance with law, but also foresees the protection of interests of individuals injured by anticompetitive behaviours. Therefore, the enforcement of antitrust law, as it will be understood within this thesis, can be defined as a process of compelling observance of antitrust provisions and removing the negative consequences of a non-compliance with antitrust rules.

3. Two methods of competition law enforcement

In the currently existing systems of antitrust law we can distinguish two different methods of enforcement, i.e. public and private[7].

First method, mainly used in the European Union, concerns the establishment of public authorities responsible for discovering and sanctioning of competition law infringements. The so-called public method of competition law enforcement is based on the special powers granted to public authorities, financial resources provided for their activity and the public objective of all the actions undertaken by law enforcer. The process of public enforcement has administrative character and is bound by the rules of legal scrutiny and transparency.

The second method of competition law enforcement, well established in the United States and still underdeveloped in the European Union, is defined as private enforcement. In the most general manner it can be described as an individually initiated litigation before a court in order to remedy an antitrust infringement[8]. It foresees the involvement of individuals, injured

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7 For more details concerning a distinction between public and private enforcement of antitrust law see A. Jurkowska-Gomułka, *Publiczne i prywatne…*, pp. 23–49.

8 K. Huschelrath, S. Peyer, *Public and Private Enforcement of Competition Law – A Differentiated Approach*, ZEW Discussion Paper No. 13-029, April 2013, p. 5, available at: http://ftp.zew.de/pub/zew-docs/dp/dp13029.pdf [access: 03.02.2014]; see also M. Szpunar, *Odpowiedzialność podmiotu prywatnego z tytułu naruszenia prawa*

by anticompetitive behaviours and personally interested in initiating private actions, in the process of detection and prosecution of illegal practices. Differently than in the case of public method, individuals are not provided with the special methods to investigate and prosecute anticompetitive behaviours. Moreover, their interest to sue is rather motivated by the personal reasons, e.g. a wish to obtain compensation, than by the general objectives of antitrust policy. The private enforcement is generally governed by the rules of civil procedure and takes place before the competent civil courts.

Undoubtedly, the aforementioned distinction between public and private method of competition law enforcement can be sometimes misleading, and the lines between these two methods may blur when we are trying to propose the optimal model of antitrust enforcement. However, for the purpose of this thesis, and in order to guarantee clear and comprehensive reasoning, we shall differentiate private actions from public proceedings. While the later may be regarded as a principle mechanism of the enforcement of antitrust law in Europe, the former shall be proposed as an alternative to the actually existing system of competition law enforcement.

II. The principle of public enforcement of European competition law

As it was stated above, the public method is regarded as the main mechanism of competition law enforcement in Europe. Both at the European and national level, the provision of incentives to comply with antitrust law is mainly achieved by the creation of an institutional system, responsible for discovering anticompetitive behaviours and imposing sanctions on law perpetrators. At the European level such a role is granted to the European Commission, while at the national level to the National Competition Authorities.

The aforementioned construction of the European system of antitrust law enforcement may be explained both by the practical and cultural reasons.

Concerning the practical implications we can claim that the public enforcement of antitrust law ensures stronger incentives to sue, provides greater investigative powers to the enforcer and guarantees effective means of financing of the enforcement actions. As it will be described in details in Part I Chapter 2 Point IV(1), such characteristics of the enforcement mechanism are crucial for the effective detection and prosecution of anticompetitive behaviours, and justify superiority of public method over the private antitrust actions.

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wspólnotowego, Oficyna a Wolters Kluwer Business, Warszawa 2008, p. 293 and H.V. Jerez, *Competition Law Enforcement and Compliance across the World. A Comparative Review*, Kluwer Law International 2014, p. 236.

Referring to the cultural reasons lying behind a dominant role of public method in the enforcement of antitrust law in Europe, we shall evoke the classical distinction between the "enforcement" and "litigation culture".

The "litigation culture" can be characterised by a particular activism of private parties in the enforcement of legal provisions[9]. It is often described as a specific style of legal contestation in which construction of a claim, search for legal arguments and gathering of evidence, are dominated not by judges or public authorities, but by disputing parties[10]. While the "litigation culture" is typical for the American system of antitrust enforcement, the European regime is characterised by the "enforcement culture". It assumes that the principal obligation for the enforcement of law rests on public authorities. As a result, the activity of private parties in the execution of legal provisions is limited, and their eventual participation in the process of enforcement has only supplementary character.

The above distinction between the "litigation culture" and the "enforcement culture" has crucial consequences not only for the general construction of the European system of competition law enforcement, but also for its openness towards the adoption of specific mechanisms of private actions. Therefore, as it will be argued in the course of this thesis, without a reassessment of the European traditional approach to the enforcement process, the establishment of the more effective system of competition law enforcement in the EU may be hard to achieve. As the good occasion for such reassessment we can consider discussion recently launched by the European Commission, and aimed to determine the possible ways of strengthening the enforcement powers of national competition authorities[11]. As the Commission held in its press release accompanying the commencement of public consultation: *"EU competition rules are now being applied on a scale that the Commission could never have achieved on its own. This is a significant contribution to a level playing field for companies operating in the Single Market and essential to drive economic growth. But there is still room for improvement."*[12]

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9 R.A. Kagan, *American and European Ways of Law: Six Entrenched Differences*, Institute of European Studies, paper 060407, pp. 16–17, available at: http://web.law.columbia.edu/sites/default/files/microsites/law-theory-workshop/files/RAKonati10-30-05.pdf [access: 12.04.2014].

10 *Ibidem*, p. 4.

11 See Public consultation "Empowering the national competition authorities to be more effective enforcers", available at: http://ec.europa.eu/competition/consultations/2015_effective_enforcers/index_en.html [access: 09.12.2015].

12 European Commission – Press release, *Antitrust: Commission consults on boosting enforcement powers of national competition authorities*, Brussels, 4 November 2015, available at: http://europa.eu/rapid/press-release_IP-15-5998_en.htm [access: 09.12.2015].

Without going into detailed analysis of public enforcement in Europe and possible ways of its further development, the following points of thesis will aim to describe the main characteristics and limitations of public method. The goal of such reasoning will be to determine the areas where private actions, and in particular group litigation, could mitigate the shortcomings of public method and lead to greater efficiency of the enforcement process.

1. Main characteristics of public method

1.1. Deterrence-based approach

As a first characteristic of public method we can evoke its deterrent character. The deterrence effect, understood as dissuading potential law perpetrators of anticompetitive conduct, is generally achieved by the existence of financial or criminal sanctions which may be imposed by public authority on a person or enterprise violating competition law provisions. The consequences of such sanctions are two-folded. On the one hand, they allow to bring certain infringement to an end ("injunctive" effect), and on the other, they are able to punish the illegal behaviour and to deter current and potential infringers from undertaking the anticompetitive conduct in future ("punitive" effect). While the "punitive" effect can be achieved both by a public and private method, the public enforcement seems to be perfectly suited for the deterrence purposes[13].

First, the public enforcement allows for imposition of a wide scope of sanctions, e.g. monetary sanctions (fines), criminal sanctions (imprisonment) or director disqualifications, what effectively alters the potential perpetrators' cost/benefit calculation, and makes them refrain from committing the antitrust infringements. Moreover, the greater scope of sanctions available to public enforcer ensures greater flexibility in punishing violation, and gives the public authority ability to choose the optimal measure for sanctioning the infringement. As W. Wils claims, this characteristic of public enforcement ensures that the deterrence is credible, and thus compliance with law is more probable[14].

Secondly, the deterrence approach of public method is manifested once the way of imposing financial sanctions is concerned. Both at the European and national level, the public enforcer disposes several mechanisms allowing

[13] A. Stawicki, E. Stawicki (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, LEX a Wolters Kluwer business, Warszawa 2011, pp. 1164–1166.

[14] W. Wils, *Principles of European Antitrust Enforcement*, Hart Publishing 2005, p. 116.

to set the optimal amount of sanction and achieve the deterrence in the best possible way. As the examples of such mechanisms we can give different possibilities available to the European Commission and NCAs in order to increase the financial fines imposed on competition law perpetrator[15]. Through such solutions, as the increase of fines based on aggravating factors, or the increase of fines based on the actual gains from the infringement, the penalty imposed on law perpetrator can be modified, with a view of guaranteeing that the punishment corresponds to the level of harm caused to the society[16].

Finally, the deterrence effect of public enforcement is achieved by the increased level of detection of anticompetitive behaviours. It should be kept in mind that not only the level or scope of possible sanctions make the enterprises comply with law, but also the probability of detection of anticompetitive conduct discourages potential infringers from undertaking a risk of being caught and punished. In case of public enforcement, such a probability is relatively high. Due to the use of wide investigative powers, e.g. market inquiries, request for information or investigation in premises, and innovative enforcement mechanisms, e.g. leniency programs, the public authorities are able to discover practices being often committed in a conspiracy and kept in the highest secrecy by the market participants.

1.2. Institutionalised character

The second characteristic of public method concerns its institutionalised character. As it was mentioned above, the public method foresees a creation of an institutional system responsible for the enforcement of legal provisions. In such a system the competition authorities have several prerogatives directly stated in law and giving them important competences in the process of enforcement.

The institutionalisation of public enforcement may be observed in its mere construction. In all of the European jurisdictions the enforcement of antitrust law is centralised and highly formalised. The power of enforcement is vested in public authority, which is empowered with the special prerogatives to investigate and punish competition law infringements. Moreover, the process of enforcement has public character and has to

[15] See for example Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, Official Journal C 210, 1.09.2006, pp. 2–5.

[16] A. Aresu, *Optimal contract reformation as a new approach to private antitrust damages in cartel cases*, European Law Review, Vol. 35, No. 3, pp. 349–369; P. Manzini, *European Antitrust in Search of the Perfect Fine*, World Competition, Vol. 31, Issue 1, 2008, p. 16.

correspond to all the requirements of administrative proceedings. Finally, the reasons justifying actions undertaken by the public authority have to correspond to the general objectives of antitrust policy.

Referring to the consequences of institutionalisation it shall be firstly stated, that it ensures greater transparency and certainty in the application of law provisions. This feature of public enforcement is especially important from the perspective of enterprises, required to comply with the antitrust law. The higher level of transparency and certainty of the enforcement process, allows to determine the character of certain business activity *ex ante,* and to adapt market behaviour to the requirements set by the public enforcer.

Secondly, the greater level of transparency allows to better optimise the enforcement process. As W. Wils argues, by the public scrutiny the behaviour of competition authorities is subject to permanent control, obliging them to act, i.e. select cases, start investigations and pursue infringements, with a view to maximise respect for the antitrust prohibitions, while minimising the costs of antitrust enforcement[17].

Finally, the institutionalisation of the enforcement process ensures its greater coherence. That is because, the power of antitrust enforcement is centralised and granted to a single body. Once empowered with a control over the public enforcement, the public authority ensures that concurrent proceedings are not initiated and that enforcement efforts are properly allocated.

1.3. Wide access to proofs

The third characteristic of public method refers to the increased ability of public enforcer to obtain the evidence of anticompetitive behaviour.

In the complex antitrust cases, a limited access to proof may cause important obstacles in prosecuting competition law infringements. Due to the secret character of illegal behaviours, their highly economic nature and a long duration of many anticompetitive practices, the individuals have often problems with detecting the violation and proving its illegality. For these reasons, many authors claim that the public enforcement is better suited for the detection of illegal behaviours in the area of antitrust law. As W. Wils claims: *"competition authorities are better at discovering and proving antitrust infringement than private parties, because the authorities have wider investigative powers."*[18]

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17 W. Wils, *Principles of European Antitrust Enforcement…*, p. 120.

18 *Ibidem*, p. 118.

Among the investigative powers of public authorities we can evoke market inquiries, request for information, interview of individuals or investigation of premises. All of them may be regarded as an important "sword" in the hands of public enforcer, and a tool able to facilitate discovery of antitrust law violations. It is especially important in the area of antitrust law, characterised by a tacit and complex character of infringements. In such situation, as J.R.S. Prichard underlines, the public authorities have often advantage over the private parties, due to their special competences and an experience in performing analysis of potentially anticompetitive conduct[19].

What shall be additionally underlined in the European context, is the reinforced character of the investigative powers of NCAs within the European Union. It is achieved through the cooperation of the Commission and NCAs within the European Competition Network (hereafter "ECN"), allowing for better flow of information, effective allocation of antitrust cases and mutual aid provided by the competition authorities[20]. Such feature of the European system of antitrust law enforcement constitutes important advantage over the private method, since in many cases the problem with gathering the evidence results not only from a nature of case and a limited access to proof of violation, but also from the transnational character of antitrust disputes. In such scenario, a limited knowledge of certain business environment, or simple language barriers, are able to hamper the law enforcer from obtaining required proof of infringement.

Apart from the important investigative powers granted to public authorities, their ability to discover antitrust infringements and collect the evidence is additionally strengthened by the wide application of leniency programs. This mechanism, allowing granting to undertaking committing the antitrust law violation an exemption or limitation of a punishment in exchange for the disclosure of information concerning the infringement, tends to be one of the most effective tools used by the public authorities in the fight against anti-competitive behaviours[21]. As T. Carmeliet claims in the analysis of leniency programs in Europe: *"leniency is a cornerstone*

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19 J.R.S. Prichard, *Private Enforcement and Class Actions*. In: J.R.S. Prichard, W.T. Stanbury, T.A. Wilson (eds.), *Canadian Competition Policy: Essays in Law and Economics*, Toronto: Butterworths 1979, pp. 217, 237.

20 See in details M. Gac, *Europejska Przestrzeń Administracyjna jako mechanizm zwiększający efektywność stosowania prawa europejskiego – analiza na przykładzie Europejskiej Sieci Konkurencji*, Rocznik Administracji Publicznej, 2015 (1), pp. 95–116 and M. Gac, *Le Réseau européen de la concurrence comme un mécanisme de la convergence entre systèmes juridiques nationaux*, in: *Deuxièmes journées juridiques franco-polonaises: Convergence et divergence entre systèmes juridiques*, Editions Mare & Martin 2015, pp. 157–182.

21 W. Wils, *Principles of European Antitrust Enforcement…*, p. 120.

of the enforcement policy of the European Commission and the National Competition Authorities ("NCAs"). Almost 60% of cartel infringements is discovered through leniency. The efficiency and effectiveness of such system can thus hardly be overestimated."[22] Also the recent European Commission's data confirm such a standpoint. As the Commission evoked in the Impact Assessment Report accompanying the recent proposal for Damages Directive: *"As regards Commission cases, when looking at the period 2008 to 2011, 21 out of 24 decisions (i.e. 88% of decisions) were based on leniency applications. […] When looking at the NCAs represented in the ECN, in 2010 18 out of 30 and in 2011 13 out of 21 cartel decisions, imposing a significant amount of fines, were based on leniency applications."*[23]

In view of the above it can be stated, that the information asymmetry, understood as an imbalance in the information possessed by the law perpetrator and the law enforcer which causes particular problems in case of private antitrust actions, is significantly limited once the public method is applied. Due to the increased access to evidence, a specialised knowledge and experience in the detection and prosecution of anticompetitive behaviours, as well as the application of innovative methods of enforcement, the public authorities have greater chances of discovering illegal practices than the injured individuals.

1.4. "Social approach" to competition law enforcement

The last characteristic, having a key impact on the importance of public method, can be described as its "social character". As it is underlined by different authors, public enforcers can be called "maximisers of social welfare"[24]. Contrary to the injured individuals, who decide to undertake the enforcement action only if the value of possible gains is higher than the costs that need to be incurred, the public enforcer decides to initiate the proceedings each time when the violation occurred and the public

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22 T. Carmeliet, *How lenient is the European leniency system? An overview of current (dis) incentives to blow the whistle*, Jura Falconis, Vol. 48, 2011–2012, p. 463.

23 See EC's Impact Assessment Report, Damages actions for breach of the EU antitrust rules, Accompanying the proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, SWD(2013) 203 final, pt. 57.

24 I. Segal, M. Whinston, *Public vs. private enforcement of competition law: a survey,* European Competition Law Review 2007, Vol. 28(5), p. 306; S.E. Keske, *Group litigation in European competition law. A Law and Economics perspective*, European Studies in Law and Economics, Intersentia 2010, p. 24.

interest requires protection. Consequently, the problem of so-called "under-investment" in the competition law enforcement does not appear.

Moreover, as W. Wils argues, thanks to the "social approach" of public authorities towards the process of enforcement, two important drawbacks of private method, i.e. unmeritorious suits and undesirable settlements, are mitigated[25].

Finally, the public enforcement of antitrust law produces important social benefits. It concerns the punishment of law perpetrators, deterrence of potential violators, setting the standards for interpretation of competition law provisions and increasing general understanding of antitrust law, all of which are crucial from the perspective of a whole society.

In view of the above it may be stated, that the public enforcement leads not only to achieving the goals of antitrust policy, but brings multiple benefits to all participants of the market, including enterprises and consumers.

2. Limitations of public method

Despite the several advantages of public enforcement evoked above, its more detailed analysis in the European and national context shows however, certain limitations of this method.

Firstly, it concerns the difficulties with the achievement of corrective justice principle. Secondly, it refers to the limited efficiency of public enforcement in case of "small" competition law infringements. Finally, it applies to a strong dependence of public mechanism on state and its current policies.

Therefore, as it is often argued, the system of competition law enforcement based solely on the activity of public authorities, cannot allow to fully achieve all the objectives of antitrust law, and needs to be reinforced by the private method[26]. The complex approach to the issue of competition law enforcement shall thus combine these two techniques (public and private), and by ensuring a proper balance between the activity of administrative bodies and injured individuals, create basis for the effective accomplishment of all the objectives of competition law enforcement process.

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25 W. Wils, *Principles of European Antitrust Enforcement…*, p. 120.

26 See for example A. Jurkowska-Gomułka, *Publiczne i prywatne…*, pp. 47–49; R. Stefanicki, *Prywatnoprawne środki dochodzenia roszczeń…*, pp. 39–56.

2.1. Lack of compensation of victims of violations

The first limitation of public method pertains to difficulties with the achievement of corrective justice principle. The goal of the aforementioned principle, previously evoked as a third pillar of competition law enforcement, is not to prevent violations from happening, but to correct injustice once a violation occurred[27]. In general, it will be achieved by obliging a party who committed an infringement, to compensate the victims of illegal practice.

Once we analyse the mechanism of public enforcement we may clearly state that its principal objectives are the punishment and deterrence. By the discovery and prosecution of illegal behaviours, as well as by the imposition of sanctions on undertakings committing infringements, the public authorities are able to fulfil two objectives of competition law enforcement, i.e. "injunctive objective" and "punitive objective"[28]. However, the question is: how should the corrective justice be achieved by the use public method?

Certain authors claim that the public enforcement can benefit corrective justice in several ways[29]. First, the compensation of victims of infringements may be achieved through the commitment decisions rendered by public enforcer. By obliging a wrongdoer to certain behaviour or accepting his commitment, the competition authority may establish in its decision a compensatory scheme, allowing to reward the victims of violation. As an example of such practice we can give a decision rendered by the Office of Fair Trading in the independent schools' cartel case[30]. In the aforementioned case, the British competition authority decided to settle a case and accepted a commitment by the schools to make a payment of 3 million GBP into an educational charitable trust, in order to benefit the students who attended the schools during the academic years when the cartel was functioning.

The second scenario when the public enforcement may lead to the achievement of corrective justice, refers to the cases in which the public

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27 W. Wils, *Principles of European Antitrust Enforcement…*, p. 117.

28 The injunctive and punitive objective of public enforcement of antitrust law is also recognised by the Polish legal doctrine – see M. Król-Bogomilska, in: T. Skoczny, A. Jurkowska, D. Miąsik (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, C.H. Beck, Warszawa 2009, p. 3; C. Banasiński, E. Piontek (eds.), *Ustawa o ochronie konkurencji i konsumentów. Komentarz*, Wyd. LexisNexis, Warszawa 2009, p. 949; K. Kohutek, in: K. Kohutek, M. Sieradzka, *Ustawa o ochronie konkurencji i konsumentów. Komentarz, LEX a Wolters Kluwer business*, Warszawa 2008, p. 1015.

29 See for example A.P. Komninos, *The Relationship between Public and Private Enforcement…*, p. 142.

30 Office of Fair Trading, 20 November 2006, Decision n° CA98/05/2006, Exchange of information on future fees by certain independent fee-paying schools, Case CE/2890-03.

authority acts on behalf of an injured party. As A.P. Komninos argues: *"certain competition regimes give powers to certain public authorities to claim damages, acting on behalf of victims."*[31] As such regime we can evoke the American system, where the State Attorneys General can bring *parens patriae* actions on behalf of victims located in their states. Also the French law, in art. L442-6(III) of Commercial Code[32], foresees a solution according to which in case of anticompetitive conduct, the President of Competition Authority, the Minister responsible for economic affairs and the Public Prosecutor may initiate an action before civil court against undertaking committing infringement, and claim, among others, for compensation of victims of violation[33].

Finally, the last example of the achievement of corrective justice principle by the public enforcer refers to a situation in which the public authority acts as an injured party in order to obtain compensation on its own behalf. The most recent example of such scenario concerns a damages action initiated by the European Commission against the members of a "lifts cartel". The "lifts cartel", which was prior investigated by the Commission and led to the imposition of fines totalling over 990 million euros among four groups of companies (Otis, Kone, Schindler and Thyssenkrupp)[34], showed that one of the main victims of price-fixing agreements was the European Union. In the period of cartel's activity it had entered into numerous contracts for the installation, maintenance and renewal of elevators, and paid to cartel

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31 A.P. Komninos, *The Relationship between Public and Private Enforcement…*, p. 142.

32 French Commercial Code [*Code de commerce*], consolidated version from 1 January 2016, available at: http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000005634379

33 See Art. L442-6(III) of French Commercial Code which provides: *"Proceedings are brought before the competent civil or commercial court by any person who provides proof of legitimate interest, the Public Prosecutor's Office, the minister responsible for economic affairs or the president of the Competition Authority, when he detects a practice mentioned in this article in the course of cases under his jurisdiction. During these proceedings, the minister responsible for economic affairs and the Public Prosecutor's Office may ask the court to which the case is referred to order that the practices mentioned in this article be ceased. They may also, for all these practices, request a declaration of nullity of the illegal clauses or contracts and the recovery of the mistaken payments. They may also request the pronouncement of a civil fine of up to 2 million Euros. Nevertheless, this fine may be increased to three times the amount of the total sums unduly paid. Compensation may also be sought for the loss suffered. In any event, it is up to the service provider, producer, trader, manufacturer or the person listed on the trade register who claims to be discharged, to provide evidence of the circumstances that resulted in the extinguishment of its obligation…"*

34 Summary of Commission Decision of 21 February 2007 relating to a proceeding under Article 81 of the Treaty establishing the European Community (Case COMP/E-1/38.823 — Elevators and Escalators), OJ 2008 C 75, p. 19.

members prices significantly higher than the real market price. As a result, the European Commission decided to initiate damages actions against the cartel members and claimed for compensation for the injury suffered by the EU. While dealing with a prejudicial question, asked by the Belgian court faced with the aforementioned case, the CJEU held that due to the fact that: *"any person can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 81(1) EC"*, the EU shall also enjoy a right to claim for damages in case of being injured by the anticompetitive practice[35]. Through such reasoning the Court confirmed that the role of public enforcer shall not be limited only to the detection and punishment of anticompetitive behaviours, but through its direct participation in damages claims, the public authority may also contribute to achievement of corrective justice principle.

The aforementioned examples illustrate that public enforcement, if shaped correctly, may benefit a corrective justice principle. Nevertheless, as the analysis of the European and national practice of antitrust enforcement shows, the situations when the public authority acts for the achievement of corrective justice principle may be regarded as an exception. In its actual state of development in Europe, the public enforcement is still regarded as a mechanism ensuring detection and punishment of illegal behaviours, rather than the compensation of victims of violations. Therefore, as many authors claim[36], and as the Commission admits[37], the effective enforcement of antitrust law in Europe must be strengthened by the use of private method. Only in this manner the corrective justice principle will receive greater attention and will have a chance of being fully achieved.

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35 Judgment of the Court (Grand Chamber) of 6 November 2012 in case C-199/11 *Europese Gemeenschap v. Otis NV and Others,* ECLI:EU:C:2012:684, pt. 43–44.

36 See for example A. Jurkowska-Gomułka, *Publiczne i prywatne…*, pp. 47–49; R. Stefanicki, *Prywatnoprawne środki dochodzenia roszczeń…*, pp. 39–56; P. Marsden, *Public-private partnerships for effective enforcement: some "hybrid" insights?*, European Competition Law Journal, Vol. 9, No. 3, December 2013, pp. 509–518; T. Ottervanger, *Designing a Balanced System: Damages, Deterrence, Leniency and Litigants' Rights*. In: P. Lowe, M. Marquis (eds.), *Integrating Public and Private Enforcement. Implications for Courts and Agencies*, Oxford and Portland, Oregon 2014, pp. 17–25; L. Silva Morais, *Intergrating Public and Private Enforcement of Competition Law in Europe: Legal Issues*. In: P. Lowe, M. Marquis (eds.), *Integrating Public and Private Enforcement. Implications for Courts and Agencies,* Oxford and Portland, Oregon 2014, pp. 113–140.

37 See European Commission, Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM(2005) 672 final; European Commission, White paper on damages actions for breach of the EC antitrust rules /* COM/2008/0165 final */.

2.2. Limited efficiency in case of "small" competition law infringements

The second drawback of public method concerns its limited efficiency in detecting and prosecuting "small" competition law infringements. As such we can define the anticompetitive behaviours which are limited to a certain part of the market, involve small number of victims of violations and do not influence the economy in a significant manner. In such situations, the public enforcer responsible for the achievement of public objectives and dealing with the multiple numbers of cases, may often decide to leave "small" cases outside of the enforcement action, and devote greater human and financial resources for the detection and prosecution of more significant violations of antitrust law.

The first reason for such scenario is often the work overload of public authorities dealing with the competition law infringements. It results both from the insufficient financial and human resources being at the possession of competition authority, and the number of infringements committed by the market participants[38]. Obviously, it can be argued that not all antitrust violations need to be prosecuted and that antitrust enforcement always has a cost[39], however the number of "small" infringements of antitrust law left outside of public prosecution is still too high in Europe to be considered as a side cost of public enforcement[40].

Apart from the overload in work of competition authorities, another reason for the inefficiency of public method in the detection and prosecution of "small" competition law infringements is the public objective of undertaken actions. As the practice shows, the public proceedings are most often initiated once the violation has significant negative influence on the market and its participants[41]. Undoubtedly, it is a case of hard core restrictions, such as price fixing, bid rigging or allocation of market. The

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38 W. Wils, *Principles of European Antitrust Enforcement…*, p. 123.

39 *Ibidem*, p. 123.

40 According to the EC's Impact Assessment Report, Damages actions for breach of the EU antitrust rules, Accompanying the proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, SWD(2013) 203 final, *"the total amount of compensation (single damages plus pre-judgment interest) that victims of antitrust infringements are currently forgoing ranges from approximately €5.7 billion (on the most conservative assumptions) to €23.3 billion (on the least conservative) each year across the EU."*

41 A. Jurkowska-Gomułka, *Publiczne i prywatne…*, pp. 157–161; K. Kohutek*, Naruszenie interesu publicznego a naruszenie konkurencji (na tle praktyk rynkowych dominantów)*, Państwo i Prawo 2010, No. 7, p. 51.

analysis of the recent Commission's decisions confirms that in the course of last decade hard-core cartels received prior attention and became principal objective of the antitrust enforcement in Europe[42]. While such practice has justified grounds from the perspective of public enforcement and its public interest objectives, some may claim that it leads to the omission of cases having important significance from the perspective of a whole society. As the examples of meritorious cases which are often omitted by public enforcers, we may give vertical restraints or abuse of dominance on the limited part of the market. The exclusion of such practices from the scope of public enforcement may lead to important disturbance on the market, and decrease in the level of protection of individuals against competition law infringements.

In view of the aforementioned it may be argued, that the public enforcement leads to establishment of a so-called enforcement gap. Within this gap we can find numerous cases, often of small value, which are not prosecuted by public authorities. While such an outcome may be understood as a cost of public enforcement, once analysed from the perspective of a whole society and the principle of full effectiveness of competition law enforcement, it is highly undesirable. First, it creates a risk that certain antitrust infringements remain undiscovered and not punished. Secondly, it leads to the situation in which numerous victims of competition law infringements remain without due compensation. Finally, if the number of cases left outside of the scope of public enforcement is high, it may lead to a decrease of the overall level of deterrence. Therefore, in order to mitigate such limitation of public enforcement, the private method may have particular significance.

2.3. Strong dependence on state

The last limitation of public enforcement concerns its strong dependence on state. It results from the mere construction of a public method which is highly institutionalised and established within the state's administrative structure. As a result, the public enforcer is functionally linked with a state and is bound by the general goals of public policy. While such a construction brings several benefits to public enforcement, e.g. wider investigative and sanctioning powers, greater access to proofs and greater means of financing, in certain cases it may also lead to the limited efficiency of public method.

[42] See EC Competition Commission statistics available at: http://ec.europa.eu/competition/cartels/statistics/statistics.pdf [access: 10.12.2015].

First, it may be observed as far as the process of selection of cases is concerned. As certain authors argue, the practice of public antitrust enforcement in many jurisdictions shows that less attention is given to "small value" infringements, while greater effort is often devoted to more prestigious cases, in the light of the self-interest of public enforcers[43]. Such scenario is especially risky from the perspective of a whole enforcement process, which if motivated by the interests of public enforcer or current political needs, may lead to wrong allocation of cases and limited protection of individuals against competition law infringements.

Secondly, apart from a strong administrative and hierarchical links which often determine the activity of public enforcer, the public authority is financially dependent on state's resources. While in a case of high financing of the enforcement efforts by a state it does not cause particular problems, it may lead to important difficulties when the money devoted to public antitrust enforcement are limited. Due to the budget constraints, the public authority may be unable to deal with all cases brought to its attention, and may be obliged to undertake a decision to sue depending on economic factors. As K. Roach and M.J. Trebilcock rightly argue, once the governments downsize in a response to fiscal constraints, the regulatory gaps start to appear in the area of public enforcement[44]. It may be observed once we refer to the period of economic crisis which recently affected the EU and its MS. As different national examples show, public authorities, among them NCAs, where obliged to limit the costs of their functioning, and as a result put in question full efficiency of the enforcement efforts[45].

In order to sum up the reasoning on public enforcement of antitrust law it shall be stated, that the public method creates a fundament for the competition law enforcement, and is absolutely essential for the achievement of its injunctive and punitive objectives. Moreover, the principles of deterrence and social welfare would be hardly fulfilled, without the existence of a public system of competition law enforcement.

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43 See K. Kohutek, *Naruszenie interesu publicznego a naruszenie konkurencji…*, pp. 51–53; T. Eger, P. Weise, *Limits to the private enforcement of antitrust law*, German Working Papers in Law and Economics, Vol. 2007, Paper 3, pp. 1–4; R. Lande, J. Davis, *An Evaluation of Private Antitrust Enforcement: 29 Case Studies*, Interim Report submitted to the Antitrust Modernisation Commission, 2006, pp. 1–10, available at: http://www.antitrustinstitute.org/files/550b.pdf [access: 04.05.2014].

44 K. Roach, M.J. Trebilcock, *Private enforcement of competition laws*, in: *Private party access to the Competition Tribunal*, Osgoode Hall Law Journal, Vol. 34, No. 3 (Fall 1996), p. 482.

45 See in details M. Merola, J. Derenne, J. Rivas, *Competition Law in time of Economic Crisis. In Need of Adjustment?*, Bruylant, Brussels 2013.

Nevertheless, the public method is not sufficient to achieve all the goals of antitrust law. Therefore, in today's systems of competition law, it is essential to propose more complex solutions which will ensure the optimal level of deterrence and the effective compliance with law. Their objective shall be not only to prevent the anticompetitive behaviours, but also to fully protect the interests of victims of competition law infringements. Taking the aforementioned into consideration, the thesis will argue in favour of a hybrid model of competition law enforcement, strongly based on the collective mechanisms of private enforcement. As it will be claimed, the goal shall be first to find a coherence between public and private method of competition law enforcement, and second to introduce more effective and innovative mechanisms of private actions. Only in such a way, the desired objective of greater efficiency of antitrust law may be achieved.

III. Private method as an alternative way of competition law enforcement

1. Private enforcement of public law

Traditionally it was assumed that the laws designed to produce public benefit shall be enforced by public authorities, while the laws intended to regulate relationships between private actors shall be enforced by individuals. This differentiation was introduced by the philosophers and theorists of law such as Thomas Hobbes, Jean-Jacques Rousseau or Max Weber. They were claiming that in the state of nature individuals relied exclusively on private enforcement[46]. However, after the development of a society and introduction of public authorities, individuals decided to transfer the power of enforcement to the more efficient bureaucratic structures[47].

This traditional distinction can hardly be defended nowadays. The boundaries between public and private enforcement are diminishing. In order to create effective system of law enforcement, legislators often agree on the solution composed of both public and private methods. Furthermore, rights of citizens participating in public life are expanding and the increasing number of laws are becoming subject to private enforcement. It allows for better access to justice, higher level of deterrence and finally greater detection of law infringements. In consequence, the enforcement is no

46 T. Hobbes, *Leviathan*, ed. by C.B. MacPherson (Middlesex, *V.K.:* Penguin, 1968), p. 186.

47 M. Weber, *Economy and Society: An Outline of Interpretive Sociology*, vol. II, ed. by G. Roth & C. Wittich, trans. E. Fischoff (Berkeley: University of California Press, 1968), pp. 8–11.

longer a prerogative of the state, but special powers are also granted to individuals, being often personally interested in detection and prosecution of law violations.

The aforementioned evolution in the approach to the enforcement of law is particularly visible in the area of competition law. The modern systems of its enforcement are no longer limited to the protection of a market against anticompetitive behaviours, but aim also to create the consumers' welfare[48]. As a result, they start to take into account not only the needs of competition authorities, but also the expectations of individuals being at the end of economical chain. Therefore, it may be argued that the modern systems of antitrust law enforcement are more and more often hybrid constructions (public-private), ensuring on the hand a high level of deterrence against anticompetitive behaviours, and on the other, an appropriate compensation to the eventual victims of antitrust law infringements[49].

2. Main characteristics of private method

2.1. Decentralised character

The first characteristic of private enforcement can be described as its decentralised character. As T. Eger states: *"Private enforcement is based on a decentralised use of information. Private parties reveal their information in order to receive compensation for the harm suffered."*[50] Through the disclosure of gathered information and commencement of a lawsuit, the private parties become the law enforcers and significantly broaden the group of entities participating in the execution of competition law provisions.

The above results not only in the additional human, financial and informational resources available for detecting and prosecuting anticompetitive behaviours, but in a long term, it may lead to the significant change in a construction of the whole enforcement process. That is because, the decentralised system of enforcement allows competition law to advance more rapidly than it ever would in a centralised regime. It is held that various courts and authorities can generate more cases than a single NCA. Moreover, it is stated that the enforcement systems involving private parties in the execution of law provisions permit the introduction of new legal

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48 J.F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, New York University Law Review, Vol. 62, 1987, pp. 1020, 1025.

49 See also on this issue A. Jurkowska-Gomułka, *Publiczne i prywatne…*, pp. 30–35.

50 T. Eger, P. Weise, *Limits to the private enforcement…*, p. 3.

approaches, serving as a basis for innovative solutions[51]. As the recent example of such development of antitrust law in Europe we can evoke the issue of access to leniency materials by private parties claiming for damages. Thanks to the private antitrust proceedings initiated by injured individual, the problem of a disclosure of leniency materials has reached the CJEU[52], and led to wide European debate on the relationship between public and private enforcement of antitrust law[53].

The tendency towards a decentralisation of competition law enforcement can be clearly observed in Europe. Its origins may be found in the introduction of the Regulation 1/2003[54]. By granting the wide powers of enforcement to the national competition authorities, and underlying the important role of national courts in the enforcement of competition law provisions, the Regulation 1/2003 intended to transfer a burden of EU competition law enforcement from the European Commission to the multiple enforcement agents. What was especially important from the perspective of private method, was the wording of Preamble to Regulation 1/2003, where it was clearly stated that: *"National courts have an essential part to play in applying the Community competition rules. When deciding disputes between private individuals, they protect the subjective rights under Community law, for example by awarding damages to the victims of infringements. The role of the national courts here complements that of the competition authorities of the Member States."*[55]

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51 G.V.S. McCurdy, *The impact of modernization of the EU competition law system on the courts and private enforcement of the competition laws: a comparative perspective*, European Competition Law Review 2004, Vol. 25, No. 8, p. 510; K.J. O'Connor, *Federalist Lessons for International Antitrust Convergence*, Antitrust Law Journal, Vol. 70, 2002, pp. 413, 416.

52 Judgment of the Court of 14 June 2011, Case C-360/09 *Pfleiderer AG v Bundeskartellamt*, European Court Reports 2011 I-0516.

53 See T. Mager, D.J. Zimmer, S. Milde, *Access to Leniency Documents—Another Piece in the Puzzle Regarding Public and Private Antitrust Enforcement? (Germany)*, Journal of European Competition Law & Practice, 2013, Vol. 4, No. 2, pp. 182–184; C. Kersting, *Removing the Tension Between Public and Private Enforcement: Disclosure and Privileges for Successful Leniency Applicants*, Journal of European Competition Law & Practice, 2014, Vol. 5, No. 1, pp. 2–5; C. Canenbley, T. Steinvorth, *Effective Enforcement of Competition Law: Is There a Solution to the Conflict Between Leniency Programmes and Private Damages Actions?*, Journal of European Competition Law & Practice, 2011, Vol. 2, No. 4, pp. 315–326.

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

55 *Ibidem*, pt. 7 of the Preamble.

By increasing the role of national courts in the protection of individuals against competition law violations, the Regulation 1/2003 contributed to greater development of antitrust practice, and in consequence, opened a path for to the establishment of a private enforcement doctrine in Europe. By the mean of decentralisation, the national courts became the actors of the enforcement process, able to deal with the issues that have not yet been ruled by the Commission, NCAs or the European courts. Moreover, the decentralisation of the enforcement process opened a door for the more significant involvement of individuals in the execution of competition law provisions. It became clear that the greater participation of private parties was required for the full efficiency of the enforcement process, and that such outcome could be obtained only when the number of enforcers, as well levels of enforcement, were increased.

2.2. "Double nature" of private enforcement

The second characteristic of private enforcement is its "double nature". It may be described as a specific feature of private method which combines within one enforcement mechanism two different objectives, i.e. compensation and deterrence. This feature is determined by the fact that individuals initiate private actions in order to achieve their personal goal, i.e. obtaining compensation for the loss suffered, however, by increasing the possibility of detection of anticompetitive behaviours they serve also punitive objective.

Such a characteristic of private enforcement is widely recognised by the legal doctrine. As C. Diemer states: *"Private enforcement can play an important role in enhancing compliance with antitrust legislation, since it potentially increases deterrence. […] Court actions leading to damages awards can have a similar effect as sanctions imposed by the competition authorities."*[56] Also the Polish scholars evoke "double nature" of private enforcement, and point out on its compensatory and deterrent function. As A. Jurkowska-Gomułka underlines: *"Although the claims for damages most fully meet the goals of private enforcement of antitrust law [aut.: compensation], they can potentially perform repressive and deterrent function"*[57]. And as R. Stefanicki adds: *"by discouraging enterprises from undertaking anticompetitive conduct the civil law sanctions may influence the market in a projective manner."*[58]

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[56] C. Diemer, *The Green Paper on Damages Actions for Breach of the EC Antitrust Rules*, European Competition Law Review 2006, Vol. 27, p. 309.

[57] A. Jurkowska-Gomułka, *Publiczne i prywatne*…, p. 403.

[58] R. Stefanicki, *Prywatnoprawne środki dochodzenia roszczeń*…, p. 183.

The "double nature" of private enforcement is also confirmed by the European Commission. As it has already stated in the Green Paper on damages actions for breach of the EC antitrust rules [hereinafter "Green Paper on damages actions"]: *"Damages actions for infringement of antitrust law serve several purposes, namely to compensate those who have suffered a loss as a consequence of anti-competitive behaviour and to ensure the full effectiveness of the antitrust rules of the Treaty by discouraging anti-competitive behaviour, thus contributing significantly to the maintenance of effective competition in the Community (deterrence)."*[59]

As a result, the private enforcement significantly complements the public mechanism. It does not only fill the gap of public method, i.e. lack of compensation, but also supports the achievement of its main objectives, i.e. deterrence and punishment. Undoubtedly, such feature of private method may also lead to the negative consequences, namely over-deterrence, however as it will be argued afterwards, if properly formulated and coordinated with public mechanism, the risk of over-deterrence may be significantly limited in the hybrid system of competition law enforcement.

2.3. Civil character of the enforcement process

The last characteristic of private method concerns its civil character. Differently than the public enforcement, governed by the rules of administrative procedure, the private enforcement is governed by the rules of civil procedure and takes place before the civil courts. Such a construction leads to several consequences, important from the perspective of injured individuals and the whole enforcement process[60].

First, the private antitrust actions have horizontal character. The proceedings oppose a claimant and a defendant, being both private parties. As a result, their procedural footing and a position within the court proceedings is equal. Differently that in the case of public antitrust actions, where the public enforcer is responsible for the application of antitrust law, and the accused undertaking is obliged to obey the antitrust rules, both parties to private proceedings may use the antitrust law as a "sword" and as a "shield" before a court deciding the case[61].

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[59] European Commission, Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM(2005) 672 final, pt. 1.1.

[60] R. Stefanicki, *Prywatnoprawne środki dochodzenia roszczeń*…, pp. 215–216.

[61] See in details A. Jurkowska-Gomułka, *Publiczne i prywatne*…, pp. 162–164, where the author recognises as a most typical situation in which the antitrust law provisions are used as a "sword" the private claim for damages brought by the parties injured by

Secondly, the legal instruments used within private actions differ significantly from those applied by the public enforcer. While the public enforcement is based on the wide investigative powers of public authority, complex economic analysis, and the use of leniency programs, the private parties claiming for compensation possess only limited instruments to prove the antitrust infringement. It concerns in particular a proof from the documents available to claimant and testimonies. The process of evidence collection by private claimants is additionally aggravated due to the very limited possibility to file a demand for disclosure of documents being in the possession of accused undertaking or competition authority[62]. Finally, the private claimants are bound by the general rules of civil procedure, such as "*Ei incumbit probatio qui dicit, non qui negat"* (the burden of proof is on him who declares, not on him who denies) and "*Accusare nemo se debet"* (no man is obliged to accuse himself), which transfer the important burden for collecting the proof and assessing the case on the shoulders of plaintiff.

Thirdly, the financing of private actions differs in comparison to public method. While the costs of public actions are covered from the state's resources, the private claimants are obliged to incur the costs of launching an action and conducting proceedings. Such a construction of private actions, once combined with the "loser-pays" principle and almost total exclusion of contingency fees in Europe, makes the private enforcement particularly costly and risky process[63].

Finally, the civil character of private enforcement determines the scope of possible remedies. The sanctions imposed on law perpetrator are of a private nature and aim to remedy the victim of anticompetitive behaviour. As a result, their amount and character are adapted to the actual loss suffered by individual. In consequence, the sanctions imposed as a result of private actions benefit the system of enforcement only in a limited manner, especially as far as punitive and injunctive objective are concerned[64].

In view of the above it may be claimed that the civil character of private enforcement determines its position in the system of antitrust enforcement. Due to the several limitations, concerning in particular the access to proofs, financing of claims and sanctions imposed by the court, the private method is not able to ensure solely, full and effective enforcement of antitrust law

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anticompetitive behaviour. On the contrary, as an example of using the antitrust law as a "shield", the author refers to a situation in which the accused undertaking claims nullity of legal action in order to protect against a claim of other party.

62 See in more details Part I Chapter 2 Point IV(3.1).

63 See in more details Part I Chapter 2 Point IV(3.2).

64 See in more details Part I Chapter 2 Point III(1).

provisions. Nevertheless, as it will be argued underneath, thanks to its specific construction and the particular role granted to individuals claiming for compensation, the private method may mitigate certain limitations of public mechanism, and complement the public authorities in their enforcement efforts.

3. Advantages of private enforcement

3.1. Achievement of corrective justice

The first advantage of private enforcement concerns its ability to achieve a corrective justice principle. As it was already described in Chapter 1 Point I(2), the goal of competition law enforcement shall be not only to punish the anticompetitive behaviours, but also to ensure that the victims of eventual infringements will be compensated. Consequently, the private enforcement mechanism, permitting individuals suffering from competition law violation to initiate proceedings and obtain compensation, may be regarded as leading to the achievement of the aforementioned principle.

The corrective justice is generally fulfilled by the mean of damages awarded by the court to the individual suffering an antirust injury. The goal of such instrument is to put an individual into the position in which it would be if the antitrust behaviour has never occurred[65]. The general objective of damages, as they are understood in the European Union, is purely compensatory. It means that the value of awarded damages shall not exceed the loss suffered by the individual, and that the compensation granted by the court shall not aim to punish the wrongdoer[66].

Apart from the possibility to award damages, the private enforcement foresees also other measures which may be issued by the court and bring justice to the victim of infringement. As their examples we may evoke injunctive reliefs or cease and desist orders, which if issued by the court,

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[65] A. Jurkowska-Gomułka, *Publiczne i prywatne*…, p. 371; R. Stefanicki, *Prywatnoprawne środki dochodzenia roszczeń*…, p. 177.

[66] See on this point Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, OJ C 167, 13.6.2013, p. 19–21, which states in point 6 that: *"Compensation for harm suffered means placing the injured parties in the position they would have been in had there been no infringement of Article 101 or 102 TFEU. Parties injured by an infringement of directly effective EU rules should therefore have the full real value of their losses restored …"*

may ensure that injustice resulting from the anticompetitive conduct will be corrected[67].

Finally, as different authors are claiming, the full achievement of corrective justice principle is also reinforced due to the limitation of time in which the justice is served[68]. It results from a fact that in many cases the courts have a power to accelerate the proceedings, e.g. through the discovery of evidence or introduction of time limitations periods, or grant the interim reliefs protecting the interest of plaintiffs in the course of the process.

In view of the above it may be claimed that private enforcement complements the public method in the achievement of corrective justice principle. While the latter fulfils the "restorative" objective only indirectly and in the limited manner[69], the private method focuses its main attention on the achievement of corrective justice principle. Through the specific mechanisms, such as damages, injunctive reliefs, cease and desist orders or interim reliefs, it guarantees that the recovery in case of competition law infringements is not only available, but also effectively achieved.

3.2. Increasing level of deterrence

The second advantage of private method results directly from its "double nature". As it was described previously, the main goal of individuals enforcing antitrust law provisions is to obtain compensation. However, through the commencement of private actions and increased pressure on enterprises violating antitrust law (especially in case of group proceedings covering multiple claimants), injured individuals achieve also other objective of competition law enforcement, i.e. deterrence.

The level of deterrence is firstly increased through the introduction of compensation liability of a wrongdoer. The risk of paying high damages in case of being caught significantly alters the cost/risk calculation of potential law perpetrator, and discourages him from undertaking anticompetitive conduct. As former EU Commissioner responsible for competition N. Kroes has stated: *"The more likely one is to be caught, the more incentive one*

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67 See in more details on the issue of possible remedies Part I Chapter 2 Point III(1).

68 D. Woods, A. Sinclair, D. Ashton, *Private Enforcement of Community Competition Law: Modernisation and the Road Ahead,* Competition Policy Newsletter, No. 2, Summer 2004, p. 32; R. Stefanicki, *Prywatnoprawne środki dochodzenia roszczeń…*, p. 182; J. Bourgeois, S. Strievi, *EU Competition Remedies in Consumer Cases: Thinking Out of the Shopping Bag*, World Competition, Vol. 33, Issue 2, 2010, pp. 241–255.

69 See in more details Part I Chapter 1 Point II(2.1).

has to comply. Compliance with the rules also increases in proportion to the sanctions one risks for violating the rules. It is clear that the risk of having to pay damages for the harm caused by an infringement of the competition rules has a strong deterrent effect."[70]

Secondly, the deterrence effect is reinforced due to the fact that private method provides additional input in the detection and prosecution of anticompetitive behaviours. This feature of private enforcement is particularly significant, when the infringements are difficult to detect without an information and data provided by the market participants. It can be a case of "small" value infringements or violations limited to the small part of the market which may be easily neglected by the public authority dealing with the large sectors of economy and focused on the hard-core restraints.

Finally, the availability of damages actions may remedy pitfalls of ineffective public enforcement[71]. It concerns in particular under-deterrence of the enforcement system which may be a consequence of the low number of cases prosecuted by the public authorities, or of the improper use of sanctions by the public enforcer. In such a case, the existence of private method may lead to the increase in the detection and prosecution of illegal behaviours, leading in consequence to the optimal level of deterrence.

The aforementioned reasoning helps us determine that private enforcement, which is generally intended to serve a corrective justice principle, will indirectly lead to strengthening the deterrence effect. Moreover, its positive influence on both the level of detection and sanctioning, will significantly increase the efficiency of competition law enforcement. Because, as R. Stefanicki rightly argues: *"The properly construed mechanisms of private enforcement allows not only to achieve the compensatory function, fundamental for a civil law protection, but also permits to fulfil other objectives of the enforcement process being in a close relationship to it."*[72]

In view of the above it may be stated, that the introduction of private method can be helpful in closing the so-called enforcement gap which can be understood not only as a limited role of public enforcement in the achievement of corrective justice principle, but also as the restrained efficiency of public method in the detection and prosecution of anticompetitive behaviours. Because, as S.E. Keske states: "*private enforcement permits more*

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70 N. Kroes, *Damages Actions for Breaches of EU Competition Rules: Realities and Potentials*, SPEECH/05/613, available at: http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/05/613&format=HTML&aged=0&language=EN&guiLanguage=en [access: 01.06.2014].

71 S.E. Keske, *Group litigation in European competition law*…, p. 30.

72 R. Stefanicki, *Prywatnoprawne środki dochodzenia roszczeń*…, p. 184.

cases to be investigated and more infringements to be punished by drawing more resources to enforcement compared to public enforcement alone and thereby leads to a closing of the enforcement gap."[73]

3.3. Increasing level of detection

The third advantage of private enforcement concerns its positive influence on the detection of anticompetitive behaviours. In many cases, an injured party has information advantage over the public authority responsible for the enforcement of competition law provisions. It often results from the fact that a victim is directly affected by the violation and can more easily determine the fact of infringement. Moreover, as K. Roach and M.J. Trebilcock evoke: *"Closer proximity to the violation may also mean that the costs of detecting possible violations and gathering evidence may be less for a private party than it would be for a public enforcer."*[74]

The aforementioned characteristics of private method, i.e. easier access to information, greater proximity to the violation and limited costs of discovery, are especially important for the effective detection of anticompetitive behaviours. As an example we can give a situation in which a customer and a firm are in close business relationship and conduct affairs on regular basis. In such a case, an unfounded increase in price or a refusal to deal, will be detected more easily by a direct customer, than by the public authority dealing with the large sectors of economy. Moreover, a victim of violation will be often more familiar with certain kind of business, what can be helpful in proving anticompetitive character of certain practice. Finally, the costs of detection, as well as time required to determine the existence of a violation, will be significantly reduced.

It shall be also noted, that apart from providing additional information concerning the infringement and limiting the costs of detection, the private enforcement may also form a separate incentive to sue (stand-alone actions). As K. Roach and M.J. Trebilcock state: "private enforcement may be crucial mean to fill regulatory gaps created as governments downsize in response to fiscal constraints."[75] This statement will be especially true once the expenditures on state's administration are restricted, and different public bodies are forced to limit the costs of their functioning. In such a situation, the existence of private method, based on the personal incentives to sue,

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73 S.E. Keske, *Group litigation in European competition law…*, pp. 31–32.

74 K. Roach, M.J. Trebilcock, *Private enforcement of competition laws…*, p. 480.

75 *Ibidem*, p. 482.

will give a chance to increase the level of effective enforcement. Because as the aforementioned authors argue: "Private enforcement can supplement public resources with private initiative and information. This is particularly compelling if the public resources devoted to enforcement are modest or diminishing and there is a need of jurisprudence to flesh out the general standards contained in the public law."[76]

3.4. Creation of checks and balances on public authorities

The last advantage of private enforcement mechanism can be described as its ability to control the enforcement power enjoyed by public authorities. It is manifested both by the increased pressure on public enforcer to detect the anticompetitive behaviours and prosecute violations[77], as well as by the capacity of private enforcement to increase individuals' knowledge on the application of competition law provisions[78]. As J. Coffee argues: *"Private enforcement also performs an important failsafe function by ensuring that legal norms are not wholly dependent on the current attitudes of public enforcers […] Absent private enforcement, potential defendants would have a considerably stronger incentive to lobby against public enforcement efforts or to seek to curtail funds to public enforcement agencies. Ultimately, private enforcement helps ensure the stability of legal norms by preventing abrupt transitions in enforcement policy that have not been sanctioned by the legislature."*[79] Nevertheless, as R. Stefanicki rightly observes, this function of private method can only be achieved, if the protection of individuals is not of "illusory character", but construes an important element of the whole system of competition law enforcement[80].

In view of the above it can be stated that the private enforcement plays a significant role in encouraging public authorities to effectively enforce competition law provisions. Moreover, as K. Roach and M. Trebilcock add: *"Private enforcement can also be an effective and efficient mean of holding public enforcers accountable for decisions not to prosecute."*[81] Therefore, by its double role, i.e. "catalyst" of the enforcement process and "verifier" of its quality, the private enforcement creates a chance that the whole system of competition law enforcement will be more effective.

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76 *Ibidem*, p. 488.

77 J.C. Coffee Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working*, Maryland Law Review, Vol. 42, Issue 2, 1983, pp. 220–230.

78 R. Stefanicki, *Prywatnoprawne środki dochodzenia roszczeń…*, p. 183.

79 J.C. Coffee Jr., *Rescuing the Private Attorney General…*, p. 227.

80 R. Stefanicki, *Prywatnoprawne środki dochodzenia roszczeń…*, p. 183.

81 K. Roach, M. Trebilcock, *Private Enforcement of Competition Laws…*, pp. 482–483.

4. Disadvantages of private method

4.1. Risk of over-deterrence

The first disadvantage of private enforcement results from the risk of over-deterrence which may be caused by the wide application of private method in the area of antitrust law.

Once we analyse the issue of deterrence, we must keep in mind that increasing its level has certain limitations. They are generally determined by the notion of "optimal deterrence" which can be described as such a level of deterrence that guarantees prevention of all anticompetitive actions, without refraining enterprises from undertaking activities increasing social welfare[82]. In order to achieve the optimal deterrence, the level of detection and sanctioning shall be matched. Because as P. Buccirossi explains: *"over-deterrence can occur either when the sanction has been set at too high level or when the enforcement effort, which determines the level of the probability of being caught and convicted, is excessive."*[83]

Taking into consideration the potential risk of over-deterrence, which may be caused by the excessive enforcement, certain authors claim that development of too far-reaching private enforcement mechanisms, especially in the form of wide collective actions, may be counterproductive, force several enterprises to refrain from undertaking innovative business activity, and in a long term, can lead to decrease in consumers' welfare[84]. In order to support such statement different scholars evoke that private enforcement is less coordinated than public method, and that control over the number of claims brought by the individuals is almost impossible. As a result, the risk of massive litigation and unfounded claims is relatively high, what can lead to devastative economic consequences, e.g. decrease in innovation, foreclosure of enterprises faced with massive claims or black mail settlements.

Despite the potential risk of over-deterrence created by the mechanism of private enforcement, the aforementioned reasoning has several drawbacks.

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82 P. Buccirossi, L. Ciari, T. Duso, G. Spagnolo, C. Vitale, *Competition Policy and Productivity Growth: An Empirical Assessment,* The Review of Economics and Statistics, October 2013, Vol. 95, No. 4, pp. 1324–1336.

83 *Ibidem*, p. 1331.

84 W.M. Landes, R.A. Posner, *The Private Enforcement of Law*, The Journal of Legal Studies, Vol. 4, No. 1, 1975, p. 15; W.P. Schwartz, *Private Enforcement of the Antitrust Laws: An Economic Critique*,Washington: American Enterprise Institute for Public Policy Research, 1981, p. 9; R. Posner, *Economic Analysis of Law,* 4th ed., Boston: Little Brown, 1992, p. 596; E.D. Cavanagh, *Detrebling antitrust damages in monopolization cases*, Antitrust Law Journal 2009, Vol. 76(1), pp. 97 and following.

Firstly, it does not take into account the fact that the risk of over-deterrence is limited when the possible damages are relatively low and can be adjusted in each single case. Secondly, it does not consider the existence of exemptions from competition law violations which significantly decrease the level of deterrence. Finally, this reasoning is not appropriate in the legal systems where the private actions are still rare, and the fines imposed on law perpetrators are too low to cause substantial deterrence effect.

Taking the aforementioned into consideration, it may be stated that the eventual risk of over-deterrence provoked by the mechanism private enforcement does not have significant importance in Europe. Firstly, it is caused by the actual level of detection of anticompetitive behaviours in Member States, where a great number of anticompetitive practices remains undiscovered[85]. Secondly, it is a consequence of relatively low value of sanctions imposed by the Commission and NCAs[86]. Finally, the risk of over-deterrence is limited in Europe due to the limited practical significance of private actions, especially in the form of group litigation, which still struggle to gain popularity among European citizens.

Therefore, when we are trying to propose an optimal system of antitrust enforcement in Europe, the private enforcement mechanism shall constitute its important part. Because as the OECD (Organisation for Economic Co-operation and Development) rightly observed in its analysis of private enforcement: *"Public and private antitrust enforcement should be viewed as complements that serve the same goal of deterring anticompetitive conduct that harms consumer welfare; each should be encouraged in areas where it was more efficient than the other enforcement system to accomplish that goal. […] The concept of "optimal deterrence" suggests that each country should seek a mix of private and public enforcement that minimizes the costs of under-deterrence and over deterrence."*[87]

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85 D. Waelbroeck, D. Slater, G. Even-Shoshan, *Study on the conditions of claims for damages in case of infringement of EC competition rules*, Ashurst (2004); C. Veljanovski, *Cartel Fines in Europe – Law, Practice and Deterrence,* World Competition, Vol. 29, March 2007; M.P. Schinkel, *Effective Cartel Enforcement in Europe*, World Competition, Vol. 30, 2007.

86 K. Hüschelrath, *Public Enforcement of Anti-Cartel Laws – Theory and Empirical Evidence*, in: K. Hüschelrath, H. Schweitzer (eds.), *Public and Private Enforcement of Competition Law in Europe. Legal and Economic Perspectives,* Springer-Verlag Berlin Heidelberg 2014, pp. 32–35.

87 Organisation for Economic Co-operation and Development, Directorate for Financial and Enterprise Affairs Competition Committee, *Private Remedies,* DAF/COMP(2006)34, p. 10, available at: http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP%282006%2934&docLanguage=En [access: 21.06.2014].

4.2. Risk of using private method as a strategic tool

Another disadvantage of private enforcement concerns a risk of its use as a strategic tool. The phenomenon of a "double-edged sword" is a consequence of the mere construction of private method which foresees that private claims are initiated not in the general public interest, but in the personal interest of injured parties. In consequence, as certain scholars underline, the private method can be used strategically by the enterprises in order to win in the courts, what they were unable to obtain in the honest competition with their rivals[88]. In such scenario, the private claims may be initiated in order to prevent rivals from competing vigorously, extort their funds, improve contractual conditions or prevent hostile takeovers. The risk of strategic use of private enforcement is especially true in the area of competition law, because as J. Brodley explains: *"the most likely plaintiffs are frequently competitors or takeover targets of defendants."*[89]

Due to the aforementioned reasons, the abusive use of private enforcement in the area of antitrust law shall not be neglected. Its negative consequences may be clearly observed once the American system of antitrust law is analysed. As it shows, too liberal private enforcement mechanisms, such as broad discovery rules or treble damages, may create imbalance in the position of victims of violations and defendants, putting the latter in the position of a strategic target[90].

The Commission seems to recognise the aforementioned risk. From the beginning of European discussion on private enforcement it has underlined that while developing private mechanisms of competition law enforcement in Europe, it is necessary to avoid the American-style excess. As J. Almunia stated in 2009: *"I intend to explore more in depth the issue of antitrust damages and the compensation of victims, bearing in mind the necessity of safeguards to prevent us from the kind of excessive litigation often experienced in the US."*[91]

The aforementioned policy of the European Commission finds also its confirmation in the changes recently introduced in the Damages Directive.

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88 R. McAfee, H. Mialon, S. Mialon, *Private v. public antitrust enforcement: A strategic analysis*, Journal of Public Economics, Vol. 92, 2008, p. 1864.

89 J.F. Brodley, *Antitrust Standing in Private Merger Cases: Reconciling Private Incentives and Public Enforcement Goals*, (1995) 94 Michigan Law Review, p. 35.

90 E. McCarthy, A. Maltas, M. Bay, J. Ruiz-Calzado, *Litigation culture versus enforcement culture. A comparison of US and EU plaintiff recovery actions in antitrust cases*, The Antitrust Review of the Americas 2007, pp. 38–42.

91 See Hearing with Joaquin Almunia, Commissioner-designate for Competition, of 22 December 2009, available at: http://www.europarl.europa.eu/hearings/static/commissioners/answers/almunia_replies_en.pdf [access: 22.06.2014].

By the introduction of specific solutions, such as the limited discovery of proofs of violation or "loser-pays" principle, and the limitation of contingency fees agreements, the Commission tried to ensure that the balance between the interests of private claimants and accused undertakings will be ensured, and the risk of a strategic use of private enforcement will be significantly reduced.

4.3. Risk of disruption of public enforcement policies

The last disadvantage of private enforcement concerns a risk of its negative influence on public enforcement policies. It is a consequence of different objectives pursued by these two methods of law enforcement. While the public method aims to detect and punish anticompetitive behaviours. The main goal of private method is to compensate individuals injured by anticompetitive practices. As R. Blomquist rightly claims: *"The only intrinsic constraint on a private suitor seeking to use law for private ends is whether the costs of litigation outweigh its potential benefit to him. In contrast, government prosecutors, when deciding to enforce a law are presumed to be substantially motivated by public interest considerations."*[92] Therefore, the clash of these two different values may lead to undesirable results.

The most recent and striking example of a potential conflict between public and private enforcement of antitrust law in Europe concerns the relationship between leniency programs and private antirust actions. While the leniency programs are commonly regarded as one of the most effective tools of public authorities in the detection and prosecution of anticompetitive behaviours, their efficiency was recently put under question, due to their conflict with private actions. As it will be described in more detailed manner in Part I Chapter 2 Point I(1.3), the reason for conflict between these two methods of enforcement was the access by private parties claiming for damages to leniency materials gathered within public proceedings. More particular, the issue referred for the first time to CJEU in *Pfleiderer* case[93], and afterwards developed in *Donau Chemie* case[94], concerned a question

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92 R.F. Blomquist, *Rethinking the Citizen as Prosecutor Model of Environmental Enforcement under the Clean Water Act: Some Overlooked Problems of Outcome-Independent Values*, (1988) 22 Georgia Law Review, p. 371.

93 Judgment of the Court of 14 June 2011, Case C-360/09 *Pfleiderer AG v Bundeskartellamt*, European Court Reports 2011 I-0516, pt. 18.

94 Judgment of the Court of 6 June 2013 in Case C-536/11 *Bundeswettbewerbsbehörde v Donau Chemie AG and Others*, OJC 2013/C 252/16.

if the European law creates limitations to access to leniency documents by individuals claiming for compensation[95].

While referring to this issue in *Pfleiderer* case, the CJEU accepted that leniency programs were useful tool in the fight against cartels[96]. Nevertheless, as it has also underlined, they were not the only instrument contributing to the maintenance of effective competition. In the Court's opinion, private actions for damages could also play a significant role in this matter[97]. As a result, despite accepting that the effectiveness of national leniency programs could be threatened, if the leniency documents were to be disclosed[98], the CJEU concluded that the provisions of EU law do not preclude a person adversely affected by an antitrust infringement and seeking for compensation, from obtaining an access to leniency documents[99].

The aforementioned position was further confirmed by the CJEU in *Donau Chemie* case[100]. The Court admitted that individuals claiming for damages may be granted an access to leniency materials in order to prove the violation of competition law[101]. Moreover, the Court added that while deciding on disclosure of leniency materials, the national court should always have a right to weigh-up the interests justifying disclosure of documents, and the need of protection of information provided by the undertaking. In the opinion of the Court, the existence of such a right is required in order to preserve a proper balance between public and private enforcement of antitrust law, and ensure effective application of competition law provisions[102]. In the opinion of the Court, full effectiveness of private enforcement would not be achieved if the national court would be deprived of the possibility on deciding on access to leniency materials[103].

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[95] See also on this issue G. Goddin, *The Pfleiderer Judgment on Transparency: The National Sequel of the Access to Document Saga*, Journal of European Competition Law & Practice, Vol. 3, No. 1, 2012, pp. 40–42; C. Canebley, T. Steinvorth, *Effective Enforcement of Competition Law…*, pp. 315–326; C. Cauffman, *The Interaction of Leniency Programmes and Actions for Damages*, The Competition Law Review, Vol. 7, Issue 2, pp. 181–220; L. Idot, *Articulation entre le public et le private enforcement*, Europe n° 8–9, September 2011, comm. 308.

[96] Judgment of the Court of 14 June 2011, Case C-360/09 *Pfleiderer AG v Bundeskartellamt*, European Court Reports 2011 I-0516, pt. 25.

[97] *Ibidem*, pt. 28–29.

[98] *Ibidem*, pt. 26–27.

[99] *Ibidem*, pt. 33.

[100] Judgment of the Court of 6 June 2013 in Case C-536/11 *Bundeswettbewerbsbehörde v Donau Chemie AG and Others*, OJC 2013/C 252/16.

[101] *Ibidem*, pt. 29–30.

[102] *Ibidem*, pt. 31.

[103] *Ibidem*, pt. 51.

The standpoint expressed by CJEU in *Pfleiderer* and *Donau Chemie* rulings was appraised by the private enforcement supporters, considering it as a positive step in development of private method. By opening an access to leniency materials for private parties claiming for compensation, one of the main problems of private enforcement, i.e. limited access to evidence, could have been finally resolved.

Nevertheless, the European Commission and NCAs referring to the aforementioned judgments, argued quite opposite. In their opinion, opening the doors for private access to leniency materials could discourage undertakings from submitting leniency applications, jeopardise efficiency of leniency programs, and in consequence, limit the efficiency of public enforcement. This negative assessment of CJEU's case law on access to leniency materials found its confirmation in the official standpoint published by the ECN[104], and in the specific proposals included in the Damages Directive[105]. In both of the above documents, the European institutions and NCAs argued in favour of a wide protection of leniency materials, assuming its non-disclosure for the purpose of private proceedings. Therefore, despite the Court's support for a greater use of private method, the balance was tipped at the European and national level, in favour of public enforcement and a wide protection of leniency programs.

The aforementioned conflict between the leniency programs and damages claims shows, how difficult it is to strike the right balance between the two methods of competition law enforcement. It also confirms that in order to establish an effective and coherent system of antitrust law enforcement, it is necessary to propose solutions respecting mutual relationship between public and private method. That is why, while introducing the new instruments for the benefit of private plaintiffs, the legislators and competition authorities of MS shall always take into consideration existing public policies, and a potential harm that private method inflicts on the mechanisms of public enforcement.

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[104] See Resolution of the Meeting of Heads of the European Competition Authorities of 23 May 2012, *Protection of leniency material in the context of civil damages actions*, available at: http://ec.europa.eu/competition/ecn/leniency_material_protection_en.pdf [access: 12.07.2014].

[105] See art. 6 and art. 7 of the Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, p. 1–19.

5. Private method – a complement to the public system of antitrust enforcement

The reasoning conducted in the previous points, led us to answering a question which is often posed by the authors analysing the issue of private enforcement, i.e.: "What is the role of private actions in the system of competition law enforcement?"

While answering this question some authors are claiming that private enforcement has no significant importance for the application of antitrust law[106]. Others perceive it as a useful addition to the public system[107]. While some of them even claim that the private method can substitute the public instruments of law enforcement[108].

Despite the justified arguments behind each of these standpoints, it shall be stated that giving an unequivocal response to this question seems to be very difficult. That is because, the private enforcement of competition law strongly depends on particularities of each legal system, e.g. level of detection and level of deterrence. Moreover, the importance of private actions varies in different legal cultures, e.g. European and American. Finally, the level of resources devoted to the achievement of corrective justice principle can be different in various jurisdictions.

While addressing this question in the European context we can state however, that the principles of effective competition and consumer welfare, require establishment of an enforcement system being a mixture of public and private method. Only such a construction, consisting of complementing, rather than substitutive instruments of public and private enforcement, can guarantee that drawbacks of today's system of antitrust law enforcement in Europe will be mitigated[109].

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106 W. Wils, *The Optimal Enforcement of EC Antitrust Law*, Essays in Law & Economics, European Monographs, Kluwer Law International, Hague 2002.

107 P. Marsden, *Public-private partnerships for effective enforcement…*, pp. 509–518; T. Ottervanger, *Designing a Balanced System…*, pp. 17–25; L. Silva Morais, *Intergrating Public and Private Enforcement…*, pp. 113–140; A. Jurkowska-Gomułka, *Publiczne i prywatne…*, pp. 47–49; R. Stefanicki, *Prywatnoprawne środki dochodzenia roszczeń…*, pp. 39–56; R. Molski, *Prywatnoprawna ochrona konkurencji…*, Kwartalnik Prawa Prywatnego 2005, z. 3, p. 809.

108 A.A. Foer, *The Ideal Model for Private Enforcement of Competition Law*. In: J. Basedow, J.P. Terhechte, L. Tichy, *Private Enforcement of Competition Law*, Baden-Baden 2011, pp. 203–217.

109 Majority of legal scholars argues in this way and speaks in favour of the establishment of a mixed (public-private) model of competition law enforcement; see for example: A. Jurkowska-Gomułka, *Publiczne i prywatne…*, pp. 35–39; R. Molski, *Prywatnoprawna ochrona konkurencji...*, p. 809; R. Van Den Bergh, S.E. Keske, *Private Enforcement of European Competition Law*: *Quo Vadis?*, European Review of Contract Law 2007, No. 4,

The aforementioned standpoint finds a confirmation in the opinions expressed by the EU institutions. Already in the White Paper on damages actions for breach of EC antitrust rules [hereinafter "White Paper on damages actions"] the Commission held that: *"Actions for damages and enforcement by public authorities necessarily interrelate to some extent. Greater enforcement by both public authorities and through private actions will increase deterrence and will increase the probability that infringers bear the costs for the harm caused. This will normally lead to a decrease, in the long run, of the number of infringements. The Commission's objective is to create an effective system of private enforcement through damages actions as a complement to, and not a substitute for, public enforcement."*[110] Also the most recent document on private enforcement of antitrust law in Europe, i.e. the Damages Directive, reaffirms that in order: *"To ensure effective private enforcement actions under civil law and effective public enforcement by competition authorities, both tools are required to interact to ensure maximum effectiveness of the competition rules. It is necessary to regulate the coordination of those two forms of enforcement in a coherent manner…".*[111]

In view of the above we may claim, that the private enforcement construes an immanent part of the competition law enforcement regime, and a factor required for its appropriate functioning. Having this in mind, the goal of Chapter 2 will be to answer how to find a right equilibrium between private and public method of competition law enforcement, and ensure greater efficiency of private antitrust actions. While this task is undoubtedly hard to achieve, it seems to be crucial in order to ensure appropriate functioning of the enforcement process, and the full protection of individuals against competition law infringements. Because as S. W. Waller rightly observes: *"Neither public or private enforcement should 'monopolize' competition law, but must work together to deter, detect, punish, and compensate victims of unlawful anticompetitive conduct. Only then is a consumer friendly competitive economy possible."*[112]

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pp. 473–476; A.P. Komninos, *Relationship between Public and Private Enforcement...*, p. 9; R.H. Lande, J.P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, University of San Franciso Law Review 2008, Vol. 42, pp. 905–906.

110 Commission Staff Working Paper accompanying White Paper on damages actions for breach of EC antitrust rules, /* SEC/2008/0404 final */, pp. 20–21.

111 See Point 6 of the Preamble Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, p. 1–19.

112 S. Weber Waller, *Towards a Constructive Public-Private Partnership to Enforce Competition Law*, World Competition 2006, Vol. 29(3), pp. 367–368.

Conclusion Chapter 1

In order to conclude the reasoning conducted in Chapter 1, we can claim that none of the methods of competition law enforcement described above, may solely construe a full and effective response to the needs of antitrust law.

While the public method ensures greater achievement of injunctive and punitive objectives of competition law enforcement, it struggles as far as the compensation of victims of competition law violations is concerned. Moreover, it turns out to be an ineffective mechanism of law enforcement, in case of "small" competition law infringements. In such scenarios, involving anticompetitive behaviours causing an injury to limited number of victims and covering small part of the market, the application of public method leads to under-deterrence and the enforcement gap.

Therefore, the initial scientific hypothesis, stating that: *"The system of competition law enforcement, that currently exists in Europe, based on a dominant role of public authorities in the enforcement of competition law rules, leads to the restrained protection of individuals against antitrust law violations and limited efficiency in discovering and prosecuting anticompetitive behaviours",* is confirmed by the assessment of a public enforcement mechanism conducted in Chapter 1.

Referring to the private method of competition law enforcement, regarded by certain scholars as a "golden mean" and a middle way in the enforcement of competition law provisions, it may be claimed that it is not a solution capable to solely resolve the current problems of competition law enforcement in Europe. That is because, apart from its several advantages, the private method runs several risks which if not properly addressed by the European or national legislator, may lead to over-deterrence, strategic and unfair use of private actions, or even disruption of public enforcement policies.

In view of the above it shall be claimed, that any analysis of the competition law enforcement, aiming to propose more effective solutions in this matter, must be based on a balanced approach. Such balance shall not mean the mutual neutralisation of both methods of competition law enforcement, leading in consequence to inefficiency of each of them, but shall be rather understood as a mutual complementing of public and private mechanism. As a model approach to this issue, the thesis evokes a hybrid solution, composed both of public and private methods of competition law enforcement. The specific elements of such solution will be described

in details afterwards, however already at this stage of reasoning it may be claimed, that a hybrid solution has to be based on two pillars of the enforcement process (public and private), additionally reinforced by the modern and innovative instruments of execution of competition law provisions (group litigation).

Therefore, the second scientific hypothesis, according to which: *„In order to increase the efficiency of competition law, private methods of its execution shall be developed at the European and national level, and shall constitute a complement to the hybrid (public-private) system of competition law enforcement"*, finds its full confirmation.

Chapter 2

Private Enforcement of Competition Law in Europe – Towards Coherent Regime of Antitrust Law Enforcement

Chapter 2 focuses on the analysis of development of private enforcement doctrine in Europe. It evaluates its current state and determines possible ways of further development. By reference to the CJEU's case-law, legislative changes introduced at the European level, as well as the national experience in the area of private enforcement of antitrust law, Chapter 2 aims to prove that the discussion on private enforcement of competition law in Europe is far from being finished. As it claims, in order to ensure effective protection of individuals against competition law infringements, more decisive steps are required from the European and national legislator.

Chapter 2 argues in favour of development of a hybrid model of competition law enforcement in which the role of private enforcement would be reinforced. As the principle mechanism able to strengthen the role of private method in the system of competition law enforcement, Chapter 2 evokes group litigation instrument.

I. Development of the European system of private enforcement

Private enforcement has been widely debated in Europe for over 10 years now, and has led to the introduction of several legal instruments at both the European and national level. Nevertheless, as current experiences show, the process of development of private antitrust enforcement in Europe is far from being over. While its usefulness is widely recognised, the question that remains, is how to increase its efficiency and ensure greater practical significance.

The European attempts to address this question have a dual character. On the one hand, they are characterised by the important role played by the CJEU in the formulation of the private enforcement doctrine. On the other, they are determined by the activities of the Commission, which aims to approximate national antitrust systems and establish a common European private enforcement model. Although both initiatives may be regarded as complementary, recent experiences in the area of antitrust law show also a risk of their mutual incoherence and limited efficiency.

1. Court of Justice of the European Union and private enforcement

For lawyers, judges and legal practitioners specialising in European law, the CJEU's case law constitutes an important point of reference. Despite that the Court's judgments are rendered in individual cases and shall be limited only to the particular disputes, they often affect a whole construction of the EU law. First, they allow for better understanding of treaty provisions and secondary legislation. Secondly, by providing solutions to the specific problems of EU law they contribute to its further development. Finally, by undertaking new and unresolved issues concerning application of European law, they often become a starting point for policies proposed by the European institutions and the national legislators.

The above-described role of CJEU's case law finds its confirmation in the area of private enforcement of antitrust law. The analysis of judgments rendered by CJEU in the course of last decade, confirms that the shape of current European policy in the area of antitrust law strongly depends on the active role of CJEU in formulating and developing the doctrine of private enforcement. As the following examples will show, thanks to its case law the Court became not only an initiator of private enforcement doctrine in Europe, but also one of the main actors in determining its current shape[1].

[1] See in details on the role of CJEU in shaping private enforcement of antitrust law in Europe M. Gac, *The influence of CJEU case law on development of private enforcement doctrine in the area of Polish and European competition law, in: The Milestones of Law in the area of Central Europe – 2014*, pp. 739–748, available at: http://lawconference.sk/milniky/sprava/files/doc/ZBORNIK%202014.pdf [access: 20.11.2015].

1.1. CJEU's case law as a starting point for private enforcement of antitrust law in Europe

When we refer to the treaty provisions and secondary legislation, we find out that there are no direct bases for private actions in the area of antitrust law. Neither Art. 101, nor Art. 102 of the Treaty on the Functioning of the European Union[2] [hereinafter "TFEU" or "Treaty"], do not provide for the possibility to claim for a recovery in case of competition law infringements. Nevertheless, as it is commonly accepted, the aforementioned right may be derived directly from the Court's case law which in the course of time confirmed a right of individuals injured by competition law infringements to claim for compensation[3].

The first steps in development of private enforcement doctrine by CJEU can be traced back to the late 70s, when the Court confirmed for the first time the direct effect of EU competition law provisions[4]. By stating that individuals may rely on treaty provisions dealing with competition law and enforce them directly before national courts, competition authorities or administrative bodies, the CJEU opened a path for development of private actions in Europe[5]. Nevertheless, it still took a while for the Court to declare that individuals have a right to initiate private lawsuits after sustaining an antitrust injury. In fact, it was not until the 2001's *Courage* judgment, when the Court first held that the private enforcement method

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2 Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47–390.

3 M. Bernatt, *Prywatny model ochrony konkurencji oraz jego realizacja w postępowaniu przed sądem krajowym*, in: E. Piontek (ed.), *Nowe tendencje w prawie konkurencji Unii Europejskiej*, Warszawa 2008, p. 331; K. Kohutek, *Komentarz do rozporządzenia Rady (WE) nr 1/2003 z dnia 16 grudnia 2002 r. w sprawie wprowadzenia w życie reguł konkurencji ustanowionych w art. 81 i 82 Traktatu (Dz. U. UE. L. 03.1.1)*, LEX/el. 2006, commentary to Art. 6 p. 5; A. Jurkowska-Gomułka, *Publiczne i prywatne*…, pp. 107–112; A. Jurkowska, *Glosa do wyroku w sprawie Courage*, in: A. Jurkowska, T. Skoczny (eds.), *Orzecznictwo sądów wspólnotowych w sprawach konkurencji w latach 1964–2004*, Oficyna a Wolters Kluwer business, Warszawa 2007.

4 See Judgment of the Court of 27 March 1974 in case C-127/73 *Belgische Radio en Televisie and société belge des auteurs, compositeurs et éditeurs v SV SABAM and NV Fonior*, ECR 00313; see also on this issue A. Jurkowska, *Prywatno-prawne wdrażanie wspólnotowego prawa konkurencji*, Zeszyty CEN, z. 19, Warszawa 2004, p. 20 and A. Jurkowska-Gomułka, *Publiczne i prywatne*…, p. 122.

5 D. Miąsik, in: A. Wróbel, K. Kowalik-Bańczyk, M. Szwarc-Kuczer (eds.), *Traktat o funkcjonowaniu Unii Europejskiej. Komentarz. Tom II*, LEX a Wolters Kluwer business, Warszawa 2012, pp. 196–197; M. Szpunar, *Odpowiedzialność podmiotu prywatnego*…, pp. 70, 297; M. Adamczak-Retecka, *Odpowiedzialność odszkodowawcza jednostki za naruszenie prawa wspólnotowego*, IWEP, Warszawa 2010, p. 170.

shall constitute an important part of an effective antitrust enforcement system and a mechanism of individuals' protection against anticompetitive behaviours[6].

In the examined case, a violation of Art. 101 of the Treaty was invoked between two parties to a contract – Mr. Crehan, holding a pub tenancy, and Courage Ltd., the brewery supplying him with beer. In the opinion of Mr. Crehan, the tenancy agreement was violating Art. 101 of the Treaty, since it was obliging him to buy his beer exclusively from Courage, and created grounds for imposing excessive prices on the products supplied by the brewery. The English court, faced with the aforementioned problem, decided to ask a following question to the CJEU: *"Is Article 81 EC (aut.: Art. 101 of the Treaty) to be interpreted as meaning that a party to a prohibited tied house agreement may rely upon that article to seek relief from the courts from the other contracting party?"*

While examining the case, the Court came to two important conclusions which created grounds for development of private enforcement doctrine in the area of European antitrust law.

First, the Court held that any individual may rely on the breach of Art. 101 of the Treaty in order to claim for damages before the national court[7].

Secondly, in the opinion of the Court, the fact that claimant was a party to the contract violating antitrust law, shall not deprive its right to claim for compensation[8].

In order to justify the aforementioned statements, the Court referred to the principle of effectiveness and claimed that: *"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."*[9] Because, as the Court held: "*the existence of such right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for*

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6 Judgment of the Court of 20 September 2001 in Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*, [2001] ECR I-06297, pt. 26; see in this context M. Szpunar, *Naruszenie prawa wspólnotowego jako przesłanka roszczenia przeciwko podmiotowi prywatnemu,* Kwartalnik Prawa Prywatnego, vol. 3, pp. 661–734; W. van Gerven, *Crehan* and the Way Ahead, (2006) 17 *European Business Law Review*, Issue 2, pp. 269–274.

7 *Ibidem*, pt. 24.

8 *Ibidem*, pt. 36.

9 *Ibidem*, pt. 26.

damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community."[10]

The position of the Court expressed in *Courage* case directly indicated that introduction of private actions for damages is the element necessary for the effective enforcement of antitrust law in Europe. A lack of such instrument would deprive individuals of the possibility to protect their rights granted by the Treaty, and as a result, would lead to the improper execution of the consumer welfare principle. Therefore, by the mean of Court's case law the private damages actions became one of the constitutive elements of competition law enforcement, and a factor required for the full achievement of its ultimate objective, i.e. effective competition[11].

1.2. CJEU's case law as an impulse for changes in the area of private enforcement

Despite the great importance of *Courage* judgment for the establishment of private enforcement doctrine in Europe, the following years have shown that it was just a beginning of the discussion on antitrust damages actions. The new objective of the European Commission, national legislators and courts applying EU law, was to answer how and by which means individuals may enforce their rights in case of competition law infringements. In other words, the goal was to determine in which manner the concept of private enforcement may be effectively applied in practice.

Once again the CJEU came with an answer. By its judgment in joined cases C-295/04 to C-298/04[12] (so-called *Manfredi* judgment), the Court addressed several problems of damages claims and gave an impulse for changes subsequently introduced at the European and national level. What was particularly important about *Manfredi* case, was that apart from

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[10] *Ibidem*, pt. 27; see also on this issue M. Adamczak-Retecka, *Ubi ius, ibi remedium? czyli: odpowiedzialność jednostki za naruszenia prawa wspólnotowego w świetle orzeczenia Trybunału Sprawiedliwości w sprawie C-453/99 Courage Ltd.*, Gdańskie Studia Prawnicze 2005, Tom XIV, pp. 603–604.

[11] V. Milutiniovic, *Private enforcement*, in: *EC Competition law. A critical assessment*, ed.: Giuliano Amato, Oxford 2007, p. 727.

[12] Judgment of the Court (Third Chamber) of 13 July 2006 in joined cases C-295/04 to C-298/04 *Manfredi v. Lloyd Adriatica Assicurazioni SpA et al.*, European Court reports 2006 Page I-06619; see in this context P. Iannuccelli, *La Cour botte en touche sur la réparation civile des dommages causés par une infraction aux règles de concurrence*, Revue Lamy de la Concurrence: droit, économie, régulation 2006 nº 9, pp. 67–72; A. Jurkowska, *Roszczenia z tytułu naruszenia wspólnotowego prawa ochrony konkurencji przez podmioty prywatne – glosa do wyroku ETS z 13.07.2006 r. w połączonych sprawach: od C-295 do 298/04 Manfredi*, Europejski Przegląd Sądowy 2009, Vol. 3, pp. 41–47.

confirming its standpoint from *Courage* judgment, the Court gave indications on procedural issues, being crucial for the treatment of private actions by national courts. Moreover, the Court undertook an attempt to define several legal notions, such as limitation period or scope of damages, having significant importance for the efficiency of private claims. For these reasons, many authors stated that in *Manfredi* judgment the Court had shown that its role was no longer limited to creating grounds for discussion on private enforcement, but it became an active actor in determining the shape of private enforcement policy in Europe[13].

First, the Court confirmed that the antitrust damages actions shall be governed by the national procedural rules[14]. However, it underlined that *"national rules governing such actions shall not be less favourable than those governing actions for damages based on an infringement of national competition rules and that those national provisions shall not render practically impossible or excessively difficult the exercise of the right to seek compensation for the harm caused by an agreement or practice prohibited under Article 81 EC."*[15] In the opinion of the Court, the principles of equivalence and effectiveness expressed above were supposed to constitute guidance for national courts dealing with private actions for damages and a solution ensuring efficiency of claims based on Treaty provisions.

Secondly, the Court referred to the particular issue of private enforcement, i.e. limitation period, and once again confirmed its active role in formulating specific elements of private method. As the Court stated: *"A national rule, under which the limitation period begins to run from the day on which the agreement or concerted practice was adopted, could make it practically impossible to exercise the right to seek compensation for the*

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13 See E. De Smijter, D. O'Sullivan, *The Manfredi judgment of the ECJ and how it relates to the Commission's initiative on EC antitrust damages actions*, Competition Policy Newsletter 2006, No. 3; M. Carpagno, *Private Enforcement of Competition Law Arrives in Italy: Analysis of the Judgment of the European Court of Justice in Joined Cases C-295-289/04 Manfredi*, The Competition Law Review, Vol. 3, Issue 1; A. Jurkowska, *Roszczenia z tytułu naruszenia wspólnotowego prawa ochrony konkurencji przez podmioty prywatne – glosa do wyroku ETS z 13.07.2006 r. w połączonych sprawach: od C – 295 do 298/04 Manfredi*, Europejski Przegląd Sądowy, nr 3/2009; M. Bernatt, *Glosa do wyroku w sprawie Manfredi*, in: A. Jurkowska-Gomułka (ed.), *Orzecznictwo sądów wspólnotowych w sprawach konkurencji w latach 2004–2009*, Oficyna a Wolters Kluwer business, Warszawa 2010, p. 87.

14 Judgment of the Court (Third Chamber) of 13 July 2006 in joined cases C-295/04 to C-298/04 *Manfredi v. Lloyd Adriatica Assicurazioni SpA et al.*, European Court reports 2006 Page I-06619, pt. 62.

15 *Ibidem*, pt. 101.

harm caused by that prohibited agreement or practice…"[16]. In the opinion of the Court: *"In such a situation, where there are continuous or repeated infringements, it is possible that the limitation period expires even before the infringement is brought to an end, in which case it would be impossible for any individual who has suffered harm after the expiry of the limitation period to bring an action."*[17] As it was claimed, such an approach of the Court to the problem of limitation period aimed to prolong the time in which individuals were able to bring their claims for damages[18]. Moreover, it could have been regarded as an attempt to establish a common approach to limitation period in Europe, which once applied by national courts, would guarantee the same level of protection of EU citizens claiming for damages. Obviously, the Court did not try to interfere with the rule of procedural autonomy of MS, but once again confirmed that it should be limited by the principles of equivalence and effectiveness of application of the EU antitrust law[19].

Finally, the Court referred to the issue of scope of damages which had particular importance for individuals claiming for compensation. While dealing with this problem, the Court held that: *"…it follows from the principle of effectiveness and the right of any individual to seek compensation for loss caused by a contract or by conduct liable to restrict or distort competition that injured persons must be able to seek compensation not only for actual loss (damnum emergens) but also for loss of profit (lucrum cessans) plus interest."*[20] As a result, the Court argued in favour of the widest possible scope of damages, covering actual loss, loss of profit and interests. In the CJEU's opinion, it would guarantee the best possible protection of individuals against anticompetitive behaviours and ensure the full achievement of compensation principle.

The *Manfredi* judgment has illustrated important evolution in the CJEU's case law on private enforcement. While the *Courage* ruling was limited only to the confirmation of a right of individuals to claim for damages, the *Manfredi* judgment addressed important number of procedural issues

16 *Ibidem*, pt. 78

17 *Ibidem*, pt. 79.

18 A. Jurkowska, *Perspektywy prywatnego wdrażania prawa ochrony konkurencji w Polsce na tle doświadczeń Wspólnoty Europejskiej*, Przegląd Ustawodawstwa Gospodarczego, no 1/2008, p. 26.

19 Judgment of the Court (Third Chamber) of 13 July 2006 in joined cases C-295/04 to C-298/04 *Manfredi v. Lloyd Adriatica Assicurazioni SpA et al.*, European Court reports 2006 Page I-06619, pt. 81.

20 *Ibidem*, pt. 95.

concerning private actions. Without limiting the procedural autonomy of Member States, the Court provided important guidelines to the national courts dealing with antitrust damages claims. The goal was to introduce common standards in the area of private enforcement and establish equal level of protection of EU citizens against competition law infringements. Finally, it shall be stressed that *Manfredi* judgment gave a strong impulse for changes in the area of private enforcement, which could have been observed in the solutions proposed by the European Commission in the following years[21].

1.3. CJEU's case law as a response to current problems of private enforcement

Apart from creating grounds for development of private enforcement doctrine in Europe and giving an impulse for its further changes, the Court's case law played also significant role in addressing the current problems of private actions. Thanks to the analysis of Treaty provisions and secondary legislation, as well as by providing solutions to the specific cases, the Court's case law allowed to overcome current limitations of private enforcement doctrine in Europe. As the CJEU's judgments rendered in *Pfleiderer*[22], *Donau Chemie*[23], *Otis*[24] and *Kone*[25] cases confirm, the Court's case law ensured further evolution of private enforcement doctrine and determined its current shape.

The first group of judgments, i.e. Court's rulings in *Pfleiderer* and *Donau Chemie* cases, was rendered between 2011 and 2013. They tackled two issues having particular importance for the efficiency of private actions, i.e. the question of a relationship between public and private proceedings and the issue of access by private claimants to leniency materials[26].

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21 See in details Part I Chapter 2 Point I(2.1).

22 Judgment of the Court of 14 June 2011, Case C-360/09 *Pfleiderer AG v Bundeskartellamt*, European Court Reports 2011 I-0516.

23 Judgment of the Court of 6 June 2013 in Case C-536/11 *Bundeswettbewerbsbehörde v Donau Chemie AG and Others*, OJC 2013/C 252/16.

24 Judgment of the Court of 6 November 2012 in Case C-199/11 *Europese Gemeenschap v. Otis NV and Others,* ECLI:EU:C:2012:684.

25 Judgment of the Court (Fifth Chamber) of 5 June 2014 in Case C-557/12 *Kone AG and Others v ÖBB-Infrastruktur AG*, ECLI:EU:C:2014:1317.

26 See in more details M. Gac, *Public versus private enforcement of European competition law – the evolution of case-law on access to leniency materials after Pfleiderer judgment*, in: K. Dobosz, M. Scheibe, K. Nowak (eds.), *In short but to the point – comments on EU law*, Kraków 2013; A. Jurkowska-Gomułka, *Między efektywnością walki z kartelami a efektywnością dochodzenia roszczeń z tytułu naruszenia art. 101 ust. 1 TFUE – glosa*

The *Pfleiderer* ruling was a result of a preliminary question referred to the CJEU by a Court in Bonn. The German court, faced with the problem of access by private party to leniency materials, decided to ask a following question to the CJEU: *"Are the provisions of Community competition law […] to be interpreted as meaning that parties adversely affected by a cartel may not, for the purpose of bringing civil law claims, be given access to leniency applications or to information and documents voluntarily submitted in that connection by applicants for leniency which the national competition authority of a Member State has received, pursuant to a national leniency program?"*[27]

While giving its answer to the aforementioned question, the Court firstly underlined that neither the Treaty provisions, nor Regulation 1/2003[28], contained common rules on the right of access to leniency documents[29]. It pointed out the existence of the Commission's notices on leniency, which however, did not have binding effect on Member States, and in consequence, could not been relied upon[30]. Secondly, the CJEU accepted that leniency programs were useful tool in the fight against cartels[31]. Nevertheless, as it also claimed, they were not the only source that contributed to the maintenance of an effective competition. As it underlined, the private actions for damages could also play a significant role in this matter[32]. In consequence, despite accepting that the effectiveness of national leniency programs could be jeopardised if the leniency documents were to be disclosed[33], the CJEU concluded that: *"the provisions of European Union law on cartels […] must be interpreted as not precluding a person who has been adversely affected by an infringement of European Union competition law and is seeking to obtain damages from being granted access to documents relating to a leniency procedure involving the perpetrator of that infringement."*[34]

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do wyroku TS z 14.06.2011 r. w sprawie C-360/09 Pfleiderer AG v. Bundeskartellamt, Europejski Przegląd Sądowy 2012, No. 7.

27 Judgment of the Court of 14 June 2011, Case C-360/09 *Pfleiderer AG v Bundeskartellamt*, pt. 18; see also G. Goddin, *The Pfleiderer Judgment on Transparency…*, pp. 40–42.

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

29 Judgment of the Court of 14 June 2011, Case C-360/09 *Pfleiderer AG v Bundeskartellamt*, pt. 20.

30 *Ibidem*, pt. 21–23.

31 *Ibidem*, pt. 25.

32 *Ibidem,* pt. 28–29.

33 *Ibidem*, pt. 26–27.

34 *Ibidem*, pt. 33.

The *Pfleiderer* ruling did not only answer to the dilemma of the German Court, but what is most important, addressed several problems of the private enforcement doctrine in Europe. The main limitation of damages actions, i.e. restrained access to evidence, was supposed to be eliminated. Moreover, the asymmetry in the position of individuals claiming for compensation and accused undertakings was diminished. Finally, the importance of private actions for the enforcement of competition law was strengthened. That is because, despite accepting their subsidiary role, the Court agreed that damages claims significantly contributed to the enforcement of antitrust law what might have justified, in certain cases, limitations to public method[35].

The *Pfleiderer* doctrine was further developed in *Donau Chemie* case. In the case referred by the Austrian Court, the CJEU was supposed to answer if the provision of a national law which made an access to leniency materials dependent upon a consent of undertaking providing these documents, did not stay in contradiction to the EU law and *Pfleiderer* doctrine[36]. While answering this question, the Court primarily confirmed its standpoint from *Pfleiderer* case, and held that individuals claiming for damages may be granted an access to leniency materials in order to prove the violation of competition law[37]. Moreover, the Court held that while deciding on disclosure of leniency materials, the national court should have a right to weigh-up the interests justifying disclosure of documents and the need of protection of information provided by the undertaking. In the opinion of the Court, the existence of such right is required in order to preserve a proper balance between public and private enforcement of antitrust law and ensure effective application of competition law provisions. As it held: *"That weighing-up is necessary because, in competition law in particular, any rule that is rigid, either by providing for absolute refusal to grant access to the documents in question or for granting access to those documents as matter of course, is liable to undermine the effective application of, inter alia, Article 101 TFEU and the rights that provision confers on individuals."*[38] As a result, the Court claimed that any rule of national law providing for an absolute refusal of access to leniency materials would undermine the application of article 101 of the Treaty and hinder the rights conferred upon individuals in the Treaty. In the opinion of the Court, full effectiveness of private enforcement

35 *Ibidem*, pt. 26–29.

36 Judgment of the Court of 6 June 2013 in Case C-536/11 *Bundeswettbewerbsbehörde v Donau Chemie AG and Others*, pt. 13.

37 *Ibidem*, pt. 29–30.

38 *Ibidem*, pt. 31.

of competition law would not be achieved if the national court would be deprived of the possibility on deciding on access to leniency materials[39].

The most recent judgements rendered by CJEU in the context of private enforcement were issued in *Otis* and *Kone* cases.

In the first case (*Otis*) the Court was supposed to answer if the European Union, in case of being injured by the anticompetitive behaviour, had a legitimacy to sue and claim for damages. While referring to the question asked by the Belgian court, the CJEU stated that any person, including the European Union, can claim compensation for the harm suffered from the antitrust law infringement[40]. The Court recognised particular risks involved in the action initiated by the EU, i.e. limited right of access to tribunal by the accused undertaking[41] and imbalance in the procedural position of the parties to the proceedings[42], however as it argued, they do *"not preclude the European Commission from bringing an action before a national court, on behalf of the European Union, for damages in respect of loss sustained by the Union as a result of an agreement or practice which has been found by a decision of the Commission to infringe Article 81 EC or Article 101 TFEU."* As certain authors argue, such a far-reaching standpoint of the Court only confirmed the great role the CJEU attributed to private enforcement[43]. It also showed that the Court's objective was not to limit the actors of private enforcement, but to ensure the widest possible scope of private antitrust actions in Europe.

The second case (*Kone*) concerned the issue of "umbrella pricing"[44] and the question of eventual scope of private action concerning antitrust infringement.

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39 *Ibidem*, pt. 51.

40 *Ibidem*, pt. 43–44.

41 *Ibidem*, pt. 48–67.

42 *Ibidem*, pt. 68–77.

43 A. Vallery, *Otis: Can the Commission be a Victim in Addition to Acting as a Police Officer, a Prosecutor and a Judge?*, Journal of Competition Law & Practice (2013), Vol. 4(3), pp. 232–236.

44 The "umbrella pricing" refers to the behaviour of a non-cartel member who raises its prices in order to align himself with a cartel. While such increase in price takes place without any collusion between members of a cartel and non-cartel members, it leads in practice to overcharge applied by non-cartelists on its clients; see in more details N. Dunne, *It never rains but it pours? Liability for "umbrella effects" under EU competition law in Kone,* Common Market Law Review 2014, Vol. 51, Issue 6, pp. 1813–1828; M. Veenbrink, C. S. Rusu, *Case Comment – Case C-557/12 Kone AG and Others v ÖBB Infrastruktur AG, The Competition Law Review*, July 2014, Vol. 10, Issue 1, pp. 107–115; J.U. Franck, *Umbrella pricing and cartel damages under EU competition law*, European Competition Journal, 2015, Vol. 11, Issue 1, pp. 135–167.

The *Kone* case was an effect of prejudicial question asked to CJEU by the Austrian court, dealing with the damages claim brought by *ÖBB-Infrastruktur AG* against the members of an "elevator cartel"[45]. The plaintiff was injured as a result of cartel's anticompetitive practice and claimed for compensation. The injury suffered by a plaintiff resulted partially from the anticompetitive behaviour of a cartel members and from the "umbrella pricing". Once faced with a claim, the national court recognised that according to Austrian law, *ÖBB-Infrastruktur AG* could not have claimed for compensation for the injury resulting from "umbrella pricing", since it was considered as a mere indirect loss, not sufficient to provide for an adequate causal link between an infringement and a loss[46]. Nevertheless, since such solution raised doubts as far as coherence between the Austrian and European law was concerned, the court decided to ask a following question to CJEU: *"Is Article 101 TFEU to be interpreted as meaning that any person may claim from members of a cartel damages also for the loss which he has been caused by a person not party to the cartel who, benefiting from the protection of the increased market prices, raises his own prices for his products more than he would have done without the cartel (umbrella pricing)…?"*

The judgment rendered by CJEU in *Kone* case has led to formulation of several principles which not only allowed to resolve the problem of compensation for "umbrella pricing", but in the opinion of certain scholars, had a potential to influence further development of private enforcement doctrine[47].

First, the Court recognised that the phenomenon of umbrella pricing was one of the possible consequences of a cartel that the members thereof could not disregard[48].

Secondly, the Court confirmed that in the absence of EU law rules governing damages claims, it was for the domestic legal system of each MS to lay down the detailed provisions governing the exercise of the right to claim compensation for the harm resulting from an anticompetitive behaviour, including those concerning the concept of causal relationship[49]. However, the Court did not stop its reasoning here, as it was previously in *Courage*

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45 See in more details on the "elevator cartel" Part I Chapter 1 Point II(2.1).

46 Judgment of the Court (Fifth Chamber) of 5 June 2014 in Case C-557/12 *Kone AG and Others v ÖBB-Infrastruktur AG*, ECLI:EU:C:2014:1317, pt. 13–15; see also M. Veenbrink, C.S. Rusu, *Case Comment – Case C-557/12…*, p. 107.

47 M. Veenbrink, C.S. Rusu, *Case Comment – Case C-557/12…*, pp. 110–115.

48 Judgment of the Court (Fifth Chamber) of 5 June 2014 in Case C-557/12 *Kone AG and Others v ÖBB-Infrastruktur AG*, ECLI:EU:C:2014:1317, pt. 27–30.

49 *Ibidem*, pt. 24.

or *Manfredi* rulings, but went a step further, and in the opinion of certain scholars, interfered with the national procedural autonomy in order to ensure greater efficiency of private enforcement.[50]

In Point 33 of *Kone* ruling the Court stated that: *"the full effectiveness of Article 101 TFEU would be put at risk if the right of any individual to claim compensation for the harm suffered were subject by national law, categorically, and regardless of the particular circumstances of the case, to the existence of a direct causal link while excluding that right because the individual concerned had no contractual links with a member of the cartel, but with an [entity] not party thereto, whose pricing policy, however, is a result of the cartel."* Moreover, as it added Point 34 of the judgment: *"the victim of umbrella pricing may obtain compensation for the loss caused by the members of a cartel, even if it did not have contractual links with them, where it is established that the cartel at issue was [. . .] liable to have the effect of umbrella pricing being applied by third parties acting independently and that those circumstances could not be ignored by the members of the cartel."*

In view of the above we can state, that by giving a ruling in *Kone* case the Court once again confirmed, that its role was not only limited to providing general scheme for private enforcement in Europe, but the Court was an active actor in shaping its actual state. Thanks to the above judgment, not only the issue of causal link in case of umbrella pricing was clarified, but what is most important, the scope of possible damages claims was significantly broaden. Because as J.O. Murach and P. Figueroa rightly observed in their analysis of *Kone* ruling[51], it opened a door for the new three types of private claims:

a) claims against the cartel members for the amounts "overpaid" to third parties;
b) claims against third parties (non-cartel members) who independently followed the cartel and increased its prices;
c) claims from the cartel members having suffered an "umbrella action" against the third party (non-cartel members) who independently followed the cartel and increased its prices (in order to recover from the "umbrella claim").

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50 See M. Veenbrink, C.S. Rusu, *Case Comment – Case C-557/12…*, who state that: *"to ensure the full effectiveness of Article 101 TFEU the Court found it necessary to fill in the concept of the causal link."*

51 See in details J.O. Murach, P. Figueroa, *Cartel Damage Claims and the so-Called "Umbrella Pricing" Under EU Competition Law: The Kone Ruling of the CJEU*, available at: http://eutopialaw.com/2014/08/27/cartel-damage-claims-and-the-so-called-umbrella-pricing-under-eu-competition-law-the-kone-ruling-of-the-cjeu/ [access: 15.07.2014].

The above analysis of recent Court's case law in the area of private enforcement shows that while addressing particular problems of private actions, the CJEU was able to affect the whole construction of a competition law enforcement regime. By defining the principles on access to leniency materials, determining the relationship between public and private method, broadening the scope of private actions and addressing the issue of liability for "umbrella pricing", the Court went beyond the limits of individual cases and gave a new shape to the policy of competition law enforcement. Therefore, the Court's case law may be regarded as an another step towards achievement of a main goal stipulated in *Courage* judgment, i.e. ensuring full efficiency of Article 101 and 102 of the Treaty, and a factor allowing for further development of private antirust actions in Europe.

2. European Commission and private enforcement

2.1. European Commission's policy as a response to CJEU's case law

The evolution of the Court's case law was followed by the changes in the policy of the European Commission. Its main objective was to provide a positive response to the doctrinal developments of CJEU. Because as stated N. Kroes, former EU Commissioner responsible for competition, it was not enough to claim that individuals injured by anticompetitive behaviours shall have a right to claim damages. It was also necessary to provide them with an effective means of enforcing this right in court[52].

The Commission took its first steps to achieve this objective at the end of 2003, when it decided to launch comparative studies of the relevant legal systems found in MS. Its goal was to identify what national rules were governing, at that time, damages claims resulting from antitrust violations. The results of this so-called *Ashurst Report* were shocking[53]. The Report determined that private enforcement mechanisms were totally underdeveloped in Europe, and that an astonishing diversity of national solutions was being used across the EU[54]. Such critical assessment confirmed that more decisive steps had to be taken by the Commission, national legislators and national competition authorities in order to provide

[52] N. Kroes, *Enhancing Actions for Damages for Breach of Competition Rules in Europe*, SPEECH/05/533, available at: http://europa.eu/rapid/press-release_SPEECH-05-533_en.htm?locale=en [access: 01.08.2014].

[53] D. Waelbroeck, D. Slater, G. Even-Shoshan, *Study on the conditions of claims for damages…*

[54] *Ibidem*, p. 1.

individuals with effective safeguards against anti-competitive behaviours. As a result, a Green Paper on damages actions[55] was published and the Commission initiated a widespread European debate on private enforcement. Its conclusion was clear: facilitating private actions was a logical next step in the development of antitrust enforcement, and an important element in the creation of a competitive economy[56].

The works conducted in the following years led to the publication of a White Paper on damages actions[57]. The document which supposed to constitute a response to the limitations of private enforcement, was based on European jurisprudence and the results of extensive public consultations. It argued in favour of more liberal rules on the disclosure of evidence, easier calculation of damages, and more effective enforcement mechanisms. It also spoke for the adoption of a binding European legal instrument on private actions which would guarantee a greater level of transparency, coherence and efficiency[58]. Despite the wide scope of the proposed changes, the desired goal of increasing the role of private antitrust enforcement was not achieved in Europe. The attempt to propose a directive on private actions failed, and so did the discussion on private enforcement. Nevertheless, in the opinion of some authors, the White Paper on damages actions constituted a turning point in the development of the European doctrine of private enforcement[59]. It codified and restated existing *acquis* on the right of individuals to claim compensation. It also marked a point of no return, because as A. Komninos stated: "*it showed that even if the whole initiative to introduce Community measures for private actions were abandoned, the existing acquis itself was a Community minimum from which there can be no departure."*[60]

The last stage of the Commission's activity in the area of private enforcement took place between 2011 and 2014 and covered two key

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55 European Commission, Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM(2005) 672 final.

56 Commission Staff Working Paper – Annex to the Green Paper – Damages actions for breach of the EC antitrust rules, SEC(2005) 1732, p. 9–11,

57 European Commission, White paper on damages actions for breach of the EC antitrust rules /*COM/2008/0165 final*/.

58 Commission Staff Working Paper accompanying the White paper on damages actions for breach of the EC antitrust rules, /* SEC/2008/0404 final */, pt. 332–333.

59 A. Komninos, *The Road to the Commission's White Paper for Damages Actions: Where We Came From*, Competition Policy International, Vol. 4, No. 2, 2008, pp. 80–105.

60 *Ibidem*, p. 98.

initiatives: the European debate on group litigation[61] and the works on the Damages Directive.

The Commission initiated a discussion on group litigation in February 2011. Its goal was to identify what legal principles underpin national collective redress systems, and to determine whether it is possible to introduce such instrument at the European level. Nevertheless, as the debate conducted within public consultation process has shown, formulating a common position on this issue proved to be hard to do. The majority of the MS, most of legal experts, and all consumers argued in favour of the introduction of a collective redress mechanism on the EU level. Still, business representatives and certain MS were against European intervention in this area, claiming that the Commission's proposal on collective redress would have no legal value and would infringe the rules of subsidiarity and proportionality[62].

Despite the disagreement between the supporters and the opponents of group litigation, public consultation confirmed that introducing a collective redress mechanism could bring several benefits to individuals enforcing competition law. It would limit the costs of private actions, increase access to proofs of antitrust violations, and reduce information asymmetry between individuals and undertakings. Hence, the European Parliament decided to speak in favour of the development of an EU collective redress mechanism. It stated that: "*action is needed at EU level in order to improve the current EU regulatory framework so as to allow victims of infringements of EU law to be compensated for the damage they sustain and thus contribute to consumer confidence and smoother functioning of the internal market.*"[63]

Despite the aforementioned outcome of the European discussion on collective redress, the Commission decided to take a rather conformist approach while dealing with the results of the public consultation. Instead of proposing an EU instrument on group litigation, it published non-binding recommendations on common principles for collective redress[64].

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61 Commission Staff Working Paper Document Public Consultation: Towards a Coherent European Approach to Collective Redress, SEC(2011)173 Final.

62 See Evaluation of contributions to the public consultation and hearing: 'Towards a Coherent European Approach to Collective Redress', Study JUST/2010/JCIV/CT/0027/A4, available at: http://ec.europa.eu/competition/consultations/2011_collective_redress/study_heidelberg_overview_en.pdf [access: 09.07.2015].

63 European Parliament resolution of 2 February 2012 on 'Towards a Coherent European Approach to Collective Redress', 2011/2089(INI), pt. 4.

64 See 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 [OJ] 2013 L 201, p. 60–65.

Undoubtedly, such solution is easier to adapt to the differences existing between MS. However, the question remains: will such an act actually guarantee greater efficiency of private enforcement?

Non-binding recommendations risk preserving the current *status quo* which according to the Commission's and the Parliament's opinions, may be described as a complex legal patchwork of national solutions, each of which is unique and none of which is fully effective[65]. Hence, the Commission's recent activity in the area of on group litigation may be considered rather as a step back than a step forward in the development of an effective mechanism of private enforcement in Europe[66].

The second of the initiatives recently undertaken by the Commission in the field antitrust private enforcement concerns a proposal of the Damages Directive. This initiative can be regarded as a much more far-reaching solution, able to overcome many limitations of private method in Europe. While its specific elements will be described in details underneath, already at this point it may be stated that due to the proposed legislative method, as well as the scope of the pursued objectives, this initiative may be considered as an important step towards establishment of the effective private enforcement system in Europe.

2.2. European Commission's "private enforcement package" – a final step in the development of European doctrine of private enforcement?

The Commission's proposal, published in June 2013, comprised several documents including:

– Proposal for a directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the MS and of the EU[67] (hereinafter " Proposal for Damages Directive");

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65 Commission Staff Working Paper Document Public Consultation: Towards a Coherent European Approach to Collective Redress, SEC(2011)173 Final, pt. 9; European Parliament Directorate General for Internal Policies, *Overview of existing collective redress schemes in EU Member States*, July 2011, pt. 3, available at: http://www.europarl.europa.eu/document/activities/cont/201107/20110715ATT24242/20110715ATT24242EN.pdf. [access 13.11.2014]; see also on this issue T. Jaworski, P. Radzimierski, *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym…*, pp. 8–15.

66 See M. Gac, *The road to collective redress in the European Union: 2011 – a step forward or a step back in the introduction of a collective redress mechanism*, in: K. Dobosz (ed.), *Current developments of the European Union Law 2011/2012*, Kraków 2013, pp. 93–109.

67 Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition

– Communication and Practical Guide on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the TFEU[68] (hereafter "Communication and Practical Guide");
– Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the MS concerning violations of rights granted under Union Law[69] (hereinafter "Recommendation" or "Recommendation on collective redress").

Despite the fact that the character of the proposed documents differed (binding and non-binding solutions), some authors argue that together they formed a sort of "private enforcement package", providing a comprehensive and complementary approach to the issue of private enforcement in Europe[70]. What should be also emphasised, is that while the Communication, Practical Guide and Recommendation seemed to continue earlier Commission's practice of proposing soft law mechanisms in the area of private enforcement, the Damages Directive (the Proposal for Damages Directive was finally adopted by the European Parliament and the Council on 27 November 2014) constituted important *novum* in this context. Thanks to a binding power, it aimed to ensure greater coherence and overcome the diversity of national solutions on damages claims[71]. Moreover, its goal was also to achieve two other objectives, i.e. ensure optimal interaction between public and private enforcement and guarantee that victims of

law provisions of the Member States and of the European Union, COM(2013) 404, 11.6.2013.

68 Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, C(2013) 3440, 11.6.2013; Commission Staff Working Document – Practical Guide on Quantifying Harm in Actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, SWD(2013) 205, 11.6.2013.

69 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, OJ L 201, 26.7.2013, p. 60–65.

70 A. Piszcz, *'Pakiet' Komisji Europejskiej dotyczący powództw o odszkodowanie z tytułu naruszenia unijnych reguł konkurencji oraz zbiorowego dochodzenia roszczeń*, Internetowy Kwartalnik Antymonopolowy i Regulacyjny 2013, No. 5(2), p. 54; L. Idot, *Pratiques anticoncurrentielles et actions privées ...*; E. Claudel, *L'essor des sanctions en droit de la concurrence. Quelle efficacité ? Quelles garanties?*, Contrats Concurrence Consommation n° 6, Juin 2014, dossier 13.

71 R. Gamble, *Whether neap or spring, the tide turns for private enforcement: the EU proposal for a Directive on damages examined*, European Competition Law Review 2013, Vol. 34, No. 12, p. 612; A. Piszcz, *Dyrektywa odszkodowawcza 2014/104/UE – przegląd niektórych rozwiązań,* Internetowy Kwartalnik Antymonopolowy i Regulacyjny 2015, No. 4(4), pp. 75–79; D. Bosco, *Dernière ligne droite pour la directive « private enforcement »*, Contrats Concurrence Consommation n° 6, Juin 2014, comm. 138.

antirust infringements would be able to obtain full compensation for the harm that they had suffered. Due to these far-reaching goals and the proposed legislative method, the Damages Directive is regarded by many scholars as an important step in bringing a new quality to the European debate on damages actions in the area of antitrust law[72].

Referring to the specific elements of the Damages Directive it can be noted that they are construed with a view of achieving two main objectives: increasing efficiency of the private method and guaranteeing appropriate balance between public and private enforcement of antitrust law[73]. Although these goals may be often difficult to reconcile[74], the Damages Directive proposes several solutions that might ensure their mutual attainment.

First, it argues in favour of an increased access to evidence concerning antirust infringements. In order to overcome "information asymmetry" between injured individuals and accused undertakings, the Damages Directive proposes a set of provisions that allow wider access to proofs of violations. According to the Art. 5 of the Damages Directive, an individual injured by a competition law infringement and claiming the resulting damages may, upon a reasonably justified demand, be granted by the court hearing the case access to evidence being in the possession of a defendant or a third party. In order to avoid excess, such disclosure shall be limited by the principle of proportionality requiring, *inter alia,* that disclosure of evidence is limited to specific types of documents and does not lead to the discovery of confidential information.

The aforementioned change constitutes an important *novum* in the current construction of private enforcement in Europe. By broadening access to proofs of antitrust violations, it significantly increases the chances for a positive outcome of private claims. Although the above change aims to

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72 S. Wisking, K. Dietzel, *European Commission finally publishes measures to facilitate competition law private actions in the European Union*, European Competition Law Review 2014, Vol. 35, No. 4, p. 193; R.H. Lande*, The Proposed Damages Legislation – Don't Believe the Critics*, Journal of Competition Law & Practice 2014, Vol. 5, No. 3, pp. 1–2; R. Gamble, *Whether neap or spring…*, p. 619; A. Piszcz, *Dyrektywa odszkodowawcza 2014/104/UE…*, p. 89; S. Pietrini, *La directive 2014/104/UE relative aux actions en réparation pour pratiques anticoncurrentielles: un pas supplémentaire dans le développement du Private Enforcement en droit de la concurrence*, Contrats Concurrence Consommation n° 10, Octobre 2015, étude 12.

73 L. Idot, *Des premières suites de la directive 2014/104/UE sur les actions en dommages et intérêts*, Europe n° 2, Février 2015, alerte 6.

74 A. Schwab, *Finding the Right Balance – the Deliberations of the European Parliament on the Draft Legislation Regarding Damage Claims*, Journal of European Competition Law & Practice 2014, Vol. 4, No. 2, pp. 65–67.

increase the efficiency of private actions, it is also clear from the text of the Damages Directive that it tries to preserve an appropriate balance between the public and the private method. That is because, in the following provisions (Art. 6 and Art. 7), the Damages Directive argues in favour of absolute or temporary protection of certain categories of documents. Accordingly, the leniency statements and settlement submissions shall be completely excluded from the possibility of disclosure. Documents prepared by the parties for the purpose of competition proceedings or those drawn up by competition authorities may be disclosed only after the termination of the proceedings[75].

The second group of solutions proposed in the Damages Directive refers to the relationship between private actions and public proceedings. They concern the binding force of decisions issued by competition authorities. Article 9 of the Damages Directive stipulates that a final decision of NCA declaring the existence of an anti-competitive behaviour shall be binding upon a court deciding on damages claim, and shall constitute a proof of an antitrust violation. In the opinion of the Commission: "*the possibility for the infringing undertaking to re-litigate the same issues in subsequent damages actions would be inefficient, cause legal uncertainty and lead to unnecessary costs for all parties involved and for the judiciary.*"[76] Such approach of the Commission should be supported. On the one hand, it ensures greater coherence between public and private proceedings. On the other, it increases the chances for a positive outcome of follow-on private actions[77]. Moreover,

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[75] See in more details on this issue C. Kersting, *Removing the Tension Between Public and Private Enforcement…*, pp. 2–5; V. Butorac Malnar, *Access to Documents in Antitrust Litigation – EU and Croatian Perspective*, Yearbook of Antitrust and Regulatory Studies 2015, vol. 8(12), pp. 127–160; A. Galič, *Disclosure of Documents in Private Antitrust Enforcement Litigation*, Yearbook of Antitrust and Regulatory Studies 2015, vol. 8(12), pp. 9–126; A. Gulińska, *Collecting Evidence Through Access to Competition Authorities' Files – Interplay or Potential Conflicts Between Private and Public Enforcement Proceedings?*, Yearbook of Antitrust and Regulatory Studies 2015, vol. 8(12), pp. 161–180; M. Błachucki, *Dostęp do informacji przekazywanych Komisji Europejskiej i Prezesowi UOKiK w trakcie procedury łagodzenia kar pieniężnych (leniency)*, Europejski Przegląd Sądowy 2015, No. 5, pp. 10–22.

[76] Proposal for a directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013) 404, 11.6.2013, pt. 4.3.1.

[77] See for example M.K. Kolasiński, *Odpowiedzialność cywilna za szkody powstałe w wyniku naruszenia wspólnotowych zakazów stosowania praktyk ograniczających konkurencję i nadużywania pozycji dominującej*, Przegląd Prawa Handlowego 2007, No. 11, pp. 20–21 and E. Rumak, P. Sitarek, *Polish Leniency Programme and Its Intersection with Private Enforcement of Competition Law*, Yearbook of Antitrust and Regulatory Studies 2009,

as some authors claim, it brings greater clarity to the discussed matter which for a long time was the subject of inconsistent jurisprudence and uncertainty on the side of individuals initiating private actions[78].

Finally, the Damages Directive refers to such issues as limitation period, the passing-on of overcharges and the quantification of harm. While they do not directly refer to the relationship between public and private enforcement, they are crucial for the efficiency of private actions. In this context, the Commission's proposals should be appraised for aiming to extend the time in which private claims can be submitted (Article 10 of the Damages Directive); giving indirect purchasers the right to sue for damages (Article 12–15 of the Damages Directive); and facilitating rules on proving and quantifying antitrust harm (Article 17 of the Damages Directive). These provisions may positively influence the private enforcement process and lead to an increase in the importance of antitrust damages claims in Europe.

When evaluating the Damages Directive, it seems at first sight that it constitutes an important step in the development of European private enforcement doctrine. The expectation is justified that a coherent approach to the issue of private antitrust enforcement may be finally established in Europe, because of the scope of the proposed changes, the goals pursued by the Commission and the applied legislative method (directive). Many authors stress however, that the European discussion on private enforcement is far from being over[79]. The adoption of the Damages Directive will greatly foster the debate, but it is unlikely to bring it to an end.

First, the implementation process of the Damages Directive may be a really difficult and complex task, requiring to reconcile the Commission's proposal with different national legal traditions[80]. Particular problems might surround the Damages Directive's provisions on the disclosure of evidence, requiring national legislators to introduce several exemptions to the traditionally existing

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vol. 2(2), p. 117, who claim that lack of binding force of decisions issued by competition authorities upon courts deciding in individual private actions constitutes important obstacle to private enforcement of antitrust law.

78 A. Piszcz, *„Pakiet" Komisji Europejskiej dotyczący powództw o odszkodowanie…*, p. 60; A. Piszcz, *Dyrektywa odszkodowawcza 2014/104/UE…*, pp. 83–85.

79 R.H. Lande, *The Proposed Damages Legislation…*, pp. 123–124; A. Howard, *Too little, too late? The European Commission's Legislative Proposals on Anti-Trust Damages Actions*, Journal of European Competition Law & Practice 2013, Vol. 4, No. 6, pp. 463–464; A. Piszcz, *Dyrektywa odszkodowawcza 2014/104/UE…*, p. 89.

80 See on this point A. Piszcz, *„Pakiet" Komisji Europejskiej dotyczący powództw o odszkodowanie…*, p. 67; despite that the date of implementation of the Damages Directive was set for 27 December 2016, by the end of 2016 a great majority of Member States did not implement its provisions into their national legal order.

disclosure rules. Furthermore, solutions such as the rebuttable presumption of harm caused by an antitrust infringement, or possibility to estimate the size of the harm by a court, will require significant changes the traditional approach to the issue of damage and its assessment. For those reasons, some authors highlight that the transposition process may lead to limitation of the efficiency of the proposed solutions. This may happen if the Damages Directive's proposals prove too difficult to reconcile with the legal traditions of different MS. In the opinion of A. Piszcz, such situation often occurs when the EU tries to harmonise these areas of law which involve procedural rules formulated differently in national legal orders[81].

The second problem concerns the scope of the Damages Directive which is said to leave several questions unanswered[82]. Commentators list here issues such as: causation, remoteness and quantification of consequential loss, which were not codified in the "private enforcement package". By leaving these matters to be determined by national laws, the Damages Directive risks the creation of varying approaches to these issues. This may in turn lead to legal uncertainty in cases of cross-border litigation and, as a result, limited efficiency of the private enforcement method.

The third problem concerns exclusion of a group litigation from the scope of the Damages Directive[83] and adoption of a soft law instrument in order to deal with this crucial element of private enforcement mechanism. It creates important risk that individuals will be still deprived of an effective method of private enforcement and that solutions on group litigation adopted in each MS will differ. The outcome of such scenario may be the inefficiency of private actions in many national jurisdictions and unequal level of protection of individuals against competition law infringements throughout the EU.

The last problem refers to the attempt to reconcile two objectives, i.e. increased efficiency of private enforcement and an appropriate balance between the public and the private method, within one legal act. As previously mentioned, while both aims seem crucial from the perspective of the entirety of the competition law enforcement system, their parallel attainment may be sometimes hard to achieve. This is especially so with respect to access to leniency materials. While specific solutions are proposed in order to preserve the public enforcement mechanism, their practical application may jeopardise the efficiency of private method. The

81 *Ibidem*, p. 67.

82 A. Howard, *Too little, too late…*, p. 464.

83 According to Recital 13 of the Damages Directive's Preamble: *"This Directive should not require Member States to introduce collective redress mechanisms for the enforcement of Articles 101 and 102 TFEU."*

consequence of the implementation of provisions on access to evidence may be the practical exclusion of individuals' access to the Commission's and NCAs' files. Bearing in mind that the leniency submissions construe a principal mechanism in detecting infringements and proving antitrust violations, exclusion of access to documents gathered within the leniency proceedings may strengthen the information asymmetry between victims of competition law violations and accused undertakings, and squander the efficiency of private follow-on actions. Comments are made therefore, that a more flexible approach should have been adopted in order to reconcile public enforcement policy with the CJEU's jurisprudence on access to leniency materials. This could comprise of a possibility to disclose leniency documents after the termination of public proceedings, combined with a residual liability of leniency recipients[84]. Undoubtedly, this is merely one of the possible solutions, but it already shows that a risk of tension between public and private enforcement may still appear, and may require Commission to reconsider its current standpoint.

To sum up the reasoning on development of private enforcement in Europe, it shall be stated that the CJEU and Commission may be described as the main actors in the process of establishment of the European doctrine of private enforcement. Through their judicial and legislative activity they led to formulation of key elements of the private enforcement mechanism, which if adopted at the national level, could lead to better protection of individuals against anti-competitive behaviours. Yet in Europe's decentralised antitrust enforcement system EU policy depends strongly on the activities of national courts, legislators, NCAs and individuals which are all involved in the design and practical use of private enforcement mechanisms. As a result, the steps undertaken at the European level may be squandered by the reluctance of national legislators and NCAs to create effective private enforcement mechanisms, and by the unwillingness of individuals to use them in courts. Therefore, in order to fully evaluate the European private enforcement doctrine, a reference to national practice is thus required. The analysis undertaken in the following points will help to assess whether the current convergence of national systems towards the European model guarantees the establishment of an effective antitrust enforcement system in the EU, and what steps shall be eventually undertaken in order to ensure the best possible protection of individuals against competition law infringements.

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84 C. Cauffman, *The European Commission Proposal for a Directive on Antitrust Damages: A first Assessment*, Maastricht European Private Law Institute, 2013, Working Paper No. 2013/13, pp. 15–16, available at: http://ssrn.com/abstract=2339938 [access: 15.12.2014].

II. Increasing importance of private enforcement in Europe

As the European example shows, thanks to the great activity of the Court and the Commission in the area of competition law private enforcement, the right of individuals to claim for compensation in case of competition law infringements was widely recognised in Europe. The individuals became actors in the enforcement process, able to influence efficiency of antitrust law provisions. Nevertheless, while the European doctrine of private enforcement has significantly developed in the course of last decade, the following analysis will try to prove that the process of establishment of private enforcement in Europe is still far from being finished. It will be argued that more far-reaching steps shall be undertaken in Europe, in order ensure greater role private method in the enforcement of competition law provisions at the national level.

1. Changes in the national legal orders

Moving to the analysis of private enforcement at the national level it shall be firstly underlined that in a decentralised system of antitrust enforcement, the European policy depends strongly on the activities of national courts, national legislators, NCAs and individuals involved in the enforcement process. As a result, the steps undertaken at the European level, in order to be fully effective, need to find a positive response from its addresses. While the analysis of all European jurisdictions is not the goal of this thesis, two legal systems, i.e. Polish and French, will be evoked in order to assess how the European doctrine of private enforcement influenced the national practice of competition law enforcement. The reference to the above legal systems, which strongly differ as far as the experience in the application of competition law provisions[85] and the duration of participation in the European construction of antitrust law are concerned[86], may give us grounds to provide some general observations on the influence of European doctrine of private enforcement on national legal practice.

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85 The grounds of antitrust law were founded in Poland at the beginning of 90s, while in France the first laws on competition law were introduced in 50s, and were further developed in 1977 and 1986.

86 France was one of the signatories of the Treaty of Rome (1957) which laid foundations for the European competition law regime, while Poland join the European Union only in 2004.

1.1. Poland

The recent evolution of Polish system of competition law enforcement may be regarded as an example of approximation of national solutions towards the model developed at the EU level. The analysis of the policy of the Polish competition authority, national jurisprudence, and the legislative changes introduced in the area of antitrust law in the course of the last decade, show increasing importance of private method in the debate on the enforcement of competition law provisions in Poland. Nevertheless, it also confirms that the gradual approximation of national solutions with the European model, is not sufficient to ensure the increase in the practical significance of private method for the enforcement of competition law provisions[87].

The first area where it is possible to assess the influence of the European doctrine of private enforcement on the Polish system of antitrust law concerns the activity of the Polish competition authority – the UOKiK President. The analysis of its policy during the last decade shows strong support of the UOKiK President for the development of private enforcement doctrine in Poland. This is reflected in competition policy documents for 2008, 2011, 2014 and 2015, which show that the promotion of private enforcement among consumers and entrepreneurs (potential victims of antitrust infringements) was one of the NCA's goals in the last decade[88]. Individuals' knowledge on private enforcement was supposed to be increased thanks to the conduct of informative campaigns. As a result, once informed about the available mechanisms of their protection, individuals were supposed to refer to private method in the area of antitrust law more frequently. According to the UOKiK's most recent policy document, greater importance of private method was supposed to establish an effective, hybrid (public-private) system of antitrust enforcement, motivate individuals to disclose existing cartels and make it possible to adapt the national policy to changes developed at the European level[89].

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87 See in more details M. Gac, *Poland: Private enforcement of antitrust law – Unfulfilled dream?*, September 2015, Concurrences Review No. 3-2015, pp. 217–222 and M. Gac, *Individuals and the Enforcement of Competition Law – Recent Development of the Private Enforcement Doctrine in Polish and European Antitrust Law*, Yearbook of Antitrust and Regulatory Studies, Vol. 2015(8)11, pp. 53–82.

88 UOKiK, *Polityka konkurencji na lata 2008–2010*, Warszawa 2008, pp. 151–152; UOKiK, *Polityka konkurencji na lata 2011–2013,* Warszawa 2011, pp. 44–46; UOKiK, *Polityka konkurencji na lata 2014–2018,* Warszawa 2014, pp. 76–80; UOKiK, *Polityka ochrony konkurencji i konsumentów*, Warszawa 2015, pp. 21–25.

89 UOKiK, *Polityka ochrony konkurencji i konsumentów*, Warszawa 2015, pp. 24–25.

Nevertheless, despite recognising the need to develop the private enforcement mechanism in Poland, the NCA failed to take any decisive steps in order to achieve this objective in the course of the entire last decade. First, it did not present any legislative proposals on private enforcement which could have potentially formed part of the Polish competition law reforms of 2007 or 2014. Second, even if not obliged to do so, it did not decide to publish guidelines or recommendations concerning private method, which could support injured individuals in bringing claims for damages. Finally, despite evoking information campaigns as one of the key steps in developing the private enforcement doctrine in Poland[90], the NCA has never conducted any such campaigns. Therefore, even with strong support of the idea of private enforcement, the Polish NCA was unable to ensure effective means by which the European doctrine of private enforcement could be popularised among Polish citizens.

The second area where important development of private enforcement doctrine in Poland may be observed concerns the national jurisprudence. Two main particularities come to light when analysing Polish case law on private enforcement. First, the support expressed by national courts to the idea of private enforcement. Second, the low number of private antitrust cases in Poland. Hence, while the position of national judiciary seems to create solid grounds for development of private enforcement in Poland, due to the reluctance of individuals to actually initiate private actions, the courts struggled to provide a positive response to the EU doctrine[91].

Referring to the specific elements of domestic jurisprudence, it can be stated first that an individual's right to enforce competition law before a court was recognised in Poland long before the CJEU's ruling in *Courage* case. Already at the end of 1993, the Polish Antimonopoly Court, while referring to the problem of private enforcement, held that: *"The lack of a public interest violation does not mean that an individual injured by the illegal behaviour of a certain undertaking, may not protect its fundamental rights. There is no obstacle in enforcing such rights before the court."*[92] This standpoint was confirmed in a Polish Supreme Court judgment of May 2001 where it was held that: *"Individual rights of market participants may be enforced by way of claims brought before common courts of law or administrative*

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90 UOKiK, *Polityka konkurencji na lata 2008–2010*, Warszawa 2008, pp. 151–152.

91 See A. Jurkowska-Gomułka, *Private Enforcement of Competition Law in Polish Courts: The Story of an (Almost) Lost Hope for Development*, Yearbook of Antitrust and Regulatory Studies, Vol. 2013, 6(8), pp. 107–128.

92 Judgment of the Polish Antimonopoly Court of 29 December 1993, XVIIAmr 42/93, (1994) 5 *Wokanda*.

courts."[93] This judicial line was reaffirmed once again in a ruling of the Polish Antimonopoly Court delivered in January 2003. It was stated therein that: *"Due to the public character of the antimonopoly act, its goal is not the direct protection of individual rights of market participants injured by the activities of other undertakings. Such protection constitutes the subject of the activity of the common courts of law."* Finally, in its judgment of 5 January 2007 the Polish Supreme Court confirmed the importance of private enforcement of antitrust law and the possibility of application of competition law rules by the courts dealing with private antitrust claims[94].

The above jurisprudence confirms that Polish courts had established strong grounds for the adoption of private enforcement doctrine in Poland, when it had only started to develop in the EU. Nevertheless, despite having such grounds, the importance of private enforcement in Poland did not increase. Due to the lack of a reciprocal link between the jurisprudence and the individuals' will to open private actions, the importance of courts' case law in the development of the private enforcement method was put in question. Moreover, the courts dealing with private antitrust cases were faced with several difficulties which significantly hampered progress in this area of legal practice.

First, it concerned a limited number of lawsuits brought by individuals injured by antitrust infringements. According to a report prepared by A. Jurkowska-Gomułka, in the period between 1999 and 2012, the number of cases concerning the competition law infringement and brought to the court did not exceed 10[95]. Second, it resulted from the very restricted content of cases brought before national courts. Without going into its detailed analysis, it is enough to say that only one issue analysed by the Polish judiciary, i.e. the binding force of competition authority's decisions, gave grounds for a private enforcement debate and led to development of private method[96].

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93 Judgment of the Polish Supreme Court of 29 May 2001, I CKN 1217/98, (2002) 1/13 *OSNC*.

94 Judgment of the Polish Supreme Court from 5 January 2007, III SK 17/2006, LexPolonica no. 2025330.

95 See A. Jurkowska-Gomułka, *Comparative competition law private enforcement and consumer redress in the EU 1999–2012*, available at: http://www.clcpecreu.co.uk/pdf/final/Poland%20report.pdf [access: 12.01.2015]; see also D. Hansberry-Biegunska, *Poland* [in:] I.K. Gotts (ed.), *The Private Competition Enforcement Review*, 4th ed., London 2011, pp. 251–259.

96 See Resolution of the Polish Supreme Court resolution of 23 July 2008, III CZP 52/2008, (2009) 2 *Monitor Prawniczy* 90, in which the Supreme Court held that a final decision of the UOKiK President in a particular case should be binding upon the court dealing

In view of the above, the Polish courts, despite arguing in favour of development of private enforcement doctrine in the area of antitrust law, were unable to increase its importance among individuals injured by anticompetitive practices.

The last area where changes concerning the issue of private enforcement may be observed, relates to the legal reforms introduced in Poland in the course of the last decade. These include: adoption of the Polish Act on Competition and Consumer Protection (hereinafter "Competition Act")[97], adoption of law on group litigation[98], and a reform of the Competition Act adopted by the Polish Parliament in 2014[99]. All of these legislative steps contain a response, however limited, to the particular problems of a private enforcement method.

The first legal instrument requiring attention here is the Competition Act of 2007. Although the act did not establish a separate private enforcement mechanism, its authors believed that it opened a path for the development of private actions in Poland.

According to the earlier Competition Act of 2004, public antitrust proceedings could be opened in Poland *ex officio* or by means of a complaint. In the Competition Act of 2007, the possibility of initiating public antitrust proceedings on the basis of an individual complaint was intentionally removed. Public enforcement was thus to be limited to the NCA's own initiative to take action against a company engaged in the anti-competitive conduct. According to the authors of the Competition Act of 2007, the above change was meant to enhance private enforcement and develop a comprehensive, dual system of competition law enforcement in Poland. According to the justification to the draft Competition Act of 2007: *"In the*

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with the same practice, unless the NCA issued a commitments decision; see in details on this ruling A. Jurkowska, *Glosa do uchwały SN z 23.07.2008 r., III CZP 52/08*, Europejski Przegląd Sądowy 2010, No. 5 and R. Poździk, *Glosa do uchwały SN z 23 lipca 2008 r., sygn. III CZP 52/08*, Orzecznictwo Sądów Polskich 2009, No. 7–8.

97 Act of 16 February 2007 on Competition and Consumer Protection [*Ustawa z dnia 16 lutego 2007 r. o ochronie konkurencji i konsumentów*], Journal of Laws 2007 No. 50, item 331, amendments: Journal of Laws 2007 No. 99, item 99; Journal of Laws 2007 No. 171, item 1206 as amended.

98 Act of 17 December 2009 on Pursuing Claims in Group Proceedings [*Ustawa z dnia 17 grudnia 2009 r. o dochodzeniu roszczeń w postępowaniu grupowym*], Journal of Laws from 2010, No. 7, item 44.

99 Act of 10 June 2014 amending the Act on Competition and Consumer Protection and Act – Code of Civil Procedure [*Ustawa z dnia 10 czerwca 2014 r. o zmianie ustawy o ochronie konkurencji i konsumentów oraz ustawy – Kodeks postępowania cywilnego*], Journal of Laws 2014, item 945.

public enforcement system, only the most important violations of competition law, having particularly negative influence on competition, shall be examined. Whereas individuals injured by antitrust infringements shall enforce their rights (claim for the nullity of the agreement, cessation of violation or damages) before civil courts. The bi-polar model, in which two ways of competition law enforcement exist next to each other, shall ensure a complementary character of public and private enforcement."[100]

Many scholars criticised the proposed change, claiming that the reform did not provide a sufficient justification for such a far-reaching change, and did not have an appropriate basis in the EU competition law enforcement model[101]. Despite these criticisms, the new solutions were adopted. However, the Competition Act of 2007 had an inherent weakness from the start: while complaint-based proceedings were abolished, the Act did not contain an effective mechanism for private actions.

The second reform introduced into the Polish legal system in the course of the last decade, which may be regarded as a positive step towards development of private enforcement in Poland, concerns the adoption of an Act on Pursuing Claims in Group Proceedings. This Act established a possibility to use group proceedings *inter alia* in the case of competition law infringements. Many authors regarded this act as an attempt to respond to the limited efficiency of private actions in Poland[102]. The act allowed for the grouping within one proceeding of at least 10 individuals injured by the same infringement. Thanks to this construction, the new legislation was supposed to overcome several difficulties faced by private enforcement, such as limited access to proofs of a violation, information asymmetry, high costs of proceedings, or low incentive to sue. As it was stated in the justification of the Act: *"Group litigation allows for increased access to justice in cases where pursuing a claim is more preferential within such proceedings than in an individual dispute (e.g. in case of small damages*

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[100] See Justification to the Act on Competition and Consumer Protection, available at: http://orka.sejm.gov.pl/Druki5ka.nsf/0/06AED0325C1F3B3FC125722600445A4A/$file/1110.pdf, p. 17 [access: 15.03.2015].

[101] See M. Bernatt, *Sprawiedliwość proceduralna w postępowaniu przed organem ochrony konkurencji*, Warszawa 2011, p. 158 and following; M. Krasnodębska-Tomkiel, D. Szafrański, *Skuteczność prawa antymonopolowego*, [in:] T. Giaro (ed.), *Skuteczność prawa*, Warszawa 2010, pp. 107–108; see also A. Piszcz, *Still-unpopular Sanctions: Developments in Private Antitrust Enforcement in Poland after 2008 White Paper,* Yearbook of Antitrust and Regulatory Studies 2012, Vol. 5(7), p. 62.

[102] See M. Sieradzka, *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym. Komentarz*, Warszawa 2010, pp. 15–16, T. Jaworski, P. Radzimierski, *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym…*, p. 4.

claims from the same party which caused the injury), and as a result leads to increase of judicial protection."[103] Nevertheless, despite the novelty of the group litigation instrument and its far-reaching goals, its empirical analysis from a 6-year perspective shows the limited practical significance of this mechanism. As it will be described in details in Part II Chapter 2 Point II, the group litigation was not able to overcome a limited role of individuals in the enforcement of competition law provisions in Poland.

The last legal instrument that needs to be analysed here is the Act amending the Competition Act and the Code of Civil Procedure (hereinafter "Amending Act"), adopted by the Polish Parliament in June 2014[104]. The Amending Act had two main objectives: to increase the efficiency of competition law enforcement and to simplify competition proceedings[105]. It also tried to respond to current European and international antirust policy with the goal to *"increase detection of most significant violations of antitrust law, strengthen the position of weaker participants of the market and informalize and accelerate applied procedures."*[106]

While one of the goals of the Amending Act was to strengthen the position of weaker market participants, very few provisions of the new legislation actually aimed to increase the efficiency of private enforcement. The changes introduced by the Amending Act referred mainly to the leniency program, concentration control, antimonopoly proceedings and the fining policy. The changes concerning private enforcement included only the introduction of the right of the UOKiK President to participate in civil damages proceedings as an *amicus curiae* (Article 63^5 of the Code of Civil Procedure[107]) and the prolongation of the limitation period for pursuing anti-competitive practices by the UOKiK from 1 to 5 years (new wording of Article 93 of the Competition Act). Apart from these two procedural

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[103] See justification to the Act on Pursuing Claims in Group Proceedings, pp. 2–3, available at: http://orka.sejm.gov.pl/Druki6ka.nsf/0/0E73993108750163C125758A004227CB/$file/1829.pdf [access: 17.03.2015].

[104] Act of 10 June 2014 amending the Act on Competition and Consumer Protection and Act – Code of Civil Procedure [*Ustawa z dnia 10 czerwca 2014 r. o zmianie ustawy o ochronie konkurencji i konsumentów oraz ustawy – Kodeks postępowania cywilnego*], Journal of Laws 2014, item 945.

[105] See justification to the project of Act amending the Act on Competition and Consumer Protection and Act – Code of Civil Procedure, p. 1, available at: http://orka.sejm.gov.pl/Druki7ka.nsf/0/9F27C3A04DCCA6E8C1257BE3003730DF/%24File/1703.pdf [access: 17.03.2015].

[106] *Ibidem*, p. 1.

[107] Act of 17 November 1964, Code of Civil Procedure [*Ustawa z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego*], Journal of Laws of 1964, No. 43, item 296 as amended.

modifications, the Amending Act did not contain any other changes that might increase the efficiency of private actions in Poland. In fact, some of its amendments may actually be regarded as undermining the efficiency of the private method. This could be the case with the new paragraphs 2a and 2b of Article 479[33] of the Polish Code of Civil Procedure which is meant to limit access to leniency materials by private damages claimants. According to the justification to the Amending Act, this change aims to preserve the attractiveness of leniency and ensure public trust in the activity of the UOKiK President[108]. However, the new rule seems to contradict the previously described CJEU's rulings in *Pfleiderer* and *DonauChemie* cases. By subordinating access to leniency materials to the approval of the undertaking, it practically eliminates the possibility of access to these documents by injured individual, and significantly decreases their chances to obtain a proof of the infringement.

The aforementioned analysis of Polish system of antitrust law shows that while private enforcement gained great popularity among NCA, Polish legislator and courts, its significance is still far from satisfactory once analysed from the perspective of competition law enforcement. Undoubtedly, it can be explained by the failure of the UOKiK's competition policy, absence of informative campaigns and the lack of the so-called "litigation culture" among Polish citizens. However, it may be also claimed that the limited practical significance of private enforcement in Poland is a consequence of the structural problems with the enforcement of competition law provisions by injured individuals. First, it concerns a lack of more effective private enforcement mechanisms. Secondly, it refers to the risk of conflicts between public and private method of competition law enforcement. Finally, it is a consequence of a dominant role of public authorities in the enforcement of antitrust provisions.

Therefore, without a reassessment of competition law enforcement policy and establishment of a real mixed system of law enforcement, the private method may still struggle to gain greater importance in the enforcement of competition law provisions in Poland.

1.2. France

Despite greater experience in the application of competition law provisions and longer participation in the EU regime of antitrust law, the situation in France did not differ much from the one that might have been

[108] *Ibidem*, pp. 26–27.

observed in Poland. While the private enforcement received support from the French NCA (*Autorité de la concurrence*), French courts and national legislator, the private method struggled to gain importance among injured individuals.

Several factors may be evoked as leading to such an outcome. First, a lack of so-called "litigation culture" among French citizens and the reluctance of victims of competition law infringements to initiate long, costly and complex antitrust proceedings. Secondly, a strict and formalistic approach of French courts towards the private antitrust claims. Finally, a lack of effective mechanism allowing for bringing damages claims before the national courts. All these elements decided that despite the changes introduced into the French legal system and the development of courts' jurisprudence on private enforcement, the private method is still regarded as an exception, rather than a standard in the enforcement of competition law provisions in France.

The analysis of policy conducted by the French NCA in the course of last decade confirms its strong support towards the doctrine of private enforcement. Already in its opinion of 21 September 2006 *Conseil de la Concurrence* (former French NCA) argued in favour of development of private antitrust actions in France, claiming that: *"they can contribute to better redress for the harm sustained due to anticompetitive practices as much as they allow striking a new power balance between companies and consumers."*[109] It also added that the private actions, especially in the form of collective redress, are able to: *"increase the effectiveness of competition policy by making consumers into a veritable ally of the public authorities in their fight against anti-competitive practices."*[110] This standpoint of French NCA was further continued by the *Autorité de la concurrence*, which in 2009 replaced *Conseil de la Concurrence* as the authority responsible for the enforcement of antitrust law in France. In its introductory speech entitled *"The New French Competition Authority: mission, priorities and strategies for the coming five years"*, the President of *Autorité de la concurrence* – Bruno Lassere, held that: *"Private enforcement […] is the second leg of competition law. Human beings must use both their legs, but these two legs must be coordinated, as otherwise standing up and walking will be risky. Allowing victims to claim damages when they have suffered from a cartel, as is the case for any other type of tort, is an important element of trust in a legal and economic system*

[109] See Conseil de la Concurrence, *The annual report for 2006,* p. 30, available at: http://www.autoritedelaconcurrence.fr/doc/synthese06_ang.pdf [access: 01.04.2015].

[110] *Ibidem*, p. 5.

based on the rule of liability for injuries caused to others."[111] The policy initiated by B. Lasserre was continued in the subsequent years, and found a confirmation in the voice expressed by the French NCA at the national[112] and international level[113]. Nevertheless, as the case was in Poland, despite its positive approach towards the issue of private enforcement, the French NCA did not come forward with any legislative proposals concerning the private actions in the area of antitrust law. Moreover, the informational campaigns on private enforcement were missing in France. As a result, the issue of private enforcement remained for a long time only a subject of discussion among legal experts, scholars and public authorities, and was not able to reach its addresses.

Moving now to the analysis of French courts' case law it shall be firstly stated that a broad right to compensation of victims of law infringements, covering all domains of legal practice, was recognised by the French courts already at the beginning of 1980s. As the French Constitutional Court held in a decision No. 82-144 DC of 22 October 1982: *"French law does not foresee, in any matter, a regime exempting from liability resulting from civil wrongs caused by individuals or legal entities, regardless of the seriousness of these offences."*[114] Therefore, once the European doctrine of private enforcement started to develop in the area of antirust law, the grounds for private actions were already established in France.

Despite the existence of strong legal grounds for bringing private actions[115], and support of French Constitutional Court towards the claims

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111 B. Lasserre, *The New French Competition Authority: mission, priorities and strategies for the coming five years,* p. 21, available at: http://www.autoritedelaconcurrence.fr/doc/intervention_bl_autorite_trustubusters_09.pdf [access: 02.04.2015].

112 B. Lasserre, *The new French competition law enforcement regime,* Competition Law International, October 2009, pp. 15–20.

113 See for example speech entitled *Towards the ECN's Second Decade*, presented by B. Lasserre at Fordham Competition Law Institute, during the 8th Annual Conference on International Antitrust Law and Policy (7–8 September 2011), where he held: *"The second topic in which further convergence is expected from many enforcers and victims of violations of EU antitrust rules is that of private enforcement, which implies to study the consequences of national litigation rules on the proper enforcement of EU competition rules.",* available at: http://www.autoritedelaconcurrence.fr/doc/intervention_bl_fordham_sept11.pdf [access: 02.04.2015].

114 See Decision, No. 82-144 DC, 22 October 1982, pt. 5.

115 In the opinion of most of French scholars legal basis for bringing private actions resulting from antitrust injuries could be found in Art. 1382 of French Civil Code stating that: *"any act of a person, which causes damages to another, shall oblige the person by whose fault it occurred, to compensate it."*

for damages[116], the French courts struggled to play important role in the debate on private enforcement. It mainly resulted from a limited number of private antitrust cases brought by injured individuals, narrow problematic of initiated lawsuits and a strict approach of French courts towards the private antitrust claims.

Referring first to the number of initiated claims, in the period from 1986 to 2013, 164 decisions concerning antitrust practices were adopted by French courts[117]. While the total number of cases could give us impression that the French courts were highly involved in the antitrust enforcement and could have played important role in the development of private enforcement doctrine in France, the more detailed analysis of private antitrust cases does not confirm such standpoint.

First, it is a consequence of a character of disputes brought before French courts. They mainly involved contractual disputes between professionals which aimed rather to obtain a nullity of the agreement than a compensation[118]. Secondly, most of the cases concerned the abuse of dominance and did not give grounds for a complex assessment of the issue of antitrust injury and a causal nexus between the suffered loss and the anticompetitive behaviour[119]. Finally, most of the disputes were limited to three sectors of economic activity, i.e. automobile distribution, food distribution and supply of alcoholic beverages, and did not allow to cover many possible violations of antitrust law.

Referring now to the approach of French courts towards the private antitrust actions, it may be described as very conservative. The analysis of French jurisprudence in the area of antitrust law shows that the French courts rather aimed to guarantee a proper balance between the interests of private claimants and accused undertakings, than to ensure greater development of private enforcement doctrine in France.

Firstly, it is confirmed by a strict approach of French courts to the issue of proof of infringement and the procedural requirements for bringing a claim. As the analysed case-law confirms, most of the claims for compensation

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116 See Decision, No. 2010-2, on a preliminary ruling on constitutionality, 11 June 2010; see also N. Lenoir, M. Plankensteiner, M. Truffier, *France: Private Antitrust Litigation,* The European Antitrust Review 2015.

117 See a written contribution from France submitted for Item III of the 121st meeting of the Working Party No. 3 on Co-operation and Enforcement of OECD on 15 June 2015, pt. 6, available at: http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3/WD(2015)1&docLanguage=En [access: 10.04.2015].

118 R. Amaro, *Le contentieux privé des pratiques anticoncurrentielles*, Editions Bruylant 2013, pt. 59.

119 R. Amaro, *Le contentieux privé des pratiques anticoncurrentielles…*, pt. 59.

were rejected due to the insufficient proof of antitrust injury or violation of procedural requirements[120].

Secondly, the strict approach of French courts towards the private antitrust actions finds a confirmation in the concept of "passing-on of overcharges", widely accepted by French jurisprudence. As different cases confirm, claiming for compensation before French courts was particularly burdensome experience, due to the fact that plaintiffs, in order to obtain a recovery, were required to prove that they did not pass any of the overcharges on their subsequent clients[121].

The strict approach of French courts towards the private actions finds also a confirmation in the statistics concerning efficiency of private claims in France. According to the analysis conducted by R. Amaro, only 32.4% of stand-alone actions and 36.4% follow-on actions were judged by the courts in favour of claimants[122].

Despite the conservative approach of French courts towards the doctrine of private enforcement, it shall be stated however, that in a limited number of cases the French courts tried to align national jurisprudence with the European doctrine of private enforcement. It concerned the issue of access by private claimants to the NCA's materials and the question of influence of NCA's decision on private proceedings.

Concerning the first issue it may be held that despite a prohibition laid down in the Art. L. 463-6 of French Commercial Code, according to which: *"The disclosure by one of the parties of information regarding another party or a third party, which it could only have known as a result of the notifications or consultations which have occurred, shall be punished by the penalties specified by Article 226-13 of the Penal Code",* and the limitation stipulated in the Law of 17 June 2011, excluding the NCA's documents from the general right of access to administrative documents[123], the French Supreme Court opened a path for greater access by private claimants to NCA's materials. As it ruled in *Semaven* case, the disclosure of documents being in the possession of French NCA may be allowed if necessary for the execution of a right

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120 *Ibidem*, pt. 70–74.

121 See for example Paris Court of Appeal, 16 February 2011, *SCA Le Gouessant et Sofral v. Ajinomoto Eurolysine et SA Ceva Santé Animale* and French Supreme Court, 15 May 2012, *Gouessant and SOFRAL v. Ajinomoto Eurolysine.*

122 R. Amaro, *Le contentieux privé des pratiques anticoncurrentielles…*, pt. 70, 78.

123 Article 50 of Law No. 2011-525 of 17 May 2011 for the simplification and amelioration of the quality of legal provisions [*Loi n° 2011-525 du 17 mai 2011 de simplification et d'amélioration de la qualité du droit*].

of defence[124]. Similarly, in two other private antitrust cases, i.e. *Ma Liste de Courses* and *DKT International*[125], the Paris Commercial Court ordered French NCA to disclose the documents obtained during an investigation process. In the opinion of the court, it was justified due to the plaintiff's inability to obtain the proof by any other means.

The second problem undertaken by the French courts concerned the influence of NCA's decision on private follow-on actions. It was particularly important in the French legal context, where the NCA's decisions were not binding on national courts dealing with private follow-on claims, causing important limitations to private parties claiming for damages. This problem was addressed by the French Supreme Court in *Lectiel v. France Telecom* case[126]. As the French Supreme Court held in the aforementioned case, the anti-competitive behaviour already sanctioned by the NCA might constitute a fault, and the victims of such behaviour shall be entitled to claim for compensation. While this judgment did not overrule the principle that NCA's decisions are not binding upon civil courts, it confirmed the high probative value of NCA's rulings and its important influence on private follow-on claims.

Referring at the end to the legal reforms introduced in France in the course of last decade, we may claim that while there was no substantial legislative changes affecting private antitrust litigation, two reforms may be regarded as bringing positive elements for development of private enforcement doctrine in France.

The first reform refers to the adoption of the Decree n°2005-1756 of 30 December 2005[127] specifying the courts competent in competition law cases. By establishing 16 courts specialising in antitrust matters and being exclusively competent to deal with private antitrust litigation, the Decree was supposed to ensure more effective functioning of litigation process, greater level of professionalism and the best possible protection of parties to the proceedings. While the creation of specialised courts has not so far resulted in a significant increase in the number of private actions, certain authors argue that if supported by the better mechanisms of private

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124 French Supreme Court, 19 January 2010, *Semavem v. JVC France*.

125 Paris Commercial Court, 24 August 2011, *Ma Liste de Courses v. HighCo.*; Paris Commercial Court, 16 March 2012, *DKT International v. Eco Emballages and Valorplast.*

126 French Supreme Court, 23 March 2010, *Lectiel v. France Telecom.*

127 Decree no. 2005-1756 of 30 December 2005 specifying the list of courts specialised in the matter of competition, industrial property and corporate difficulties [*Décret n°2005-1756 du 30 décembre 2005 fixant la liste et le ressort des juridictions spécialisées en matière de concurrence, de propriété industrielle et de difficultés des entreprises*].

enforcement, it could lead to establishment of an effective system of private enforcement in France[128].

The second reform, having more complex character and a potential to influence private enforcement in a more significant manner, concerns the Law no. 2014-344 of 17 March 2014 governing consuming[129]. The so-called "Hamon Law", which aimed to balance the powers of economic stakeholders and ensure better protection of consumers, introduced two reforms having particular significance from the perspective of individuals injured by competition law infringements and claiming for compensation.

The first change concerns the prolongation of limitation period in which the victims of competition law infringements may bring a claim for damages. While the general rule of French Civil Code[130] provides that limitation period to bring an action for compensation is five years and runs from *"the date when the holder of a right knew or should have known the facts necessary to exercise this right"*[131], the "Hamon Law" introduced a change which could positively influence private actions in France. It concerns the new wording of the Art. L. 462-7 of Commercial Code, according to which the limitation period to bring a private claim is suspended by the opening of proceedings before the French NCA, NCA of other MS or by the European Commission. Such change shall be regarded as positive step towards development of private enforcement in France. On the one hand, it ensures establishment of a balanced relationship between private actions and public enforcement. On the other, it allows for greater efficiency of private claims, especially in situations where a discovery of violation and obtaining a proof of infringement could be too burdensome to injured individual.

The second reform contained in the "Hamon Law", being an attempt of rapprochement of French system of antitrust law enforcement towards the EU model, concerns the introduction of a collective redress mechanism. While this solution will be analysed in details in the second part of this thesis[132], it may be already stated that by introducing collective redress,

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128 See M. Thill-Tayara, M. Giner Asins, *France*, in: I. Knable Gotts (ed.), *The Private Competition Enforcement Review,* Fifth Edition, London 2012, pp. 149–150.

129 Law no. 2014-344 of 17 March 2014 on consumption [*Loi n° 2014-344 du 17 mars 2014 relative à la consommation*], Official Journal of French Republic 0f 18 March 2014, p. 5400, text no. 1.

130 French Civil Code [*Code Civil*], consolidated version from 1 January 2016, available at: http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070721

131 See Art. 2224 of French Civil Code.

132 See Part II Chapter 2 Point I(1.7).

the French legislator positively responded to the European discussion on private enforcement. Moreover, it tried to establish a mechanism allowing to mitigate the main problems of individual actions for damages, i.e. limited access to evidence and problems with financing. While the practical significance of group litigation mechanism is still very low in France, the mere fact of introduction of the law on collective redress into the French legal order shall be positively evaluated.

In order to sum up the analysis of legal, political and judicial changes concerning private enforcement adopted in Poland and France, it may be stated that the voice of the Commission and CJEU was heard in both of the analysed jurisdictions. Through changes of the NCA's policy, development of courts' case law and introduction of legislative reforms, both legal systems tried to ensure greater involvement of individuals in the enforcement of competition law provisions. Nevertheless, as the example of Poland and France also confirmed, the simple approximation of national solutions towards the European model, was not enough to ensure establishment of the effective system of private enforcement. It may be thus claimed that the convergence between private enforcement models existing in different jurisdictions, without wide informative campaigns, more innovative solutions and stronger involvement of national courts in development of private method, may not ensure greater participation of individuals in the enforcement of antitrust law provisions and establishment of the effective mechanism of private enforcement in Europe. In consequence, in the following points it will be argued, that only through introduction of innovative solutions able to respond to main limitations of public enforcement, the greater practical significance of private method may be achieved. The particular attention will be devoted to the group litigation mechanism, being regarded by many scholars and legal practitioners, as the most effective mechanism of individuals' protection against competition law infringements.

2. Increasing number of individual claims – empirical assessment

In order to fully evaluate the current state of development of private enforcement in Europe, a reference to the empirical data concerning a number of private actions initiated in the area of antitrust law shall be made. It is necessary in order to assess if the current policy of the Commission and NCAs, legislative changes adopted at the European

and national level, as well as courts' jurisprudence, allowed to establish a reciprocal link between the private enforcement doctrine and the individuals' will to initiate private actions.

Starting with Poland it shall be stated that a number of private actions initiated up to now by individuals suffering antitrust injury is far from desirable. As the Polish example shows, despite the UOKiK's support to private enforcement and the legislative reforms introduced in the course of last decade, individuals are still reluctant to initiate private actions in case of competition law infringements. According to the report prepared by A. Jurkowska-Gomułka, the number of private enforcement cases initiated before Polish courts between 1999 and 2012 was very low – it did not exceed 10[133]. Moreover, none of the cases was initiated by consumers – they were all brought forward by entrepreneurs. Furthermore, almost all of the proceedings concerned abuse of dominance and aimed to confirm the nullity of a contract resulting from anti-competitive behaviour. Finally, none of the claims sought compensation for an antitrust infringement and none involved a violation of EU competition law provisions.

Referring to the French jurisdiction, we may state that a situation of private enforcement in France is much better than in Poland. In the period between 1986 and 2013 individuals initiated 164 cases concerning antitrust practices[134]. Moreover, most of the claims were brought in the course of last decade, showing increasing popularity of private actions in France[135]. Nevertheless, despite the higher number of private actions, the limitations of private enforcement mechanism in France are still significant. First, the great majority of cases were initiated by entrepreneurs and were a consequence of the contractual disputes between professionals. Second, the private cases involved mainly abuse of dominance and aimed rather to obtain the annulment of the agreement than a compensation. Thirdly, private actions did not cover the whole French economy, but where limited to the three sectors of the market (food, automobile industry and alcoholic beverages). Finally, the majority of claims (almost 70%) were unsuccessful and did not lead to any kind of recovery of victims of anticompetitive behaviours. Therefore, as the results of undertaken analysis confirm, despite

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133 See A. Jurkowska-Gomułka, *Comparative competition law private enforcement…*; see also D. Hansberry-Biegunska, *Poland…*, pp. 251–259.

134 See a written contribution from France submitted for Item III of the 121st meeting of the Working Party No. 3 on Co-operation and Enforcement of OECD on 15 June 2015, pt. 6, available at: http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3/WD(2015)1&docLanguage=En [access: 10.04.2015].

135 R. Amaro, *Le contentieux privé des pratiques anticoncurrentielles…*, pt. 74.

the increasing number of private antirust cases in France, the efficiency of private enforcement is still limited.

Referring to the situation in other European jurisdictions, it may be claimed that in general it does not differ significantly from the one observed in France and Poland. According to the comparative analysis of private enforcement of antitrust law in 27 MS (Croatia was not included in the survey) in the period between 1999 and 2012[136], in most of the European jurisdictions the ratio of private antitrust lawsuits was relatively low and did not exceed few cases per year. Moreover, in more than a half of MS private actions were not brought at all or were of margin importance. Finally, in all of the jurisdictions the number of successful cases was relatively low and in none of the MS exceeded 40% of initiated lawsuits.

The tendency presented above finds also a confirmation in the data provided by the European Commission. As it held in the Impact Assessment Report accompanying the proposal for a Damages Directive: *"out of the 54 final cartel and antitrust prohibition decisions taken by the Commission in the period 2006–2012, only 15 were followed by one or more follow-on actions for damages in one or more Member States."*[137] Moreover, as the Commission observed, a great majority of private antitrust cases took place in a few MS only, causing an undesirable imbalance in the protection of EU citizens against competition law infringements[138].

While the general analysis of the aforementioned data could give us impression that private enforcement is of low practical importance in the whole European Union, three jurisdictions do not confirm this standpoint. It concerns Spain and Netherlands, where number of private actions exceeded 300, and Germany, where in the period between 1999 and 2012, 608 private antitrust cases were initiated. The main reason for greater efficiency of private enforcement in the three above-mentioned legal orders are the legislative changes introduced in the course of last decade. Through the limitation of costs of private proceedings, introduction of new methods of financing and wide application of group litigation mechanism, the

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136 See B. Rodger, *Competition Law. Comparative Private Enforcement Collective Redress across the EU*, Wolters Kluwer, 2014. Results of the report available are also available at: http://www.clcpecreu.co.uk [access: 20.04.2015].

137 See EC's Impact Assessment Report, Damages actions for breach of the EU antitrust rules, Accompanying the proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, SWD(2013) 203 final, pt. 52–53.

138 According to the aforementioned report, the vast majority of antitrust damages actions were initiated in three European jurisdictions: the UK, Germany and the Netherlands.

aforementioned jurisdictions were able to respond to the main problems of individuals claiming for compensation, i.e. information asymmetry, limited access to evidence, high costs of the proceedings, and enhanced the participation of private parties in the enforcement of competition law provisions.

Table 1. Number of private antitrust actions initiated between 1.05.1999 and 1.05.2012

	Total number of cases	Number of successful cases (at least partially)
Austria	64	22
Belgium	137	28
Bulgaria	0	0
Cyprus	0	0
Czech Republic	4	0
Denmark	8	5
Estonia	1	1
Finland	4	1
France	80	29
Germany	608	231
Greece	27	3
Hungary	16	0
Ireland	25	0
Italy	133	n.a.
Latvia	1	0
Lithuania	3	1
Luxembourg	4	0
Malta	7	3
Netherlands	308	n.a.
Poland	6	4
Portugal	33	6
Romania	3	0
Slovakia	5	0
Slovenia	5	2
Spain	323	84
Sweden	26	n.a.
United Kingdom	106	41

Table prepared at the basis of the following report: B. Rodger, *Competition Law. Comparative Private Enforcement Collective Redress across the EU*, Wolters Kluwer, 2014. Results of the report are also available at: http://www.clcpe-creu.co.uk [access: 27.05.2014].

In view of the aforementioned analysis we may come to the following conclusions on the current state of private enforcement in Europe:

1) Despite the increase in a number of private actions in Europe in the course of last decade, the involvement of individuals in the detection and prosecution of anticompetitive behaviours is still too low to construe important supplement of public enforcement of antitrust law.
2) The current EU's policy in the area of private enforcement based on a voluntary convergence of national systems towards the European model failed to establish coherent and effective system of private enforcement of antitrust law in Europe.
3) Introduction of more innovative solutions in the area of private enforcement may lead to increase in the individuals' participation in the detection and prosecution of anticompetitive behaviours.

Therefore, the reasoning presented in the following parts of this thesis will be based on two main assumptions.

First, that development of an effective system of private enforcement of antitrust law in Europe requires adoption of binding and coherent solutions at the EU level, allowing to ensure appropriate balance between MS and equal level of protection of EU citizens against competition law infringements. In this context, the adoption of the Damages Directive will be regarded as a step forward in the development of the private enforcement doctrine and a solution which may mitigate several shortcomings of private enforcement in Europe.

Second, that without introduction of innovative mechanisms of private enforcement, greater involvement of individuals in the execution of antirust provisions is not possible. In this context, the main emphasis will be put on group litigation mechanism, being commonly regarded as the most effective mechanisms of the enforcement of competition law provisions by private parties. It will be argued that only through establishment of a balanced public-private enforcement system equipped with the effective mechanism of collective redress, the greater involvement of individuals, and in consequence, higher level of efficiency in the enforcement of antitrust law provisions, may be achieved.

III. The concept of a mixed (hybrid) system of competition law enforcement – the general scheme for more effective enforcement of antitrust law in Europe

As the conducted analysis shows, neither public, nor private method of competition law enforcement, may solely ensure that all the objectives of the enforcement process will be achieved. While the public method struggles to guarantee the fulfilment of a corrective justice principle, the private enforcement is limited as far as detection, punishment and deterrence of anticompetitive behaviours. Moreover, despite increasing importance of private enforcement in Europe, individuals are still reluctant to refer to this method in order to execute their rights in courts.

For these reasons, many scholars argue in favour of establishment of a mixed (hybrid) system of competition law enforcement, in which both methods of law enforcement would have complementary character[139]. The goal of such approach is to ensure that all objectives of the enforcement process will be achieved, and that greater level of efficiency in the detection and prosecution of illegal practices will be attained.

The voice of legal scholars seems also to be confirmed by the recent legislative practice of the European Commission. As it stated in the Explanatory Memorandum to the Proposal for Damages Directive, one of the main goals of the proposed reform is *"optimising the interaction between the public and private enforcement of competition law",* because *"the overall enforcement of the EU competition rules is best guaranteed through complementary public and private enforcement."*[140]

In view of the above, in the following points it will be argued that only through the establishment of a balanced public-private system of competition law enforcement, greater efficiency of antitrust law may be achieved.

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[139] See for example: A. Jurkowska-Gomułka, *Publiczne i prywatne…*, pp. 431–444; R. Molski, *Prywatnoprawna ochrona konkurencji...*, p. 807; R. Stefanicki, *Ochrona konsumenta…*, pp. 18–19; P. Marsden, *Public-private partnerships for effective enforcement…*, pp. 509–539; S.W. Waller, *Towards a Constructive Public-Private Partnership…*, pp. 367–368; J. Kloub, *White Paper on Damage Actions…*, pp. 515–547.

[140] Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013) 404, 11.6.2013, pt. 1.2.

1. Allocating a principal role in the enforcement process to the competition authorities

The first issue that needs to be addressed while dealing with a concept of a hybrid system of competition law enforcement concerns the role of both methods (public and private) in the execution of antitrust law provisions. It requires to determine what is their mutual relationship and if any of them may be regarded as a superior one.

Once we analyse the above-mentioned issue from the European perspective we may easily come to the conclusion that in all of the European jurisdictions the public method is regarded as a principle mechanisms of the enforcement of competition law provisions. The main responsibility for a detection, prosecution and punishment of anticompetitive behaviours lies on the NCAs, while the activity of individuals is limited and focused mainly on the achievement of corrective justice. In such a system, the public method may be regarded as a superior mechanism of competition law enforcement, while private method can be described as its complement[141]. The aforementioned construction may be explained by several reasons.

First, the superior character of public method results from the informative and investigative advantage of public enforcer over private claimants. The Commission and NCAs are equipped with a set of instruments, such as a possibility to conduct market inquiries, issue requests for information, interview individuals or investigate premises, which significantly facilitate detection and prosecution of illegal behaviours. Moreover, they are composed of economic and legal experts, experienced in dealing with complex antitrust cases. Finally, the Commission and NCAs are entitled to use innovative mechanisms, e.g. leniency programs, allowing motivating business undertakings to cooperate with public enforcer in the process of detection and prosecution of cartels. All that ensures that anticompetitive behaviours, having often tacit character, may be detected and punished more easily by the use of public method of competition law enforcement.

Secondly, the superior character of public method results from a greater sanctioning powers available to public authorities. As W. Wils argues, it concerns not only the number of sanctions available to public authority (monetary fines, director disqualifications or sanction of imprisonment), but

[141] A. Jurkowska-Gomułka, *Publiczne i prywatne…*, pp. 35–36; R. Molski, *Prywatnoprawna ochrona konkurencji...*, p. 809; R. Van Den Bergh, S.E. Keske, *Private Enforcement of European Competition Law…*, pp. 473–476; A.P. Komninos, *Relationship between Public and Private Enforcement...*, p. 9; R.H. Lande, J.P. Davis, *Benefits from Private Antitrust Enforcement...*, pp. 905–906.

it is also a consequence of a possibility to adapt the level of punishment to the gravity of violation[142]. As a result, the sanctioning powers executed by the public authority allow not only for a more effective punishment of law perpetrators, but what is most important, permit to ensure the optimal level of deterrence.

Thirdly, the public method is often regarded as a superior over the private one, due to the reasons lying behind the public enforcement. As W. Wils observes, while the private actions are driven by a private interest of a plaintiff aiming to obtain compensation, the public authorities undertake the proceedings in the general public interest[143]. While this characteristic may cause certain limitations of public enforcement in case of small value infringements, in most of the cases it allows to avoid unmeritorious suits and inadequate investment in the enforcement process. Due to the centralisation of the enforcement power in the hands of public authority, the cases may be better allocated and the enforcement efforts properly incurred.

Finally, the last advantage of public method over the private one concerns the costs of the enforcement process. While the private enforcement requires involvement of courts, legal attorneys and individuals in the process of detection and prosecution of anticompetitive behaviours, the number of actors involved in the public enforcement is restricted. It does not only limit the complexity of a procedure, but it also makes the enforcement cheaper. As W. Wils states: *"Public enforcement may generally be cheaper because of the higher degree of specialisation of the actors involved and the generally lower cost of administrative procedures as compared with civil litigation."*[144]

In view of the aforementioned we may claim that the superior role of public method in the enforcement of competition law provisions is duly justified. Due to its several characteristics, public method of competition law enforcement allows for better detection of anticompetitive behaviours, greater efficiency of the enforcement process and higher level of deterrence. Nevertheless, despite its several advantages, even the most effective system of public enforcement may not ensure the full achievement of the objectives of competition law enforcement. It concerns in particular problems of public method with the fulfilment of corrective justice principle and the limited detection of small value infringements[145]. Therefore, the principle argument speaking in favour of the establishment of a mixed system of competition

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142 W. Wils, *Principles of European Antitrust Enforcement…*, pp. 118–119.

143 *Ibidem*, p. 120; see also on this issue A. Jurkowska-Gomułka, *Publiczne i prywatne…*, pp. 149–156.

144 W. Wils, *Principles of European Antitrust Enforcement…*, p. 122.

145 See in details Part I Chapter 1 Point II(2).

law enforcement, is the imperfect character of public method, which for the full efficiency of antitrust law shall be reinforced by the greater role of individuals in the detection and prosecution of anticompetitive behaviours.

2. Determining mutual relationship between public and private enforcement

Once it seems to be clear that the public mechanism has a superior role in the enforcement of competition law provisions in Europe, it still needs to be answered how to determine the mutual relationship between public and private method. In other words, it shall be answered if the private mechanism shall be regarded only as a supplement of public enforcement, rather as its complementary element or if it shall be put in a position of a concurrent mechanism to public enforcement?

Once we try to address this question, we may firstly observe that the public and private enforcement of antitrust law have two different objectives, often difficult to reconcile. While the public method focuses on the general public interests, such as deterrence, punishment of anticompetitive behaviours and restoring competitive process, the main goal of private actions is to ensure the full compensation of victims of competition law infringements. As a result, several conflicts between these two mechanisms may appear, and as it will be argued underneath, may lead to disruption of public enforcement policies or limited efficiency of private actions.

Secondly, the two analysed methods have different legal nature. While the public enforcement takes form of public proceedings and is governed by the strict rules of administrative procedure, the private enforcement falls under the scope of civil procedure. It results in many differences, concerning in particular the issue of evidence collection, access to proofs of violation and the level of antitrust expertise on the side of competition law enforcer.

Finally, in case of each method of competition law enforcement the reason behind a decision to initiate the enforcement action is different. While the public actions are started once the violation occurred and aim to punish the law perpetrator in the name of general public interest, the private actions are individually driven and determined by a personal interest of an injured individual. It results not only in different selection of claims, but may influence the construction of a whole enforcement process.

In view of the aforementioned, the relationship between public and private enforcement could be easily described as concurrent. Due to the divergent objectives, different enforcement actors and various character

of proceedings, public and private enforcement of antitrust law could be put in opposition. Nevertheless, as different authors rightly argue, these two methods of law enforcement have also a lot in common, what gives grounds for their mutual coexistence.

First, as P. Marsden claims, public and private enforcement are often linked by common interests. Both methods are interested in "righting a wrong" which is explained by the author as returning players to a level playing field and working for consumers[146]. Moreover, both methods of law enforcement try to contribute to greater competition culture and aim to ensure that anticompetitive conducts will be detected and punished. Because as the Commission argued in its recent Proposal for Damages Directive, compliance with the antitrust rules may be ensured only through the strong public enforcement, combined with the greater involvement of individuals in detecting anticompetitive behaviours and initiating private actions[147].

Secondly, both methods of law enforcement complement each other in achieving intended purposes. On the one hand, private enforcement, by providing additional input for detecting anticompetitive behaviours and sanctioning violations, leads to greater level of punishment and deterrence. Whereas public enforcement, by providing additional proofs of violations and facilitating follow-on actions, opens the door for better achievement of corrective justice principle.

Finally, the public and private enforcement may provide a "relief" to each other. As far as the "relief" offered by private enforcement is concerned, we may refer to small value infringements which are often neglected by public authority dealing with the large sectors of economy. As it was argued before, private enforcement, ensuring a close link between a victim and a violation, as well as a personal interest in bringing a claim, may allow for greater detection of such behaviours and ensure their effective punishment. Referring to the possibility of filling the gaps of private actions by public enforcement, the most striking example concerns access to proofs of violations. By opening an access to competition authority's files in case of private follow-on actions, the public method helps to reduce the information asymmetry between claimants and accused undertakings, and enhance private mechanism of competition law enforcement.

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146 P. Marsden, *Public-private partnerships for effective enforcement…*, p. 510.

147 Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013) 404, 11.6.2013, pt. 1.1.

In view of the above, many supporters of a hybrid system argue that the complementary relationship between public and private method of competition law enforcement cannot be denied, and shall find a confirmation in the specific legal solutions adopted in each legal system. Because as S.W. Waller argues: *"Neither public nor private enforcement should "monopolize" competition law, but must work together to deter, detect, punish, and compensate victims of unlawful anticompetitive conduct."*[148] Moreover, as J. Terhtecht claims: *"Especially in the European Union the creation of a "competition culture" is still an important task for the enforcement process and could be achieved with a balanced approach that is based on private enforcement as well as public enforcement, emphasising that the ideal situation is one of mutual encouragement."*[149] Finally, as A. Jurkowska-Gomułka points out, there is an: *"indisputable necessity of the coexistence of public and private enforcement of competition law rules."*[150]

The aforementioned standpoint of legal scholars, speaking in favour of a hybrid system of competition law enforcement, seems to find a confirmation in the legal actions undertaken by the Commission at the European level.

First, we may refer to the Regulation 1/2003, which introduced a decentralised system of competition law enforcement within the EU, and transferred important part of responsibility for the execution of antitrust law provisions to the national courts[151]. In the opinion of T. Ottervanger, it proved that EU legislator considered private method as a mean which could strengthen public enforcement of antitrust law in Europe, and by the way of decentralisation and delegation of enforcement powers to national courts, increase efficiency of detection and prosecution of anticompetitive behaviours[152].

Secondly, once we refer to the Commission's documents on private enforcement, we may clearly observe that it considered it not only as a way of strengthening individuals' right to compensation, but also as a mechanism able to increase the general level of detection and deterrence of anticompetitive behaviours. As it has already stated in the Green Paper on damages actions: *"Damages actions for infringement of antitrust law serve*

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148 S.W. Waller, *Towards a Constructive Public-Private Partnership…*, pp. 367–368.

149 J. Terhecht, *Enforcing European Competition Law…*, p. 8.

150 A. Jurkowska-Gomułka, *Publiczne i prywatne…*, p. 48.

151 K. Kowalik-Bańczyk, *Sądowe stosowanie unijnego prawa konkurencji*, in: A. Wróbel (ed.), *Stosowanie prawa Unii Europejskiej przez sądy. Tom 1*, Wolters Kluwer, Warszawa 2010, p. 794.

152 T. Ottervanger, *Designing a Balanced System…*, p. 19.

several purposes, namely to compensate those who have suffered a loss as a consequence of anti-competitive behaviour and to ensure the full effectiveness of the antitrust rules of the Treaty by discouraging anti-competitive behaviour, thus contributing significantly to the maintenance of effective competition in the Community (deterrence).”[153] Also in the White Paper on damages actions the Commission has claimed that: *“Even though actions for damages in Europe are primarily about victims effectively exercising Treaty rights, an enhanced level of actions for damages will also have the positive effect of increasing deterrence for potential infringers. Indeed, actions for damages can complement public enforcement by adding to the risk of administrative sanction, the risk of having to compensate the harm caused to the victims, and also by widening the scope of enforcement of EC competition rules to cases not dealt with by the competition authorities.”*[154] Finally, in its most recent document on private enforcement, i.e. proposal for Damages Directive, the Commission underlined a need of establishment of a dual and complementary system of law enforcement which would serve the goals of deterrence and compensation. Because as it has stated: *“The overall enforcement of the EU competition rules is best guaranteed through complementary public and private enforcement.”*[155] In consequence, the Commission proposed a set of legal solutions which main goal was to: *“optimise the interaction between public and private enforcement of the EU competition rules, ensuring that the Commission and the NCAs can maintain a policy of strong public enforcement, while victims of an infringement of competition law can obtain compensation for the harm suffered.”*[156]

Among the solutions finally proposed in the Damages Directive and aimed to establish a hybrid system of competition law enforcement, we can evoke prejudicial effect of competition authorities rulings (Art. 9 of the Damages Directive) and limited access of private claimants to the competition authority’s files (Art. 6 – 7 of the Damages Directive). Both of the above mechanisms aimed to find a balance between public and private method, and ensure that once combined within a single model

153 European Commission, Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM(2005) 672 final, pt. 1.1.

154 European Commission Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules, SEC(2008) 404, p. 10.

155 Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013) 404, 11.6.2013, pt. 1.2.

156 *Ibidem*, pt. 1.2.

of competition law enforcement, they will not mutually diminish their efficiency.

In view of the above we can state, that by the development of private enforcement of antitrust law and establishment of specific mechanisms concerning relationship between public and private method, the Commission confirmed that these two techniques shall be neither subsidiary, nor concurrent, but rather complementary mechanisms in the execution of competition law provisions. Moreover, it proved that while the public method is still in the centre of European regime of law enforcement, the full efficiency of antitrust law may not be achieved if the individuals are not empowered with the effective measures of protection against competition law violations.

3. Tailoring private enforcement to remedy the gaps of public method

Apart from setting the relationship between public and private method, and creating a balance between these two techniques of law enforcement, the introduction of a mixed (hybrid) system of competition law enforcement requires to provide effective means of private actions. Their goal shall be to ensure that the rights of individuals granted by the European and national law will be effectively executed before the national courts. The proposed solutions shall mitigate the main limitations of private method, and guarantee that it will construe an important added value to the whole system of competition law enforcement.

3.1. Broadening the rules on discovery

The first area in which development seems to be crucial in order to increase the efficiency of private enforcement, concerns an access to evidence. In the currently existing system, the procedural rules of most of the MS foresee only limited possibilities for a disclosure of evidence available to parties claiming for compensation. Such limitation is especially perceptible in the area of antitrust law which involves fact-intensive nature of cases and strong information asymmetry between a claimant and a defendant. Therefore, increasing an access to evidence and broadening the rules on disclosure may be defined as one of the main objectives of tailoring private method to the needs of competition law enforcement.

The importance of access to evidence was recognised by the Commission at the very beginning of European discussion on private enforcement. As

it was stated in the White Paper on damages actions, a limited access to evidence makes it *"very difficult, if not impossible, for claimants to bring a successful action for antitrust damages."*[157] Also in the Proposal for Damages Directive the Commission assumed that: *"the difficulty a claimant encounters in obtaining all necessary evidence constitutes in many Member States one of the key obstacles to damages actions in competition cases."*[158] As a result, one of the key elements of a debate on private enforcement, concerned the proposal of more liberal and coherent rules on a disclosure of evidence in all MS.

The first attempt to introduce wide rules on disclosure of evidence was undertaken by the Commission in the Green Paper on damages actions. In this context, the Commission referred to different solutions, such as lowering the standard of proof, shifting overall burden of proof to defendant, or sanctioning accused undertaking for a non-disclosure of evidence[159]. The Commission's goal was to mitigate a problem of limited access to evidence and strengthen the private mechanism of competition law enforcement[160]. Nevertheless, despite the far-reaching character of the aforementioned proposals, they were abandoned in the subsequent discussion on private enforcement.

Already in the White Paper on damages actions, the Commission assumed that introduction of too liberal rules on disclosure may lead to abusive litigation. In consequence, it argued in favour of a balanced disclosure process, being under a strict control of the court. Because as the Commission explained: *"Whilst it is essential to overcome this structural information asymmetry and to improve victims' access to relevant evidence, it is also important to avoid the negative effects of overly broad and burdensome disclosure obligations, including the risk of abuses."*[161] According to the Commission's proposal expressed in the White Paper on damages actions, the claimant asking for a disclosure had to fulfil specific conditions, before

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157 European Commission Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules, SEC(2008) 404, pt. 87.

158 Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013) 404, 11.6.2013, pt. 4.2.

159 Commission Staff Working Paper – Annex to the Green Paper – Damages actions for breach of the EC antitrust rules, SEC(2005) 1732, pt. 89–100.

160 European Commission, Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM(2005) 672 final, pt. 2.1.

161 European Commission, White paper on damages actions for breach of the EC antitrust rules /*COM/2008/0165 final*/, pt. 2.2.

obtaining a disclosure order from the court. First, he had to present all the facts and means of evidence that were reasonably available to him, provided that they showed plausible grounds to suspect that he had suffered an injury. Second, he had to demonstrate that the required evidence could have not been obtained by other means. Third, he had to determine categories of documents to be disclosed. And finally, he had to ensure that the disclosure of evidence was necessary, proportionate and relevant to the case. Fulfilment of these conditions was supposed to be under a strict control of the court.

The aforementioned construction confirmed a balanced approach of the Commission to the question of disclosure. On the one hand, it aimed to increase the access to evidence. On the other, it tried to preserve the interests of business undertakings and ensure an equal procedural footing of both parties to the proceedings.

The policy set by the Commission in the White Paper on damages actions is continued in the Damages Directive. As the Commission stated in a Proposal for Damages Directive, while the directive aimed to *"ensure that in all Member States there is a minimum level of effective access to the evidence needed by claimants and/or defendants to prove their antitrust damages claim and/or a related defence",* it also tried to avoid the introduction of *"overly broad and costly disclosure obligations that could create undue burdens for the parties involved and risks of abuses."*[162] This balanced approach to the question of disclosure of evidence shall be positively assessed. It fits in with the idea of a mixed system of competition law enforcement which goal is to preserve both public and private method of execution of antitrust law provisions. Nevertheless, as it will be argued underneath, while the mere objective of the Commission's proposal can be appraised, the specific elements of the Damages Directive may raise doubts, as to whether they are able to establish an effective disclosure mechanism in Europe.

The mechanism of disclosure of evidence finally adopted in the Damages Directive is based on three main pillars. The first pillar concerns a right to claim for disclosure of evidence granted to parties initiating private lawsuits. According to the Art. 5 of the Damages Directive: "*Member States shall ensure that, where a claimant has presented reasonably available facts and evidence showing plausible grounds for suspecting that he, or those he represents, has suffered harm caused by the defendant's infringement of competition law, national courts can order the defendant or a third party to*

[162] Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013) 404, 11.6.2013, pt. 4.2.

disclose evidence." In the opinion of the Commission, the availability of such a right is necessary in order to mitigate the information asymmetry, resulting from the fact that in most antitrust cases an evidence required to prove the case is in the possession of a defendant or a third party[163].

The second pillar of a new disclosure regime concerns a strict control of the court over disclosure process. The judge is granted a role of "gate-keeper" and is responsible for ensuring a balance between the interests of a plaintiff and a defendant. Moreover, by controlling the necessity, scope and proportionality of disclosure demands, the judge helps to prevent the enforcement process against the abuse. Finally, by issuing the disclosure orders and imposing sanctions on undertakings non-complying with the disclosure procedure (Art. 8 of the Damages Directive), the judge ensures greater efficiency of a disclosure mechanism.

The third pillar of a disclosure regime concerns a limited access to certain categories of documents. As it was stated before, the leniency statements and settlement submissions are completely excluded from the possibility of disclosure (Art. 6 of the Damages Directive), while the documents prepared by the parties for the purpose of competition proceedings, or those drawn up by competition authorities, can be disclosed only after the termination of the proceedings (Art. 7 of the Damages Directive). The goal of such solution is to *"prevent that the disclosure of evidence jeopardises the public enforcement of the competition rules by a competition authority."*[164]

While we try to assess the aforementioned proposal on disclosure of evidence in private antitrust cases, we may state that it construes an important step in development of a mixed system of competition law enforcement in Europe. On the one hand, it tries to mitigate the main limitation of private actions, i.e. restricted access to evidence, and on the other, it aims to preserve the full efficiency public enforcement policies. Nevertheless, while such goal shall be appraised, it may be questioned if the Commission's proposal may work effectively in practice.

The first problem of the aforementioned solution concerns the scope of responsibility conferred upon judges dealing with private claims. While the Commission justifies the great role of a judge in the disclosure process by the legal tradition of European countries, and states that: *"the proposal is compatible with the different legal orders of the Member States",* it can be questioned if the European judges are prepared to assume such responsibility and fulfil all the obligations conferred upon them by the

[163] *Ibidem*, pt. 4.2.
[164] *Ibidem*, pt. 4.2.

Commission. Firstly, most of the national judges are unexperienced in dealing with the disclosure demands and are missing knowledge and expertise required to govern complex discovery process in the area of antitrust law[165]. Secondly, due to the ambiguity of notions used by the Commission, e.g. "proportionality of request", "plausibility of grounds for suspecting a harm", the great responsibility for their interpretation and assessment is transferred to national courts. Finally, the problems of national judges may result from a novelty of the disclosure mechanism, which requires to reverse currently existing hierarchy of civil procedure and the well-established "*accusare nemo se debet"* (no man is obliged to accuse himself) rule.

The second problem of a new disclosure regime concerns the limitation of access to certain categories of evidence. Once the limitation of access to leniency materials and competition authorities files may be justified by a need of preservation of public enforcement policies, the question is, if such exclusion does not practically squanders effective access evidence in a great number of private follow-on claims. The following question may be raised, because as the practice of competition law enforcement shows, in the great majority of antitrust cases infringements are discovered thanks to the leniency applications[166]. As a result, the evidence required to prove the infringement, will be often out of reach of private claimants[167].

Finally, the last limitation of the proposed regime is the ambiguous character of conditions for filing a disclosure claim. The Damages Directive states that an individual, while trying to obtain an access to evidence being in a possession of a defendant or a third party, shall present reasonably available facts and evidence showing plausible grounds for suspecting that he, or those he represents, have suffered harm caused by the infringement of competition law by a defendant. While such conditions may be justified as preventing the judicial proceedings from abusive and unfounded claims, their imprecise character may be questioned. The notions such as "reasonably available facts" or "plausible grounds" may cause important interpretational

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165 A. Galič, *Disclosure of Documents in Private Antitrust Enforcement Litigation…*, pt. I.

166 See EC's Impact Assessment Report, Damages actions for breach of the EU antitrust rules, Accompanying the proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, SWD(2013) 203 final, according to which in the period 2008 to 2011, 21 out of 24 EC's decisions (i.e. 88% of decisions) were based on leniency applications. When looking at the NCAs represented in the ECN, in 2010 18 out of 30 and in 2011 13 out of 21 cartel decisions, imposing a significant amount of fines, were based on leniency applications.

167 V. Butorac Malnar, *Access to Documents in Antitrust Litigation*…, pt. II.

difficulties, and cause unequal level of protection of individuals in different national jurisdictions. This problem may be additionally aggravated due to the fact that the Art. 5 of the Damages Directive is based on a principle of minimum harmonisation[168], what creates a risk that a position of a judge, as well as mechanism of assessment available to him, will be differently determined in various national jurisdictions. Therefore, it may be argued that more clear-cut solution should have been proposed by the Commission, not only in order to ensure greater transparency and coherence of introduced regime, but also to guarantee that all victims of competition law infringements will receive the same level of protection within the EU.

In view of the above it may be stated that the recent Commission's proposal on disclosure of evidence is an imperfect attempt of tailoring private method to the needs of effective antitrust enforcement. Due to the ambiguity of applied notions and the attempt to compromise two different objectives, i.e. increasing efficiency of private enforcement and preserving interests of public enforcement policies, it raised more questions than answers concerning the issue of disclosure of evidence. Undoubtedly, it is still too early to evaluate the effects of the Damages Directive, since it still has to be implemented and applied at the national level, however, it may be questioned if it addressed the problem of a limited access to evidence in the best possible manner.

3.2. Limiting the costs of private proceedings

The second area of private enforcement requiring further debate concerns the rules on financing of private claims. They are important not only from the perspective of general costs of private enforcement, but what is most important, they may determine the mere efficiency of private antitrust actions. Because as the Commission rightly observed in the Green Paper on damages actions: *"Cost rules play an important role in being an incentive – or disincentive – for bringing an action. While it is clear that the single most important issue in deciding whether to bring an action is the likelihood of winning, rules on cost recovery can either give special incentives for going to court, or can act as a restraining influence."*[169]

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[168] According to the Art. 5(8) of the Damages Directive: *"Without prejudice to paragraphs 4 and 7 and to Article 6, this Article shall not prevent Member States from maintaining or introducing rules which would lead to wider disclosure of evidence."*

[169] See Commission Staff Working Paper – Annex to the Green Paper – Damages actions for breach of the EC antitrust rules, SEC(2005) 1732, pt. 214.

The issue of costs of private proceedings formed a part of the European debate on private enforcement from its very beginning. Both the Green and White Paper on damages actions tried to address this issue, and aimed to propose a solution able to overcome the financial limitations of individuals claiming for compensation. Nevertheless, despite the great significance of the aforementioned issue, the Damages Directive did not address the question of financing. None of the policy options assessed during a discussion on the Damages Directive foreseen the introduction of a common EU approach to cost rules[170]. As a result, the question of financing remained a domain of national law, what as the practice shows, may be important obstacle to development of private actions in the area of antitrust law.

In all of the European jurisdictions the main principle governing financing of private proceedings is "loser-pays" principle. It assumes that the costs of a successful party are paid by the losing one. The goal of such solution is to avoid speculative litigation and ensure a balance between the interests of a claimant and a defendant. While such solution is strongly rooted in legal tradition of all MS and is evoked by the Commission as one of the main safeguards against the abusive litigation in Europe[171], it may be argued however, that the "loser-pays" principle causes important limitations to private actions in the area of antitrust law.

Firstly, the "loser-pays" principle requires a party claiming for compensation to consider the risk of paying significant costs if the challenge is unsuccessful. Secondly, in case of claims initiated by consumers, the "loser-pays" puts a defendant, i.e. an enterprise committing infringement and possessing greater financial resources to cover the costs of defence, in a better procedural position than the plaintiff. Finally, due to the high uncertainty of private antitrust claims, combined with the complex nature of cases and high costs of proceedings, the "loser-pays" principle discourages many injured individuals from bringing an action.

These limitations of "loser-pays" principle were recognised by the Commission. As it has already claimed in the Green Paper on damages actions: *"The application of the "loser pays" principle will, however, be*

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[170] EC's Impact Assessment Report, Damages actions for breach of the EU antitrust rules, Accompanying the proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, SWD(2013) 203 final, pt. 79–80.

[171] EC Public consultation, *Towards a Coherent European Approach to Collective Redress*, p. 23, available at:http://ec.europa.eu/justice/news/consulting_public/0054/ConsultationpaperCollectiveredress4February2011.pdf [access: 19.01.2015].

problematic in those cases in which very small amounts of damages are being claimed. In such a situation the actual cost of the action might be disproportionate, even with regard to recoverability under cost rules." Moreover, as it has added: *"The application of the "loser pays" principle will also be problematic in those cases in which the outcome of the case cannot be assessed upfront. In such a situation, it will be very difficult for a possible claimant to know whether he will be in a position to pay all the costs or in a position to recover his own costs."* And while the Commission did not question the "loser-pays" principle, it proposed two solutions which aimed to adapt the analysed rule to the needs of private enforcement[172].

The first solution expressed by the Commission in Green Paper on damages actions concerned a possibility to grant by a court a "cost protection order". Its main objective was to protect parties injured by the law infringement and claiming for compensation from the excessive costs of court proceedings.

According to the Commission's proposal, the first scenario in which a "cost protection order" could be issued, concerned a situation in which a party failed to win the case on the merits, but by the mean of court order would be exempted from covering the costs of proceedings. In such a case, a "cost protection order" would be a discretionary power of the court, used once the private claim was unsuccessful. The second scenario concerned *ex ante* assessment, and envisaged that the "cost protection order" could be granted at the outset of action, in order protect economically weaker parties (e.g. consumers) from the cost exposure. Such a solution would motivate injured individuals to bring a claim for damages, despite limited financial resources being at their disposal.

The second solution proposed by the Commission in order to mitigate disincentive effect of "loser-pays" principle concerned its partial limitation. It was supposed to be achieved, by setting a rule according to which the costs would only be ordered against a claimant who acted manifestly unreasonable by bringing an action. In the Commission's opinion: *"such a rule would work to protect claimants while at the same time working as a mechanism against unmeritorious litigation."*[173]

Both of the solutions proposed in the Green Paper on damages actions may be regarded as innovative and moderate in the same time. On the one hand, they intended to enhance private enforcement by limiting the costs

[172] See Commission Staff Working Paper – Annex to the Green Paper – Damages actions for breach of the EC antitrust rules, SEC(2005) 1732, pt. 220.

[173] *Ibidem*, pt. 220.

of judicial action. On the other, they aimed to protect market participants against unmeritorious litigation. That is because, both the "costs protection orders" and partial limitation of "loser-pays" principle were supposed to remain under a strict control of the court, ensuring their application only in well justified cases.

Despite the innovative character of proposed solutions, they were abandoned in further discussion on private enforcement. Although the Commission recognised in the White Paper on damages actions that a lack of flexible rules on financing may cause serious "*disincentive to bringing an antitrust damages claim, given that these actions may be particularly costly and are generally more complex and time-consuming than other kinds of civil action*"[174], it did not come forward with a constructive proposal on this issue. As it held: *"The Commission does not suggest any specific changes to national cost regimes in favour of claimants. However, given the importance of the issue of costs, Member States are encouraged to reflect on their cost regimes so as to facilitate meritorious antitrust litigation."*[175] Shifting the problem of financing to MS, without proposing specific solutions on this issue, shall be negatively assessed. It led neither to greater coherence of private enforcement in Europe, nor to greater efficiency of private antitrust actions. Moreover, it constituted a step back in comparison to the Green Paper on damages actions, where the specific recommendations on financing of private claims were given to MS.

The line set by the Commission in the White Paper on damages actions is continued nowadays. As it was stated above, none of the provisions of the Damages Directive refer to the cost shifting rules. Such approach of the Commission shall be regarded as disappointing. By leaving these matters to be determined by national laws, the Damages Directive risks to create various standards within the EU. This may in turn lead to legal uncertainty in cases of cross-border litigation, different level of protection of EU citizens against competition law infringements, and finally, limited efficiency of private enforcement mechanism.

Apart from the cost shifting rules, the second issue which raised a debate within the European discussion on private enforcement concerned the methods of funding. This time the main attention focused on contingency fees, often evoked as the most effective mechanism of private claims' financing.

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[174] European Commission, White paper on damages actions for breach of the EC antitrust rules /*COM/2008/0165 final*/, pt. 2.8.

[175] European Commission Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules, SEC(2008) 404, pt. 254.

The contingency fees assume that a plaintiff is not obliged to pay any fees to his attorney, unless and until the plaintiff collects damages. The remuneration of the attorney, specified in the contingency-fess agreement, constitutes a certain percentage of damages granted to the injured party. Thanks to such solution the costs of legal proceedings are significantly limited. Moreover, the financial risk of initiating private action is reduced. In consequence, an individual injured by the law infringement, and a lawyer representing his interests, are more keen to initiate and conduct private proceedings.

The issue of contingency fees was first evoked by the Commission in the Green Paper on damages actions. Despite that it did not form a part of the Commission's proposal on the problem of financing, the Commission recognised importance of contingency fees for funding of private claims. As it held: *"contingency fees are a strong incentive because the financial risk for bringing the action is borne not by the claimant but by private attorneys."*[176] Moreover, the Commission did not exclude the possibility of introduction of contingency fees by national legislators, and recognised their existence in several national jurisdictions[177].

For the second time the Commission referred to the issue of contingency fees in the White Paper on damages actions. This time its standpoint towards contingency fees was more critical. As the Commission argued while referring to the results of consultation launched by the Green Paper on damages actions: *"Although the Commission did not suggest any changes concerning lawyers' fees in its Green Paper […] most of the respondents supported the viewpoint that contingency fees, whereby lawyers' fees are calculated as a percentage of any successful claim, should not be encouraged."* Based on such assessment, the Commission refrained from a proposal arguing in favour of contingency fees, being regarded as a factor leading to the abuse[178]. In the same time, the Commission proposed other means of funding, which could be developed at the national level and ensure better balance between the needs of private claimants and legal tradition of all MS. As such it proposed legal aid mechanisms, legal aid insurance and third party funding, all able in the opinion of the Commission to: *"mitigate expenses and therefore help reduce the obstacles related to the funding of private actions."*[179]

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176 Commission Staff Working Paper – Annex to the Green Paper – Damages actions for breach of the EC antitrust rules, SEC(2005) 1732, pt. 218.

177 *Ibidem*, pt. 218.

178 Commission Staff Working Paper accompanying White Paper on damages actions for breach of EC antitrust rules, /* SEC/2008/0404 final */, pt. 266.

179 *Ibidem*, pt. 266.

While the Commission's standpoint to the issue of funding seemed to evolve in the Green and White Paper on damages actions, the recent Damages Directive may raise important doubts as far as continuity of Commission's policy is concerned. None of the provisions of the Damages Directive refer to the rules on financing of private claims. Moreover, neither Proposal for Damages Directive, nor Impact Assessment Report, evoke introduction of cost rules and new methods of financing as the objectives of undertaken reform. In consequence, the current *status quo* seems to be preserved, and the issue of financing still remains a domain of MS. Such situation shall be negatively assessed, since a lack of coherent European approach to the issue of funding, risks to create imbalance in the protection of EU citizens against competition law infringements. Moreover, it runs a risk that in case of absence of innovative solutions on financing at the national level, the EU's initiative to develop wide and effective mechanisms of private enforcement in the area of antitrust law may be squandered.

In view of the above reasoning we can state, that the issue of costs is one of the most important, and most complex questions concerning the private enforcement of antitrust law. Providing effective response to this question requires not only the reassessment of legal traditions of MS (e.g. as far as the "loser-pays" principle or contingency fees are concerned), but also proposal of the procedural solutions interfering with the national procedural law. Mainly for these reasons, the Commission decided to refrain from undertaking an action in the Damages Directive, and left it to MS to decide on the issue of costs and financing. Such position of the EU legislator may be criticised, and as it will argued in the second part of this thesis, more constructive proposal on the issue of costs and financing is necessary in order to ensure effective functioning of private enforcement mechanism. It should not refrain from innovative and far reaching solutions, e.g. contingency fees, which according to the national legal practice, may work effectively even in civil law legal traditions[180].

3.3. Increasing the role of group litigation

The last and most significant area, where the private actions could be better tailored in order to mitigate the limited efficiency of antitrust law enforcement, concerns the methods of bringing a claim. While there are

[180] As an example we can give Poland, which introduced a possibility of success fees in its law on collective redress. Such method of financing is currently regarded, both by individuals claiming for compensation, and lawyers representing groups of claimants, as an important factor in undertaking a decision to initiate a claim.

different ways to encourage private litigation in the area of competition law, one of the most efficient is providing individuals with a possibility to pursue a claim collectively. Because as different surveys confirm, individuals are more keen to protect their rights in court, if there exists a possibility of joining a group of claimants suffering the injury from the same illegal behaviour[181]. Moreover, as it is widely agreed, collective actions allow to limit the costs of private proceedings, increase an access to proof of violations, strengthen the pressure on competition law perpetrators and increase the chances for a positive outcome of private antitrust claims. In consequence, the group litigation mechanism creates chances that the main limitations of private enforcement will be removed, and that the individuals injured by anticompetitive behaviours, will be significantly supported in their claims for compensation.

Referring to the European discussion on private enforcement it shall be stated, that the group litigation mechanism has been long recognised by the EU institutions, NCAs and national legislators[182] as the important complement of the competition law enforcement regime. Both N. Kroes and J. Almunia were underlining that when we talk about compensation for private damages, we also think of collective redress[183], which in their opinion was a mechanism necessary to give consumers and small businesses a realistic and efficient possibility to obtain compensation in cases of scattered damage[184]. Nevertheless, since the publication of *Ashurst Report* in 2004, it became clear that the enforcement of competition law by the use of group litigation, would have to overcome an astonishing diversity and total underdevelopment of private enforcement at the European and national level[185].

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[181] See for example Flash Eurobarometer on "Consumer attitudes towards cross-border trade and consumer protection" from March 2011, according to which 79% of the European consumers stated that they would be more willing to defend their rights in court if they could join a collective action.

[182] See D. Waelbroeck, D. Slater, G. Even-Shoshan, *Study on the conditions of claims for damages…*, according to which sixteen Member States introduced a collective redress mechanism in their legal systems in the course of last decade.

[183] J. Almunia, *Competition policy in 2010 and the SGEI reform*, Brussels 12/07/2011, SPEECH/11/515, available at: http://europa.eu/rapid/press-release_SPEECH-11-515_en.htm?locale=en [access: 01.06.2014].

[184] N. Kroes, *Antitrust: Commissioner Kroes welcomes the European Parliament's cross-party support for damages for consumer and business victims of competition breaches*, Brussels 26/03/2009, MEMO/09/135, available at: http://europa.eu/rapid/press-release_MEMO-09-135_en.htm?locale=en [access: 01.06.2014].

[185] D. Waelbroeck, D. Slater, G. Even-Shoshan, *Study on the conditions of claims for damages…*, p. 1.

The steps undertaken by the Commission in the following years, such as publication of the Green and White Paper on damages actions, did not lead to improvement of this situation. Also the public consultation entitled *"Towards a Coherent European Approach to Collective Redress"*[186], launched by the Commission at the beginning of 2011, with a view of identifying which forms of collective redress could fit into the European legal system, did not change this scenario. It only confirmed that finding consensus on the issue of group litigation among various stakeholders, i.e. consumers, enterprises and public authorities, as well as different national approaches to the issue of collective redress, was almost impossible task[187].

Disappointingly, the most recent document published by the Commission in the area of group litigation, i.e. Recommendation on collective redress, does not constitute important step forward in this matter. Instead of proposing binding solution on group litigation in Europe, it consists of non-binding recommendations on common principles for collective redress[188]. Undoubtedly, such solution is easier to adapt to the differences existing between MS. However, the question remains: will such an act actually guarantee greater efficiency of private enforcement in Europe?

Initial analysis of the Recommendation allows us to claim that the aforementioned document has limited chances of success. As different scholars underline, due to its non-binding nature and a strong dependence on Member States' will to adopt solutions proposed by the Commission, the Recommendation will not constitute an added value to the European discussion on group litigation[189]. Moreover, the character of solutions proposed in the Recommendation, e.g. opt-in mechanism, limitation of standing to sue to representative bodies, exclusion of contingency fees, seems to be more preservative than the instruments already developed in many national legal orders. It may thus be stated, that the Commission's proposal on group litigation constitutes more of a step back than a step forward towards in the introduction of effective European mechanism of collective redress. It seems to preserve a *status quo,* being described by the Commission as a complex legal patchwork of national solutions, each of

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186 EC Public consultation, *Towards a Coherent European Approach to Collective Redress*…

187 See in details M. Gac, *The road to collective redress in the European Union*…, pp. 93–108.

188 See 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 [OJ] 2013 L 201, p. 60–65.

189 D. Simon, *Recours collectifs: la relance?*, Revue Mensuelle LexisNexis Jurisclasseur, Novembre 2011, p. 64; C. Leskinen, *Recent developments on collective antitrust damages actions in the EU*, Global Competition Litigation Review 2011, Vol. 4(2), p. 88.

which is unique and none of which is fully effective[190]. In such a system, the individuals are faced with the incoherent mosaic of national approaches to group litigation, leading to forum-shopping, unequal level of protection against competition law infringements and a lack of legal transparency.

In view of the above it may be argued, that moving an issue of collective redress to the European level, especially in a case of cross-border litigation, and proposing a binding solution to all MS, would ameliorate a legal protection of individuals against competition law infringements and guarantee better enforcement of EU antitrust law. Therefore, in the following points it will be claimed, that only by the establishment of the wide EU approach to collective redress and introduction of a binding solution at the EU level, the private method may be adjusted to the needs of competition law enforcement and ensure effective protection of EU citizens against competition law infringements.

Conclusion Chapter 2

As the analysis conducted in Chapter 2 illustrates, the development of private enforcement doctrine in the EU did not lead to establishment of a coherent and effective regime of competition law enforcement neither at the European, nor at the national level. While the impulse towards establishment of the innovative mechanisms of private enforcement was given by the CJEU and the Commission, the MS were reluctant to introduce more far-reaching solutions whiting their national legal orders. Moreover, the individuals, despite being granted a right to claim for compensation in case of antitrust law violations, were often refraining from exercising this prerogative.

The outcome of such scenario, once analysed from the law enforcement perspective, is highly unsatisfactory. Numerous individuals injured by competition law infringements are left without protection, and the efficiency in the detection and punishment of anticompetitive behaviours is restrained. Therefore, the initial scientific hypothesis, according to which: *"The system of competition law enforcement, that currently exists in Europe, based on*

[190] Commission Staff Working Paper Document Public Consultation: Towards a Coherent European Approach to Collective Redress, SEC(2011)173 Final, pt. 9; European Parliament Directorate General for Internal Policies, *Overview of existing collective redress schemes in EU Member States*, July 2011, pt. 3, available at: http://www.europarl.europa.eu/document/activities/cont/201107/20110715ATT24242/20110715ATT24242EN.pdf [access: 15.06.2015].

a dominant role of public authorities in the enforcement of competition law rules, leads to the restrained protection of individuals against antitrust law violations and limited efficiency in discovering and prosecuting anticompetitive behaviours", is once again confirmed.

In view of the above, the author argues in favour of the establishment of a hybrid model of competition law enforcement, which if well balanced and adapted to the needs of individuals injured by the anticompetitive behaviours, could mitigate numerous problems of a current regime of competition law enforcement in the EU. While the recent changes introduced at the EU level, i.e. adoption of "private enforcement package", may be regarded as a step towards attainment of such a model, the analysis conducted in Chapter 2 confirms that still a lot has to be done before a complex public-private regime of competition law enforcement may be established in the EU.

The main doubts result from the restrained character of solutions proposed in the Damages Directive, strong dependence of the Damages Directive on the will of MS, possible incoherence of the national solutions adopted within the implementation process, and finally exclusion of a group litigation mechanism from the scope of the Damages Directive. Therefore, the debate on effective enforcement of antitrust law in Europe is still an ongoing process, and still a lot has to be done before the expectations of CJEU, European institutions, European enterprises and citizens are fully met.

Having this in mind, the following Chapters will aim to determine what shall be the further direction of the European debate on private enforcement, and what steps shall be undertaken in order to increase the efficiency of private antitrust actions in the EU. The main emphasis will be put on a group litigation mechanism, being in the author's opinion, a still missing puzzle in the current regime of competition law enforcement in the EU. It will be argued that without reassessment of current European position on group litigation, and further changes in this area of legal practice, the coherent and fully effective model of competition law enforcement will not be established within the EU.

Chapter 3

Group Litigation – A Key Element of the Modern System of Competition Law Enforcement

The goal of Chapter 3 will be to prove that only through development of the effective mechanism group litigation, the greater efficiency of private enforcement may be achieved. As it will be argued, the existence of a group litigation is crucial, not only to ensure appropriate protection of individuals against antitrust law infringements, mitigate drawbacks of individual private actions and answer the problems of public enforcement, but also in order to strengthen the position private method within the mixed (hybrid) model of competition law enforcement.

Chapter 3 will start by the description of a general concept of group litigation, its main characteristics, as well as the reasons for its development in the area of private enforcement. Afterwards, Chapter 3 will refer to the main models of group litigation and will determine the principal problems of this mechanism of private enforcement. At the end, Chapter 3 will refer to the American system of class action, being a starting point for the discussion on group litigation in the area of antitrust law. Through its analysis, the Chapter 3 will aim to determine if the European debate on group litigation, may draw inspiration from the American system of class actions.

I. The concept of group litigation

1. The idea of "collectivisation" – how to better protect the individual interests

As it was mentioned in the previous Chapters, one of the main problems in the enforcement of competition law provisions is the limited efficiency of individual private claims. While the victims of antitrust law infringements

are empowered with a possibility to claim for a recovery in case of suffering antitrust injury, they are most often reluctant to undertake long, complex and costly proceedings. Many reasons are given to explain this phenomenon.

First, individual claims raise important difficulties with gathering the necessary evidence. In case of competition law violations, an individual initiating private proceedings is obliged to conclude a complex reasoning in order to prove the fact of violation, existence loss and a causal link between the infringement and a harm suffered. Such a wide scope of issues that have to be proven creates a first obstacle for individual solely initiating a private action. The problem is additionally increased due to the limited powers of individual in gathering the evidence. While the public bodies, consumer associations or groups of claimants initiating private actions possess wider access to information and greater number of possible resources, an individual claiming for damages is significantly limited in his investigational capacities.

The second limitation of individual claims concerns a lack of specialised knowledge on the side of an individual initiating the court action. In case of competition law violations the plaintiffs are often required to conduct complex analysis of the anticompetitive practice. Such an activity usually involves application of the economic and legal theories allowing to compare the actual state of affairs with the hypothetical state of the market. In the great number of cases, an individual initiating private claim will not possess a sufficient knowledge required to conduct such reasoning. Undoubtedly, we can state that in such scenario the problem of limited knowledge and expertise may be mitigated by a professional advise provided to the individual claimant. Nevertheless, in many cases, especially these brought by the consumers, the costs of such advice will exceed the level of possible compensation, making it unjustified from the economic perspective.

Finally, the last important difficulty faced by individuals initiating private actions are the costs of proceedings. As it follows from the *Ashurst Report*, high cost of private antitrust proceedings are one of the main reasons why individuals decide not to bring private claim[1]. High costs of private actions are often caused by the duration of the proceedings and a level of their complexity, what usually requires an advice of a professional attorney or an assistance of an economical expert. This characteristic of private antitrust cases will be especially perceptible for individual claimants, whose resources

[1] D. Waelbroeck, D. Slater, G. Even-Shoshan, *Study on the conditions of claims for damages…*, p. 12.

for covering the costs of action will be lower in comparison to the group litigants or specialised associations.

All the aforementioned factors lead to the so-called "rational apathy" on the side of injured individuals which instead of executing their duly justified right to compensation, decide to refrain from justice. Such an outcome is undoubtedly undesirable from the perspective of a whole system of law enforcement which goal shall be to ensure a full protection of private parties against the law infringements. Therefore, many scholars, legal professionals and legislators, more and more often argue in favour of introduction of more effective solutions in the area of law enforcement. Among them, a group litigation, allowing to bundle several individual claims into one single action, gains particular importance[2].

As the recent experience in the area of law enforcement illustrates, in the course of last decades, almost each developed jurisdiction introduced a group litigation mechanism (in the form of class actions, collective actions or representative actions). In the opinion of P.C. Lafond, the expansion of group litigation in different jurisdictions and domains of legal practice, may be regarded as an attempt to give response to difficulties faced by individuals injured by law violations and claiming for compensation[3]. L. Boy goes even further, and describes so-called "collectivisation" of law as one of the most important phenomenon of our times[4]. As he observes, the development of group litigation may be found both in civil and common law jurisdictions. It covers more and more areas of legal practice (e.g. environmental law, financial law, antitrust law, consumer protection law). Finally, it corresponds to the development of modern economy which through its global character, multiplicity of transnational connections and development of mass production, often results in legal and financial consequences covering hundreds, thousands or even millions of individuals coming from several countries. Therefore, as M. Cappelletti rightly observes, the group litigation may be described as a *"principal judicial manifestation […] created by the modern economy."*[5]

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2 See for example R. Stefanicki, *Prywatnoprawne środki dochodzenia roszczeń…*, pp. 359–386; P. Pogonowski, *Postępowanie grupowe: Ochrona wielu podmiotów w postępowaniu cywilnym,* Warszawa 2009, p. 77; M. Sieradzka, *Pozew grupowy jako instrument prywatnoprawnej ochrony interesów kosnumentów…*, pp. 385–387; T. Jaworski, P. Radzimierski, *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym…*, pp. 3–5.

3 P.C. Lafond, *Le recours collectif: entre la commodité procédurale et la justice sociale,* 29 Revue de droit de l'Université de Sherbrooke, (1998–99), p. 25.

4 L. Boy, *L'intérêt collectif en droit français*, thèse Nice, 1979, p. I.

5 M. Cappelletti, *La protection d'intérêts collectifs et de groupe dans le procès civil (Métamorphoses de la procédure civile),* Revue internationale de droit comparé, Vol. 27, Issue 3, 1975, p. 571.

2. Group litigation as a solution to the problems of individual claims

Limiting our further reasoning to the area of antitrust law, it may be claimed that the group litigation is often regarded as a principal remedy to the problems of individuals claiming for compensation. While many jurisdictions still struggle to establish effective mechanism of group litigation, it is commonly agreed that its specificities could resolve many difficulties faced by individuals claiming for damages[6]. Therefore, further analysis will try to enumerate these advantages and describe how the group litigation mechanism may effectively respond to the main problems of private actions in the area of antitrust law.

2.1. Increased access to justice

In the modern societies, enhancing access to justice is one of the most important characteristics of legal systems. The general objective of national governments and legislators is to ensure that each individual, regardless of his capabilities, will have a chance to enjoy the full protection of his rights[7]. In consequence, the provisions of substantive and procedural law aim to guarantee an access to court or administrative tribunal, efficiency of judicial or administrative proceedings and availability of redress mechanism in case of law infringement. However, while the principle of access to justice is widely recognised, the question that always needs to be asked considers effectiveness of its achievement. In other words, if the solutions concerning access to justice established in a particular area of law, guarantee that the rights of each individual are fully protected and enforceable.

Referring the aforementioned question to the area of European antitrust law it may be claimed that the individuals' access to justice is quite recent phenomenon. It was not until the 2001 *Courage* judgment, when the CJEU held for the first time that: *"The full effectiveness of Article 85 of the Treaty [Article 101 TFEU] […] 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*

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6 See for example M. Sieradzka, *Pozew grupowy jako instrument prywatnoprawnej ochrony interesów konsumentów…*, pp. 385–386; K.J. Cseres, *Harmonising Private Enforcement of Competition Law in Central and Eastern Europe: The Effectiveness of Legal Transplants Through Consumer Collective Actions*, Yearbook of Antitrust and Regulatory Studies, vol. 2015, 8(12), pp. 43–45.

7 S. Wrbka, S. Van Uytsel, M. Siems (eds.), *Collective actions. Enhancing Access to Justice and Reconciling Multilayer Interests?*, Cambridge University Press 2012, pp. 1–2.

liable to restrict or distort competition"[8]. The CJEU thus confirmed that private claims for damages shall constitute an important part of the effective system of antitrust law enforcement, and a way in which the principle of access to justice will be fully achieved[9]. The reform initiated by the Court was followed by the national courts, legislators and by the European Commission. Their goal was to provide a positive response to the CJEU's case law and limit various obstacles to the establishment of a sound system of access to justice in the area of European and national antitrust law[10].

Among different solutions proposed in the course of last decade, such as wider access to proofs of violation, longer limitation periods for initiating a claim, or easier methods of calculation of damages, the one which attains particular attention is a group litigation mechanism. Analysed from the perspective of access to justice, it may be evoked as a perfect remedy to limitations of individual claims, able to overcome total underdevelopment of private enforcement of competition law in Europe. As R. Mulheron underlines, group litigation provides the substantive law with "teeth" and ensures that individuals' right to claim for damages will not lose its significance due to the lack of practical and economical method of asserting and enforcing a claim[11].

2.1.1. Increasing access to justice by limiting the costs of litigation

As the first way in which the group litigation mechanism may increase the access to justice, we may evoke a limitation of costs of legal proceedings. As the European example shows, the question of costs of litigation, often considered as an important barrier in undertaking decision on initiating a private claim, requires comprehensive approach, involving such issues as methods of financing, principles of costs division and insurance. The complexity of these questions, their special character (legal and economical) and different approach to the issue of financing in many national jurisdictions, create important difficulties in finding consensus at the European level. Therefore, as some authors claim, instead of changing national rules on financing, the simpler response would be to introduce a cost-effective group

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8 Judgment of the Court of 20 September 2001 in Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*, [2001] ECR I-06297, pt. 26.

9 V. Milutinovic, *Private enforcement – Upcoming issues*, in: G. Amato (ed.), *EC Competition law: A critical assessment*, Oxford 2007, p. 727.

10 See in details Part I Chapter 2 Point I–II.

11 R. Mulheron, *The Class Action in Common Law Legal Systems…*, p. 53.

litigation mechanism[12]. By grouping together several individual claims into one single action, it would offer the claimants a possibility to spread the costs of litigation among several members of the group. Moreover, the financial investment in litigation would have greater chances of profitability. Due to the fact that the required proofs, knowledge and expertise would be provided by the greater number of victims of violation, the chances for a positive outcome of case would significantly increase.

2.1.2. Increasing access to justice by overcoming "rational apathy" of injured individuals

Apart from increasing access to justice by limiting the costs of legal proceedings, the group litigation mechanism offers also another "economical" advantage over the individual private claims. As S. Pietrini underlines, the group litigation has an ability to overcome individuals' "rational apathy" in launching private actions[13]. This difficulty, particularly burdensome from the point of view of access to justice, is a result of simple calculation of costs which has to be incurred by an individual launching a claim and benefits which may be obtained in case of its positive outcome. As S. Harnay explains, individual *"chooses to sue once its gain […] compensates the legal expenses that it incurs within the process."*[14] However, as the author underlines: *"once the anticipated expense exceeds the possible gain, the claimant is deterred from entering a legal process."*[15]

This type of reasoning is particularly accurate in competition law cases, often involving numerous individuals suffering a harm of small single value. In such cases, launching an individual claim and incurring high costs of proceedings may be simply unprofitable, since the value of possible damages is relatively low. In order to overcome this limitation, the group litigation seems to construe a well-adapted solution[16].

First, it may limit the value of individual investment and spread the costs of litigation among numerous private parties. Secondly, it may increase chances of a positive outcome of case, mainly by providing additional proof of law infringement and by increasing the pressure on

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12 S. Wrbka, S. Van Uytsel, M. Siems (eds.), *Collective actions…*, pp. 3–6.

13 S. Pietrini, *L'action collective en droit des pratiques anticoncurrentielles…*, p. 150.

14 S. Harnay, *Les class actions, un outil juridique au service d'un accès au(x) droit(s) élargi?*, in: J. P. Domin (ed.), *Au-delà des droits économiques et des droits politiques, les droits sociaux?*, L'Harmattan, 2008, p. 281.

15 *Ibidem*, p. 282.

16 S. Pietrini, *L'action collective en droit des pratiques anticoncurrentielles…*, p. 150.

accused undertaking. Finally, it can provide a group with the assistance of so-called "repeat-players", being described by M. Galanter as those who are familiar with the judicial system and provide a group with the plan of litigation, strategies of action and expertise, which are often missing in case of isolated individual claims[17]. As the examples of "repeat-players" we can evoke lawyers specialised in group litigation, representative organisations (e.g. consumers associations) or public authorities, which may support the group of claimants and increase chances for a positive outcome of case.

2.1.3. Increasing access to justice by limiting a "diffuse of interests"

The last barrier in access to justice which can be distinguished in the area of antitrust law and mitigated by the use of group litigation mechanism refers to the problem of a high "diffuse of interest" to claim. As M. Cappelletti and B. Garth explain, in case of collective injuries one of the main obstacles in launching an action is that *"either no one has a right to remedy the infringement of a collective interest"* or *"the stake of any one individual in remedying the infringement is too small to induce him or her to seek enforcement action."*[18]

The first problem refers to the important procedural issue, i.e. a question of standing to sue. It requires a claimant, prior to initiating a private action, to determine his personal interest in undertaking and conducting a claim. While this stage of legal process does not lead to particular difficulties in simple civil proceedings, in the complex antitrust cases, involving spread of injuries and numerous victims at different levels of economic chain, establishing a link between the anticompetitive behaviour and the individual harm may be a task hard to accomplish. Therefore, it may be argued that by grouping individual interests and providing a right of standing to the lead plaintiff, the representative body or a public authority, the group litigation mechanism may overcome the aforementioned difficulty, and grant wider access to justice to numerous individuals.

The second problem evoked by M. Cappelletti and B. Garth refers to a situation in which monetary amount involved in a dispute does not reach a level at which individual would be willing to undertake a claim. The "rational apathy" in launching private damages actions may be effectively overcome by the aggregation of claims, even in a case when the value of

[17] M. Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, Law and Society Review 1974, Vol. 9, p. 95.

[18] M. Cappelletti, B. Garth, *Access to Justice. World Survey*, Giuffrè Editore/Alphen aan den Rijn, 1978, p. 18.

each individual injury is relatively low. Undoubtedly, the efficiency of group litigation mechanism in overcoming this limitation will strongly depend on the method of group formation chosen in particular legal system (opt-in or opt-out), however, already at this stage of reasoning, it can be argued that the aggregation of claims may provide a solution to the aforementioned difficulty.

In view of the aforementioned it can be claimed, that the problem of limited access to justice may be mitigated in a significant manner by the development of group litigation mechanism. Several legal, economical and psychological factors may cause that individuals, once empowered with a group litigation mechanism, will be more keen to join the group, provide the proofs of violation and defend their rights in court. Therefore, one of the main limitations of individual private claims, i.e. limited access to justice, have chances of being resolved, or at least alleviated, by the use of group litigation mechanism.

2.2. Reduction of asymmetry between the victims of law infringements and law perpetrators

The second problem which may be observed in the area of individual claims concerns the asymmetry in the position of individuals claiming for compensation and undertakings accused of certain infringement. It refers in particular to different economic power of both parties to the proceedings, unequal level of expertise and limited access to proofs of violations by the parties claiming for a recovery[19]. While all these limitations result from several economic, legal and social factors, and cannot be overcome by a simple reform of legal provisions, the goal of the effective system of private enforcement shall be to reduce the aforementioned asymmetry, and increase chances for a positive outcome of private claims.

2.2.1. Traditional ways of reducing asymmetry between the victims of law infringements and law perpetrators

Once we analyse the discussion on private enforcement of antitrust law, we may observe that several solutions are proposed to address the aforementioned problem.

First, we may point out on the discovery rules and the increased access to evidence by individuals claiming for compensation. As it was already

[19] R. Stefanicki, *Prywatnoprawne środki dochodzenia roszczeń*…, pp. 269–270.

argued, wider access to proofs of violations, especially difficult to ascertain in complex competition law cases, may encourage individuals to claim for damages, increase a possibility of a positive outcome of case and reduce procedural advantage of undertakings accused of certain infringement[20].

Second solution concerns the cost-shifting rules and the attempts to readapt traditional "loser-pays" principle to the needs of individual claims. As it was mentioned above, high costs of proceedings construe one of the main barriers in undertaking private actions, and a reason why numerous victims of anticompetitive behaviours refrain from enforcing their rights in court[21]. Moreover, in many cases economical imbalance give important procedural advantage to powerful enterprises which are able to incur important expenditures, prolong the proceedings and force the individuals to settle a case on unfavourable conditions, or even withdraw a claim before the costs of action exceed possible gains.

Despite the fact that all of the above-mentioned solutions have important advantages, and may lead to increase in the efficiency of private actions in the area of antitrust law, they are often criticised as too far reaching or even abusive. That is a case of broad discovery rules, often regarded as undermining the well-established principle of "equal procedural footing", confidentiality of trade secret and the efficiency of public enforcement mechanisms, e.g. leniency programs. The similar critics may be observed once the question of cost-shifting rules is discussed. As it is underlined, departure from traditional "loser-pays" principle and transfer of greater part of procedural costs to accused undertaking, may lead to speculative litigation and unjustified limitation of economic power of many enterprises.

For all these reasons it may be argued, that in order to reduce the procedural and informational asymmetry between the victims of competition law infringements and law perpetrators, more comprehensive solution needs to be proposed. As such, we may evoke the group litigation mechanism, being regarded as a perfectly adapted to the needs of antitrust law, and allowing to reduce the aforementioned asymmetry without a need of limiting the rights of none of the parties to private proceedings.

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20 See in details Part I Chapter 2 Point III(3.1).

21 See in details Part I Chapter 2 Point III(3.2).

2.2.2. Group litigation as a mean to reduce the asymmetry between the victims of law infringements and law perpetrators

Group litigation offers several ways in which the asymmetry between the victims of law infringements and law perpetrators may be reduced, without a need of creating imbalance between the aforementioned parties.

First, it results from the fact that the group litigation mechanism allows to respond to two main problems of private claimants, i.e. high costs of litigation and limited access to proofs of violation, without a need of weakening the position of business undertakings. Thanks to assembling numerous individual claims into one single action, the economic power of a group is increased and costs of litigation are shared between the claimants. Moreover, the informational asymmetry, especially burdensome in case of individual actions, have chances to be significantly reduced. Due to the wider access to proofs of violations, greater number of available testimonies and "individual input" into the group, the informational advantage of business undertaking is limited. Finally, the participation of "repeat-players"[22] in a collective claim ensures greater professionalism, strategy and procedural tactics. Therefore, while the individual claimants are significantly strengthened, the position and rights of potential defendants remain untouched.

Secondly, the asymmetry is reduced by the increase of pressure on undertakings faced with a collective claim. As different empirical studies confirm, accused enterprises are more keen to settle a dispute and avoid long and costly proceedings, once they are faced with a big group of individuals claiming for compensation[23]. In consequence, the bargaining position of victims of law infringement is strengthened and the chances of obtaining compensation are significantly increased. This phenomenon is aptly described by H.B. Newberg, who states that the collective claim members *"gain a more powerful adversarial posture than they would have through individual litigation"*, what *"serves to balance a currently imbalanced adversarial structure, in which large defendants with sufficient economic means are able to enjoy an overwhelming advantage against parties with small individual claims."*[24]

Finally, the group litigation mechanism may lead to reduction of asymmetry within business to business relationships. While the previous

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22 On the issue of "repeat player" see Part I Chapter 3 Point I(2.1.2).

23 See for example P.H. Lindblom, G.D. Watson, *Complex Litigation – A Comparative Perspective*, Civil Justice Quarterly 1993, Vol. 12, pp. 33–74.

24 A. Conte, H.B. Newberg, *Newberg on Class Actions*, 4th ed., 2002, § 5.57, p. 478.

examples focused mainly on claims initiated by consumers against business undertakings, different scholars also evoke that possible disequilibrium may exist in a situation when a private claim is initiated by other enterprise injured by the anticompetitive behaviour[25]. In such a case, the argument of financial or informational asymmetry may be no longer valid, but may be replaced by the economic pressure of an accused undertaking on potential or actual claimant, e.g. refusal to supply in order to weaken a position of distributor. In order to respond to such problem, and reduce the asymmetry resulting from different position of market participants, certain authors argue in favour of a group litigation mechanism. In their opinion, it might empower enterprises (especially small and medium enterprises) with an effective measure of protection, particularly important in a hostile and competitive business environment. As S. Pietrini claims: *"Collective redress may constitute an essential mechanism, since it reduces a risk of reprisals. In fact, it seems less probable that the law offender will take the measure of reprisal against a large number of enterprises, especially in the case when they are partners."*[26]

In view of the aforementioned, it may be claimed that the group litigation mechanism may effectively lead to reduction of asymmetry between victims of law infringements and law perpetrators, without a need of weakening the procedural position of none of them. Such feature seems to be particularly important, especially once we analyse the course of European debate on private enforcement. As it shows, the conflict between consumer associations, trying to preserve the best possible protection of weaker parties, and enterprises, aiming to ensure their competitive advantage, nourished the recent discussion on damages claims. Moreover, it led to bipolarisation of possible solutions in the area of private enforcement, arguing in favour of a wide group litigation mechanism or no action at all. Nevertheless, as the analysed example of group litigation shows, one of the main limitations of individual private claims, i.e. asymmetry in the position of victims of violations and law perpetrators, may be reduced without undermining the interests of both parties to the proceedings.

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25 S. Pietrini, *L'action collective en droit des pratiques anticoncurrentielles…*, pp. 155–156; B. Thullier, A. Reygrobellet, *Action de groupe et droit des affaires*, in: *Les actions de groupe. Implications processuelles et substantielles (Partie II)*, Revue Lamy droit civil, 2006, No. 33, p. 70.

26 S. Pietrini, *L'action collective en droit des pratiques anticoncurrentielles…*, p. 156.

2.3. Increased detection, prosecution and deterrence of anticompetitive behaviours

Apart from several advantages offered to victims of competition law infringements, the group litigation mechanism may also bring important benefits to the whole system of competition law enforcement. It is widely agreed that the private enforcement plays important role in the detection of anticompetitive behaviours, prosecution of unlawful practices and compensation of victims of violations. While all these objectives may be achieved by the mean of individual damages actions, the current experience with private enforcement in Europe confirms that efficiency of this mechanism is still far from satisfactory[27]. On the one hand, it results from the limited will of individuals to initiate private claims and participate in competition law enforcement ("rational apathy"). On the other, it is a consequence of different procedural barriers and limitations which make the individual private actions particularly difficult and costly process. For all these reasons, the recent European discussion on private enforcement seems to devote more and more attention to the group litigation mechanism, which due to its particular features, may mitigate several limitations of antitrust law enforcement at the stage of detection and prosecution of anticompetitive practices, and increase the level of deterrence of anticompetitive behaviours.

2.3.1. Group litigation and the detection and prosecution of anticompetitive behaviours

First, once we talk about detection and prosecution of antitrust practices, we may claim that thanks to the greater number of victims covered by a claim, higher flow of information on the potential or actual law infringement, and greater number of proofs of violation being in the possession of a group claimant, the chances for discovering and proving the antitrust infringement are significantly higher. This advantage of group litigation mechanism is a consequence of one of its fundamental features, missing both in case of public enforcement and individual private claims, i.e. notification process.

Notification process can be described as an obligation of a lead plaintiff to inform potential victims of an infringement on a possibility to join the action (opt-in system) or refrain from participating in the group (opt-out system). Apart from great importance from the procedural perspective – ensuring that each individual will have a possibility to protect its rights in court, the notification system has also other, more practical advantages.

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27 See in details Part I Chapter 2 Point II.

First, it allows the victims of certain infringement, often unaware of anticompetitive practice, to obtain an information on violation.

Secondly, in case of stand-alone actions, i.e. claims initiated prior to the commencement of public proceedings, the notification process may contribute to greater detection and prosecution of anticompetitive behaviours. It is a consequence of additional informational "input" which may be provided by victims deciding to join the group upon receiving required information.

Finally, in case of follow-on actions, i.e. claims initiated once the administrative decision on certain infringement was rendered, the notification process may ensure higher efficiency of private damages claim. As the practice shows, greater flow of information on violation may lead to detection of new elements, which could have been omitted by the public authority[28].

2.3.2. Group litigation and the deterrence of anticompetitive behaviours

Apart from the important role played at the stage of detection and prosecution of anticompetitive behaviours, the group litigation mechanism may also have a great significance once the punishment and prevention of illegal practices are concerned.

Most often it is argued that while the public enforcement is intended to punish existing, and deter potential anticompetitive practices, the goal of

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[28] As an example of such scenario we can give US "vitamins cartel case" covering several international companies accused of fixing prices and sharing the market of vitamins. According to the decisions rendered by the US Department of Justice in the late 90s, fourteen chemical manufacturers were condemned for a violation of antitrust law provisions by establishing a price fixing agreement, covering various vitamin products and lasting for more than 9 years. The value of imposed fines reached an amount of 910 million dollars. Despite the long and complex prosecution of Department of Justice and great amount of sanctions imposed, the subsequent class actions initiated by injured individuals significantly modified the Department of Justice's assessment. Thanks to the additional proofs provided within the group proceedings, as well as the great number of information and testimonies delivered by group members, the courts were able to assess that cartel covered also other vitamins markets not mentioned in Department of Justice decisions (16 vitamins products in nearly every country in the world), and lasted for more than 20 years. It led also to numerous settlements with accused undertakings and imposition of damages by courts, which in total reached the amount of few billion dollars (for more details on this case see *ICPAC Final Report*, Chapter 4: *International Anticartel Enforcement and Interagency Enforcement Cooperation,* available at: http://www.justice.gov/atr/icpac/finalreport.html [access: 01.07.2015] and J.M. Connor, *Global Price Fixing,* Springer, 2 ed. (2008)).

private enforcement shall be to achieve the corrective justice. While this standpoint is generally correct, its main limitation is a risk of bipolarization of the role of public and private enforcement. Because as it was already mentioned, neither public nor private enforcement is responsible solely for the punishment, deterrence or compensation[29]. As the example of group litigation shows, its role may be multiple and affect not only the compensation of victims of violations, punishment of law perpetrators, but may also influence the prevention of future infringements.

First, it is not surprising to say that thanks to the greater number of victims of competition law infringement covered by a collective claim, the value of potential damages is higher than in case of individual private claims. As a result, the principle of corrective justice, being one of the pillars of effective antitrust enforcement, has greater chances of being fully achieved once the group litigation mechanism is applied.

Secondly, the collective claim, once combined with the public antitrust proceedings, ensures that the punishment for the infringement of antitrust law is be better adapted to the gravity of violation. It results from the fact that due to the wider group of victims covered by a claim and greater amount of damages being awarded, the illegal gains which could be preserved by an undertaking in case of small number of individual actions, may be taken away from the enterprise.

Finally, the achievement of the last objective of antitrust enforcement, i.e. deterrence, is significantly strengthened by the existence of an effective mechanism of group litigation. As certain authors claim, once faced with a risk of paying high damages resulting from the collective claims, enterprises will often refrain from entering into anticompetitive agreement or undertaking a decision on the abuse of dominance[30]. The deterrence effect of group litigation will be achieved not only by the value of possible damages that may be awarded in a collective claim, but also by the probability of detection of violation which is significantly higher in case of existence of group litigation instrument.

2.4. Greater judicial economy and predictability

The last important advantage of group litigation mechanism over the individual private claims refers to the higher judicial economy and predictability. Both elements are important from the perspective of a whole

[29] See in details Part I Chapter 1 Point II–III.

[30] S. Pietrini, *L'action collective en droit des pratiques anticoncurrentielles…*, pp. 153–154.

legal system, and may be regarded as one of the key objectives of its effective functioning.

As far as the judicial economy is concerned, the group litigation is particularly important in case of individually recoverable claims, i.e. claims which due to the lack of procedural, financial or practical constraints may be litigated individually[31]. In such a case, the possibility of grouping the claims, instead of launching a series of individual actions, allows to avoid their separate analysis, requiring investment of greater judicial resources.

This characteristic of group litigation is particularly important nowadays, because as H. Woolf underlines: *"as we become an increasingly mass producing and mass consuming society, one product or service with a flaw has potential to injure or cause other loss to more and more people."*[32] Therefore, each judicial system, in order to adapt to the modern economy, needs to refer to the more effective solutions, often requiring to shift from the traditional, to more flexible and innovative instruments. As M.J. Trebilcock argues: *"economies of scale now dictate mass redress procedures for consumers prejudiced by a common legal wrong […] individually tailored law-suits are often as much an anachronism as the concept that all cars that are put on the market shall be handcrafted."*[33] Also the Polish legal doctrine underlines that the group litigation mechanism creates effective response to the problem of concerted actions[34], and in this manner brings several benefits to the judicial and social organisation of each society[35].

The second important advantage of group litigation concerns greater predictability of judicial decisions. Once again, it is a consequence of grouping several claims into one collective action. While multiple individual claims may lead to divergent or even conflicting solutions, collective claim ensures greater coherence of judicial process and its outcomes. It brings benefits to the whole judicial system – greater coherence and transparency, to each of the injured individuals – equal treatment and similar recoveries, and finally to the defendants, who are protected from the inconsistent

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31 R. Mulheron, *The Class Action in Common Law Legal Systems…*, p. 57.

32 H. Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales,* HMSO, London 1996, Chapter 17.1.

33 M.J. Trebilcock, *A Study on Consumer Misleading and Unfair Trade Practices*, Ottawa, Information Canada, 1976, Vol. 1, p. 270.

34 "Concerted actions problem" refers to the situation in which undertaking cooperation within a group brings more benefits to each of its members, than in the case of undertaking activity by each member of the group on its own.

35 J. Stelmach, B. Brożek, W. Załuski, *Dziesięć wykładów o ekonomii prawa,* Warszawa 2007, pp. 51–52, 66; M. Niedużak, *Postępowanie grupowe…*, p. 123.

obligations which could be potentially created by varying judgments rendered by different courts[36].

In view of all the aforementioned reasons, it may be stated that the group litigation mechanism has crucial meaning from the perspective of a competition law enforcement. It is able to fill several limitations of both public and private method, and increase the efficiency of a hybrid model in the execution of competition law provisions. Undoubtedly, the group litigation mechanism is not a solution without drawbacks, and mainly for this reason, it is still discussed in Europe. Nevertheless, if properly adjusted to the needs of claimants, defendants and the whole system of law enforcement, the group litigation mechanism may lead to increase in the efficiency of competition law enforcement. Therefore, further analysis will concentrate on the principal approaches to group litigation, possible procedural solutions in the area of antitrust law and main risks of group litigation. The goal will be to present a general concept of group litigation which will be further analysed in details at the basis of European and national experience.

3. Types of group litigation mechanisms

In the modern legal systems we can distinguish different types of a group litigation mechanism. While their common objective is similar, i.e. increasing access to justice and guaranteeing better economy of judicial proceedings, they significantly differ once we analyse their specific elements. Therefore, different authors try to classify the group litigation models depending on two main criterions, i.e. nature of representation (joinder procedures, representative actions, collective actions) and the rules on group formation (opt-in, opt-out and mixed systems). The following distinction concentrates on most important features of group litigation mechanism and allows for the clear division of different approaches to this legal concept. The following analysis, based on the aforementioned criterions, will try describe each of the models of group litigation, determine its main advantages and drawbacks, and analyse its significance from the perspective of competition law enforcement.

[36] R. Mulheron, *The Class Action in Common Law Legal Systems…*, p. 49.

3.1. Nature of representation

3.1.1. Joinder procedures

Joinder procedures, also referred to as join actions, occur when several victims of law infringement file individual claims which are subsequently joined (bundled) into one single procedure[37]. Such solution exists in all of the European jurisdictions.

The bundling of individual claims is most often a consequence of the individual decision of claimants – so-called voluntary bundling. Nevertheless, it may also result from the court's order which assumes that joining of claims may be justified by the interests of individuals and better administration of justice (obligatory bundling). What is generally crucial to bundle a case, is the similarity (identity) of a defendant and the commonality of legal and factual elements.

Referring to the consequences of bundling, it shall be underlined that despite being joined, individual claims remain intact. Therefore, each individual may have its own representative, may undertake a decision on settling or withdrawing a case, and disposes a full control over its claim[38]. For this reason, certain authors argue that joinder procedures shall be rather defined as collective actions *sensu largo*, and differed from collective actions *sensu stricto*, characterised by merging of several individual claims into one single action and a sole assessment of case[39]. Such distinction seems to be justified and allows for greater precision as far the analysis of group litigation models is concerned.

Referring to the advantages of joinder procedures over the individual actions, it shall be stated that they are rather limited. Analysed from the perspective of victims of law infringements, we can point out on a possibility to coordinate the efforts of claimants, exchange of information within the procedure, reduction of costs of collecting the proofs of violation and a possibility of common representation (by the same lawyer or association)[40]. Once assessed from the perspective of a judicial system, joinder procedures may lead to judicial economy, greater coherence of rulings and better administration of justice. Nevertheless, as S. Wrbka rightly emphasises,

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37 S.E. Keske, *Group Litigation in European Competition Law…*, p. 47.

38 S. Wrbka, S. Van Uytsel, M. Siems (eds.), *Collective actions…*, p. 73; M. Sieradzka, *Pozew grupowy jako instrument prywatnoprawnej ochrony interesów konsumentów…*, p. 389.

39 S. Pietrini, *L'action collective en droit des pratiques anticoncurrentielles…*, pp. 200–201.

40 S.E. Keske, *Group Litigation in European Competition Law…*, p. 47.

these advantages shall not be overestimated. Due to the fact that each claim needs be treated separately and the awards must be made individually, joinder procedures will rather lead to complex mass litigation, than to the real collective assessment of individual claims[41].

In view of all the aforementioned reasons, joinder procedures may not be regarded as the important alternative to the individual damages claims in the area of antitrust law enforcement.

First, they do not address effectively the most important problems of individual claims, i.e. high costs of proceedings, limited access to proofs of infringement, asymmetry in the position of victims of violations and perpetrators. Secondly, as the European experience with private enforcement shows, they have not been effective measure in pursuing the antitrust damages claims in those countries where joinder procedures were available for a long time[42]. Finally, as the European discussion on private enforcement shows, joinder procedures were not evoked as a mechanism able to increase the efficiency of private claims and support individuals in their fight for compensation in case of competition law violations[43].

Apart from the traditional joinder procedures described above, we may also distinguish in certain jurisdictions the so-called "test cases" ("test claim procedures"). They refer to individually filed suits, which upon being selected by the court, provide guidelines for the multitude of similar or equivalent individual cases[44]. In consequence, a test case remains an individual action, but thanks to the existence of common issues with other claims, it may become a basis for the subsequent analysis of individual claims, for bundling of similar individual actions or even for the assignment of claims to representative body.

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41 S. Wrbka, S. Van Uytsel, M. Siems (eds.), *Collective actions…*, p. 75.

42 S.E. Keske, *Group Litigation in European Competition Law…*, p. 49; D. Waelbrock, D. Slater, G. Even-Shoshan, *Study on the conditions of claims for damages…*, p. 1.

43 See for example European Commission, White paper on damages actions for breach of the EC antitrust rules /*COM/2008/0165 final*/, which refers only to representative actions and collective actions as possible mechanisms of group litigation in the area of antitrust law.

44 S. Wrbka, S. Van Uytsel, M. Siems (eds.), *Collective actions…*, p. 73.

Test claim procedures may be found in England[45], Germany[46], Norway[47], Portugal[48], Switzerland[49] and Austria[50]. Their main advantages are: greater economy of justice (in case of negative outcome of a test case the flow of mass individual claims may be avoided); better flow of information on law infringement (judgments rendered upon test case procedure are published); and reduction of asymmetry between victims of violations and law perpetrators (once a test claim is assessed by the court, other individuals injured by the same infringement have better procedural standing, as well as better access to proof of violation). Nevertheless, the main drawback of test cases is that claims are still treated separately, and a separate judgment is required in each case brought by the injured individual. Mainly for this reason, the test cases were not evoked as a possible solution within the European discussion on private enforcement of antitrust law. While they can be a source of inspiration for certain solutions, such as sharing the costs of legal proceedings or publicity of the judgment, they are not enough to provide an effective response to the difficulties of private enforcement in the area of antitrust law. Because as M. Leclerc underlines: *"This procedure (aut.: "test cases") has to be regarded simply as a way of facilitating work of a judge. It doesn't facilitate an access to justice of individuals. They still have to introduce an action on their own and support financial risk of the procedure, even if it can be shared with other claimants."*[51]

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45 See C. Hodges, *Country Report: England and Wales*, in: D.R. Hensler, C. Hodges, M. Tulibacka, *The Globalization of Class Actions,* The Annals of the American Academy of Political and Social Science Series, Vol. 622.

46 See M. Sturner, *Model Case Proceedings in the Capital Markets – Tentative Steps Towards Group Litigation in Germany*, Civil Justice Quarterly 2007, Vol. 26, pp. 250, 253; H. Koch, *Non-Class Group Litigation Under EU and German Law*, Duke Journal of Comparative and International Law 2001, Vol. 11, pp. 355, 360.

47 See C. Bernt-Hamre, *Class Actions, Group Litigation & Other Forms of Collective Litigation in the Norwegian Courts*, in: D.R. Hensler, C. Hodges, M. Tulibacka, *The Globalization of Class Actions,* The Annals of the American Academy of Political and Social Science Series, Vol. 622.

48 See H. Sousa Antunes, *Class Actions, Group Litigation & Other Forms of Collective Litigation (Portuguese Report)*, in: D.R. Hensler, C. Hodges, M. Tulibacka, *The Globalization of Class Actions*, The Annals of the American Academy of Political and Social Science Series, Vol. 622.

49 See V.S.P. Baumgartner, *Group Litigation in Switzerland*, in: D.R. Hensler, C. Hodges, M. Tulibacka, *The Globalization of Class Actions*, The Annals of the American Academy of Political and Social Science Series, Vol. 622.

50 See B. Pirker-Hörmann, P. Kolba, *Österreich: Von der Verbandsklage zur Sammelklage*, paper presented at Kollektive Rechtsdurchsetzung – Chancen und Risiken, Bamberg, pp. 199–211.

51 M. Leclerc, *Les class actions, du droit américain au droit européen…*, p. 209.

3.1.2. Representative actions

The second possible approach to the question of group litigation is the representative action. This solution is most widely adopted in the European legal systems, and despite particularities existing in each national jurisdiction, may be currently found in all Member States[52].

According to the definition stipulated by the Commission in the Recommendation on collective redress, the representative action may be defined as: *"an action which is brought by a representative entity, an ad hoc certified entity or a public authority on behalf and in the name of two or more natural or legal persons who claim to be exposed to the risk of suffering harm or to have been harmed in a mass harm situation whereas those persons are not parties to the proceedings."*[53]

The main distinction to joinder procedure or a test case is that while the above require individual victims to bring a claim and initiate proceedings, in case of representative action, such obligation is transferred to the specialised body. In consequence, victims of law infringement are not a part of the action, and are not required to take additional steps in order to enforce their rights[54]. Another consequence of such construction is different purpose of representative action. While joinder procedures generally lead to compensation, the principle objective of representative action is to obtain injunction or cease-and-desist order. It results from the mere construction of representative actions which may not involve direct participation of victims of infringements, but thanks to the application for injunction and cease of illegal practice may bring benefits to larger group of persons harmed by the unlawful behaviour[55].

While the aforementioned characteristics of representative actions may be regarded as an important advantage in many areas of law, e.g. in the environmental law or consumer law, their significance is rather limited in the area of antitrust law. It results from the fact that the representative actions leading to injunction or cease-and-desist order do not allow to fully achieve one of the main objectives of competition law enforcement, i.e. corrective justice. Mainly for this reason, from the beginning of European discussion on group litigation, the European Commission argued in favour of other solution, better adapted to the needs of antitrust law enforcement.

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52 S. Pietrini, *L'action collective en droit des pratiques anticoncurrentielles…*, p. 211.

53 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, OJ L 201, 26.7.2013, p. 60–65, pt. 3(d).

54 See A. Stadler, *Collective Action as an Efficient Means for the Enforcement…*, p. 204.

55 *Ibidem*, p. 74.

As it claimed, only the representative actions leading to damages could construe effective solution to the problem of limited efficiency of private enforcement[56]. Such reasoning is also continued by the Commission nowadays, which in the Recommendation on collective redress encourages MS to grant to specialised bodies a right to bring damages claims in favour of numerous victims of antitrust infringements[57].

Despite several advantages of the aforementioned solution, certain authors claim that the representative actions aiming at compensation bring more questions than answers[58]. First of all, it concerns a problem of division of damages awarded as a result of representative action. Secondly, it refers to the problem of allocation of undistributed compensation. Finally, the doubts may arise once the question of victims' participation in the proceedings is analysed. Therefore, as many scholars argue, the national legislators should be extremely prudent once introducing this type of group litigation mechanism into their national legal order[59].

Apart from different outcomes of representative actions, i.e. injunction, cease-and-desist order or damages, another characteristic of this mechanism which may cause controversies and lead to divergent solutions at the national level concerns the rules on legal standing.

In most of the European jurisdictions the legal standing to launch representative action is granted to the representative organisations, e.g. consumer associations. That is a case in Great Britain, Germany, France, Italy, Portugal, Spain, Sweden, Belgium or Netherlands, where the consumer associations may act in the interests of its members or in the general interest of the consumers. Moreover, in certain countries, such as Netherlands, Germany or Portugal, the scope of actors entitled to initiate representative action is broaden, and may cover foundations (Netherlands), professional associations (Germany), or other groups able to represent interests of its members (Sweden and Portugal).

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56 See European Commission, White paper on damages actions for breach of the EC antitrust rules /*COM/2008/0165 final*/, p. 4, pt. 2.1.

57 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, OJ L 201, 26.7.2013, p. 60–65.

58 S. Wrbka, S. Van Uytsel, M. Siems (eds.), *Collective actions…*, p. 74.

59 A. Stadler, *Collective Action as an Efficient Means for the Enforcement…*, p. 205; F. Garcia Cachafeiro, *The Role of Consumers Associations in the Enforcement of Article 82 EC*, in: S. Enchelmaier, M.O. Mackenrodt, B.C. Gallego, BC (eds.), *Abuse of dominant position: new interpretation, new enforcement mechanisms?*, MPI Studies on Intellectual Property, Competition and Tax Law, Springer 2008, pp. 199–203.

Another solution which may be observed in Europe, concerns granting a right to bring representative action to public bodies. It may be a competition authority, minister or ombudsman. The rule is the public character of a representative body and its activity in the protection of public interest. The aforementioned solution may be found in Poland, Portugal, Norway, Finland and Denmark. Its unquestionable advantage is greater control over the action undertaken by public authority, high level of expertise and professionalism, as well as the increased chances for the positive outcome of case. However, due to the multiple objectives that need to be attained by public bodies, and the overload of administrative work, the efficiency of such solution may be put at risk. It will be especially a case in small value injuries which often do not constitute a priority of the enforcement system and, if not covered by the representative action, may leave numerous individuals without required protection.

Referring the aforementioned remarks to the area of European antitrust law, it shall be firstly noted that from the beginning of European discussion on private enforcement the Commission tried to ensure the widest possible scope of representative actions. Already in the White Paper on damages actions it argued in favour of representative actions for damages brought by qualified bodies (e.g. consumer associations, trade associations), *ad hoc* certified entities and state bodies acting in the general public interest[60]. In the opinion of the Commission, such representative actions would be appropriate in competition cases because *"consumer organisations, trade associations or State bodies having as their object to protect specific interests may be less reluctant to start actions against competition law infringers than the individual consumers or small businesses whose interests have been harmed."*[61] As the Commission argued, it would be a consequence of the objectives of such organisation, greater human and financial resources being in its possession, and lack of mutual relations with the accused undertaking.

The aforementioned standpoint of the Commission is continued nowadays. In the Recommendation on collective redress it argues in favour of the representative actions brought by *ad hoc* certified entities, designated representative bodies and public authorities[62]. Moreover, it tries to adapt

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60 European Commission, White paper on damages actions for breach of the EC antitrust rules /*COM/2008/0165 final*/, p. 4, pt. 2.1.

61 Commission Staff Working Paper accompanying White Paper on damages actions for breach of EC antitrust rules, /* SEC/2008/0404 final */, pt. 50.

62 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, OJ L 201, 26.7.2013, pt. 18 of the Preamble.

proposed solution to the needs of victims of competition law infringements and accused undertakings. In order to fully protect the interests of injured parties, having limited influence on the conduct of representative actions, as well as to avoid abusive litigation, the Commission requires representative body to fulfil several criterions prior to launching a claim. It concerns the administrative and financial capacity to be able to represent the interest of claimants, a non-profit character of its activity and a link between its objectives and the interests of injured individuals[63]. The aforementioned threshold ensures that unfounded or speculative litigation will not be launched, and the activity of such bodies will be under strict public control.

In order to sum up the reasoning on representative actions, we can point out on its several advantages for private enforcement of antitrust law. It concerns the limitation of costs of the proceedings, high level of professionalism and expertise, and better access to proofs of violations. Nevertheless, the main drawback of such solution, which may weaken its practical significance, concerns the risk of exclusion of certain infringements from the scope of action of representative entity. It may be especially a case in the area of antitrust law, where many violations involve large number of small value injuries, require complex legal and economic analysis, and demand great number of proofs in order to determine the existence of law infringement. Therefore, as different scholars argue, qualified entities or public bodies will be often not able to pursue certain claims, leaving individuals without due protection[64]. As a result, system based solely on such solution risks to create a gap in the enforcement process which can be hardly filled by a mechanism of individual private claims.

3.1.3. Collective actions

The last solution, bringing the most benefits to the enforcement of law by individuals, but in the same time, rising the most controversies once the issue of group litigation is discussed, concerns the collective action mechanism[65].

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63 *Ibidem*, pt. 4–7.

64 L. Sinopoli, *La légitimité des porteurs de l'action de groupe: entre représentation et qualité,* in: I. Omarjee, L. Sinopoli, *Les actions en justice au-delà de l'intérêt personnel*, Paris 2014, p. 33.

65 Different notions can be used in order to describe this instrument. In the United States the notion of class actions is used. European debate most often refers to the notion of collective redress.

Collective action may be defined as a legal procedure which enables the claims of numerous persons against the same defendant to be determined in a one legal suit. In the collective action procedure, differently than in the case of joinder procedures or representative actions, the collective claim is brought by one or more persons injured by law infringement ("lead plaintiff") on his or her own behalf, and on behalf of other individuals ("group members"), who have a claim to remedy for the same or similar alleged wrong. The consequence of such solution is that the lead plaintiff plays a dominant role in the commencement and conduct of group proceedings, while the group members, despite their limited role in a collective action, are bound by its outcome, whether favourable or adverse to the group[66].

Referring to the main characteristics of collective action it shall be firstly stated, that differently than in a case of representative actions, the lead plaintiff bringing a claim is personally interested in its outcome. It significantly increases the efficiency of action, since a person responsible for the commencement and conduct of the proceedings is ready to devote greater time and financial resources to win the case. Moreover, it is often best placed to start the action and provide required proofs to support the claim.

Secondly, depending on the method of group formation (opt-in or opt-out), collective action creates chances of covering a very wide number of victims by the scope of claim. It is particularly a case once the opt-out solution is chosen, since it allows to encompass within the action all possible victims of law infringement, even if they are not identified individually, but are merely described[67].

Thirdly, collective action, thanks to ensuring the participation of victims in the proceedings, provides wider access to proofs of violation and increases chances for a positive outcome of claim. Differently that in a case of representative actions, the members of a group may provide testimonies, documents or data in order to prove the violation, determine its gravity and establish a causal link between the law infringement and a harm.

Furthermore, the outcome of collective action is binding upon all members of the group, without a need of undertaking any additional action once the proceedings are terminated. Such solution ensures greater judicial economy and allows to limit the costs of access to justice by each member of a group.

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66 R. Mulheron, *The Class Action in Common Law Legal Systems…*, p. 3.

67 M. Sieradzka, *Pozew grupowy jako instrument prywatnoprawnej ochrony interesów konsumentów…*, pp. 394–396.

Finally, the problem of division of damages, causing particular difficulties in case of representative actions, is more effectively addressed. Due to the better identification of victims of infringement and scope of suffered injury, damages may be more effectively distributed once the collective proceedings are terminated.

Due to all the aforementioned reasons, collective action is often described as *"one of the most significant procedural developments of the century"*[68], able to effectively address the problem of limited access to justice in case of law infringement causing mass injuries. However, despite this positive assessment, collective action is not a solution without drawbacks. They concern in particular the question of group formation and limited representation of certain individuals, principal-agent problem, free-rider issue or finally a question of mass litigation, leading to the increased pressure on enterprises[69]. Therefore, as the European discussion on group litigation shows, the most demanding question is how to ensure that development of collective action mechanism will not lead to abuse.

The most classical example of collective action mechanism is the American system of class actions. Developed already in the middle of 21st century, it had as its main objective to empower private parties with the effective and flexible mechanism of law enforcement. As it will described in details in the second part of this Chapter, this goal was supposed to be achieved by grouping the widest possible number of individuals into one single action (opt-out solution), increasing access to proofs of violation (discovery rules) and providing effective mechanism of claim's financing (contingency fees). While this idea seemed to be simple at the departure, in the course of time the class action mechanism revealed a lot of difficulties, giving grounds for its wide criticism and rejection in many national jurisdictions.

It was also a case in Europe, where from the beginning of a discussion on group litigation the American system of class actions was evoked as a main risk to the European enterprises and consumers. In consequence, in order to differ from the American solution, and propose the EU-like approach to group litigation, the idea of collective redress was developed in Europe. Thanks to its particular characteristics[70], it was supposed to constitute a solution able to respond to the needs of European citizens, as well as legal, social and economic reality in Europe. The main goal was

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68 R. Mulheron, *The Class Action in Common Law Legal Systems…*, p. 4.

69 It concerns in particular a risk of "black mail settlements" referring to the situations in which a defendant, faced with a costly and risky trial, is forced into settling a case for more than it is really worth.

70 See in details in Part II Chapter 1.

to ensure that by the introduction of well-tailored mechanisms in the area of group formation, group representation, conduct of the proceedings and financing of claim, the abuse will be avoided, and the access to justice of European citizens will be significantly increased.

From the beginning of European discussion on group litigation, the collective redress mechanism revealed to have particular importance for the enforcement of competition law provisions. The characteristics of collective action mechanism seemed to be perfectly adapted to the needs of individuals injured by competition law infringements. The possibility of grouping large number of victims into one single action, the chance of ensuring their participation in court proceedings, as well as limitation of costs of private actions, were able to address the main problems of private enforcement in the area of antitrust law. For these reasons, the European Commission stated in the White Paper on damages actions that: *"competition law is a field where collective redress mechanisms can significantly enhance the victims' ability to obtain compensation and thus access to justice, and contribute to the overall efficiency in the administration of justice […] it is essential that collective redress mechanisms are available for competition law infringements."*[71] In the opinion of the Commission, it could provide an effective response to the limited efficiency of private enforcement, being result of high costs of litigation and multiple risks deterring injured parties from bringing individual actions for damages[72].

The similar reasoning of the Commission may be observed nowadays. In the Recommendation on collective redress it encourages all Member States to take all necessary measures in order to implement the mechanism of group litigation into their own legal systems[73]. Because as it argues: *"The possibility of joining claims and pursuing them collectively may constitute a better means of access to justice, in particular when the cost of individual actions would deter the harmed individuals from going to court."*[74]

Nevertheless, despite this clear standpoint of the Commission, and a long lasting European debate on collective redress, still a lot has to be done

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71 Commission Staff Working Paper accompanying White Paper on damages actions for breach of EC antitrust rules, /* SEC/2008/0404 final */, pt. 40.

72 European Commission, White paper on damages actions for breach of the EC antitrust rules /*COM/2008/0165 final*/, pt. 2.1.

73 See pt. 24 of the Preamble to the 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, OJ L 201, 26.7.2013.

74 *Ibidem*, pt. 9.

in the EU in order to ensure effective protection of EU citizens against antitrust infringements. As further analysis will show, the group litigation mechanisms still struggle to reach a desired level popularity and efficiency in Europe. Moreover, the non-binding and rather limited character of the Recommendation on collective redress, does not ensure that innovative and uniform solution will be established in the EU. Therefore, in the following Chapters, by reference to the national experience in the area of group litigation, as well as through the detailed analysis of European proposals on this matter, the thesis will try to assess the main advantages and limitations of European approach to collective redress. Moreover, it will try determine what steps could be undertaken in order to empower victims of competition law infringements with an effective mechanism of group litigation, and overcome limited practical significance of private enforcement of antitrust law in the EU.

3.2. Rules on group formation

The second criterion relevant to distinguish different models of group litigation concerns the rules on group formation. As it was mentioned above, not only the way in which multiple victims are represented in court may change their procedural position, but also the modalities of forming a group are able to determine the situation of injured individuals in a significant manner. Among currently existing models of group litigation we can distinguish three major approaches to the issue of group formation, i.e. the opt-out mechanism, the opt-in mechanism and the mixed system. The following analysis will try to assess particularities of each of the aforementioned solutions and determine how they influence the position of parties to the proceedings.

3.2.1. Opt-out mechanism

The opt-out mechanism foresees that individuals become members of a group and are bound by the judgment rendered in collective proceedings, unless they take an affirmative step to express they will to be excluded from the claim[75]. In practice, it is achieved by informing individuals on the commencement of the proceedings and by providing them with a right

[75] R. Mulheron, *The Class Action in Common Law Legal Systems*…, p. 34; M. Sieradzka, *Pozew grupowy jako instrument prywatnoprawnej ochrony interesów konsumentów*…, pp. 394–396; T. Jaworski, P. Radzimierski, *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym*…, pp. 6–8.

to opt-out from the claim within the specific period of time. Once the individuals execute such a right, they are excluded from the group and are not covered by the consequences of the eventual ruling. However, in case of failure to do so, individuals are covered by a claim, bound by the judgment and lose their right to initiate individual action concerning the same law infringement. Therefore, the consequences of such approach to the issue of group formation are crucial both for the lead plaintiff and the victims of law infringement.

Concerning the person initiating a group action we can state that the opt-out mechanism facilitates its activity and accelerates collective proceedings. The lead plaintiff is no longer required to wait for the acceptance of each single individual to join the claim, but its mere inaction within specific period of time equals approval to join a group. Moreover, due to covering larger group of potential victims by a claim, the access to proofs of violation is wider and the chances for a positive outcome of case increase.

Once analysed from the perspective of injured individuals, the opt-out mechanism offers also several advantages.

First, thanks to the greater simplicity in joining a claim and no obligation of undertaking affirmative steps in order to become a member of a group, it ensures wider access to justice.

Secondly, by creating a chance to cover the greater number of victims of violation by a scope of action it significantly reduces asymmetry in the position of victims of violation and accused undertaking(s). Furthermore, it strengthens the chances for a full compensation, by ensuring that persons who would normally, due to the reasons of ignorance, inertia or unfamiliarity, refrain from undertaking an action, are given possibility to become a part of the action and enforce their rights in court.

Finally, the opt-out solution increases the level of deterrence of antitrust infringements. That is because, as the British Office of Fair Trading underlines in its report on private enforcement of antitrust law: *"A system […] which maximizes the number of individuals on whose behalf an action may be brought also maximizes the financial risks for businesses that breach competition law, which may find themselves having to pay damages to all those who have been harmed, and not just those who were sufficiently motivated (or otherwise able) to pursue a claim."*[76]

[76] Office of Fair Trading, *Private actions in competition law: effective redress for consumers and business*, Discussion Paper, April 2007, OFT916, available at: http://www.biicl.org/files/2752_discussion_paper_-_oft_private_actions_in_competition_law_-_effective_redress_for_consumers_&_business.pdf [access: 04.07.2015].

Despite the aforementioned advantages of opt-out solution, and its wide application in most of the common law jurisdictions, the discussed model struggles to gain importance in the European Union. Apart from Portugal, Netherlands and England, where the opt-out mechanism was adopted[77], and Norway and Denmark, where mixed systems were proposed, a great majority of European jurisdictions argue in favour of opt-in mechanism[78].

First, it results from a wide criticism of opt-out solution by the European Commission, which from the beginning of European debate on group litigation described it as a construction leading to abuse and violation of individual rights and freedoms[79].

Secondly, it is a consequence of several risks of opt-out model, such as limitation of a right to free trial, risk of over deterrence or development of massive litigation, which may be observed in the US and are evoked in Europe as main threats to the traditional European litigation systems[80].

Finally, it stems from the general rejection of the American class action system (based on the opt-out solution) and an attempt to develop the "EU-like" collective redress mechanism[81].

While most of the arguments brought by the opponents of opt-out solution are well justified and find strong legal basis, the still pending question is: "Can we construe an effective mechanism of group litigation in the area antitrust law without introduction of opt-out mechanism?"

This question has its particular significance nowadays, since as many data and empirical analysis from Member States illustrate, currently existing opt-in solutions struggle to provide effective response to the needs of individuals injured by antitrust law infringements[82]. Therefore, further consideration of opt-out mechanism, as a potential part of group litigation

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77 See on this issue S.O. Pais, *Private Antitrust Enforcement: A New Era for Collective Redress?*, Yearbook of Antitrust and Regulatory Studies, vol. 2015, 8(12), pp. 15–18 and 23–30.

78 See Overview of existing collective redress schemes in EU Member States from 2011, July 2011, available at: http://www.europarl.europa.eu/document/activities/cont/201107/20110715ATT24242/20110715ATT24242EN.pdf [access: 04.07.2015].

79 Commission Staff Working Paper accompanying White Paper on damages actions for breach of EC antitrust rules, /* SEC/2008/0404 final */, pt. 67.

80 T. Jaworski, P. Radzimierski, *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym…*, pp. 7–8; R. Mulheron, *The Class Action in Common Law Legal Systems…*, pp. 37–38.

81 See in details Part II Chapter 1 Point II(1).

82 R. Mulheron, *Reform of Collective Redress in England and Wales: A Perspective of Need,* available at: https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/CJC/Publications/Other+papers/reform-of-collective-redress.pdf, pp. 155–156 [access: 05.07.2015].

model, does not seem to be aimless attempt. As it will be argued in Part II Chapter 3 of this thesis, once properly adapted to the European reality, the opt-out mechanism may bring several benefits to the individuals launching antitrust damages actions. In consequence, it may construe an element of *de lege ferenda* proposals in the area of private enforcement and an interesting alternative to the European regime of group litigation.

3.2.2. Opt-in mechanism

The second approach to the issue of group formation, i.e. opt-in mechanism, construes a counterbalance to the opt-out solution. The main difference in comparison to opt-out mechanism is that in case of opt-in approach victims need to be precisely identified once the claim is brought, and they may not be bound by its outcome, unless they have expressly agreed to join the group proceedings. In consequence, the opt-in mechanism requires greater activity of potential victims of infringement in joining a group, and imposes important burden on a lead plaintiff once the group is formed[83].

The general construction of opt-in mechanism allows to respond to several limitations of opt-out solution.

First, it permits to determine precisely victims of certain law infringement and ensure equal procedural footing to the group claimant and the accused undertaking. In other words, it guarantees that each victim of antitrust infringement, deciding to participate in collective action, will be represented in court and will have a right to express himself within the proceedings. It also ensures that the accused undertaking will have a chance to identify all the claimants and properly prepare its defence against a collective claim.

Secondly, thanks to the possibility of determining exact number of victims covered by the claim, the opt-in mechanism allows to assess *ex ante* the potential amount of damages awarded in the case, as well as the costs of eventual litigation. Such a feature of opt-in mechanism is particularly important for the both parties to the proceedings, since it allows to determine in advance the possible costs of legal action.

Finally, the opt-in solution allows to avoid over deterrence and massive and unfounded litigation, being often a consequence of wide and easily accessible opt-out claims.

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[83] M. Sieradzka, *Pozew grupowy jako instrument prywatnoprawnej ochrony interesów konsumentów…*, pp. 394–395.

Due to the aforementioned characteristics, the opt-in solution is often regarded as better adapted to civil law legal tradition which is strongly based on the *"nul ne plaide par procureur"* rule and a right of each victim of infringement to defend and represent its rights in court. Many authors consider the opt-in model as the only one able to properly protect the interests of victims of antitrust law infringements, and avoid the abuse in the same time[84]. This approach seems also to find a strong support among EU institutions, which evoke the opt-in mechanism as one of the constitutive features of the European collective redress mechanism. As the EU Parliament states in its Resolution on collective redress: *"the European approach to collective redress must be founded on the opt-in principle, whereby victims are clearly identified and take part in the procedure only if they have expressly indicated their wish to do so, in order to avoid potential abuses."*[85] Also the Commission in the Recommendation on collective redress argues that: *"Collective redress mechanisms should preserve procedural safeguards and guarantees of parties to civil actions (…) in order to avoid the development of an abusive litigation culture in mass harm situations"*[86], and among such safeguards proposes the opt-in mechanism[87].

Despite several advantages, the opt-in solution encompasses also numerous limitations, putting in question the significance of opt-out group litigation model for the enforcement of competition law provisions. As R. Mulheron underlines, while these limitations have different nature, i.e. psychological, social, procedural or economic, all of them confirm an imperfect character of the opt-in solution for the enforcement of antitrust law provisions[88].

Among psychological and social reasons, causing reluctance of individuals to opt-in to collective claim, R. Mulheron evokes unfamiliarity with the collective procedure, feeling of otherness and limited will of individual to be "in the same boat" with other members of the group.

Among procedural reasons which may limit the efficiency of opt-in mechanism, the author recognises the problems with the notification of

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84 See for example A. Świczewska, *Class action i inne postępowania zbiorowe,* Przegląd Sądowy 2008, No. 4, pp. 34–37.

85 European Parliament resolution of 2 February 2012 on 'Towards a Coherent European Approach to Collective Redress, 2011/2089(INI), pt. 20.

86 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, OJ L 201, 26.7.2013, pt. 15 of the Preamble.

87 *Ibidem*, pt. 21.

88 R. Mulheron, *Reform of Collective Redress in England and Wales…*, pp. 33–34.

victims of violation, limited knowledge about the law infringement and a free-rider issue. The later limitation may be described as a desire of certain individuals not to opt-in, in order to let others incur burden of proceedings and "piggy back" on the court's ruling in any subsequent proceedings.

The third group of limitations evoked by R. Mulheron concerns the issues related to the defendant. It refers to the fear of reprisals from the defendant on the side of victims of the infringement (e.g. in case of employment scenarios), or loyalty towards defendant (e.g. in case of strong commercial links). In case of opt-in proceedings, often covering only limited group of individuals precisely determined in the claim, the aforementioned factors may strongly influence the victim's decision-making process and force an individual to refrain from joining a group.

Finally, certain economic factors may cause that opt-in solution, once chosen as a method of group formation, will limit the efficiency of group litigation mechanism. As such we can evoke the victim's desire to obtain higher damages once acting individually, or a fear of devoting important time and many for proving common issues, while letting alone its individual interests.

Due to all the aforementioned reasons, we may wonder if the group litigation mechanism based on the opt-in model may construe important added value to the enforcement system in the area of antitrust law. Complexity of this solution, combined with its limited practical significance in different national jurisdictions, may raise doubts as far as its development at the European level is concerned. These doubts may be even greater in the area of antitrust law. Due to the fact that individual injuries are often widespread and very small in amount, opt-in mechanism, requiring complex notification process and greater activity of injured individuals within the litigation process, may create a risk that in case of small injuries, victims will remain passive and the efficiency of group action will be restrained.

3.2.3. Mixed systems

The last solution which may be observed in different national jurisdictions can be described as a "mixed" or "hybrid" system. Its main objective is to combine the opt-in and opt-out model within one single mechanism, and propose a solution able to respond to the main limitations of the previously analysed approaches.

Among European jurisdictions, mixed system may be found in Denmark and Norway, where the opt-it and opt-out solutions exist parallel, and are applied in different cases according to the particular conditions. Outside

of Europe, very interesting example of a "hybrid" system may be found in Brazil, where the collective procedure is divided into two stages, governed respectively by the opt-out and opt-in mechanism.

While trying to describe the main characteristics of mixed systems, we may firstly evoke particular relationship between the opt-in and opt-out model. In the analysed systems, the opt-in mechanism is regarded as the principal method of forming a group, while the opt-out solution may be considered as an exception to the general rule.

According to Danish Law on the administration of justice, the opt-out mechanism shall be used to form a group only if two conditions are fulfilled:

a) the value of individual prejudice does not exceed 2.000 DKK (around 270 euros),
b) opt-in solution is not appropriate in particular case, especially when the claim involves very large number of victims and the notification process would involve costs disproportionately high to the value of claim.

The similar approach is proposed by the Norwegian legislator, which in Section 35-7 of Act of 17 June 2005 relating to procedure in civil disputes stipulates: *"The court can decide that persons who have claims within the scope of the class action shall be class members without registration on the class register, if the claims on their own involve amounts or interests that are so small that it must be assumed that a considerable majority of them would not be brought as individual actions, and are not deemed to raise issues that need to be heard individually."*[89]

While the Scandinavian systems propose rather similar approach to the issue of relationship between the opt-in and opt-out, the Brazilian solution is slightly different. Here, instead of determining the opt-out mechanism as an exception to general opt-in principle, Brazilian legislator decided to grant it a status of a permanent element of a group litigation procedure. According to the Consumer Defence Code of 1990[90], providing for a group litigation mechanism in Brazil, the collective procedure is divided into two stages. First, concerns establishment of a responsibility of certain undertaking. Second, covers a decision of a court on eventual damages, amount of damages and its division. And while the second stage requires each single individual to join the group in order to become a part of the action and claim for damages (opt-in), during the first stage of proceedings individuals are not precisely determined and a lead plaintiff acts on behalf of the unidentified

89 See Section 35-7 of Norwegian Act of 17 June 2005 no. 90 relating to mediation and procedure in civil disputes (The Dispute Act).

90 LEI Nº 8.078, de 11 de setembro de 1990.

group of members (opt-out). Such solution allows covering widest possible group of victims by the scope of certain violation and gives strong grounds for establishing responsibility of accused undertaking[91]. Interestingly, similar solution has been recently established under the new French law on group litigation ("Hamon Law"), and as it will be described in details in Part II Chapter 2 Point I, it may construe an interesting alternative for the EU approach to collective redress.

The second characteristic of "hybrid" systems refers to the role of a judge in group proceedings. As we can observe while analysing Danish and Norwegian solution, judge plays central role in assessing fulfilment of conditions for opt-out procedure, and ensures that the abuse, as far as forming a group and launching proceedings, will be avoided.

In Denmark, the judge decides on the number of potential victims forming a group, possible difficulties in notification process and costs of the notification. In Norway, the role of a judge is to assess if due to the value of amounts involved in the proceedings individual would not decide to undertake individual action, and if there are no issues in the claim that would require to be heard individually. Only in case of a negative response to the aforementioned questions, the opt-out collective action may be launched. Also in Brazil the role of a judge shall not be underestimated. By deciding on a responsibility of certain undertaking, it ensures that doors for collective action are opened and multiple victims of law infringement may join a claim in order to enforce their rights.

In view of the above it can be stated, that in each of the "hybrid" systems the role played by a judge is not limited only to the mere application of legal provisions, but takes the more substantial form. The judge can be compared to a "gate keeper", ensuring that the most appropriate mechanism (opt-in or opt-out) will be used to conduct specific collective action.

Finally, all "mixed" systems may be characterised by the utilitarian approach to the issue of opt-out. It is especially visible in the Scandinavian systems, where the opt-out mechanism may be decided by the court if a value of individual claim is relatively low, and the opt-out solution seems to be the best adapted to the interest of parties in a particular case. Such approach ensures on the one hand, that the principal role of opt-in solution will be preserved, but on the other, it allows a court to argue in favour of opt-out mechanism if interests of parties to the proceedings may be better protected. Such flexibility offered by the "mixed" approach, once combined

[91] See in details A. Gidi, *Class actions in Brazil: a model for Civil Law Countries*, The American Journal of Comparative Law, Vol. 51, No. 2 (Spring, 2003), pp. 311–408.

with the previously described control function of a judge, may construe effective response to the limited utility of opt-in solution in antirust cases, especially when a harm is widespread, victims are numerous and the value of individual injury is relatively low.

As the aforementioned analysis illustrates, the mixed system may bring several benefits to the victims of law infringements, without a need of creating disequilibrium in the position of parties to the proceeding, or creating a risk of abuse. Therefore, further analysis of "hybrid" systems may construe interesting alternative for the establishment of a model solution on group litigation in Europe. As the Norwegian, Danish and Brazilian examples show, by well-tailored legislative changes, the opt-out model may be adapted to the civil law legal tradition and coexist with the opt-in approach. It also confirms that the "responsible transplant"[92], taking into consideration particularities of each legal culture, may lead to desired outcomes in the area of group litigation, and mitigate several drawbacks of opt-in and opt-out models.

4. Typical problems of group litigation mechanism

Before moving to the analysis of specific models of group litigation, it is necessary to determine the main limitations of the analysed mechanism. While its several advantages were previously evoked, the group litigation opponents often underline that the group action is not a golden solution to the problems of individual claimants. In order to assess this standpoint, the main limitations of a group litigation mechanism need to be pointed out. Their critical evaluation is necessary in order to propose more effective solutions on group litigation, able to overcome difficulties of private enforcement in the area of antitrust law and construe an important complement to the hybrid model of competition law enforcement.

4.1. The principal-agent problem

The first limitation of group litigation mechanism concerns a principal-agent problem. The principal-agent theory, known also as an agency theory, refers to the relationship between an agent and his principal, where the latter delegates some tasks to the former. Such relationship may be easily found in case of group litigation mechanism which both in the form of

92 A. Gidi, *Class actions in Brazil…*, p. 314.

representative actions and collective actions foresees a delegation of certain powers by the injured individuals to the representative body or a lead plaintiff. Thanks to such delegation, an agent obtains a competence to initiate, conduct and govern the case, while the principal is responsible for the supervision over its activity[93].

While the principal-agent relationship is at the heart of group litigation mechanism and does not cause any particular problems itself, the difficulties may appear once the principal is not able to control the action of agent. In such scenario, an agent, while pursuing its activity, may try to achieve its own objectives, often differing from those of the principal[94]. As a result, the problem of principal-agent may arise, causing important limitation to the development of an effective mechanism of group litigation.

The principal-agent problem was discussed both in the European and American debate on group litigation. However, while in the United States the aforementioned problem was recognised once it has already led to abuse, the goal of European approach to group litigation was to prevent from its outset, a negative influence of agency relationship on the rights of injured individuals.

4.1.1. The American and European approach to the principal-agent problem

Referring first to the American example, we may state that in the course of time American scholars and legal practitioners agreed that the transfer of significant powers on launching a claim from injured individuals to lead plaintiff, not supported by an effective mechanism of control over activity of agents, may lead to abuse[95]. As it was argued, it may result in the underinvestment by lawyers in their work of securing clients' interests (shirking) and in selling-out of clients by the lead plaintiffs (sweet-heart dealing)[96]. In the United States it was manifested in the

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93 See in more details M. Niedużak, *Postępowanie grupowe…*, pp. 131–139; T.S. Ulen, *An introduction to the law and economics of class litigation*, European Journal of Law and Economics, No. 32, pp. 185–203.

94 M. Niedużak, *Postępowanie grupowe…*, pp. 133–134; D. Braun, *Principal-agent theory and research policy: an introduction*, Science & Public Policy 2003, Vol. 30, p. 302; K.M. Eisenhardt, *Agency theory: An assessment and review*, The Academy of Management Review 1989, Vol. 14, p. 57.

95 A. Klement, *Who Should Guard the Guardians? A New Approach for Monitoring Class Action Lawyers*, The Review of Litigation 2002, T. 21, p. 25.

96 R. Van den Bergh, *Private Enforcement of European Competition Law and Persisting Class Action Problem*, Maastricht Journal of European Comparative Law, No. 20, 2013, p. 27.

commonly used settlement practice, giving grounds for a collusion between accused undertakings and lead plaintiffs, as well as in the development of entrepreneurial litigation, aimed rather at securing the interests of lawyers than the represented clients[97]. In such scenarios, victims were deprived of a right to full compensation, e.g. in a case when the value of agreed settlements was lower than actual damages suffered by individual, or were left without due protection, once the attorney decided to achieve its own interest rather than this of represented clients.

As the most common example of such outcome of the principal-agent problem in the United States we may give "coupon settlements". According to this mechanism, the accused undertaking, instead of going into complex and risky class action proceedings, has a possibility to settle with a class and provide injured individuals with the coupons for any future purchases from such enterprise. While the total value of coupons, being the basis for calculation of lawyer's fees, is relatively high and allows for a full remuneration of attorney, the coupon granted to each individual has low single value, and as the practice shows, is rarely redeemed[98]. Therefore, while the interests of an agent are fully achieved by the mean of a "coupon settlement", the effective protection of injured individuals is put at risk.

Recognising the aforementioned difficulties of the American class action mechanism, the European debate on collective redress tried to address the principal-agent problem from the very beginning. Already in the White Paper on damages actions it was evoked that the American solution may lead to abuse, and due to its several features, *inter alia* the opt-out construction, may create *"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)."*[99] Such reasoning, initially limited to the private enforcement of antitrust law, obtained in the course of time more universal status. In the Public consultation on collective redress[100], the Commission argued in favour of a better protection of individuals against principal-agent problem, and as possible safeguards against such limitation evoked greater control of

[97] See M. Gilles, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 University of Pennsylvania Law School Review, where it is stated: *"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."*

[98] J. Bronsteen, *Class Action Settlements: An Opt-In Proposal*, University of Illinois Law Review 4 (2005), pp. 903–928.

[99] Commission Staff Working Paper accompanying White Paper on damages actions for breach of EC antitrust rules, /* SEC/2008/0404 final */, p. 58.

[100] EC Public consultation, *Towards a Coherent European Approach to Collective Redress…*

victims over activity of lead plaintiff, strict rules on a right of standing and judicial control of the activity of lead plaintiffs and representative bodies[101].

The aforementioned standpoint of the Commission was widely accepted by the participants of public consultation. As the analysis of its results shows, the great majority of stakeholders claimed that the appropriate safeguards shall be proposed, in order to ensure that legitimate interests of victims of law infringements are fully protected[102]. Among possible safeguards they pointed out on a strict control of lead plaintiffs and prior approval of representative organisations. As it was argued, such solutions were crucial to avoid that too much power is granted to those who control litigation strategically, and that the interests of "sleeping claimants" are exploited[103].

The most recent voice of European institutions in the debate on group litigation, i.e. Recommendation on collective redress, does not seem to depart from the aforementioned standpoint. As the Commission argues in the preamble to the Recommendation: *"Collective redress mechanisms should preserve procedural safeguards and guarantees of parties to civil actions."*[104] As such, the Commission proposes strict rules on standing to bring representative action[105], opt-in principle[106] and limitation of lawyer's incentives to undertake unnecessary litigation[107]. All of the proposed solutions aim to ensure that better control over lead plaintiff/representative body will be achieved, and that the conflict between the interests of clients and its representatives will be avoided.

When trying to evaluate the aforementioned proposals, we may state that while each of them has justified grounds and may limit the principal-agent problem, what seems to be missing in the European debate on the above issue, is the approach better adapted to particularities of each form of group litigation. Because, as the further analysis will illustrate, while the

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101 Commission Staff Working Document, Public Consultation: Towards a Coherent European Approach to Collective Redress, SEC(2011)173 final, pt. 21–26.

102 B. Hess and others, *Evaluation of contributions to the public consultation and hearing: "Towards a Coherent European Approach to Collective Redress",* Study JUST/2010/JCIV/CT/0027/A4, p. 13, available at: http://ec.europa.eu/competition/consultations/2011_collective_redress/study_heidelberg_summary_en.pdf [access: 09.07.2015].

103 *Ibidem*, p. 45.

104 See Point 15 of the Preamble to the 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, OJ L 201, 26.7.2013.

105 *Ibidem*, pt. 4.

106 *Ibidem*, pt. 21–24.

107 *Ibidem*, pt. 29–30.

principal-agent problem affects the whole construction of a group litigation, in each scenario, i.e. representative action and collective action, the risks and possible solutions differ.

4.1.2. The principal-agent problem and different models of group litigation

4.1.2.1. Representative actions and the principal-agent problem

As far as the representative actions are concerned, the risk of a principal-agent problem is limited. That is because, the mere objective of representative bodies, such as consumer associations or public organisations, is to undertake and conduct the action in the best interests of protected parties. In consequence, in case of representative actions, the risk that the consumer association or a public authority, while pursuing its activity, will try to achieve its own objectives differing from those of represented parties, is rather low.

Nevertheless, while this preliminary remark cannot be questioned, the more detailed analysis of representative actions shows that such mechanism is not an easy escape route out of agency problems[108]. Several difficulties will still occur, and will depend on the extent to which the members can control the representative body, on the possible influence of third parties on such entity, and on the possibility of a representative body to control a lawyer acting on its behalf.

Referring first to the influence of members of the representative body on its activity, we may state that in case of its limited character, the risk of a principal-agent problem will be significant. It will be particularly visible as far as detection of illegal behaviours and prosecution of competition law infringements are concerned.

First, as S.E. Keske evokes: *"while the association acts as agent for society working on a certain remuneration schedule, society as the principal is only imperfectly informed."*[109] In consequence, injured individuals are strongly dependent on the efficiency of such organisation in detecting and prosecuting law infringements, and have limited ways of influencing its activity.

Secondly, in case of monopolistic associations, such as *Consumentenbond* in the Netherlands, *Verbraucherzentrale* in Germany, or *Test Aankoop*/*Test Achats* in Belgium, their incentives to invest optimal effort, time and financial resources to pursue all violations of antitrust law, may be limited. Due to

[108] R. Van den Bergh, *Private Enforcement of European Competition Law*…, p. 29.
[109] S.E. Keske, *Group Litigation in European Competition Law*…, pp. 132–133.

their monopolistic position, they will tend to select these claims which are assessed as the most important from their own perspective.

Finally, in case of a limited control of a society over the representative bodies, they will be rather keen to pursue claims with the high potential of gains, than the small competition law infringements covering limited number of individuals.

The second risk for development of a principal-agent problem in case of representative actions concerns the limited supervision of representative bodies over the lawyers representing its interests. While we can state in general that the representative organisations are "repeat players" able to assess and monitor the lawyer's behaviour, the possibility of establishing an *ad hoc* associations for pursuing certain claims, as foreseen in the Recommendation on collective redress[110], may disturb this picture. Due the lower level of expertise of such body and limited ability to control the activity of lawyers acting on its behalf, the independence of an *ad hoc* association in assessing specific claim may be put at risk. In the opinion of R. Van de Bergh, such construction may lead to a situation when the representative bodies are captured by lawyers aiming to obtain their own profits[111].

Finally, the last risk concerning representative actions refers to the possible influence of third parties on the activity of representative bodies. In the opinion of R. Van den Bergh, it will be especially a case when losses are widespread, members have little control over the activity of organisation, and numerous group of influence are present in the specific legal environment[112]. As a result, instead of acting in the clients' interests, the representative bodies may try to satisfy the interests of a specific group of pressure, e.g. political party or business association.

For all the aforementioned reasons, the problem of a principal-agent shall not be neglected in case of representative actions, and specific solutions shall be adopted in order to mitigate eventual difficulties of this mechanism of group litigation. Among them we can evoke strengthening the control of members over the association (strong mechanisms of voting and exit from association), strict public control over the activity of representative bodies, and minimum threshold for the establishment of such entities. All

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110 See 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, OJ L 201, 26/07/2013, p. 60–65, pt. 18 of the Preamble.

111 R. Van den Bergh, *Private Enforcement of European Competition Law*…, p. 28.

112 *Ibidem*, p. 30.

of the evoked solutions may ensure that while the representative bodies will be granted a power to act in the interests of numerous claimants, their activity will not lead to abuse.

4.1.2.2. Collective actions and the principal-agent problem

In case of collective actions, the risk of principle agent problem is much higher than in case of representative actions. That is because, the very construction of collective action mechanism, requiring a transfer of important rights from injured individuals to the lead plaintiff, provokes a limited control over its activity.

In the collective action scenario the possible tension may arise between the interests of a lead plaintiff and the members of the group, as well as between the interests of a lead plaintiff and the appointed lawyer.

The first situation will be rather rare, since both the lead plaintiff and the group members have the same common objective – obtaining recovery for the injury suffered. Nevertheless, even in this case, the principal-agent problem may occur, especially in a situation when the group members are not engaged in a collective lawsuit on a regular basis. As S.E. Keske argues, in such a case, the control of victims over proceedings may be limited, leading to a dichotomy between the outcome of a case and the expectations of group's members[113].

The second situation, i.e. the conflict of interests between the lead plaintiff and the appointed lawyer, is much more common.

First, it results from the strong dependence of a lead plaintiff on a lawyer in the conduct of collective proceedings. As the practice shows, lawyer determines the procedural strategy, gathers the proofs and conduct the action. In such scenario, the lead plaintiff is dependent upon getting correct and complete information from the lawyer, whose incentives may deviate from those of the client.

Secondly, the lawyer may have strong incentive to restrict the amount of time and effort spent on the case, and try to persuade a lead plaintiff to settle a dispute. In such scenario, a limited control of a lead plaintiff over the lawyer's activity in the course of proceedings, and limited expertise allowing to assess chances for the positive outcome of case, may undermine the interests of claimant and benefit these of the lawyer.

Finally, depending on which remuneration model is chosen, the interests of lawyer and a lead plaintiff may significantly differ. While the widely

[113] S.E. Keske, *Group Litigation in European Competition Law…*, p. 133.

criticised contingency fees agreements may ensure that the lawyer, paid at the basis of percentage of the awarded damages, will undertake all the best efforts to win the case and obtain highest possible value of damages. In case of the hourly fee agreements, as the case is in most of the European jurisdictions, the risk of prolonging proceedings by lawyer with a view of obtaining greater remuneration is much higher.

It shall be also added, that the gravity of the aforementioned problems will be additionally strengthened or wakened depending on which model of group formation is chosen. As R. Van den Bergh argues: *"The principal-agent problem is exacerbated by the opt-out scheme."*[114] It results from the fact that the number of silent group members is larger, their character is more heterogeneous and the incentive to control the activity of a lead plaintiff is limited. On the opposite, as the author claims: *"under an opt-in scheme a minimum of effort and interest by the represented parties may still be expected"*[115], what ensures at least minimum level of control over the agent's activity.

Referring at the end to the possible solutions to the principal-agent problem in case of collective actions, it may be stated that eventual responses are multiple. It may be the greater participation of group members in the collective proceedings (both at the stage of collection of proofs and conduct of action), judicial review of the merits of case, judicial control of the terms of the settlement and judicial control of the agreement on lawyer's remuneration.

As the aforementioned analysis shows, the need of avoiding a conflict between the interests of injured individuals and their representative may determine the construction of a group litigation mechanism introduced in a specific legal system. Therefore, any debate on group litigation shall aim to determine how to mitigate the aforementioned difficulty and which kind of approach guarantees the best equilibrium between the interest of the principal and the agent. As the European and national experience will show, different solutions may be proposed, however the main question that need to be answered is:

"How to ensure that the introduced model will effectively respond to the problem of principal-agent, without limiting the efficiency of group litigation mechanism in the same time?"

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[114] R. Van den Bergh, *Private Enforcement of European Competition Law*…, p. 26.
[115] *Ibidem*, p. 26.

4.2. The free-rider problem

The second difficulty of group litigation mechanism refers to the free-rider issue. It may be described as a situation in which a party injured by the law infringement, instead of executing its right in court, leave the enforcement efforts to other parties, and tries to obtain profits without incurring high costs of litigation[116]. Among profits of free-riding party S.E. Keske distinguishes: a possibility to take advantage of judgment rendered in other case without a need of undertaking court action (e.g. injunction or cease-and-desist order imposed on law perpetrator) and a possibility to initiate follow-on action at the basis of claim launched previously by other individual[117]. The later concerns such benefits as an access to additional proofs of law infringement and a possibility to refer to the judgment previously rendered in a similar case. The consequences of free-riding are burdensome to the whole system of law enforcement.

First, it results in a disincentive to sue. Individuals, instead of launching an action once their rights are violated, prefer to let others to do so and wait for the outcome of case.

Secondly, the free-rider practice may lead to under-deterrence of illegal behaviours. Due to the lower participation of individuals in the detection and prosecution of illegal practices, and reluctance of injured parties "to be the first" to start litigation, numerous unlawful practices have a chance of remaining undiscovered or not prosecuted. In consequence, the importance of private enforcement for the execution of law provisions diminishes.

4.2.1. The free-rider problem in the area of antitrust law

While the free riding problem may be present in any two-party litigation scenario and in each domain of legal practice[118], the antitrust law infringements constitute particularly fertile ground for its development.

First, as it was already mentioned, the antitrust law infringements may be characterised by a widespread of injuries of small individual value. In such a case, the financial incentive to sue on the side of each single individual is relatively low, inducing private parties to refrain from initiating an action. Instead, they prefer to wait for others to do so, and assess, at the basis of their claim, if litigation is a worthy risk.

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116 *Ibidem*, p. 24.

117 S.E. Keske, *Group Litigation in European Competition Law…*, p. 86.

118 R. Van den Bergh, *Private Enforcement of European Competition Law…*, p. 24.

Secondly, the competition law infringements are characterised by their complex nature, limited access to proofs of violation and difficulties with determining the relationship between the law infringement and the injury suffered. In such a case, the free-riding may construe interesting alternative for those individuals, who do not want to launch a stand-alone action and face the aforementioned difficulties. The party launching subsequent action may benefit from the proofs gathered in the initial proceedings, and has a chance to refer to the judgement rendered by the court in a similar case.

Finally, due to the high costs of private enforcement of antitrust law individuals are often reluctant to step up and initiate the claim. Also in this case, the free-riding may construe a sort of alternative for these individuals, who do not possess sufficient resources to initiate a claim, or are not keen to take this risky attempt.

4.2.2. The free-rider problem and the mechanism of group litigation

Referring now to the mechanism of group litigation, we may state that its particular construction may mitigate or aggravate the free-riding problem. For this reason, each debate on group litigation needs to address this issue, and determine how to avoid a situation in which certain individuals, instead of joining collective claim and increasing efficiency of this mechanism, would decide to stay out from the proceedings and "piggy back" on a collective ruling. In order to illustrate this difficulty several examples are to be given.

4.2.2.1. Collective actions and the free-rider problem

As the construction of collective actions foresees, the lead plaintiff, being a person injured by the law infringement and personally interested in its prosecution, initiates an action and forms a group of claimants. The lead plaintiff is responsible for formulating a claim, gathering the proofs of violation and informing potential victims of the infringement on a possibility to join an action or opt-out from the proceedings. In consequence, the important financial burden, as well as a risk of initiating an action, are transferred to the lead plaintiff. In such a case, the main question which shall be asked is:

"How to ensure that a person injured by law infringement, will decide to start the proceedings and become a lead plaintiff, instead of waiting for someone else to initiate an action, and join a group as its silent member?[119]

[119] S.E. Keske, *Group Litigation in European Competition Law*…, p. 104.

In the opinion of different scholars, in order to address this issue and avoid the free-riding problem the lead plaintiffs' effort shall be properly rewarded. It can take a form of monetary reward paid to the plaintiff out of a total amount of awarded damages. It can also involve a possibility to settle the case by a lead plaintiff and obtain specific percentage of the agreed amount of money. Finally, it may take a form of a fixed remuneration of a lead plaintiff, agreed by the parties prior to the commencement of the proceedings[120]. Despite which method is chosen, what seems to be essential, is the existence of the lead plaintiff's reward. That is because, in case of its absence and the traditional approach to group litigation, i.e. division of damages according to the actual harm suffered by each member of the group, the risk that none of the injured individuals will have an interest to initiate an action and incur important time and money to pursue a claim may be significantly high.

4.2.2.2. Representative actions and the free-rider problem

The second example of free-riding problem in the area of group litigation concerns representative actions. In general, we may say that the public bodies, consumer associations or other entities responsible for the protection of collective interests, will have a strong incentive to sue once the infringement causes an injury to its members or violates protected public interest. In such a case, the consumer associations will undertake an action once the antitrust behaviour violates the interests of several individuals. Public bodies will undertake an action once the public interest is put at stake. And other entities, e.g. associations of employees, will start the proceedings once the interests of its members are infringed. While the incentive to sue of such bodies is clear and may be understood by the mere goal of their functioning, the free-riding problem will still occur in two scenarios.

First, it will concern the claims brought by the non-members of representative body. As R. Van den Bergh observes, if the representative action is not limited to members of association, who pay the membership fees and support the association in its functioning, the non-members will have a tendency to free-ride on its action. They will also benefit on the representative actions if they decide to bring follow-on damages claims. In such a case, both the factual and legal issues decided by the court in the representative action, will be used by the free-riders as the grounds for their

[120] *Ibidem*, p. 104.

subsequent claims. Finally, the individuals injured by the law infringement and not covered by the representative action will have a chance to benefit from certain forms of financial remedies awarded by the court. As such, R. Van den Bergh evokes the forced price reduction which applies to the whole market and creates a sort of windfall profits to the individuals who never purchased products of the price-fixing enterprise[121].

The second situation which may lead to the free-riding problem in case of representative actions, concerns the existence of numerous representative bodies competing with each other. While the greater number of law enforcers shall be in general regarded as a positive phenomenon, as S.E. Keske underlines, the multiplicity of representative bodies may also create an incentive to free-ride[122]. In such a case, the representative entities may try to save large costs of functioning, by concentrating rather on follow-on actions than initiating stand-alone actions. As a result, despite the existence of a great number of entities responsible for law enforcement, their internal rivalry may lead to the limited efficiency of a whole enforcement process. In order to illustrate this phenomenon, we may refer to different national examples which confirm that when the consumer associations enjoy greater monopoly, e.g. *Consumentenbond* in the Netherlands, *Verbraucherzentrale* in Germany, or *Test Aankoop*/*Test Achats* in Belgium, they are more active in bringing claims, than the similar associations operating in a competitive environment, e.g. in France or Italy[123].

4.2.2.3. Rules on group formation and the free-rider problem

The last problem concerning a relationship between the free-rider phenomenon and a group litigation mechanism may be observed once the rules on group formation are concerned. Depending on the applicable construction (opt-in or opt-out), the free-rider problem may be strengthened or limited.

First, as far as the opt-in mechanism is concerned, we may state that a need to express a will to join the collective action, and the requirement to undertake positive steps in order to become a member of a group, may enhance the free riding problem. As it was argued before, such obligation, imposed on individuals informed on the existence of law infringement, may create important doubts as far as the risks, costs and difficulties

121 R. Van den Bergh, *Private Enforcement of European Competition Law*…, p. 25.
122 S.E. Keske, *Group Litigation in European Competition Law*…, pp. 126–127.
123 R. Van den Bergh, *Private Enforcement of European Competition Law*…, p. 26.

connected with the collective action are concerned. Therefore, once faced with a question of opting-in, many individuals will decide not to do so, in order to let others incur burden of proceedings and "piggy back" in any subsequent litigation initiated once the liability of undertaking was established.

On the other hand, as R. Van den Bergh tries to argue, the influence of group formation on the free-riding problem may be less severe in case of opt-out procedures[124]. As the author explains, while the victims of law infringements often hesitate to join the group, because of a risk of loss, high cost of proceedings and the requirement of sharing potential damages with other members of the group, they are more keen to stay in the action which already covers them[125]. This paradox has its particular importance in competition law cases, involving large number of victims and small individual value of injuries. As G. Miller explains, in cases when the individual loss of each victim is small, the opting-out from the action and free-riding on a judgment rendered in collective claim does not seem to be an attractive strategy[126]. On the opposite, staying in the group significantly increases chances of receiving compensation, and makes this solution preferable to individuals injured by the competition law infringement.

As the aforementioned analysis shows, the free-riding problem may have important influence on the efficiency of specific group litigation mechanism. Depending on the way in which the system of group litigation is construed, it may lead to increase or decrease of the efficiency law enforcement. Therefore, further debate on group litigation needs to take into account this phenomenon, and propose solutions able to ensure that instead of waiting for the action of others, the individuals will be more keen to join the collective claims and enforce their rights in court in case of competition law infringements.

4.3. The problem of financing

The last important problem which may be observed once the group litigation mechanism is analysed, concerns the issue of financing. As it was mentioned before, the high costs of litigation form one of the main obstacles to development of private enforcement in Europe, and a reason why an access to justice of individuals injured by competition law infringements

124 *Ibidem*, p. 24.
125 *Ibidem*, p. 25.
126 G. Miller, *Class Actions*, in: P. Newman (ed.), *The New Palgrave Dictionary of Economics and the Law Volume 1* (MacMillan, London 1998), p. 260.

is still limited. In this context, the group litigation mechanism, allowing to spread the costs of litigation and divide them between members of the group, is evoked as a possible solution. However, while this general advantage of group litigation does not seem to be contested, what raises more doubts, is a question of financing of collective claims. The main difficulty is to propose a mechanism that will ensure the effective method of financing, without creating imbalance between both parties to legal proceedings.

4.3.1. Group litigation and the costs of legal proceedings

When talking about the group litigation it shall be firstly observed, that while the individual costs of each member of the group may be limited by spreading the financial burden among numerous individuals, the total cost of legal action will be higher in case of group litigation, than in a case of individual private claim. It results not only from the fact that number of parties to the action is greater, proceedings are longer, and the scope of issues analysed by the court is broader, but it is also a consequence of new procedural elements involved in the group litigation. It concerns in particular the stage of notification, obliging the lead plaintiff to inform all potential victims on the existence of law infringement. Such informational obligation significantly increases the costs of litigation, and requires from a lead plaintiff or representative body to incur great financial investment, even before the group was formed and collective proceedings were initiated.

Secondly, in the competition law cases, involving the need of expertise, legal and economic analysis, as well as the collection of complex proofs and data, the multitude of parties involved in the proceedings increases the complexity and costs of legal action. That is because, the existence of law infringement, the causal link between the injury and the violation, as well as scope of damages, need to be proved and assessed not only for one individual, but for the numerous parties forming a group. Therefore, as several authors underline, the costs of group claim may be notoriously high, making the collective action particularly risky investment[127].

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[127] R. Amaro, *Le contentieux privé des pratiques anticoncurrentielles. Etude des contentieux privés autonome et complémentaire devant les juridictions judiciaires*, Bruylant 2014, p. 246; A. Pinna, *La mobilisation de la créance indemnitaire*, Revue trimestrielle de droit civil, 2008, p. 229 and following; J. Peysner, *Costs and Financing in Private Third Party Competition Damages Actions*, Competition Law Review 2006, vol. 3, pp. 97 and following.

Finally, the aforementioned characteristics of group litigation, once combined with the traditionally existing in Europe "loser-pays" principle, may constitute important obstacle to undertaking decision on initiating a collective claim. As the European Commission states: *"The costs associated with antitrust damages actions, and also the cost allocation rules, can be a decisive disincentive to bringing an antitrust damages claim, given that these actions may be particularly costly and are generally more complex and time-consuming than other kinds of civil action."*[128]

Due to the aforementioned reasons, one of the main problems in different debates on group litigation concerns the question of financing. The goal is to determine how to arrange the system of financing, and ensure that high costs of group litigation will not cause a limitation to the efficiency of collective proceedings. Among solutions to the aforementioned problem several approaches can be distinguished.

4.3.2. Possible ways of group litigation's financing

4.3.2.1. Self-financing

The first and the most widely represented method of financing is funding of a collective action from the party's own resources. This most traditional method requires a party which initiates a collective action to cover the costs of litigation, with a view of obtaining profits once the case is won. While this method of financing does not cause important problems in case of individual actions, it may be less effective in case of collective claims. It results from the higher total costs of the proceedings, longer duration of a judicial process and greater complexity of the legal action. Therefore, it may be stated that self-financing of collective claims is not the solution best adapted to the particularities of group litigation mechanism.

4.3.2.2. Legal cost insurance

Second approach to the problem of financing concerns the legal costs insurance which may be purchased by a person wishing to claim for compensation or defend a case. In general, it will cover the court fees and the costs of legal representation incurred to bring a claim or defend a litigation. As C. Hodges distinguishes, such insurance may be divided into before-the-event insurance, purchased in advance of any claim, as

[128] European Commission, White paper on damages actions for breach of the EC antitrust rules /*COM/2008/0165 final*/, pt. 2.8.

a protection against the risk of possible future costs of litigation, and after-the-event insurance, purchased once the event occurred and the litigation is prepared[129]. While both of the aforementioned solutions provide for interesting way of financing collective claims, they are rather business-relevant solutions. Due to the relatively high costs of insurance and its complex character, they do not provide an interesting alternative to individuals claiming for compensation. Therefore, they construe only limited response to the problem of collective actions financing.

4.3.2.3. Third-party funding

The last group of solutions refers to the third-party funding. It can be defined as a practice by which a third party provides money to enable a lawsuit to be pursued or defended[130]. Third party funding may take three possible forms, i.e. public funding, private funding and funding by lawyer, each of which has its own particularities.

4.3.2.3.1. State funding

The state funding takes most often a form of a financial aid provided to the claimant or a defendant. Moreover, it can also take a form of public fund, responsible for providing financial support to the parties enforcing their rights. Among the model solutions in this area of law, we can evoke French proposal for the establishment of a Fund of aid for access to justice (so-called "*Loi Chatel*")[131]. Despite the fact that *Loi Chatel* has never into forced, it formulated a series of interesting solutions in the area of public funding.

The main idea of French solution was to construe a fund having legal personality and able to cover the costs of collective actions. In order to obtain such financing, the case had to present "serious chances of success", what was assessed by the fund. Once the financing was granted, the plaintiff could have covered with allocated money the costs of proceedings, publicity and legal aid. Moreover, the burden of recovering money, and claiming

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[129] C. Hodges, J. Peysner, A. Nurse, *Litigation Funding: Status and Issues*, January 2012, p. 11, available at: http://www.csls.ox.ac.uk/documents/ReportonLitigationFunding.pdf [access: 21.07.2015].

[130] *Ibidem*, p. 10.

[131] Proposal of law on introduction of consumer collective actions presented by M.L. Chatel on 26 April 2006 [*Proposition de loi visant à instaurer les recours collectifs de consommateurs n° 3055, 26 avril 2006*].

for reimbursement from undertaking losing the case was transferred to the fund. Finally, the last element of French proposal concerned the question of financing of fund's activity. According to *Loi Chatel*, its financial resources were supposed to be ensured, on the one hand by public funding, and on the other, as a part of financial penalties imposed on undertakings committing violations of antitrust and consumer law. Therefore, the link between the public enforcement, leading to such penalties, and private enforcement, partially financed from penalties paid by the law perpetrators, was supposed to be ensured.

The European debate on state funding was not limited to France. Also at the European level such solution was evoked. In December 2008, while referring to the question of financing of group litigation in Europe, the European Social and Economic Committee stated: *"One of the ways of funding this system would be by establishing a 'support fund for collective action', provisioned by the sum of the 'unlawful profits' made by enterprises which have been convicted; these profits, as defined by the judge in the course of the procedure, could be so used insofar as they are not claimed by identified persons who have suffered direct injury."*[132] Moreover, as the European Social and Economic Committee continued in its opinion, the role of the fund could be also to centralise all the information relating to ongoing collective actions and pass on information relating to the steps to be taken by the persons concerned[133].

The aforementioned approach of the European Social and Economic Committee seemed to be continued in the further European debate on group litigation. Three years later, in the public consultation on collective redress, the Commission still wondered if public funding may construe an alternative to financing of collective actions in the EU[134]. As the outcome of public consultation has shown, majority of stakeholders, especially academics, consumer organisations and legal experts argued in favour of a public fund, which in their opinion, could support potential plaintiffs in financing of collective redress[135].

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[132] Opinion of the European Economic and Social Committee on Defining the collective actions system and its role in the context of Community consumer law (Own-initiative opinion), 2008/C 162/01, OJ C 162, 25.6.2008, p. 1–19, pt. 7.6.3.

[133] *Ibidem*, p. 7.6.4.

[134] Commission Staff Working Document, Public Consultation: Towards a Coherent European Approach to Collective Redress, SEC(2011)173 final, question 25.

[135] B. Hess and others, *Evaluation of contributions to the public consultation and hearing…*, p. 12.

Nevertheless, in the recent Recommendation on collective redress, the Commission did not decide to take more decisive step in the debate on state funding. It only argued that: *"funding for collective redress litigation should be arranged in such a way that it cannot lead to an abuse of the system or a conflict of interest"*[136], and refrained from formulating any constructive proposals on this matter. Such approach of the Commission may be regarded as disappointing, since as the European debate on group litigation has shown, the question of funding construes one of the main obstacles to development of the effective mechanism of group litigation in the EU. Moreover, due to the lack of coherent approach at the EU level, the Commission opened a door to the unequal protection of individuals in different Member States and created a risk of forum shopping in Europe[137].

4.3.2.3.2. Private funding

The third method of financing of group litigation refers to private funding. It concerns a situation when money is provided to the claimant or the defendant by a private entity, aiming to obtain financial reward in exchange for such help. Such solution gives important financial benefits to the individuals claiming for compensation, and creates a possibility to pursue claims which due to the high risk of financial investment could be excluded from the public funding[138]. Despite the aforementioned advantages, it is often argued that the private third party funding may lead to so-called "commercialisation" of justice. As it was evoked during the European debate on collective redress, opening a door for private third party funding may lead to abuse, and create a risk that the funder's economic interests will take priority over these of the claimants[139].

While the aforementioned risks of the private third party funding cannot be neglected, the recent European developments in the area of group litigation show increase in the importance of such method of financing.

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136 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, OJ L 201, 26/07/2013, p. 60–65, pt. 19 of the Preamble.

137 See R. Amaro, *Le contentieux privé des pratiques anticoncurrentielles…*, p. 247*;* American Bar Association, *Joint Comments on the Commission of The European Communities' White Paper,* p. 32, available at: http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/aba_en.pdf [access: 22.07.2015].

138 B. Hess and others, *Evaluation of contributions to the public consultation and hearing…*, p. 12.

139 *Ibidem*, p. 12.

It concerns in particular situations when the right to claim for damages, considered as a receivable, is assigned to third party in exchange for financial remuneration. While such solution seems to be controversial at the first sight, as A. Pinna argues, it may have particular importance in the area of antitrust law, where: *"Each citizen is […] a holder of portfolio of claims for compensation, which remain unexploited until a slow game of assignment consolidates this factual situation."*[140] Moreover, as R. Amaro argues, in the area of competition law, where the multiple victims are often injured by law infringements and refrain from undertaking an action for damages, the huge market of potential compensation claims exists[141]. In the author's opinion, the transfer of rights to initiate such claims to third parties, may construe an interesting alternative for financing of group litigation proceedings, and a way of increasing efficiency of private enforcement in the area of antitrust law[142].

Several examples of such practice may be observed in Europe. First, we may point out on the activity Belgian company called Cartel Damage Claims SA (hereinafter "CDC") which in the period from 2002 to 2005 concluded contracts with the 36 victims of "German cement cartel". According to these agreements, a right to claim for compensation from cartel members was transferred from the injured individuals to CDC, in exchange for the specific percentage of damages which were supposed to be obtained through the claim. Moreover, the injured individuals refrained from undertaking any subsequent action concerning the same law infringement.

Referring to the efficiency of such solution we must underline its remarkable results. The action initiated by CDC against members of "German cement cartel" was accepted by the German court and led to the settlement with 29 cartel members for the amount of 152 million euros. Undoubtedly, as M. Leclerc underlines, the decision of a German court, which recognised a right to claim for compensation in case of antitrust injury as a transferable receivable, does not have to be followed by other European courts, but it opens an interesting path for financing of collective litigation in the EU[143]. Moreover, this path does not seem be forbidden under the Damages Directive, which while referring to the issue of access

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140 A. Pinna, *La mobilisation de la créance indemnitaire…*, no. 3.

141 R. Amaro, *Le contentieux privé des pratiques anticoncurrentielles…*, pp. 248–249.

142 *Ibidem*, p. 249.

143 M. Leclerc, *Les class actions, du droit américain au droit européen…*, pt. 453–454, pp. 212–213.

to evidence, recognised a possibility of acquiring the injured individual's claim by a third party[144].

The second example of a third party private funding may be found in Ireland. The Irish based company named Claims Funding International (hereinafter "CFI"), groups the claims for damages in the area of competition and financial law, and launches proceedings against the law perpetrators. The CFI's model of functioning is similar to CDC, since it involves an assignment of rights by companies to a special purpose vehicle owned by CFI, in exchange for payment of 25 per cent of whatever is recovered as damages in the event of success. CFI is funding all investigation costs and incurs all the risks involved in the proceedings. Up to now, the CFI has launched several claims for compensation, among which the most significant one was a claim against airline companies (KLM, Air France and Martinair) based on the Commission's Decision establishing the existence of a cartel in fuel surcharges for air freight[145].

As the aforementioned analysis shows, while the European debate on financing of group litigation is still in progress, the market already offers certain solutions to the problems of group litigation. Therefore, it seems to be necessary that the EU follows current changes in the group litigation context and undertakes the issue of private third party funding.

4.3.2.3.3. Funding by lawyer

The last solution covered by the scope of third party funding refers to a situation in which money are provided by the party's lawyer. It can take a form of contingency fees, conditional fees agreements or success fees. The aforementioned method of third party funding seems to cause the most controversies in the European debate on group litigation, and is one of the reasons why collective actions opponents consider this mechanism of law enforcement as a way of "commercialising" justice.

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144 See Art. 7(3) of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, p. 1–19, which stipulates: *"Member States shall ensure that evidence which is obtained by a natural or legal person […] can be used in an action for damages only by that person or by a natural or legal person that succeeded to that person's rights, including a person that acquired that person's claim."*

145 Commission Decision C(2010) 7694 final relating to a proceeding under Article 101 TFEU, Article 53 of the EEA Agreement and Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport (Case COMP/39258 – Airfreight).

Without going into detailed analysis of this method of financing, which will be described in more exhaustive manner in the following points of thesis, it is enough to say that during the last public consultation on collective redress in the EU, this method of financing was rejected by a clear majority of stakeholders[146]. However, despite such outcome consultation, the discussion on contingency fees in the EU does not seem to be an ended story.

On the one hand, it is a consequence of certain national approaches to this method of financing which recently enabled group claimants to agree with a lawyer on a third party funding (e.g. UK, Poland).

On the other, it results from the standpoint expressed by the Commission itself. As it held in the Recommendation on collective redress: *"The Member States should not permit contingency fees which risk creating such an incentive."* However, as it added in the next phrase: *"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."* Such standpoint of the Commission seems to leave the doors for the introduction of contingency fees opened in the EU. Therefore, further analysis of contingency fees seems to be necessary, in order to answer if such mechanism can be introduced in the EU, and in case of affirmative, under which conditions[147].

As the aforementioned analysis illustrates, the question of group litigation financing raises more doubts than answers. The multitude of approaches, complexity of the analysed questions and difficulties with finding one, optimal solution, create grounds for further analysis in this area of law. Therefore, any legislative proposal on group litigation mechanism needs to undertake this analysis, and answer which model should be adopted in order to ensure greater efficiency of group litigation, and guarantee the right equilibrium between the interests of both parties to collective proceedings.

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146 B. Hess and others, *Evaluation of contributions to the public consultation and hearing…*, p. 12.

147 See in details Part II Chapter 3 Point II(5).

II. The American system of class actions – a starting point in the introduction of a group litigation mechanism in the area of competition law

Before moving to the second part of thesis, which goal will be to provide an answer on the optimal system of group litigation in the EU, a short reference to the American mechanism of class actions is required. That is because, the group litigation mechanism which shall become a core element of the private enforcement regime in Europe and the important complement of a hybrid model of competition law enforcement, originates from the American system of antitrust law. Moreover, the European approach to collective redress is often construed as a response to the American class action mechanism, and aims to propose a solution able to limit the American abuse in the area of group litigation. Therefore, in order to ensure the clarity of legal reasoning and fully understand the European approach to group litigation, a general description of the American system of class actions shall be made at this stage of analysis.

1. Origins of the American system of class actions

1.1. From opt-in to opt-out – evolution of class actions mechanism

The American system of class actions was originally created as a mechanism of equity, allowing different groups of individuals having common interests to enforce their rights in a single lawsuit[148]. Such a construction was supposed to guarantee wider access to justice, increase level of deterrence and reduce asymmetry in the position of injured individuals and law perpetrators. Despite the initial problems with its achievement, the evolution of American class action instrument has led to establishment of one of the most powerful mechanism of individuals' right enforcement which can be regarded as a model solution for different legal systems. As T. Jaworski and P. Radzimierski underline: *"The American system of class actions may be considered as a cradle of group litigation in its current form, and its achievements are widely used in other legal systems."*[149]

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[148] F. Sherman, *American Class Actions: Significant Features and Developing Alternatives in Foreign Legal Systems*, 215 Federal Rules Decisions (2003), p. 130.

[149] T. Jaworski, P. Radzimierski, *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym…*, p. 5.

The first provisions on class actions were introduced into the American law in 1938. According to the Rule 23 of Federal Rules of Civil Procedure (hereinafter "FRCP")[150], class actions could have been initiated when the separate actions would create a risk of inconsistent or varying adjudications, or a risk of impairing the interests of individuals. The goal of such construction was to group numerous claims into one action, what would accelerate the proceedings, guarantee their greater coherence and increase chances for a positive outcome of claim. By contrast, the aim of "traditional" class actions was not to involve mass torts into the group litigation regime. That is because, the presence of many complex individual issues, such as causation or amount of damages, was regarded as an obstacle to the manageability of class actions[151]. Moreover, the "traditional" class actions were trying to assure greater predictability and certainty of group litigation proceedings. Therefore, the Rule 23 argued in favour of opt-in mechanism which aimed to cover by the action only the parties that expressed their will to join the group of claimants[152].

Despite the novelty of the aforementioned construction, and significance of changes introduced into FRCP, its practical importance was limited in the first two decades of functioning. As it was underlined: *"from 1938 until the class actions rules were amended, class actions were few and far between."*[153] Both courts and individuals were rather reluctant to the use of class action mechanism, being regarded as a good legal concept working difficult in practice.

The above-mentioned scenario forced the Congress to undertake works aiming to increase the efficiency of discussed mechanism. Its goal was to empower individuals with more flexible and accessible instrument of their protection. As a result, the new construction of class action mechanism was proposed in 1966[154]. The "traditional" class action mechanism was

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150 Federal Rules of Civil Procedure, as amended on December 1, 2015, available at: https://www.federalrulesofcivilprocedure.org/frcp/ [access: 15.12.2015].

151 J.C. Alexander, *The introduction to class action procedure in the United States*, pp. 5–6, available at: http://law.duke.edu/grouplit/papers/classactionalexander.pdf [access: 27.07.2015].

152 T. Jaworski, P. Radzimierski, *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym…*, p. 6.

153 F. Sherman, *American Class Actions: Significant Features and Developing Alternatives…*, p. 132.

154 N.M. Peace, *Class Actions in the United States of America: An Overview of the Process and the Empirical Literature,* Rand Institute for Civil Justice, Santa Monica, California 2007, p. 8; see also on this issue T. Jaworski, P. Radzimierski, *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym…*, p. 6.

modernised, and as many lawyers and politicians desired, the popularity of group litigation exploded.

The most important change of 1966s reform was the introduction of an opt-out mechanism. According to the new wording of Rule 23 of FRCP, once the class was certified, the individuals covered by a claim were provided with a notice on the commencement of class action proceedings. After receiving the information, they had a right to opt-out from the claim and refrain from the consequences of the eventual class action judgment. In case of failure to do so, individuals were covered by a claim and bound by the class action ruling. Moreover, they were losing a right to initiate individual action for the same law violation. The consequences of the aforementioned change were crucial, both for the plaintiffs and the defendants.

First of all, the class action procedure was significantly simplified. The plaintiff was no longer required to obtain an agreement from each single individual in order to initiate the proceedings, but non-activity of injured party was satisfactory to form a group.

Secondly, the financial value of class actions was largely increased. The greater number of individuals covered by a claim was guaranteeing a chance to obtain higher damages in case of positive outcome of the proceedings. As a result, the popularity of discussed instrument among injured individuals and lawyers, being most often awarded at the basis of contingency fees agreements, increased significantly.

Finally, the effectiveness of group litigation procedure had a chance to reach its highest level. Greater access to proofs, increased pressure on the defendants and reduced asymmetry in the position of injured individuals and law perpetrators, were creating strong grounds for the positive outcome of class action cases.

The aforementioned reform led to the increase in the popularity of class actions among lawyers, and greater familiarity of discussed institution among individuals[155]. Public interest attorneys started to use class action mechanism in order to obtain injunctive relief from governments, e.g. concerning elimination of discriminatory practices. While private sector lawyers benefited from the aforementioned procedure in order to obtain monetary compensation for victims of consumer fraud, product related injuries or finally antitrust law violations[156]. As a result, the number of class actions initiated in the United States exploded, and the instrument

[155] T. Jaworski, P. Radzimierski, *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym…*, p. 6.

[156] D.R. Hensler, *The globalization of class actions…*, p. 8; M. Sieradzka, *Dochodzenie roszczeń w postępowaniu grupowym…*, pp. 56–57.

having initially limited practical significance, had become one of the main weapons of groups of individuals in the fight for their rights[157].

Despite the positive influence of 1966s reform on the popularity of class action procedure in the United States, the changes introduced by Congress were not free from criticism.

First of all, some scholars were arguing that the new opt-out system exacerbated already existing principal-agent problems. By allowing lawyers to speak in favour of classes of people, it created important risk of improper representation, or even violation of individuals' rights and freedoms[158].

Secondly, some commentators were pointing out on the potential violation of due process rule. As they were claiming, the opt-out mechanism significantly limited chances of the injured party to exercise its rights before the court. In exchange, it proposed a representation by a lead plaintiff, whose interests often differed from those of injured individuals[159].

Finally, the introduction of opt-out construction created a risk of development of so-called "entrepreneurial litigation"[160]. The facility in forming a group, initiating an action, as well as increased chances in obtaining high damages, were in the opinion of many authors factors creating grounds for mass and unfounded claims, motivated rather by the desire to obtain profits, than the actual need of justice[161].

The aforementioned illustrates that the criticism evoked in the United States at the end of 1960, is still present while the American-style class actions are being discussed in Europe. The issues such as the principal-agent problem, the risk of due process rule violation or entrepreneurial litigation, are often recalled as the elements giving grounds for the abusive litigation, running particular fears in the European Union. However, what is worth mentioning at this point, is the Congress' awareness of the potential risks of the opt-out class actions, and its readiness to introduce discussed reform

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157 T.L. Russell, *Exporting class actions to the European Union*, Boston University International Law Journal, Vol. 28, 2010, p. 160.

158 M. Gilles, *Exploding the Class Action Agency Costs Myth…*, pp. 112–113.

159 A.D. Lahav, *Due process and the future of class actions*, 44 Loyola University Chicago Law Journal, 2012, pp. 545–546.

160 T.L. Russell, *Exporting class actions…*, pp. 160–161; R.H. Klonoff, *Class action and Other Multi-Party Litigation in a Nutshell*, Second Edition, Thomast West 2004, pp. 70 and following; P. Pogonowski, *Ochrona roszczeń rozproszonych w Anglii i USA. Dwa modele regulacji postępowań grupowych*, Przegląd Sądowy 2009, No. 6, pp. 112 and following.

161 R.H. Klonoff, *Decline of class actions*, Washington University Law Review, Vol. 90, 2013, pp. 9–10; T. Jaworski, P. Radzimierski, *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym…*, p. 6.

in spite of it[162]. Because as the Advisory Committee emphasised while commenting the proposed reform: *"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."*[163]

The above standpoint illustrates that the need of guaranteeing efficiency of class action proceedings, may sometimes take precedence over the particular interests of individuals. Such approach can be surprising once analysed from the European perspective, often putting the interest of private parties first. However, the balanced approach, based on weighing different ratios once introducing a class action instrument, is characteristic for the American legal system. Because as it is underlined: *"the effective and economic handling of group actions necessarily requires a diminution, compromise or adjustment of the rights of individual litigants for the greater good of the action as a whole."*[164]

To sum up the reasoning on the origins of class actions in the United States we can state, that the instrument introduced initially as another mechanism of civil procedure, has not only modernised the American system of law enforcement, but has also changed the social approach to the issue of law violations and its prosecution. The reform of 1966 shifted the balance of powers between citizens and their governments, employees and employers, consumers and enterprises[165]. It was no longer useless or impractical to initiate a civil lawsuit in case of relatively modest injuries, because individuals were empowered with a mechanism allowing joining their forces in the fight for their rights. That is why, while commenting a development of the American-style class actions, D.R. Hensler has stated: *"While on the surface the adoption of a class action procedure might have appeared to be a technical matter of interest only to lawyers, the social, economic, and political consequences of permitting class actions were potentially vast."*[166]

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[162] W.B. Rubenstein, *On What a "Private Attorney General" is – and Why it Matters*, 57 Vanderbilt Law Review, 2004, p. 2148.

[163] Federal Rules of Civil Procedure 23, Advisory Committee's note (discussing 1966 amendment).

[164] H. Woolf, *Access to Justice Inquiry: Issues Paper (Multi-Party Actions)*, London 1996, pt. [2], [2(a)].

[165] D.R. Hensler, *The globalization of class actions…*, p. 9.

[166] *Ibidem*, p. 8.

1.2. Class actions as a response to antitrust law violations

The development of class action mechanism is immanently connected with the American system of antitrust law. It results from its specific construction which assumes strong participation of individuals in the detection and prosecution of anticompetitive behaviours. Consequently, it requires existence of the effective methods of individuals' protection which on the one hand, will guarantee wider access to justice, and on the other, will strengthen position of individuals in disputes with strong and powerful enterprises. The class actions seem to respond perfectly to the above--mentioned criterions[167]. And as the Antitrust Modernisation Commission confirms: *"The vitality of private antitrust enforcement in the United States is largely attributed to two factors: (1) the availability of treble damages plus costs and attorneys' fees, and (2) the U.S. class action mechanism."*[168]

The history of the American system of private enforcement of antitrust law dates back to the end of 19th century. Already with the introduction of Sherman Act in 1890[169] it became clear that effective enforcement of antitrust law would require involvement of individuals in the detection and prosecution of anticompetitive behaviours. It was subsequently confirmed in the Clayton Act from 1914, according to which: *"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore 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."*[170] As a result, the American citizens were entitled to initiate private proceedings if their interests were violated by the competition law infringement. Moreover, they had a right to obtain high, trebled damages, what was additionally increasing attractiveness of the aforementioned construction[171].

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[167] See in more details on this issue M. Gac, *Collective redress v. class actions – convergence or divergence between the European and American solutions on group litigation?*, in: *The Interaction of national legal systems – convergence or divergence*, pp. 116 and following, available at: http://www.tf.vu.lt/dokumentai/Admin/Doktorantų_konferencija/Gac.pdf [access: 30.07.2015].

[168] Antitrust Modernization Commission, *Report and Recommendations*, April 2007, available at: http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf [access: 29.07.2015].

[169] Sherman Antitrust Act 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1–7 (2000)).

[170] The Clayton Antitrust Act of 1914 (Pub. L. 63–212, 38 Stat. 730, enacted October 15, 1914 (current version at 15 U.S.C. §§ 1–7 (2000)).

[171] On the issue of treble damages in the American law see E. Bagińska, *Odszkodowania karne (punitive damage) w prawie amerykańskim*, Państwo i Prawo 2003, No. 6.

Despite the important changes introduced by Sherman and Clayton Act, the practical significance of private method in the enforcement of antitrust law provisions was limited till the second half of 20th century. As it is stated: *"For the first 60 year period from 1890 to 1949, there were just over 300 reported decisions and approximately 1,100 cases were commenced."*[172] The main reason for that was a lack of mechanism allowing for the effective enforcement of competition law provisions by private parties. The traditional methods of civil procedure were not adapted to complex antitrust law cases. Moreover, in most of the competition law infringements the value of individual injuries was relatively low, what was often discouraging private parties from initiating civil proceedings. In consequence, numerous individuals were deprived of compensation for the harm suffered, and deterrence effect of private method, often evoked as one of its goals, was barely perceptible[173].

The aforementioned obstacle to development of private enforcement of antitrust law was finally overcome at the end of 1960s. The introduction of criminal investigations by the Antitrust of Department of Justice, and creation of the opt-out class actions proceedings, opened a path for development of private enforcement in the area of antitrust law. While the first change allowed for opening to public numerous business executives' prosecutions and gave strong incentive to sue, the introduction of opt-out class actions has finally empowered individuals with the effective mechanism of their protection. As a result, the number of private actions in the area of antitrust law has exploded and was constantly growing in the course of next years. Just to illustrate it is enough to say, that while before 1977 only 25% of leading antitrust cases were private, at the end of 1980s more than 60% of cases were initiated by individuals[174]. The aforementioned tendency continued in the next two decades and reached its summit at the end of 20th century, when at least 90% of all Federal antitrust cases were initiated by private parties[175]. Also nowadays, private actions form a basis for the antitrust law enforcement in the United States. As the Global Competition

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172 K. Holmes, *Public enforcement or private enforcement? Enforcement of competition law in the EC and UK*, European Competition Law Review 2004, Vol. 25(1), p. 25.

173 C. Jones, *Private Enforcement of Anti-trust law in the EU, UK and USA*, Oxford University Press, 1999, p. 80.

174 S. Calkins, *Coming to Praise Criminal Antitrust Enforcement*, in: *European Competition Law Annual: 2006*, Hart Publishing 2007, p. 356.

175 C. Jones, *Private Enforcement of Anti-trust law in the EU, UK and USA*, Oxford University Press, 1999, p. 80.

Review informs[176], the number of federal courts lawsuits initiated by private parties in years 2006–2009 was 4087, what gives an average of over 1000 antitrust claims a year. Moreover, more than 70% of private actions were initiated in the form of class actions[177]. The most recent statistics also shows huge importance of private actions in the enforcement of antitrust law provisions. According to the Administrative Office of the U.S. Courts, private plaintiffs filed 844 antitrust cases in federal district courts in the year 2014[178].

The aforementioned illustrates that the American system of antitrust law enforcement is strongly based on the execution of competition law provisions by private parties. Such construction leads to the increase in the efficiency of a whole enforcement system, since it ensures that the execution of antitrust law is no longer limited to public authorities, but is spread among each actor of the society. As a result, the chances for a discovery and punishment of certain law infringements are significantly raised. And what is often underlined by the US Supreme Court, the level of deterrence is increased[179].

The American experience also confirms that development of private enforcement in the area of antitrust law, cannot be limited to introduction of legal provisions allowing individuals to enforce their rights in courts, but requires establishment of the effective instruments of their protection. Such solutions shall guarantee proper response to the specific requirements of antitrust law, as well as needs of certain society. In case of failure to do so, the concept of private enforcement carries a risk of being only a mere legal construction, hardly applicable in practice.

Referring the aforementioned remarks to the American mechanism of class actions it can be stated, that its particular success in the enforcement of antitrust law was a combination of both legal and cultural factors.

First of all, the class action mechanism guaranteed a most appropriate response to the violations of antitrust law provisions. Since the most common antitrust law infringements were resulting in relatively small injuries suffered

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176 See T.S. Longman, J. Ostoyich, *US Private Enforcement*, The Antitrust Review of the Americas 2011.

177 See J. Ostoyich, D. Emanuelson, P. Normann, *More of the same: Growth in the private antitrust litigation and cutbacks by the US Supreme Court*, The Antitrust Review of Americas 2009.

178 See the statistics available at: http://www.uscourts.gov/uscourts/Statistics/StatisticalTables ForTheFederalJudiciary/2014/june/C02Jun14.pdf [access: 01.08.2015].

179 See for example *Illinois Brick v. State of Illinois*, 431 U.S. 720, 748 (1977).

by a big number of individuals[180], private parties were often refraining from undertaking an action for a recovery due to the practical reasons. High costs of proceedings and low value of potential damages, were the main reasons why individuals were deciding not to exercise their rights in court. In consequence, numerous law violations were not discovered, and several individuals were left without compensation despite suffering an antitrust injury. The most appropriate response to the aforementioned difficulty was to allow individuals to group their interests, and despite small individual value of each injury, initiate collective proceedings. As the District Court of Alabama stated in the *Coleman v. Cannon Oil Co.* case: *"class actions were the most fair and efficient mean of enforcing the law where antitrust violations have been continuous, widespread, and detrimental."*[181]

Secondly, the class action instrument allowed overcoming disequilibrium in the position of individuals injured by antitrust law violation and enterprises committing certain infringement. It significantly strengthened the position of individuals that had to face enterprises within complex legal proceedings.

First of all, by the introduction of opt-out mechanism it guaranteed to cover with a claim the widest possible group of injured parties. It was especially important in case of antitrust law infringements which were often hidden, hard to detect, and thus were not prosecuted by the mean of individual claim. Moreover, the opt-out construction allowed increasing pressure on a defendant, and as a result, raised chances of obtaining compensation by the mean of settlement or class action judgment.

Furthermore, the class action mechanism significantly broaden the scope of proofs of infringement available to victims of violation. Big number of claimants, combined with the liberal discovery rules characteristic for American civil procedure, was increasing the number of potential testimonies and documents being in the possession of plaintiffs.

Finally, the class action construction was giving response to one of the main obstacles of private enforcement in the area of antitrust law, i.e. high costs of proceedings. Thanks to the limitation of costs of the proceedings and introduction of contingency fees agreements, the problem of limited financial resources being in the possession of individuals had a potential to be overcome.

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[180] C.G. Lang, *Class Actions and the US Antitrust Laws: Prerequisites and Interdependencies of the Implementation of a Procedural Device for the Aggregation of Low-Value Claims*, World Competition, Vol. 24(2), 2001, p. 287.

[181] *Coleman v. Cannon Oil Co.*, United States District Court, M.D. Alabama, Southern Division, November 3, 1995.

Apart from the legal and procedural grounds for the great success of class actions in the United States, there was also important cultural factor which allowed for its great importance in the area of competition law enforcement. It refers to the approach of American society towards the issue of law enforcement, which significantly differs from the one known in the European Union. While most of the continental societies are based on the assumption that public authorities shall play the main role in the enforcement of legal provisions, the American legal tradition can be characterised by a strong individualism and increased role of private parties in the law enforcement. So-called "litigation culture", being strongly rooted in the American society, can be described as a specific style of legal contestation, in which construction of claim, search for legal arguments and gathering of evidence are dominated not by judges or public authorities, but by disputing parties[182]. As a result, the position of individuals in the enforcement of legal provisions, and activism of private parties in the protection of their rights, are significantly increased.

Referring these cultural specificities to the American system of antitrust law we may claim, that the private method of enforcement is a natural way of responding to the needs of American society. The strongly rooted "litigation culture" obliged the US legislator to grant far-reaching privileges to individuals, in order to guarantee appropriate protection of their rights. As a result, the mechanism such as class actions, allowing for greater activism of private parties in the enforcement of their rights, became a result of social organisation, and a construction widely acceptable by the American society.

2. Main characteristics of the American system of class actions

The American mechanism of class actions was construed as an instrument aiming to guarantee increased access to justice and better protection of individuals against law violations. The main idea behind its development was to empower private parties with the effective and flexible mechanism of law enforcement that would reduce asymmetry in the position of injured individuals and accused undertakings. In order to achieve this goal, the American legislator proposed solutions intended to facilitate class action proceedings, limit their costs and increase chances for their positive outcome. All of the proposed solutions were supposed to ensure that

[182] R.A. Kagan, *American and European Ways of Law: Six Entrenched Differences*…, p. 4.

individuals suffering injuries resulting from the same law infringement, will have a chance to easily group their interests and effectively exercise their rights in court.

2.1. The principle of certification

According to the Rule 23 of FRCP, private claim in order to proceed as a class action has to fulfil specific requirements. The process during which these requirements are controlled is known as "certification". Its specific construction, as well as importance for the establishment of a claim, are characteristic for the American system of class actions and can be evoked as its first particularity.

The class certification can be defined as a preliminary hearing, by which the class action can only proceed if and when the court makes allowance for the validity of this form of lawsuit[183]. The reasons for class certification are numerous, i.e. avoidance of abusive litigation, efficiency of law enforcement and proper administration of justice. However, what is most important from the perspective of individuals injured by law violation and accused undertakings, is the role played by a certification process in the protection of their interests. The goal of certification process is not only to determine the admissibility of class action proceedings, but also to protect the absent class members and accused undertakings from a violation of their rights.

The class certification shall be differed from the "judgment on receivability", known also in the European systems of civil procedure[184]. While the latter aims to control if all the procedural requirements for initiating civil lawsuits were fulfilled, the certification procedure aims to attain different objective. Its main goal is to guarantee that this specific procedure will not violate the interests of individuals injured by law violation and the rights of parties accused for certain law infringement. Moreover, the certification process aims to ensure that a reference to class action will achieve the principle of good administration of justice in the best possible way[185].

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183 R. Mulheron, *The Class Action in Common Law Legal Systems…*, p. 23.

184 See for example Art. 31 of French Rules on Civil Procedure which states: *"The right of action is available to all those who have a legitimate interest in the success or dismissal of a claim, without prejudice to those cases where the law confers the right of action solely upon persons whom it authorises to raise or oppose a claim, or to defend a particular interest."*

185 M. Leclerc, *Les class actions, du droit américain au droit européen…*, pt. 97, p. 56.

The aforementioned goal is supposed to be achieved by a judicial control, aiming to determine if the particular claim is eligible for class action proceedings. In order to obtain a certification the action shall fulfil following conditions[186]:

- the number of class members is so numerous that joinder of all members is impracticable;
- there are questions of law or facts common to the class;
- the claims or defences of the representative parties are typical of the claims or defences of the class; and
- the representative parties will fairly and adequately protect the interests of the class.

Moreover, in case of damages class actions, which are most often used in case of antitrust law violations, two additional conditions shall be fulfilled, i.e. "predominance" and "superiority".

The first condition, also called as "numerosity" requirement, is fulfilled when the court ascertains that a number of injured parties justifies the use of class action instrument. Due to the fact that FRCP do not specify the minimum number of parties required to satisfy this standard, the court is obliged to decide in each single case whether the class action shall be initiated, or whether it is more appropriate to join individual cases under a joinder claim.

As the American case-law shows, the courts' interpretation of this requirement often varies. Certain courts define a minimum number of claimants as twenty[187], while others allow the class action only when the number of injured parties exceeds forty[188]. Moreover, the maximum number of claimants varies in the American courts' jurisprudence from one to ten millions of claimants[189]. All this illustrates, that while the "numerosity" condition is concerned, the predictability of court's decision is limited.

The second condition, known also as "commonality" requirement, foresees that the class members shall share at least one legal or factual issue forming the basis for their claim[190]. According to the Supreme Court's judgment rendered in *General Telephone v. Falcon* case, the goal of this requirement is to ensure that: *"the named plaintiff's claim and the class claims*

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186 See in more details I.B. Mika, D. Kasprzycki, *Class action a ochrona interesów konsumentów,* Przegląd Prawa Handlowego 2000, No. 12, pp. 14 and following.

187 See for example *Cox v. American Cast Iron Pipe Company,* 784 F2d 1546 (11th Cir. 1986).

188 See for example *Moreno-Spinosa v. J&J Ag. Prods.,* 247 F. R.D 686, 688 (S. D. Fla. 2007).

189 D. Mainguy, *L'introduction en droit francais des class actions,* LPA, 22.12.2005, No. 254, p. 6.

190 FRCP 23(a)(2).

are so interrelated that the interests of the class members will be fairly and adequately protected in their absence."[191] In case of antitrust law violations, the commonality requirement is fulfilled once the injuries suffered by the members of a group result from the same anticompetitive practice.

The third condition, so-called "typicality" requirement, unlike the "numerosity" and "commonality" conditions which focus on the characteristics of a class, draws its attention to the person of representative plaintiff[192]. As the Supreme Court held in *General Telephone Co. of the Northwest v. Equal Employment Opportunity Commission* case, the goal of the typicality requirement is to: *"limit the class claims to those fairly encompassed by the named plaintiffs' claims."*[193] The goal of "typicality" requirement is to ensure that the claims of class representatives (lead plaintiffs) will be similar enough, to guarantee that the facts proven by them will also prove the claims of a whole class[194]. In order to determine the fulfilment of "typicality" requirement, the court shall take into consideration: *"whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same conduct."*[195] Elements which may limit or exclude typicality include: the existence of special facts underlying the representative plaintiff's claim or the presence of unique defences that may be raised against such a claim[196].

The last condition that shall be fulfilled is the "adequacy" requirement. Similarly as "typicality", it refers to the characteristics of a representative plaintiff rather than to the whole class. It concerns also the attorney representing a group, whose experience, legal knowledge and current position shall guarantee full impartiality and proper level of legal expertise. The main goal of "adequacy" requirement is to ensure that the interests of class will be fully and properly represented by its representatives. In order to achieve this objective, the judge examines the class representative's willingness and ability to pursue a claim. Moreover, the class counsel shall prove to have required experience in handling such an action, as well as legal

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191 *General Telephone v. Falcon*, 457 U.S. 147 (1982), p. 157 no. 13.

192 W. Rubenstein, A. Conte, H.B. Newberg, *Newberg on Class Actions*. *Prerequisites for Maintaining a Class Action*, 4th ed. 2002, §3.13, pp. 316–317.

193 *General Telephone Co. of the Northwest v. Equal Employment Opportunity Commission*, 446 U.S. 318 (1980), p. 330.

194 P. Karlsgodt, *World Class Actions. A Guide to Group and Representative Actions around the Globe*, Oxford University Press 2012, p. 23; W. Rubenstein, A. Conte, H. B. Newberg, *Newberg on Class Actions*…, pp. 316–317.

195 *Auction houses antitrust litigation*, 193 F.R.D (S.D.N.Y. 2000), pp. 162, 164.

196 W. Rubenstein, A. Conte, H.B. Newberg, *Newberg on Class Actions*…, §3.14.

knowledge concerning the subject of claim[197]. Finally, the representative plaintiff shall confirm its financial ability to initiate an action and carry it on, also through the appellation.

Apart from the four general conditions for certification, two additional elements shall be fulfilled in case of damages class actions specified under Rule 23(b)(3) of FRCP.

The first requirement is known as "predominance" condition. It foresees that the legal or factual issues that are common to all represented parties shall predominate the questions of law or facts that are only relevant in the individual claims. In consequence, the general condition of commonality, rather easy to satisfy in non-damages class actions, is significantly intensified in case of damages claims. Moreover, wide discretion as far as determining the fulfilment of predominance condition is left to the judge. While the general criterions for its achievement are widely accepted, i.e. similar legal grounds for action; similar factual grounds for action; common proofs of law violation, their interpretation in each single case may vary. In consequence, the predictability of court's decision on the fulfilment of "predominance" condition, especially in complex antitrust proceedings, may be significantly limited.

The second specific requirement concerning damages class actions refers to the issue of "superiority". It requires the court to weigh the class action treatment of case against other possible methods of dispute resolution. The main goal of such reasoning shall be to answer if a class action is the best possible method of resolving a dispute. It aims also to ensure that the full protection of individuals will be achieved in accordance with the best administration of justice. In consequence, such elements as costs of the proceedings, access to proofs of violation or a possibility of individual claim are analysed. If in the result of such reasoning the judge may state that the class action predominates over the other methods of dispute resolution, the aforementioned condition is fulfilled.

The construction of certification process, and complexity of this stage of the proceedings, illustrate that the American legislator was fully conscious of the particularity of the analysed mechanism of law enforcement. By the introduction of specific requirements for the commencement of class action, it aimed to ensure that the interests of injured parties will be well protected, and the risks of possible abuses of group litigation mechanism will be avoided. Because as it was underlined: *"the class actions are sufficiently*

[197] *Ibidem*, § 3.21.

different from unitary litigation to require a special judicial filter to weed out the inappropriate cases."[198]

Undoubtedly, the construction allowing to eliminate unfounded claims already at the first stage of proceedings shall be positively estimated. It can be a perfect response to the problem of mass and abusive litigation, motivated rather by economic reasons than the need of fairness. And as some commentators underline, it can be regarded as the most attractive feature of the American class action mechanism[199].

The aforementioned characteristic of American class action mechanism is also especially important once analysed from the European perspective, often criticising the American solution. As the certification mechanism shows, the safeguards against the abuse exist in the American system. However, in order to be fully effective and prevent the judicial system from mass and unfounded litigation, they need to be properly applied by the courts.

2.2. The rules on formation of a group

The rules on group formation construe another particularity of the American system of class actions. Its specific construction aims to guarantee that the class action will cover the widest possible group of injured individuals, and in consequence, will ensure strong deterrence effect of the group litigation mechanism.

The construction of a group can be divided into two stages. The first stage takes place already during the process of certification. It requires a representative plaintiff to properly define a class, and in consequence, to determine the scope of potential claimants. Due to the fact that defining process has a crucial meaning for further development of the proceedings, it has to be strictly controlled by the court. While defining the class a representative litigant shall follow several criterions.

First of all, the class definition shall be ascertainable[200]. It means that the definition cannot be too vague and may not lead to over inclusion of claimants into the action. Moreover, it shall be based on some objective criterions, allowing to determine which individuals fall under its scope. As an example we can say that in case of anticompetitive practice concerning price-fixing, it would be rather required to state that class comprises of

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198 R. Mulheron, *The Class Action in Common Law Legal Systems…*, p. 24.

199 *Ibidem*, p. 26.

200 See for example *De Bremaecker v. Short*, 433 F.2d 733 (5th Cir. 1970).

"all customers of the defendant who bought a specific, overvalued product in a particular period of time" than defining a class as "all actual and potential customers of a defendant." Furthermore, the class definition shall be limited to parties suffering the same type of injury. Finally, the legal and factual grounds for a claim shall be the same for each individual forming a group[201].

The aforementioned shows that defining a group at the first stage of class action proceedings may have crucial consequences for its further development. It does not only determine the potential scope of class, but it also establishes the mutual position of parties to the proceedings. In case of wide definition of a class, initial disequilibrium between the defendant and individuals injured by law violation is significantly reduced. Whereas narrow definitions, run a risk that the eventual class will not be strong enough to oppose the defendant during the complex antitrust litigation.

The second stage of group's formation starts once the decision on certification was issued by the court. If all the conditions for the certification were fulfilled and a class was properly defined, the court examining a demand certifies the class. Such decision finally opens a door for group proceedings. At this stage another particularity of American-style class actions appears, i.e. opt-out mechanism.

As it was mentioned before, while most of the European jurisdictions argue in favour of opt-in mechanism, the American system proposes other solution[202]. The opt-out mechanism foresees that individuals are bound by the class action ruling, unless they take an affirmative step to express that they wish to be excluded from the claim[203]. Such solution has crucial consequences for a lead plaintiff, since it is no longer required to wait for the acceptance of each single individual to join the claim, but their inactivity is satisfactory to form the group. As a result, the class action proceedings are accelerated and the chances for covering with a claim the widest possible group of injured parties are significantly increased.

The opt-out procedure can be divided into two stages. First, concerns the notification of potential class members about commencement of the proceedings. The second stage requires persons who do not want to become members of a group, to lodge opt-out notices in order to exclude from the litigation.

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201 See I.B. Mika, D. Kasprzycki, *Class action…*, p. 14.

202 T. Jaworski, P. Radzimierski, *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym…*, pp. 6–8.

203 R. Mulheron, *The Class Action in Common Law Legal Systems…*, p. 34.

The first stage of opt-out procedure starts once the class was certified. The general rule is that notification is ordered by the court, which controls its form, as well as the specific elements. According to the Rule 23(b)(2) of FRCP: *"The court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."* As we can see from this provision, the goal of a notice shall be to inform all potential members of the class, falling under the scope of previously formulated class definition, about the class action proceedings. Moreover, such notice shall be easy to understand (*"the notice must clearly and concisely state in plain, easily understood language"*), and effective in informing the widest possible group of claimants (*"the best notice that is practicable under the circumstances"*). In order to fulfil this condition, the US-courts most often decide to issue a letter to the potential victims of law infringement. Nevertheless, in case where the individual identification of injured individuals is impossible or impractical, other methods, such as publication in the newspapers, magazines or even on-line are applied. Because as P. G. Karlsgodt underlines in his analysis of American system of class actions: *"With the widespread use of the Internet, websites have become a common feature in most class action notice programs"*[204].

The second stage of opt-out proceedings takes place once a notification was delivered to the potential claimants. Its goal is to determine the group of claimants, by giving a possibility to opt-out from the proceedings to the parties injured by law violation. According to the opt-out mechanism, individual informed about the class action proceedings may exercise his right to opt-out from the litigation, by lodging an opt-out notice in a specific period of time. In case of failure to do so, he automatically becomes a member of a group and is bound by the eventual class action judgment. Moreover, he loses his right to the individual action, in case of not being satisfied by a decision rendered in class action proceedings.

As it is often argued, the opt-out solution is an instrument significantly increasing efficiency of class action mechanism[205].

First of all, thanks to covering with a claim the greater number of victims of violation, it raises the level of deterrence and reduces asymmetry in the position of defendant and injured individuals.

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[204] P. Karlsgodt, *World Class Actions…*, p. 33.

[205] See for example A. Kubas, R. Kos, *Opinia w sprawie projektu ustawy o dochodzeniu roszczeń w postępowaniu grupowym*, Druk sejmowy No. 1829, from 20 October 2009, arguing in favour of opt-out mechanism and evoking it as a model for the Polish approach to group litigation.

Secondly, it strengthens chances for a full compensation, since it allows including in group litigation persons who would normally, due to the reasons of ignorance, inertia or unfamiliarity, refrain from undertaking an action permitting to execute their rights[206].

Finally, the opt-out mechanism significantly facilitates and accelerates the class action proceedings. That is because, individual statement to join a group, characteristic for the opt-in solution, is replaced by a general presumption that each individual injured by a law infringement becomes a member of a class.

Despite the aforementioned practical advantages, the American opt-out mechanism is strongly criticised in Europe. Many European commentators underline that the opt-out construction cannot be reconciled with the civil law legal tradition of EU Member States[207]. The European Commission is even arguing that eventual introduction of opt-out mechanism in the EU, would surely lead to abuse and violation of individuals' rights and freedoms[208].

2.3. Pre-trial discovery and disclosure rules

The third characteristic of American class action mechanism focuses on the rules on discovery. As it was already mentioned, one of the main obstacles of private enforcement is a limited number of proofs of violation being in the possession of injured individuals. This problem is especially visible in case of antitrust law violations which often require parties claiming for compensation to undertake complex legal and economical reasoning in order to prove that certain behaviour resulted in the antitrust injury. And while the European legal systems are rather reluctant to introduce broad discovery rules, the FRCP propose a solution ensuring wider access to evidence.

According to the Rule 8(a) of FRCP, a party initiating civil lawsuit is required to set forth a "notice pleading". The delivery of this document, consisting of three statements, i.e. statement of the grounds upon which the court's jurisdiction depends; statement of the claim showing that the pleader is entitled to relief; and demand for judgment, already entitles

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206 B. Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure I,* 81 Harvard Law Review (1967), pp. 356, 398.

207 P.G. Karlsgodt, *World class actions…*, p. 166; S. Brunengo-Basso, *L'émergence de l'action de groupe…*, p. 250.

208 Commission Staff Working Paper accompanying White Paper on damages actions for breach of EC antitrust rules, /* SEC/2008/0404 final */, pt. 67.

a plaintiff to issue discovery requests[209]. Through such requests, plaintiff can ask for a discovery of certain documents, or testimony of specific facts from other party to the proceedings. Moreover, the claimant can issue a request for admission which obliges defendant to admit or deny the truth or factual matters.

Such broad scope of elements covered by the discovery requests, and facility with which certain information can be obtained, constitute significant advantage for parties claiming for compensation. As P. Victor and C.V. Roberts state, while referring to antitrust damages actions: *"It enables them [aut.: individuals] to file antitrust claims without initially having evidence that would be anywhere near sufficient to prove their case in court."*[210] Obviously, there are certain limits to the discovery requests. They involve the possibility of objection to discovery that appears irrelevant, annoying, embarrassing, oppressive or unduly burdensome or expensive to the party. They also concern the possibility to refuse a discovery of information, subject to evidentiary privileges or protected from disclosure. Nevertheless, the aforementioned limits do not undermine the liberal character of discovery rules in the American civil procedure.

The above rules on discovery apply also to the class actions. They allow strengthening the power of a class, obtaining wider access to proofs of violation, and as a result, increase pressure on defendant. Moreover, in case of class action, they create grounds for so-called pre-certification discovery, permitting representative plaintiff to obtain certain information even before the class was certified by the court.

The pre-certification discovery is regulated under Rule 26(a) of FRCP. It concerns a disclosure by a defendant of certain documents or information required to prove the fulfilment of certification requirements. The plaintiff is generally entitled to pre-certification discovery on the issues pertaining to class certification. Nevertheless, in some cases disclosure on the merits of a claim is also asserted[211]. Therefore, even before deciding whether a class action can be brought, certain amount of a factual discovery may take place.

The aforementioned reasoning illustrates, that American legislator once again tried to empower individuals with the effective mechanisms of

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209 See Art. 26 of Federal Rules of Civil Procedure.

210 A.P. Victor, C.V. Roberts, *Consumer enforcement of federal and state antitrust laws in the United States*, in: E.A. Raffaelli (ed.), *VI Conference Antitrust between EC law and national law*, Brussels 2005, p. 363.

211 R.J. Lazarus, *Discovery prior to class certification: new considerations and challenges*, Mealey's Litigation Report: Class Actions, Vol. 9, No. 21, January 2010, pp. 1–6.

protection of their rights. Thanks to the introduction of liberal discovery rules, the initial disequilibrium in the position of parties injured by competition law violation and enterprises committing infringement is significantly reduced. As a result, individuals often limited in financial resources and effective methods of evidence collection, are put at the equal procedural footing with the law perpetrators. Nevertheless, while the general goal of such construction shall be positively estimated, its specific elements may sometimes lead to abuse. Pre-certification discovery, facility in formulating discovery requests and limited control of a court over disclosure of certain documents, may lead to transfer of a too heavy burden on defendants. In consequence, the initial disequilibrium in the positions of parties to the proceedings, may be replaced by a risk of violation of "equality of arms" principle and dictate of groups of claimants.

This "black scenario" may be regarded as exaggerated, however, its goal is to show that too liberal discovery rules may create a risk of abuse. This risk is also recognised by the European Commission, which while referring to the idea of broad discovery rules in the European system of competition law enforcement stated: "*Whilst it is essential to overcome this structural information asymmetry and to improve victims' access to relevant evidence, it is also important to avoid the negative effects of overly broad and burdensome disclosure obligations, including the risk of abuses."*[212] In consequence, it argued in favour of a minimum level of disclosure which in its opinion could be the only way allowing to guarantee that excess would be avoided and overly broad and burdensome disclosure obligations would not be imposed on defendants[213].

Both American and European approach to discovery rules have advantages and drawbacks, nevertheless, as the analysis of recent changes in both systems of law enforcement illustrates, some compromise is required. While the European Union tries to find a solution guaranteeing wider access to proofs of violation in antitrust cases (the recent European case-law on access to proofs; the Damages Directive)[214], the American Supreme

[212] European Commission, White paper on damages actions for breach of the EC antitrust rules /*COM/2008/0165 final*/, p. 2.2.

[213] See Commission Staff Working Paper accompanying White Paper on damages actions for breach of EC antitrust rules, /* SEC/2008/0404 final */, pt. 103 and the proposals on a discovery of evidence included in the Art. 5–8 of the Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, p. 1–19.

[214] See in details Part I Chapter 2 Point I.

Court[215] and US legislator[216] try to guarantee wider control over discovery process and the limitation of its negative impact on enterprises and civil procedure. It confirms that changes in this area of group litigation shall be made, and the rules on discovery need to guarantee respect to the interests of both parties to the proceedings.

2.4. Contingency-fees and cost-shifting rules

The last characteristic of the American-style class actions concerns the issue of financing. This element has important practical meaning, and often determines the efficiency of a group litigation mechanism in a specific legal system.

Firstly, it shall be underlined that while all the European jurisdictions are based on the "loser pays" principle, the American law proposes different solution. According to the Rule 54(d)(1) of FRCP, the losing party is obliged to pay the court costs of the prevailing party. Nevertheless, as the outcome of application of this rule shows, it does not comprise attorney's fees which are supposed to be covered by each party to the proceedings, in spite of the case result[217]. In consequence, the eventual costs of a lawsuit are limited only to the parties own expenses and the costs of court proceedings. The main reason for such construction stems from the necessity of guaranteeing the widest possible access to justice to the victims of law infringements[218]. Because as the US Supreme Court stated in *Fleishmann Distilling Corp. v. Maier Brewing Co.* case: *"since litigation is at best uncertain, one should not be penalised for merely defending or prosecuting a lawsuit … The poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel."*[219] Therefore, by the limitation of costs of the proceedings and introduction of "no-indemnity" rule, the American courts try to motivate individuals to initiate private actions in order to protect their rights.

The general construction of cost-shifting rules is additionally strengthened in favour of plaintiff in the area of antitrust law. According to §26 of Clayton Act: *"in any action under this section in which the plaintiff substantially prevails,*

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215 *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007).

216 It concerned in particular adoption of Class Actions Fairness Act of 2005.

217 J.R. Maxeiner, *Cost and Fee Allocation in Civil Procedure*, American Journal of Comparative Law, Vol. 58, No. Supplemental, 2010.

218 D. Woods, *Private enforcement of antitrust rules – modernization of the EU rules and the road ahead*, Loyola Consumer Law Review 2004, p. 437.

219 *Fleishmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967).

the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff". Consequently, apart from exemption of paying defendant's attorney's fees in case of a loss, the private party claiming for damages in case of antitrust law violation is additionally entitled to the reimbursement of its attorney's fees in case of a "substantial" prevail over defendant. Obviously, the possibility of such reimbursement, as well as its specific amount, still need to be decided by a court, however, the mere existence of such possibility may additionally encourage private parties to initiate lawsuits in case of antitrust law infringements.

The second characteristic element of the American approach to financing concerns contingency fees. While the aforementioned instrument is strongly criticised in the European Union, it can be recognised as one of the fundaments of the American-style class actions system. According to the American law, private plaintiffs initiating an action for damages are entitled, prior to the commencement of the proceedings, to conclude a contingency fees agreement with a counsel[220]. Under such agreement, the plaintiff is not obliged to pay any fees to his attorney, unless and until the plaintiff collects damages. In exchange, the attorney is entitled to obtain specific percentage of awarded damages in case of a positive outcome of the claim. As a result of such solution, the costs of an action, as well as the risks of its commencement, are significantly limited. It is particularly advantageous for the private plaintiffs with limited financial resources, since it allows them to initiate damages action without having to fund the proceedings along the way. Moreover, it is also attractive for legal attorneys, since it permits them to obtain certain percentage of awarded damages, being relatively high in the American system of treble damages.

The aforementioned construction, once analysed from the class actions' perspective, can be regarded as the most appropriate method of financing.

First of all, the group litigation is often characterised by the increased costs of the proceedings and high level of damages. In such a case, the possibility of concluding contingency fees agreement can constitute perfect response to the interests of injured individuals and legal attorneys. While the later obtain possibility of gaining high financial profits in case of a positive outcome of the proceedings, the members of a class are granted exemption from financing a claim, what is often a main obstacle in initiating private action.

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[220] E. McCarthy, A. Matlas, M. Bay, J. Ruiz-Calzado, *Litigation culture versus enforcement culture…*, p. 39.

Secondly, the contingency fees agreements may have positive influence on the efficiency of class actions. That is because, the lawyers encouraged by a chance of obtaining profits, will be more devoted to conduct of the proceedings, and more determined to win the case.

Finally, in case of antitrust damages actions, often characterised by numerous injuries of limited value, the contingency fees agreements may be the only mean allowing injured parties to finance a claim.

The specificity of class actions, i.e. numerous claimants and difficulties with concluding contingency fees agreement with each single individual, required American courts to develop specific approach to contingency fees in case of class actions. The so-called "common fund doctrine" established in the US jurisprudence, mirrors the contingency fees contracts in the area of class actions, and provides for a specific solution in the area of group litigation[221]. According to this doctrine, the legal attorney representing a group is rewarded from the common class fund, created from the recovery awarded to the class as a whole. In consequence, the remuneration of a lawyer is still calculated as a percentage of awarded damages, whereas each member of a group participates in covering the costs of representation[222]. The reason for such construction is guaranteeing that the class counsel will be properly rewarded, and none of the class members will refrain from incurring the costs of litigation. Because as the US Supreme Court stated in *Trustees v. Greenough* case: *"who in good faith maintains the necessary litigation to save it from waste and secure its proper application is entitled in equity to the reimbursement of his costs as between solicitor and client, either out of the fund itself or by proportionate contributions from those who receive the benefit of the litigation."*[223]

In view of the aforementioned reasoning, we can state that the American law regulates the instrument of class actions in a complex and coherent way. It introduces several solutions which not only encourage parties to use class action mechanism, but also aim to protect their interests within the proceedings. Moreover, through the specific construction of class action mechanism, the American law introduces an instrument which guarantees higher efficiency of antitrust law enforcement. As both individuals and

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221 S.E. Keske, *Group litigation in European competition law…*, p. 233.

222 M.K. Bedard, *Attorney fee award and the common fund doctrine: hands in the plaintiff's pockets?,* available at: http://www.plaintiffmagazine.com/May08%20articles/Bedard_Attorney%20fee%20awards%20and%20the%20common%20fund%20doctrine-Hands%20in%20the%20plaintiffs%20pockets_Plaintiff%20magazine.pdf [access: 03.08.2015].

223 *Trustees v. Greenough*, 105 U.S. 527 (1881), pt. 4.

public authorities underline, the existence of class action mechanism is crucial for development of private enforcement in the area of American antitrust law, and fully responds to the needs of individuals injured by competition law violations[224].

Firstly, it results from the fact that class actions mechanism allows gathering in a one claim numerous victims of antitrust law violations that are often not able to solely initiate private lawsuits. Secondly, it strengthens the negotiating power of injured parties and increases pressure on competition law violators. Thirdly, due to the possibility of obtaining high financial awards, the class action mechanism provides a strong incentive for legal counsels to prosecute private actions. Finally, the class actions allow covering with a claim the widest possible group of injured individuals, what significantly increases the possibility of a proper achievement of compensation and deterrence principles.

Nevertheless, despite numerous advantages of the American-style class actions, it is not a mechanism free of drawbacks. Its application often shows that its general construction, as well as specific elements, may often lead to abuse. For this reason, many European commentators, as well as the European Commission, often underline that one of the first goals of the European Union while undertaking initiative in the area of group litigation, is to avoid a risk of abuse generated by the American-style class actions[225]. Accordingly, different American mechanisms working effectively in the United States, such as liberal discovery rules, contingency fees or opt-out mechanism, were rejected in the European Union.

Undoubtedly, this approach fully corresponds to the European Commission's standpoint, arguing from the beginning of European debate on group litigation in favour of European-style collective redress, being a response to the American concept of class actions[226]. Nevertheless, after one decade of European discussion on group litigation which still lacks a coherent proposal on collective redress, the following question shall be asked:

"Is it possible to create an effective mechanism of group litigation without the reference to the American instrument of class actions?"

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224 C.G. Lang, *Class Actions and the US Antitrust Laws…*, pp. 301–302.

225 M. Gac, *Collective redress v. class actions…*, pp. 116–120.

226 See European Commission, Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM(2005) 672 final; European Commission, White paper on damages actions for breach of the EC antitrust rules /*COM/2008/0165 final*/; and European Commission, Green Paper on Consumer Collective Redress, COM(2008) 794 final.

Or in other words:

"Shouldn't the European approach, based on a general presumption of divergence between the American and European legal systems, be revisited?"

Before answering these questions, a reference to the main drawbacks of the American mechanism of class actions shall be made. Only in this way, the grounds for the European fear of US-style collective redress can be understood. Therefore, the following point will refer to such issues as instrumental use of class actions, violation of a right to free trial and the risk of over-deterrence, which are often evoked as the main drawbacks of American class action mechanism.

3. Main drawbacks of the American-style class actions

3.1. Instrumental use of class actions

The first drawback of American-style class actions concerns its instrumental use by the lawyers and representative plaintiffs. It can be understood as such usage of class action mechanism that is rather focused on increasing pressure on a defendant, than on achieving civil justice. Such situation runs a risk of development of unfounded claims and abusive litigation, being often evoked as one of the main disadvantages of American class action mechanism.

The first factor leading to such difficulty are broad discovery rules available to group claimants. As it was already mentioned, the possibility of wide access to proofs of violations, the broad scope of elements covered by the discovery requests, facility with which certain information can be obtained, as well as possibility of pre-certification discovery, significantly strengthen the plaintiffs in their dispute with the defendants. In consequence, individuals claiming to suffer anticompetitive injury are keener to initiate a civil lawsuit, and often decide to start private proceedings as soon as they obtain information on the potential anticompetitive behaviour. Undoubtedly, such construction has several advantages once analysed from the perspective of individuals. Nevertheless, it may run serious doubts once the position of defendants and administration of justice are concerned.

Firstly, wide and liberal discovery rules assume a transfer of a significant part of a responsibility for obtaining a proof of violation from a plaintiff to a defendant. Secondly, they tend to reverse a traditional principle of civil lawsuit, stating that the burden of proof always lies with the person who lays charges. Finally, they run a risk of unfounded litigation. Because

as P. Victor and C.V. Roberts underline, the construction foreseeing wide and liberal discovery rules *"enables them [aut.: plaintiffs] to file antitrust claims without initially having evidence that would be anywhere near sufficient to prove their case in court."*[227]

The second factor running a risk of abusive litigation relates to the rules on financing. While the "no-indemnity" rule and availability of contingency fees agreements significantly reduce the costs of proceedings, they also eliminate one of the filters against abusive litigation. The necessity of paying only own costs of legal representation, and exemption of covering the costs of proceedings, create a factor motivating individuals to initiate civil lawsuit, even if chances of its success are limited. As a result, the risk of unfounded claims and abusive litigation is increased.

Finally, as the American practice of class actions shows, the last factor creating grounds for abuse and instrumental use of group litigation is a settlement procedure. The instrument regulated under Rule 23(e) of FRCP allows a defendant to settle with the class, before the class action judgment was rendered by the court. The general idea behind this institution is that defendant, in exchange for some form of class wide relief, obtains a release of claims on behalf of the class. As P. G. Karlsgodt explains, the decision to settle may be described as *"buying by the defendant peace from future litigation from both the named plaintiff and absent class members."*[228] And while the general construction of settlements, allowing accelerating the class action proceedings and guaranteeing compensation to injured parties is widely accepted, the practice of its application raises a lot of controversies.

The first group of critics concentrates on the issue of "blackmail settlements". It concerns a situation in which a defendant is forced to settle, even when the class claim is weak or marginal[229]. The aforementioned situation is often a consequence of the wide privileges granted to plaintiffs which lead to increased pressure on defendants within the class action proceedings. As a result, the defendants once faced with the numerous claimants, empowered by liberal discovery rules and "entrepreneurial" attorneys, decide to settle and avoid a loss resulting from a court's decision being an "or all nothing" verdict. As B. Hay and D. Rosenberg argue: *"if the defendant is risk-averse, it will be willing to pay a handsome premium*

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[227] A.P. Victor, C.V. Roberts, *Consumer enforcement of federal and state antitrust laws…*, p. 363.

[228] P. Karlsgodt, *World Class Actions…*, p. 36.

[229] T. Jaworski, P. Radzimierski, *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym…*, p. 6.

to avoid going to trial, even if its chances of winning at trial are strong."[230] The consequence of such outcome is detrimental for the whole judicial system, because as the aforementioned authors claim, the class' recovery will rather reflect the defendant's fear of staking everything on a single trial, than the merit of claim[231].

The second group of critics concerning the class action settlements focuses on the position of plaintiff, and refers to the issue of "sweetheart settlements"[232]. They concern a situation in which a defendant and a class counsel have a joint incentive to negotiate a settlement. It results from the fact that both are interested in fast termination of the proceedings and satisfaction of their financial interests. That is why, legal attorneys will be often keen to negotiate a settlement guaranteeing to cover their fees, instead of undertaking long and complex judicial proceedings. In consequence, the class action members will be obliged to satisfy with the amount negotiated within the settlement process, and deprived of a chance to obtain full compensation. In the opinion of proponents of this theory, the risk of "selling out" the members of a class is potentially high in the American system of class actions, due to the fact that a judge has limited information about the value of the class claims, and cannot easily verify whether a settlement provides appropriate recovery[233].

The aforementioned reasoning illustrates that the mechanisms often evoked as the principle advantages of American-style class actions, i.e. liberal discovery rules, limited costs of proceedings and settlements, can become a "double-edged sword" once applied in practice. Their limited control by a judge, additionally reinforce by the US-like "litigation culture", may lead to abuse of class action mechanism. Mainly for these reasons, the latest proposals of reform of a class action mechanism in US argued in favour of higher scrutiny and greater judicial control as far as the settlement

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230 B. Hay, D. Rosenberg, *"Sweetheart" and "blackmail" settlements in class actions: reality and remedy*, 75 Notre Dame Law Review, 1999–2000, p. 1392

231 *Ibidem*, p. 1392.

232 See in more details on this issue J.C. Coffee Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Columbia Law Review (1995), pp. 1347–48; S.P. Koniak, *Feasting While the Widows Weep: Georgine v. Amchem Products, Inc.*, 80 Cornell Law Review (1995), pp. 1055–56; S.P. Koniak, G.M. Cohen, *Under Cloak of Settlement*, 82 Virginia Law Review (1996), pp. 1053–57; K. Reszczyk, *Zastosowanie powództw zbiorowych na przykładach ustawodawstwa Stanów Zjednoczonych Ameryki i wybranych ustawodawstw europejskich,* RP 2009, No. 5, p. 30; A. Reszka, P. Skórski, *Projekt polskiej instytucji powództwa zbiorowego na tle modelu amerykańskiego*, RP 2009, No. 3, p. 43.

233 B. Hay, D. Rosenberg, "*Sweetheart" and "blackmail" settlements…*, p. 1390.

procedure and discovery process are concerned[234]. This only confirms that certain limits to group litigation procedure shall be introduced, in order to guarantee that the asymmetry between a defendant and injured individual, as well as limited access to justice, will not be replaced by the risk of massive and unfounded litigation.

3.2. Violation of a right to free trial

The second drawback of a class action mechanism, often evoked as the main obstacle to its introduction in Europe, concerns the risk of violation of a right to free trial.

As it was previously described, the American class action mechanism is based on the opt-out principle. It foresees that the outcome of class action proceedings is binding to all members of a group, unless they have opted-out from the claim. In other words, a victim of a law infringement has to clearly refuse its eventual participation in the group, in order not to become its member. Therefore, if a party does not express his will to withdraw from a group, it becomes its part and loses a right to the eventual individual claim. Despite several positive consequences of such solution, e.g. limitation of asymmetry in the position of a defendant and a plaintiff, increase in the level of deterrence and greater compensation of victims of violations, the aforementioned mechanism has been often evoked as a source of abuse.

Firstly, many commentators underline that the opt-out construction runs a risk of limitation of a right to free trial[235]. It results mainly from the fact that a representative plaintiff can initiate an action without an express consent of the parties injured by a law infringement. Moreover, the rights of individuals can be infringed at the stage of notification. Due to the difficulties in communicating a notice to the absent class members, their right to decide whether to remain within the class or to opt-out from an

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[234] See for example *The U.S. Class Action Fairness Act of 2005*, 28 U.S.C. Sections 1332(d), 1453, and 1711–1715; see also S.J. Shapiro, *Applying the jurisdictional provisions of the Class Fairness Act of 2005: In search of a sensible judicial approach*, 59 Baylor Law Review (2007); S.B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: a Preliminary View*, University of Pennsylvania Law Review (2008), Vol. 156, No. 6, pp. 1439–1551.

[235] R. Mulheron, *The Class Action in Common Law Legal Systems…*, p. 37; M. Leclerc, *Les class actions, du droit américain au droit européen...*, p. 124; F. Polverino, *A Class Action Model For Antitrust Damages Litigation In The European Union,* University of Chicago Law School, Working Paper Series, 29.08.2006, p. 35.

action may be often hindered[236]. As a result, the fulfilment of a *nul ne plaide par procureur* principle may be put under question.

Secondly, the opt-out mechanism runs a risk that individuals covered by a claim, will have limited, or even none control over the conduct of class action proceedings. Because as E. H. Cooper underlines: *"the selection of the representative plaintiff, the choice of defendants, the causes of action alleged, the selection of class lawyers, and the timing of the litigation, are all matters over which the absent class members loses control to a large extent, but which can greatly influence the outcome of the litigation."*[237] Thus, several elements being crucial for the appropriate protection of individuals' rights in court, will stay beyond the control of a large number of represented claimants.

Finally, the aforementioned limitations of a right to free trial may be additionally aggravated by the fact that the interests of legal attorneys and represented class members will often differ. It will be especially visible in case of previously mentioned "sweetheart settlements" which run the risk that class members will be simply sold-out by lawyers interested in obtaining profits[238]. Therefore, as M. Gilles underlines: *"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."*

The above problems illustrate that the introduction of solutions intended to increase efficiency of class action instrument, may often lead to several limitations in a course of its application. They also confirm that the negative consequences of introduced reforms, may turn against parties being in the centre of their attention, i.e. individuals injured by law infringements. Nevertheless, despite the potential risks run by innovative and far-reaching mechanism in the area of group litigation, the American legislator does not seem to depart from a line stroke at the end of 1960s. As different commentators of US class action mechanism explain, the reason is that: *"the effective and economic handling of group actions necessarily requires a diminution, compromise or adjustment of the rights of individual litigants for the greater good of the action as a whole."*[239]

This pragmatic approach finds also a confirmation in the position of US Supreme Court, which while analysing conformity of the opt-out mechanism

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236 R. Mulheron, *The Class Action in Common Law Legal Systems…*, p. 62.

237 E.H. Cooper, *Class Action Advice in the Form of Questions*, 11 Duke Journal of Comparative and International Law (2001), p. 223.

238 M. Gilles, *Exploding the Class Action Agency Costs Myth…*, p. 103.

239 H. Woolf, *Access to Justice Inquiry…*, pt. [2], [2(a)].

with Fifth and Fourteenth Amendments of American Constitution, ensuring a right to be heard, stated: *"a minimum requirement necessary to fulfil a right to be heard principle is that class action members are adequately represented, received "best practicable" notice of the class action and were afforded a right to exclude from the proceedings."*[240] Moreover, as it claimed while referring to the position of absent class members: *"The court and named plaintiffs protect their interests. Besides this continuing solicitude for their rights, absent plaintiff class members are not subject to other burdens imposed upon defendants. They need not to hire counsel or appear. […] She or he may sit back and allow the litigation to run its course, content in knowing that there are safeguards for [her or] his protection."*[241]

As we can see from the above, despite recognising the potential risk of opt-out mechanism, the US Supreme Court argued in favour of its application. By weighing the interests of claimants and defendants, it confirmed that guaranteeing only minimum standards of individuals' protection is sufficient to preserve the interests of injured parties, and in the same time, necessary for the proper and efficient functioning of a class action instrument.

3.3. The risk of over-deterrence

The third group of critics of the American system of class actions concentrates on the issue of deterrence. They result from the fact that the American construction aims to not only increase the access to justice and guarantee full compensation of victims of violations, but also to deter enterprises from committing illegal behaviours[242]. While this general goal shall be positively evaluated, the ways of its achievement are often questioned.

The first factor running the risk of over-deterrence in case of antitrust class actions concerns the issue of certification. As it was previously described, this stage of group proceedings has a crucial meaning for both parties to legal action. It determines if, and under which conditions, the class action can be launched. Therefore, it plays a role of a filter which once properly applied, allows separating unfounded from well justified claims. However, if the certification requirements are interpreted in a too broad or liberal manner, the risk of abuse may occur. It can result in the

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[240] *Phillips Petroleum Co v Shutts,* 472 US, pt. 808, 812-14, 105 S Ct 2965 (1985).
[241] *Ibidem*, pt. 797, 809–10.
[242] M. Leclerc, *Les class actions, du droit américain au droit européen...*, p. 127.

excessive antitrust enforcement, requiring market participants to act less competitively in order to avoid the risk of litigation[243].

Referring the aforementioned remarks to the American system of class actions, we can state that the conditions for certification, stipulated in Rule 23 of FRCP, run particular difficulties once the antitrust collective actions are concerned. That is because, among three standards for certification stipulated in Rule 23 of FRCP, the one that is most often used in antitrust cases, refers to the Rule 23(b)(3), requiring a court to verify multiple conditions before certifying class action.

Firstly, the court is obliged to determine the existence of "predominance" of common over individual issues, and the "superiority" of class action over the other methods of adjudication. The aforementioned task is often hard to achieve in antitrust cases, characterised by the high complexity of factual basis, and difficulty with separating common from individual issues. Moreover, the evaluation of "predominance" and "superiority" criterions is additionally hampered by the exclusion of merits-based inquiry at the stage of certification. Because as the US Supreme Court stated in *Eisen v. Carlisle & Jacquelin* case: *"We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action. Indeed, such a procedure contravenes the Rule by allowing a representative plaintiff to secure the benefits of a class action without first satisfying the requirements for it."*[244] Such approach of the US Supreme Court significantly limits the scope of information available to the court, and runs a risk of issuing improper decision on certification. Because as K.J. Bozanic states: *"Busy district court judges may justify certifying a class which has not conclusively established all of the requisites of Rule 23(b)(3) on the basis of the Supreme Court's mandate of avoiding the merits."*[245] The aftermath of improper certification may be burdensome for enterprises which will often prematurely decide to settle[246] or simply act less competitively in order to avoid the potential risk of litigation.

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[243] K.J. Bozanic, *Striking an efficient balance: making sense of antitrust standing in class action certification motions*, The Pennsylvania State University the Dickinson School of Law, Legal Studies Research Paper No. 17-2010, p. 6.

[244] See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 177 (1974).

[245] K.J. Bozanic, *Striking an efficient balance…*, p. 4.

[246] See *Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305, 310 (3d Cir. 2008), where the US Supreme Court states: *"In some cases, class certification may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability."*

The second element of American class action mechanism running a risk of over-deterrence refers to the opt-out solution. It foresees to cover by a claim the widest possible group of injured parties. In order to do so, the Rule 23(c) of FRCP provides for publication of a notice on class action proceedings: *"to all members who can be identified through reasonable effort."* While such provision guarantees higher flexibility to the lead plaintiff, it lacks certainty and predictability once regarded from the perspective of a defendant. Moreover, it gives grounds for the creation of unmanageably large groups of claimants in which the individual identification of injured parties will be almost impossible. In consequence, the preparation of defence or negotiation of settlement may become highly difficult task for a defendant.

The additional risk of opt-out construction derives from the moment when a notification takes place. The American solution foresees that publication of information on class action proceedings takes place before rendering a decision on defendant's responsibility. As a result, a specific enterprise risks to face a negative judgment by public opinion, even before being held responsible for certain anticompetitive behaviour. In this case, a simple allegation of anticompetitive behaviour may already tarnish the reputation of enterprise, provoke the loss of clients or finally retreat of investors. Such negative consequences of a notification process may be often burdensome for enterprise, especially if we take into consideration the early stage of proceedings, and a need to invest a lot of time and money to defend its rights in court[247].

Due to the aforementioned reasons, many European commentators and business representatives argue that the opt-out construction may have detrimental effects not only on enterprises faced with the collective claims, but on the whole economy[248]. As they are claiming, over-deterrence and a risk of unfounded litigation may force enterprises, especially in highly innovative areas of business, to refrain from undertaking competitive activities, due to the fear of massive litigation. Moreover, as certain commentators underline, the increased risk of group litigation and a need to protect against potential claims, can lead to transfer of certain costs of

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[247] M. Leclerc, *Les class actions, du droit américain au droit européen...*, p. 121; *Target: Europe, Global Export of US-Style Class action Lawsuits*, US Chamber Institute for Legal Reform Paper, 13.05.2009.

[248] S. Brunengo-Basso, *L'émergence de l'action de groupe…*, pp. 247–248; see also X. Fontanet, *Faut il ou non une class action à la française?,* a speech delivered during the conference organised by CCIP and MEDEF, p. 29.

business activity on consumers, e.g. by the increase in prices of products or services[249].

In view of the aforementioned reasoning we can state, that two of the main characteristics of American class action mechanism, i.e. certification procedure and opt-out mechanism, may be the elements running a potential risk of over-deterrence. Undoubtedly, their negative influence on the level of deterrence shall not be exaggerated, since both the certification procedure and opt-out mechanism remain under a strict control of the court, and will only exceptionally lead to over-deterrence. Nevertheless, the possibility of such risks shall be taken into consideration while the group litigation is analysed in the EU.

4. American class actions and the European debate on group litigation – a need for convergence?

The analysis of American mechanism of class actions illustrates that the introduction of an instrument allowing for grouping interests of several individuals injured by law violations into one single action, may lead to important change in the efficiency of a whole system of law enforcement. The previously ignored, omitted or simply non-discovered law infringements, have a chance to be detected, prosecuted and properly compensated. Moreover, injured individuals, thanks to the increased access to justice and stronger position in disputes with law perpetrators, may start to play the role of law enforcers, even in the domains traditionally reserved to public authorities (e.g. antitrust law). Nevertheless, while the positive influence of group litigation on the efficiency of law enforcement is widely accepted, the question that still remains is: "How to construe the appropriate mechanism of group litigation?"

The American system of class actions proposes complex solution to the aforementioned issue. By the introduction of a mechanism based on the limited costs of proceedings, wide discovery rules and broad scope of collective claims, it aims to guarantee widest possible access to justice and full achievement of principles of deterrence and compensation. Moreover, through the creation of opt-out mechanism, it tries to ensure greater facility of class action proceedings and their availability to numerous individuals. Nevertheless, despite several advantages, the American example also shows that introduction of a far-reaching class action procedure may lead to abuse. As a result, the limited protection of injured parties and low efficiency

[249] D. Hensler, *Class Action Dilemmas: Pursuing Public Goals for Private Gains*, Rand Institute for Civil Justice (2000), pp. 1, 23.

of private enforcement may be replaced by the massive, unfounded and entrepreneurial litigation, being the main ground for the rejection of the American solution in the European Union[250]. Nevertheless, the question that still needs to be asked is as follows:

"Does the simple rejection of the American solution guarantee a safeguard against abuse?"

Or in other words:

"Can the European Union venture to reject over 70-year of American experience in the application of class-actions while discussing the issue of collective redress?"

Without going into detailed analysis of European discussion on collective redress, which will be the subject of second part of this thesis, it shall be stated at this point that the EU still struggles to introduce a group litigation mechanism at the European level. The novelty of the analysed concept, forces the European Commission and national legislators to propose solutions which practical consequences are hard to determine. It results in highly divergent outcomes in different Member States[251], and difficulties with establishing a common European approach to collective redress[252]. In consequence, EU citizens and enterprises are faced with a complex legal patchwork of national solutions which are applied by some MS, but not by others. It often results in forum shopping, limited legal transparency and unequal protection of private parties within the EU.

Due to the aforementioned reasons, certain authors argue, that upholding exclusion of American experience in the area of group litigation can hinder development of an effective European approach to collective redress[253]. Through the rejection of such instruments as more liberal discovery rules, limited costs of proceedings or higher flexibility in the formation of a group, the European legislator may waste a chance to introduce effective mechanism of group litigation in the EU. Undoubtedly, the "dark side" of the American-

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[250] See European Commission, Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM(2005) 672 final; European Commission, White paper on damages actions for breach of the EC antitrust rules /*COM/2008/0165 final*/; and Green Paper on Consumer Collective Redress, COM(2008) 794 final.

[251] The European Commission stated in pt. 9 of EC Public consultation, *Towards a Coherent European Approach to Collective Redress…*, that: *"every national system of compensatory redress is unique and there are no two national systems that are alike in this area."*

[252] See EC Public consultation, *Towards a Coherent European Approach to Collective Redress…*, pt. 7.

[253] A. Aiq, *'Class Actions in Europe? Dutch and Italians Say"Yes"; EU Says "Maybe"*, (2009) The Legal Intelligencer, p. 7; see also M. Gac, *Collective redress v. class actions…*, pp. 120–124.

style class actions cannot be neglected, but a simple rejection of the opt-out mechanism, discovery rules or contingency fees, will neither lead to elimination of the risk of abuse, nor to the increase in the efficiency of collective actions.

The aforementioned standpoint may be confirmed by the European experience in the area group litigation. As it shows, each of the previously described elements of the American-style class actions, may have different practical consequences once introduced in the European legal context. While it can lead to abuse when applied in the system of increased litigant activism, its eventual repercussions may differ in the legal systems based on "enforcement culture". As the example we can give Dutch, Danish, Portuguese, English or Polish legal system[254], where the introduction of certain elements of American-style class actions, such as opt-out solution or contingency fees agreements, did not lead to abuse.

It shall be also added that the American experience may be important source of inspiration for development of more effective mechanisms in the EU. As an example we can give recent changes brought in the American law aiming to increase in the judicial control over collective claims[255]. If properly understood by the European legislator, they can allow to develop effective responses for the drawbacks of group litigation mechanism.

Finally, the rapprochement of European proposal on group litigation towards the American mechanism of class actions may lead to establishment of more universal solutions, especially important from the perspective of trans-Atlantic business relationships, requiring coherent and transparent legal solutions to disputes which may eventually arise.

In view of the above it can be claimed, that the modern approach to collective redress cannot be based on a simple rejection of the US-style class actions, but rather requires to reconcile both legal solutions. By the use of different convergence mechanisms, such as cooperation between American and European public authorities, CJEU's case law or finally legal activity of Member States, legal differences may be diminished and eventual diversities can become a source of inspiration. Because as R. Sacco stated while referring to the problem of convergence between different legal systems, without variation we would not progress, but if we want to progress, the variety shall be the source of openness, rather than reluctance towards other legal systems.[256]

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[254] See *Overview of existing collective redress schemes in EU Member States…*

[255] The U.S. Class Action Fairness Act of 2005, 28 U.S.C. Sections 1332(d), 1453, and 1711–1715.

[256] R. Sacco, *Diversity and Uniformity in the Law*, The American Journal of Comparative Law, Vol. 49, No. 2 (Spring 2001), p. 174; referring to the Polish legal doctrine on

Conclusion Chapter 3

In order to conclude Chapter 3 it may be stated, that only through empowering of individuals with the collective mechanisms of their protection, the limitations of private enforcement of competition law may be overcome. As the conducted analysis confirms, the group litigation mechanism offers several benefits to the system of law enforcement, which may not be neglected once the private enforcement of antitrust law is concerned.

First, it refers to the access to justice, which is significantly increased once the collective redress mechanism is available. It is the consequence of limited individual costs of group proceedings (the costs are shared within the group) and lower reluctance of individuals to initiate a court action (individuals are more keen to join the group than to initiate the proceedings on their own).

Secondly, the group litigation mechanism allows to reduce the asymmetry between the victims of infringements and law perpetrators. It results from the enhancement of negotiating power of individuals covered by the group and increase of pressure on undertakings committing the infringements.

Thirdly, as the analysis conducted in Chapter 3 shows, thanks to the increased access to proofs within the group, the collective redress mechanism allows for better detection of violations and greater efficiency of private enforcement actions.

Finally, the group litigation mechanism offers certain benefits to the whole system of law enforcement, such as higher level of detection, greater level of deterrence, greater coherence of court rulings and better allocation of human and financial resources within the judicial system.

The above confirms the third scientific hypothesis according to which:

"With a view of guaranteeing higher efficiency of antitrust law and proper protection of individuals against competition law violations, it is required to develop more flexible and innovative private methods of competition law enforcement, especially a group litigation mechanism."

Apart from confirming the importance of group litigation mechanism for the effective enforcement of competition law, the Chapter 3 determines the risks which may result from the rejection of an entire American experience

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the aforementioned issue, we may evoke a standpoint expressed by R. Molski, who claims that while American system of competition law enforcement may be regarded as "excentric", it does not mean that we should refrain from introducing into the national legal order solutions based on American experience – R. Molski, *Prywatnoprawna ochrona konkurencji…*, p. 807.

in the area of class actions. As it confirms, the simple exclusion of American achievements in such areas as disclosure of evidence, financing of group proceedings or formation of a group, may significantly limit the scope legal solutions available to the European and national legislators. Hence, the Chapter 3 concludes, that in order to establish modern and effective mechanism of collective redress in the EU, European and American approach to group litigation have to be reconciled.

PART I – General Conclusion

As the analysis conducted in Part I of thesis tried to prove, the modern approach to competition law enforcement requires complex assessment of the currently existing instruments, and proposal of the solutions able to combine public and private techniques within the hybrid model of competition law enforcement. While the thesis agrees that the main role in such a model shall be granted to public method, being the principle mechanism of competition law enforcement in all of the European jurisdictions, the position of a private method in the execution of antitrust law provisions shall be significantly strengthened.

In order to achieve this objective, the Part I evokes several proposals which may ensure greater efficiency of private method in the currently existing regime of competition law enforcement in the EU. As such the Part I proposes:

- limitation of costs of private proceedings,
- introduction of more liberal rules on access to evidence by private parties claiming for compensation,
- establishment of a binding force of competition authorities rulings on courts deciding in private antitrust claims.

While all these elements seem to be recognised by the European Union, and find a confirmation in the proposals included in the Damages Directive, the Part I proves that one important puzzle is still missing in the European approach to private enforcement. That is a uniform, complex and coherent approach to group litigation which if not developed, may squander the efficiency of changes proposed in the Damages Directive, and lead to preservation of current *status quo* in the protection of individuals against competition law infringements.

As the gradual analysis of public and private enforcement conducted in Part I also showed, despite development of private enforcement doctrine within the EU, and rapprochement of national regimes of competition law enforcement towards the European model, the victims of competition law infringements are still deprived of the effective mechanism of protection.

In such scenario, development of a group litigation mechanism, which according to its specific elements has a potential to mitigate limitations of individuals private actions and construe effective response to the needs of individuals claiming for compensation, gains particular importance. Moreover, as the analysis of American experience in the area of antitrust class action shows, if properly formulated, the group litigation mechanism may become a perfect complement to the hybrid model of competition law enforcement and a response to several limitations of public method.

Therefore, in order to conclude the analysis conducted in the first part of thesis and give grounds for reasoning undertaken in Part II, we may refer to the third scientific hypothesis stating that: *"With a view of guaranteeing higher efficiency of antitrust law and proper protection of individuals against competition law violations, it is required to develop more flexible and innovative private methods of competition law enforcement, especially a group litigation mechanism."*

As the analysis conducted in Part I confirms, only through further changes in the area of private enforcement, and introduction of a wide and uniform mechanism of group litigation, the previously described hybrid model of competition law enforcement may be fully achieved, and become able to fulfil all the enforcement objectives, i.e. detection, punishment (deterrence) and compensation.

PART II

TOWARDS INCREASED EFFICIENCY OF COMPETITION LAW ENFORCEMENT IN EUROPE – A NEED OF COMMON APPROACH TO COLLECTIVE REDRESS

Following the conclusions of the first part of thesis, the Part II will focus on a group litigation mechanism, being in the author's opinion a still missing puzzle in the European approach to competition law enforcement. The Part II will undertake a general overview of the European approach to collective redress, as well the national developments in this area of legal practice. By the comparative analysis of the European, French and Polish proposals on collective redress, the Part II will try to determine how to establish a mechanism of group litigation, able to empower individuals injured by competition law infringements with the effective mechanism of protection. The final conclusions on this matter will be provided in the last chapter of thesis (Chapter 3), being a set of *de lege ferenda* proposals for the European and national legislators dealing with question of collective redress.

The analysis conducted in Part II will start by the assessment of current development in the area of group litigation in Europe (Chapter 1). The author will evaluate the results of recent discussion on collective redress in the European Union and determine possible ways of its further development. At this point it shall be stated, that while the author apprises the most recent attempt of the European legislator to address the issue of private enforcement and collective redress, i.e. adoption of the "private enforcement package", he does not consider it as a final word in the European debate on private enforcement of antitrust law.

First, it is a consequence of a limited scope of the Damages Directive and a character of solutions proposed herein. Secondly, it results from the exclusion of group litigation mechanism from the scope of the Damages Directive. Thirdly, it refers to the adoption of a soft law instrument (Recommendation on collective redress) in order to deal with the question of group litigation in Europe. Finally, it is a consequence of the content of Recommendation which instead of proposing specific solutions on group litigation to MS, constitutes rather an incomplete patchwork of proposals, having conservative and limited character.

Following the evaluation of European discussion on collective redress, the Part II will refer to the national experience in the area of group litigation (Chapter 2). The goal will be to determine how the European debate on group litigation influenced a national legal practice. The Part II will undertake detailed analysis of two legal systems: French and Polish.

Their comparative analysis will focus on the assessment of group litigation mechanisms introduced in both jurisdictions, as well as on the empirical evaluation of the collective redress proceedings initiated in France and Poland. Apart from the comparison between two approaches to collective redress, being a possible source of inspiration for model solutions in this area of legal practice, the conducted analysis will also try to confirm, how difficult it is to find a coherence between divergent national positions on the issue of group litigation.

The last part of thesis will constitute an attempt to propose, at the basis of preceding reasoning, specific solutions aimed at guaranteeing higher efficiency of competition law enforcement (Chapter 3). The main attention will be given to the establishment of a directive on collective redress, being in the author's opinion, the most appropriate and desired tool for development of a coherent and effective regime of group litigation in Europe. By the use of comparative method, and reference to different approaches to collective redress, the thesis will develop a model solution on group litigation which could be a source of inspiration for the European and national legislators aiming to increase the efficiency of their competition law enforcement regimes.

The main goal of the last stage of reasoning will be to answer a question asked at the beginning of thesis: *"How to establish a system of antitrust law enforcement able to mitigate the problems of injured individuals claiming for compensation?",* and formulate *de lege ferenda* proposals able to respond to the currently existing limitations of the European and national regimes of competition law enforcement.

Chapter 1

The European Way Towards Common Approach to Collective Redress – What is the Direction?

The goal of Chapter 1 is to assess the current state of development in the area of group litigation in the EU. By the analysis of a debate on collective redress conducted at the European level in the course of last decades, and through the evaluation of most recent proposal on group litigation issued by the Commission (Recommendation on collective redress), the Chapter 1 will aim to create basis for formulation of *de lege ferenda* proposals in the last part of thesis.

Chapter 1 starts by the analysis of reasons for development of group litigation in the EU. Afterwards, it briefly presents the history of development of European approach to collective redress. At the end, Chapter 1 determines the main characteristics of the European approach to group litigation and tries to point out on its main shortcomings and still unresolved problems.

The general conclusion of Chapter 1 is that the European mechanism of group litigation, in its current state of development, does not constitute an effective method of competition law enforcement. Therefore, as the author argues, further changes are required (both at the European and national level), in order to empower EU citizens and enterprises injured by the antitrust law infringements, with the effective mechanism of collective redress.

I. The idea of collective redress – European alternative to American class actions system

The European debate on group litigation is not a new legal phenomenon. According to C. Hodges, a pressure for development of group actions in Europe can be traced to the beginning of 1980s, when the first discussions on collective redress appeared in the area of consumer law[1]. Through the introduction of several legal instruments, such as Directive on misleading advertising[2], Directive on unfair terms on consumer contracts[3] or Directive on injunctions for the protection of consumers interests[4], the European Union tried to ensure that the interests of consumers will be properly protected and enforced by the mean of court or administrative proceedings[5]. In consequence, various regulations concerning collective enforcement of consumer rights were introduced in most of the national jurisdictions[6]. However, while the issue of group litigation was widely discussed at the European and national level, till the end of 20th century there was no common EU approach to group litigation. Moreover, the debate was limited to consumer law, while other areas of legal practice, such as environmental

1 C. Hodges, *Collective Redress: A Breakthrough or a Damp Sqibb?*…, p. 68; see also the similar standpoint expressed by R. Stefanicki, *Prywatnoprawne środki dochodzenia roszczeń*…, p. 359.

2 Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising, OJ L 250, 19.9.1984, p. 17–20, see Art. 4.1 (the Directive 84/450/EEC is no longer in force, it was repealed on 11 December 2007 by the Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (codified version), OJ L 376, 27.12.2006, p. 21–27.

3 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21.4.1993, p. 29–34, see Art. 7 (the Directive 93/13/EEC was amended by the Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ L 304, 22.11.2011, p. 64–88).

4 Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, OJ L 166, 11.6.1998, p. 51–55, see Art. 1–3 (the Directive 98/27/EC is no longer in force, it was repealed by Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (Codified version), OJ L 110, 1.5.2009, p. 30–36).

5 M. Sieradzka, *Dochodzenie roszczeń w postępowaniu grupowym*…, p. 57.

6 D.P.L. Tzakas, *Effective collective redress in antitrust and consumer protection matters: a panacea or a chimera?*, Common Market Law Review (2011), Vol. 48, pp. 1128–1129.

law, financial law, and what is most important competition law, were left out of its scope.

The 21st century brought important change in this matter. Thanks to the activity of the European Commission, European Parliament and the Member States, the European discussion on collective actions obtained greater significance. It was finally recognised, that in order to effectively protect individuals against EU law infringements, a group litigation mechanism covering different areas of legal practice should be established within the Union. Moreover, the EU debate started to reflect the needs of European citizens, who according to different surveys, were arguing that they would be more willing to defend their rights in court if they could join a collective action[7]. In consequence, several initiatives were undertaken by the Commission and led to development of so-called "European approach" to group litigation[8]. It was characterised by the strong safeguards against abusive litigation, rejection of the American model of class actions and a constant attempt to find a coherence between different legal traditions of MS.

Nevertheless, as the following Chapter will try to prove, despite the important evolution of European discussion on collective redress in the course of last decade, and development of EU model of collective actions, the results of aforementioned debate are still not satisfactory. While the significance of collective mechanisms for the protection of EU citizens against law infringements is widely accepted in the EU, recent changes did not lead to introduction of a single European mechanism of collective actions. Moreover, several MS have developed their own instruments, leading to complex legal patchwork of national solutions and unequal level of individuals' protection within the Union. Finally, the mechanisms adopted by MS struggled to provide effective response to European law infringements, and did construe important added value to the system of law enforcement[9]. Therefore, it may be claimed that the European discussion on group litigation is not finished yet, and a final response to the problem

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7 See for example Eurobaromètre Spécial, *La protection des consommateurs dans le Marché interiéur,* Eurobaromètre Spécial 252, September 2006, according to which 79% of the asked consumers claimed that they would be more willing to defend their rights in court if they could join a collective action; see also Flash Eurobarometer, *Consumer attitudes towards cross-border trade and consumer protection,* Flash EB Series # 299, according to which almost 80% of the asked consumers responded in the same manner.

8 C. Hodges, *Collective redress in Europe: the new model*, Civil Justice Quarterly 2010, Vol. 29(3), p. 370.

9 D. Simon, *Recours collectifs…*, p. 64; C. Leskinen, *Recent developments on collective antitrust damages actions…*, p. 88.

of limited efficiency of collective redress has to be given. As the following Chapter will try to argue, only complex and coherent European approach to the aforementioned issue may guarantee that the individuals will be properly protected, and that the European system of law enforcement will be significantly strengthened.

1. The reasons for development of group litigation in Europe

1.1. Increasing access to justice

The first reason for development of group litigation in Europe resulted from a need of achievement of "access to justice" principle. According to the Art. 6 of the European Convention on Human Rights[10], Art. 47 of the Charter of Fundamental Rights of the EU[11] and a right to fair procedure recognised in the constitutions of all MS[12], each individual in case if its rights and freedoms granted by law were violated, should have a right to the effective remedy. While the aforementioned right was commonly accepted in the EU, it was still necessary to ensure that European citizens in case of EU law infringements, will have a chance of effective redress.

Referring to the area of antitrust law it may be stated, that at the beginning of 21st century an access to justice of European citizens injured by the competition law infringements was far from satisfactory. Despite the fact that the Court recognised individuals' right to claim for a recovery in case of competition law violations[13], the private enforcement of antitrust law was underdeveloped. According to *Ashrust* Report[14], only limited number of anticompetitive behaviours resulted in damages claims filed by injured parties, and a great majority of victims of competition law infringements was left without due protection. The above was a consequence of several factors, *inter alia* high costs of proceedings, long and complex character

[10] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome 4.11.1950.

[11] Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391–407.

[12] I. Benöhr, *Consumer Dispute Resolution after The Lisbon Treaty: Collective Actions and Alternative Procedures*, Journal of Consumer Policy (2013), Vol. 36, p. 88.

[13] Judgment of the Court of 20 September 2001, C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*, European Court reports 2001 Page I-06297; Judgment of the Court (Third Chamber) of 13 July 2006 in joined cases C-295/04 to C-298/04, *Manfredi v. Lloyd Adriatica Assicurazioni SpA et al.*, European Court reports 2006 Page I-06619; see in details Part I Chapter 2 Point I(1.1).

[14] See D. Waelbrock, D. Slater, G. Even-Shoshan, *Study on the conditions of claims for damages…*

of judicial or administrative actions, limited access to proofs of violations and asymmetry in the position of parties to the proceedings. All the aforementioned elements were causing that injured individuals, instead of protecting their rights by the mean of court or administrative actions, were often refraining from a right to due compensation.

Recognising the aforementioned problem, the European Commission decided to undertake more decisive steps and ensure that victims of competition law infringements would obtain wider access to courts[15]. As one of the instruments appropriate to achieve this objective, the Commission proposed group litigation. In the opinion of former Competition Commissioner N. Kroes, it was a mechanism necessary to give consumers and small businesses a realistic and efficient possibility to obtain compensation in case of scattered damage[16]. As the Commission was claiming, the group litigation was able to overcome main shortcomings of private enforcement and ensure desired level of individuals' protection. Because as it held in the Green Paper on damages actions: *"Collective and representative actions can improve the efficiency of the litigation process by consolidating a potentially large number of different actions into one action. This saves time and cost and avoids the risk of tactical litigation […]. Moreover, some form of organized collective action can be important in balancing the resources and bargaining position of otherwise diffuse claimants against well-organized and potentially resource-rich defendants."*[17]

The aforementioned reasoning was further developed in the White Paper on damages actions, where the Commission clearly stated that: *"Policy Options that, for instance, allow effective and efficient collective redress […] will score well on the "access to justice" criterion."*[18] As a result, the group litigation became one of the main instruments of the Commission's policy in the area of private enforcement, and a factor allowing for better achievement of access to justice principle in the area of antitrust law.

The reasoning based on the access to justice principle may be also found in recent Commission's initiatives in the area of group litigation. As it follows from the European Commission's Communication to the EU

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15 See in details on this issue Part I Chapter 2 Point I(2.1).

16 N. Kroes, *Antitrust: Commissioner Kroes welcomes the European Parliament's cross-party support for damages for consumer and business victims…*

17 Commission Staff Working Paper – Annex to the Green Paper – Damages actions for breach of the EC antitrust rules, SEC(2005) 1732, pt. 193.

18 Commission staff working document accompanying document to the White paper on damages actions for breach of the EC antitrust rules – Impact assessment /* SEC/2008/0405 final */, pt. 134.

Parliament, the Council, the European Economic and Social Committee and the Economic Committee of the Regions on collective redress (hereinafter "Communication"): *"The possibility of collectively bringing an action encourages more persons who have been potentially harmed to pursue their rights for compensation. The availability of collective court action in national legal systems – together with the availability of collective consensual dispute resolution methods – may therefore contribute to improving access to justice."*[19] Also the Recommendation on collective redress states that increasing access to justice constitutes one of the main goals of the Commission's policy in the area of "freedom, security and justice" and a reason why common collective redress mechanism shall be established in the EU[20].

1.2. Increasing judicial economy

The second reason for development of group litigation in the EU concerned a need of increasing judicial economy. By grouping several individual claims within one single proceedings, the group litigation was supposed to limit number of cases, allow for better allocation of claims and ensure greater coherence of courts' rulings[21].

The aforementioned logic may be observed once we analyse the European Commission's proposal on group litigation included in the White Paper on damages actions. As the Commission stated herein: *"a situation where national courts would have to handle a multitude of scattered low-value individual claims with no possibility of collective redress would lead to procedural inefficiency."*[22] Therefore, the Commission argued in favour

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[19] Communication from the Commission to the European Parliament, the Council, the European Economic And Social Committee and the Committee of the Regions "Towards a European Horizontal Framework for Collective Redress", COM(2013) 401 final, pt. 2.2.1.

[20] See 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, OJ L 201, 26/07/2013, p. 60–65, pt. 10 of the Preamble stating that: *"The aim of this Recommendation is to facilitate access to justice in relation to violations of rights under Union law and to that end to recommend that all Member States should have collective redress systems at national level that follow the same basic principles throughout the Union, taking into account the legal traditions of the Member States and safeguarding against abuse."*

[21] M.T. Vanikiotis, *Private antitrust enforcement and tentative steps toward collective redress in Europe and the United Kingdom*, 37 Fordham International Law Journal, July 2014, p. 1645.

[22] Commission Staff Working Paper accompanying White Paper on damages actions for breach of EC antitrust rules, /* SEC/2008/0404 final */, pt. 48.

of a group litigation, claiming that: *"collective redress mechanisms can significantly enhance the victims' ability to obtain compensation and thus […] contribute to the overall efficiency in the administration of justice."*[23] Such reasoning confirms that development of a group litigation mechanism could contribute not only to better protection of individuals, but might also bring several benefits to the whole system of law enforcement.

The similar reasoning is continued by the Commission in its recent proposals on collective redress. As it argues in the Communication: *"Collective redress is a procedural mechanism that allows, for reasons of procedural economy and/or efficiency of enforcement, many similar legal claims to be bundled into a single court action."* Moreover, as it claims, group litigation*: "strengthens the negotiating power of potential claimants and contributes to the efficient administration of justice, by avoiding numerous proceedings concerning claims resulting from the same infringement of law."*[24]

The aforementioned approach shall be positively evaluated. It confirms that the collective redress is not only an *ad hoc* solution allowing to respond to current limitations of private enforcement, but forms a part of complex policy in the area of antitrust law.

Furthermore, as different authors argue, the development of collective redress mechanism was also supposed to ensure that through achievement of judicial economy, certain benefits would be granted not only to courts or administrative bodies, but also to parties to legal proceedings[25]. That is because, by the introduction of collective actions, allowing for replacement of series of individual proceedings by one single trial, the economies of scale could have been achieved for both plaintiffs and defendants. On the side of complainants, it referred to the limited costs of proceedings, wider access to proofs of violations and increased chances for a positive outcome of cases. Whereas, on the side of respondents, it concerned limited risk of numerous individual claims and a possibility to concentrate greater time and financial resources on a single collective trial. Therefore, judicial economy became another reason why development of group litigation was so important within the EU[26].

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[23] *Ibidem*, pt. 49.

[24] Communication from the Commission to the European Parliament, the Council, the European Economic And Social Committee and the Committee of the Regions "Towards a European Horizontal Framework for Collective Redress", COM(2013) 401 final, pt. 1.2.

[25] T.S. Ulen, *An introduction to the law and economics of class action…*, p. 186; A. Cassone, G.B. Ramello, *The simple economics of class action: private provision of club and public goods*, European Journal of Law and Economics (2011), Vol. 32, pp. 211–213.

[26] See also on this issue M. Niedużak, *Postępowanie grupowe…*, pp. 118–123.

1.3. Ameliorating functioning of the internal market

The third reason which formed grounds for development of group litigation in the EU, concerned a need of improvement of the internal market's functioning. Some authors even argue, that while increasing access to justice for individuals with small claims was one of the goals of the European policy in the area of antitrust law, it was only subsidiary to the overriding economic objectives[27]. Therefore, enhancing competitiveness, ensuring a right balance in a market structure and guaranteeing appropriate functioning of the economic exchange, were another factors behind the development of group litigation in the EU.

Referring the aforementioned remarks to the area of antitrust law it shall be firstly stated, that the analysis of the Commission's policies published in the course of last decade confirms important economic reasoning behind the proposals formulated by the European Commission. As the White Paper on damages actions provides: "*Improving compensatory justice would therefore inherently also produce beneficial effects in terms of deterrence of future infringements and greater compliance with EC antitrust rules. Safeguarding undistorted competition is an integral part of the internal market and important for implementing the Lisbon strategy. A competition culture contributes to better allocation of resources, greater economic efficiency, increased innovation and lower prices.*"[28] In consequence, in order to increase the efficiency of antitrust law and ensure greater competitiveness on the internal market, the Commission argued in favour of development of group litigation mechanism. It was regarded by the Commission as an important complement in the fight against cartels, and a measure allowing for an active participation of individuals in establishing undistorted competition.

Secondly, the group litigation was considered by the Commission as a mechanism perfectly suited for a fight with competition law infringements[29]. It resulted from a fact that in many cases concerning violation of antitrust law the damage was scattered, causing great number of injuries of small individual value. In consequence, many consumers or small enterprises suffering an antitrust injury were refraining from undertaking long and costly private proceedings, for a simple reason of economic inefficiency.

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27 C. Hodges, *From class actions to collective redress: a revolution in approach to compensation*, Civil Justice Quarterly 2009, 28(1), pp. 44–45.

28 European Commission, White paper on damages actions for breach of the EC antitrust rules /*COM/2008/0165 final*/.

29 Commission Staff Working Paper accompanying White Paper on damages actions for breach of EC antitrust rules, /* SEC/2008/0404 final */, pt. 38–39.

As M.T. Vanikiotis underlines, the result of such scenario was particularly burdensome to the internal market. Due to the high aggregated amount of individual injuries, a *"large illicit windfall"* was gained by the enterprises committing infringements[30]. Therefore, not only the individuals were left without compensation, but also the competitors of law perpetrators were worse off. It was leading to distortion of competition and disruption of a required balance within the internal market structure.

The aforementioned scenario is especially visible in the area of EU antitrust law. According to the Commission, due to the lack of effective compensation mechanisms and inefficiency of private actions, annually between 13 and 37 billion euros of direct costs caused by illegal cartels are suffered by EU consumers and other victims of competition law infringements[31]. Moreover, only 25% of Commission's decisions on violation of antitrust law are followed by damages actions[32], allowing cartels' members to keep illegal gains and obtain advantage over their competitors.

Aware of this problem, the Commission started to claim that better protection of consumers, greater efficiency of competition and appropriate functioning of the internal market, require development of common approach to group litigation in the EU[33]. On the one hand, it would ensure that any dispute concerning cross-border trade could be resolved quickly, cheaply and under similar rules and procedures anywhere in the single market. On the other, it would guarantee that individuals would not refrain from claiming for due compensation, and thanks to a possibility of grouping their claims within collective actions, would be more keen to participate in private enforcement of antitrust law[34].

The above reasoning may be observed in recent Commission's proposals on collective redress. As it follows from the Communication, group litigation is regarded as one of the mechanisms which ensures high level of consumers' protection, greater efficiency of EU law enforcement, and

30 M.T. Vanikiotis, *Private antitrust enforcement*..., p. 1644.

31 See EC's Impact Assessment Report, Damages actions for breach of the EU antitrust rules, Accompanying the proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, SWD(2013) 203 final, pt. 64.

32 *Ibidem*, pt. 52, where it is stated that in the period from 2006 to 2012 only 15 from 54 Commission's decisions on violation of antitrust law were followed by private actions.

33 Communication from the Commission to the European Parliament, the Council, the European Economic And Social Committee and the Committee of the Regions "Towards a European Horizontal Framework for Collective Redress", COM(2013) 401 final, p. 16.

34 C. Hodges, *From class actions to collective redress…*, p. 45.

in consequence, serves for the economic development of MS[35]. Because, as the Commission states in the Communication: *"In economically challenging times, a sound legal environment and efficient justice systems can contribute decisively to the European Union's goal of achieving competitive growth."*[36] Also the Recommendation on collective redress reflects the above logic, and underlines that introduction of collective redress in the EU, may have positive impact on functioning of a single market, competitiveness of European economy and consumers' trust in the internal market[37].

In view of the aforementioned it may be argued, that in the course of time the group litigation mechanism evolved from one of the instruments of law enforcement, to the important element of Commission's single market policy. The recent discussion on group litigation is no longer limited to the area of consumer law, but covers other areas of European economy and legal practice, such as competition law, financial law, law on securities and data-protection. As the Commission underlines in the Communication, establishment of a horizontal approach to group litigation in the EU is crucial not only to increase access to justice and ensure coherence between national procedures on collective actions, but is required in order to guarantee that the European economy will function and evolve in a desired way[38]. Therefore, the introduction of common collective redress in Europe could be regarded as an unprecedented event, and a factor which could possibly influence a whole legal and economical construction of the EU.

2. The history of development of group litigation in Europe

The history of development of group litigation in the EU may be analysed from a perspective of two areas of legal practice. On the one hand, it concerns the antitrust law, where the group litigation was considered as an important mechanism of private enforcement. On the other, it refers to the

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35 Communication from the Commission to the European Parliament, the Council, the European Economic And Social Committee and the Committee of the Regions "Towards a European Horizontal Framework for Collective Redress", COM(2013) 401 final, pp. 2–4.

36 *Ibidem*, p. 2.

37 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, OJ L 201, 26/07/2013, pt. 41.

38 Communication from the Commission to the European Parliament, the Council, the European Economic And Social Committee and the Committee of the Regions "Towards a European Horizontal Framework for Collective Redress", COM(2013) 401 final, p. 16.

consumer law, where the group litigation was proposed as an instrument allowing for the effective protection of consumers against violations of their collective rights. While these two areas of legal practice significantly differ, especially as far as the issue of law enforcement is concerned, C. Hodges underlines that they were intertwined from the beginning of European discussion on group litigation[39]. Different projects of legal reform arguing in favour of collective redress were claiming that its introduction would bring several benefits to individuals injured both by consumer and competition law infringements. Also the most recent European initiatives in the area of group litigation, i.e. Communication and Recommendation on collective redress, propose wide, horizontal approach to collective actions, covering different areas of legal practice, in particular consumer law and competition law. Therefore, during the analysis of development of group litigation in the area of antitrust law, some references will be also made to consumer law. It will be necessary in order to illustrate how the concept of collective redress evolved in the EU, and what are its main characteristics nowadays.

2.1. Green Paper on damages actions for breach of EC antitrust rules – a need for collective redress recognised

The first works on collective redress in the area of antitrust law started at the beginning of 21st century, when it became clear that guaranteeing to individuals a right to claim for compensation in case of competition law violations is an element necessary for its effective enforcement. The Court's rulings in *Courage*[40] and *Manfredi*[41] cases opened a discussion on private enforcement of antitrust law which goal was not only to confirm individuals' right to claim for damages, but also to *"put some extra wind in the sails of enforcement boat"*[42].

As one of the possible ways of accelerating so-called "enforcement boat", the Commission proposed the collective redress mechanism. In its opinion, expressed for the first time in the Green Paper on damages actions, the group litigation mechanism was able to effectively respond to many shortcomings

[39] C. Hodges, *Current discussions on consumer redress: collective redress and ADR*, ERA Forum (2012) 13, p. 16.

[40] Judgment of the Court of 20 September 2001, C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*, European Court reports 2001 Page I-06297.

[41] Judgment of the Court (Third Chamber) of 13 July 2006 in joined cases C-295/04 to C-298/04, *Manfredi v. Lloyd Adriatica Assicurazioni SpA et al.*, European Court reports 2006 Page I-06619.

[42] See speech of N. Kroes, *Enhancing Actions for Damages for Breach of Competition Rules…*

of individual claims (e.g. high costs of proceedings, low incentives to sue or limited access to proofs) and ensure better protection of European citizens against antitrust law infringements[43]. As the Commission held, a rarity of group litigation mechanisms at the national level was significantly reducing litigation options available to potential claimants, and thus, was forming an obstacle in the development of private actions in the EU[44].

The aforementioned reasoning led the Commission to formulation in the Green Paper on damages actions of a clear need for development of group litigation mechanism in Europe[45]. In the opinion of the Commission, introduction of the collective redress instrument within the Union would not only enhance protection of EU citizens against competition law violations, but would also improve efficiency of a whole litigation process. It would allow to establish required balance between the injured individuals and accused undertakings[46].

The adoption of Green Paper on damages actions in December 2005 opened a period of public debate on private enforcement of antitrust law. The discussion terminated in April 2006, showing that the effective response to antitrust law violations required to aggregate individual injuries in some way[47]. As many respondents claimed, in order to reduce a difference between the costs of private actions and small value of suffered injuries, the group litigation mechanism had to be established[48]. Nevertheless, as it was also argued, due to the possible wide impact of collective redress on law enforcement system, the European mechanism of group litigation should be designed in a way to protect against unmeritorious claims and abusive litigation. Because, as the American example had shown, uncoordinated and too liberal approach to collective actions might lead to undesirable results[49].

The debate conducted within the Green Paper on damages actions confirmed that legislative changes were required in order to ensure appropriate protection of EU citizens against competition law infringements.

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43 European Commission, Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM(2005) 672 final, pt. 2.5.

44 Commission Staff Working Paper – Annex to the Green Paper – Damages actions for breach of the EC antitrust rules, SEC(2005) 1732, pt. 31.

45 European Commission, Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM(2005) 672 final, pt. 2.5.

46 *Ibidem*, pt. 193.

47 T.L. Russell, *Exporting class actions to the European Union*…, p. 171; R. Stefanicki, *Prywatnoprawne środki dochodzenia roszczeń*…, pp. 360–361.

48 European Commission Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules, SEC(2008) 404, pt. 30.

49 *Ibidem*, pt. 29, 32.

It also showed, that while development of collective redress could allow to achieve this objective, it would require to overcome astonishing diversity and total underdevelopment of private enforcement mechanisms within the EU[50]. Finally, it confirmed that any proposal on group litigation had to ensure equilibrium between the interest of consumers, business undertakings and public authorities[51], and that the most simple solution, i.e. legal transplant of American class actions system, would not be possible in the European Union[52]. Therefore, as the following years had shown, a lot had to be done before the European mechanisms of collective redress could have been introduced and applied in practice.

2.2. White Paper on damages actions for breach of EC antitrust rules – a step towards introduction of common collective redress instrument in Europe

Nearly 3 years after the publication of Green Paper on damages actions, another document on private enforcement of antitrust law was issued by the Commission – White paper on damages actions. Its adoption was preceded by the EU Parliament's resolution on competition law damages actions, in which the Parliament held that: *"in the interests of justice and for reasons of economy, speed and consistency, victims should be able voluntarily to bring collective actions, either directly or via organizations whose statutes have this as their object."*[53] Such standpoint of the EU Parliament was a clear signal to the Commission that a change in the area of group litigation was needed, and that more decisive steps should have been undertaken in order to establish effective mechanism of collective redress in the EU.

The White Paper on damages actions was published in April 2008. As its primary objective it determined improvement of legal conditions under which victims of competition law infringements would be able to claim for compensation[54]. Among different mechanisms allowing to achieve this goal, e.g. wider access to proofs of violations, binding effect of national

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50 D. Waelbrock, D. Slater, G. Even-Shoshan, *Study on the conditions of claims for damages…*, p. 1.

51 European Commission Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules, SEC(2008) 404, pt. 32.

52 D. Corapi, *Class Actions*, in: K.B. Brown, D.V. Snyder (eds.), *General Reports of the XVIIIth Congress of the International Academy of Comparative Law/Rapports Généraux du XVIIIème Congrès de l'Académie Internationale de Droit Comparé*, DOI 10.1007/978-94-007-2354-2_9, p. 192.

53 European Parliament resolution of 25 April 2007 on the Green Paper on Damages actions for breach of the EC antitrust rules (2006/2207(INI)), pt. 21.

54 *Ibidem*, pt. 1.2.

competition authority's decisions, limited costs of antitrust proceedings or longer limitation periods for bringing a claim, the Commission argued in favour of development of group litigation instrument in the EU. In its opinion, due to the fact that individual consumers and small businesses were often deterred from bringing individual actions by the costs, delays, uncertainties, risks and burdens involved, there was a clear need for establishment of a mechanism allowing for aggregation of their single claims[55]. Such standpoint was supported by a complex Impact Assessment Report[56] which showed that the amount of uncompensated harm and problems encountered by individuals claiming for compensation were particularly high[57]. According to the Impact Assessment Report, one of the main reasons for limited importance of private enforcement in Europe was the inefficiency of traditional mechanisms of civil procedure, working improperly in the specific context of antitrust claims[58]. The competition law cases, characterised by a large number of victims, small value of individual injuries and complexity of economic issues involved, required different and more innovative approach[59]. Therefore, recognising the specificity of antitrust damages claims and low practical significance of private enforcement, the Commission argued in favour of establishment of a group litigation instrument in the EU.

The Commission proposed to introduce two mechanisms of group litigation, i.e. representative actions and opt-in collective claims, referring. While proposing these two mechanisms of group litigation, the Commission underlined their complementary character[60]. The representative actions were supposed to ensure that interests of individuals would be properly protected by specialised bodies, and that unfounded claims would be avoided. Whereas, the opt-in claims, initiated directly by victims of infringements, were intended to increase access to justice, ensure better access to evidence

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55 *Ibidem*, pt. 2.1; see also on this point D. Bosco, *Un nouveau pas vers le private enforcement: un Livre blanc de la Commission*, Contrats Concurrence Consommation n° 5, Mai 2008, comm. 133.

56 Commission staff working document accompanying document to the White paper on damages actions for breach of the EC antitrust rules – Impact assessment, /* SEC/2008/0405 final */.

57 *Ibidem*, pt. 31.

58 *Ibidem*, pt. 47–48.

59 T.L. Russell, *Exporting class actions…*, pp. 172–173; see also C. Bergen, *Generating Extra Wind in the Sails of the EU Antitrust Enforcement Boat,* Journal of International Business & Law (2007), Vol. 5, p. 203.

60 European Commission, White paper on damages actions for breach of the EC antitrust rules /*COM/2008/0165 final*/, pt. 2.1.

and provide greater incentive to sue. Finally, the representative actions and opt-in mechanism were supposed to guarantee that the US-style abusive litigation would be avoided in Europe.

Nevertheless, while the Commission was rather firm as far as the need of development of group litigation in Europe was concerned, it was less clear on the issue of legal instrument which would allow for its establishment.

Firstly, the Commission did not precise what shall be a character of legal action in the area of group litigation (binding or non-binding; regulation, directive or recommendation)[61].

Secondly, it signalised that due to the parallel discussion on collective redress in the area of consumer law, a broader initiative, comprising both antitrust and consumer law, might be more appropriate in order to effectively tackle difficulties encountered by individuals claiming for compensation[62].

Finally, the Commission's proposal on collective redress was missing greater precision on several important questions. It concerned the issue of funding which often caused important obstacle in launching collective claim[63]. It also did not refer to the problems of sustaining specific costs of proceedings and compensating victims of violations, being of particular importance in the system of representative actions[64]. Therefore, as certain authors underlined, once the White Paper on damages actions was published, the uncertainty still reigned in the European discussion on group litigation, and further steps of the Commission were hard to foresee[65].

To sum up, it can be claimed that the White Paper on damages actions was an important step in the European discussion on group litigation. It confirmed the importance of collective redress for the European system of private enforcement and determined specific elements of EU approach to group litigation. Based on the opt-in solution, representative actions and strong safeguards against abusive litigation, it was regarded as an alternative to the American class actions mechanism[66]. Nevertheless, as

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61 European Commission Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules, SEC(2008) 404, pt. 62–64.

62 *Ibidem*, pt. 64.

63 T.L. Russell, *Exporting class actions to the European Union…*, p. 179.

64 T. Chieu, *Class action in the European Union?: Importing lessons learned from the United States' experience into European Community Competition Law*, Cardozo Journal of International and Comparative Law, Vol. 18 (2010), pp. 149–150.

65 T. Chieu, *Class action in the European Union?: Importing lessons learned from the United States…*, p. 148.

66 C. Hodges, *Collective Redress: A Breakthrough or a Damp Sqibb?…*, pp. 71–72; T. Chieu, *Class action in the European Union?: Importing lessons learned from the United States…*, pp. 151–153.

further discussion on antitrust damages actions has shown, the White Paper's proposal did not succeed to overcome fear of business representatives, claiming that development of private enforcement, in particular in the form of collective actions, would lead to flow of massive and unfounded claims, having burdensome consequences to the internal market[67]. Moreover, due to the inconsistency of the Commission's approach (different proposals in the area of consumer and competition law), the above initiative was criticised by several governments, claiming that only coherent policy in the area of group litigation may construe an added value to the European discussion on collective redress[68]. In consequence, due to the lack of political support and a strong pressure of business representatives, the Commission's draft Directive on damages actions, prepared in 2009 and strongly based on the proposals included in the White Paper, turned out to become failure.

2.3. Green Paper on Consumer Collective Redress – alternative way of development in the area of group litigation

As it was mentioned above, in parallel to the Commission's initiatives in the area of antitrust law, important works on collective redress were undertaken in the area of consumer protection. In its Consumer Policy Strategy for the period 2007–2013[69], the Commission emphasised importance of collective redress mechanism for the enforcement of consumer law provisions, and underlined a need of introduction of *"collective redress mechanisms for consumers both for infringements of consumer protection rules and for breaches of EU antitrust rules."*[70]

The publication of Consumer Policy Strategy was followed by two studies on group litigation in the EU[71] which showed that collective redress constituted important element of many national policies in the area of consumer law. As the DG SANCO (Directorate General for Public Health

67 C. Hodges, *Collective Redress: A Breakthrough or a Damp Sqibb?…*, p. 72.

68 *Ibidem*, p. 72.

69 EU Consumer Policy Strategy for 2007–2013, COM(2007) 99 Final.

70 *Ibidem*, pt. 5.3.

71 The Study Centre for Consumer Law – Centre for European Economic Law Katholieke Universiteit Leuven, *An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings*, Final Report – January 17, 2007, available at: http://ec.europa.eu/consumers/archive/redress/reports_studies/comparative_report_en.pdf [access: 16.08.2015]; European Commission – DG SANCO, *Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union,* available at: http://ec.europa.eu/consumers/archive/redress_cons/finalreportevaluationstudypart1-final2008-11-26.pdf [access: 16.08.2015].

and Consumer Protection) report claimed: *"Collective redress mechanisms have an added value to consumers' access to justice in all Member States where they exist, even in those where individual litigation and ADR is easily accessible."*[72] Whereas, in countries where group litigation did not exist, consumers *"were likely to suffer a detriment as a result of the unavailability of such mechanisms."*[73]

The reasoning presented in DG SANCO report was supported by the empirical evaluation of group litigation in the EU. It showed that in the countries where the collective redress mechanisms were not established, the loss of consumer welfare was equal to around 2.1 million euros per year, leading to important burden on the side of individuals. In view of the aforementioned, the report advised the Commission to undertake wide, European initiative in the area of group litigation. In the Commission's opinion it could yield benefits to consumers in MS where collective redress was not available, as well as in these jurisdictions, which already established collective actions in their national legal order[74].

The Commission's response to the results of DG SANCO report came just few months later. In December 2008, it published a Green Paper on Consumer Collective Redress[75], initiating a wide debate on group litigation in the area of consumer law in the EU. Its goal was to assess a current state of collective redress mechanisms in MS, and to provide options required to close any possible gaps to effective redress of EU consumers[76]. The Green Paper on Consumer Collective Redress proposed four alternative solutions in the area of group litigation on which participants of a debate were supposed to express their opinion.

First option concerned a lack of European legislative action in the area of group litigation and enhancement of existing national and European solutions on this matter (hereafter "Option 1"). Second option proposed the reinforcement of a cooperation between MS within the existing legal framework (hereafter "Option 2"). Third solution referred to the introduction of new binding and non-binding instruments by the Commission, with a view of establishing effective and coherent mechanism of group litigation in the EU (hereafter "Option 3"). And finally, the last option concerned

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72 *Ibidem*, p. 5.
73 *Ibidem*, p. 5.
74 *Ibidem*, p. 5.
75 European Commission, Green Paper on Consumer Collective Redress, COM(2008) 794 final.
76 *Ibidem*, pt. 4.

introduction of a common judicial mechanism of collective redress in all MS (hereafter "Option 4").

In the opinion of many commentators, such standpoint of the Commission confirmed that a change was required in order to foster European debate on collective redress[77]. However, as they have also argued, by proposing four different solutions, varying from inaction to binding EU proposal on group litigation, the Commission showed that determining which option would be chosen was almost impossible to foresee[78].

The Commission's uncertainty on possible action in the area of consumer collective redress was also reflected in the responses to the Green Paper[79], provided by the public consultation's participants. As its analysis illustrates, they were strongly divided and none of the options gained significant advantage[80]. Moreover, two opposite proposals, i.e. lack of EU-action and the Commission's intervention in the area of collective redress, received similar support.

More detailed analysis of the Green Paper's outcome allows us however to ascertain, that the third option, i.e. combined binding and non-binding approach of the Commission to issue of collective redress, gained greatest popularity among participants of the debate. That is because, while the percentage of supporters of Option 1 and Option 3 was almost the same, the first solution had much more opponents (60%) in comparison with Option 3 (40%). Moreover, while the standpoints in favour of Option 1 were combined mostly of the responses of business representatives (around 60%), Option 3 included positive opinions of all stakeholders (academics, business representatives, legal practitioners, public authorities and consumer organisations). Finally, business representatives, generally critical to the EU intervention in the area of collective redress and strongly opposing to Option 4, claimed that: *"Option 3 takes advantage of the existing mechanisms and it is always best to try to improve these before turning to other options. It is also aimed at prevention of the problem rather than on the consequences."*[81]

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77 D. Fairgrieve, G. Howells, *Collective redress procedures – European debates,* International & Comparative Law Quarterly, Vol. 58, April 2009, pp. 401–405; G. Wagner, *Collective redress – categories of loss and legislative options*, Law Quarterly Review 2011, Vol. 127 (January), pp. 57–58.

78 G. Wagner, *Collective redress – categories of loss and legislative options*…, pp. 58–59.

79 See Final Analytical Report on the Green Paper on Consumer Collective Redress submitted by the Consumer Policy Evaluation Consortium, available at: http://ec.europa.eu/consumers/archive/redress_cons/docs/feedback_statement.pdf [access: 19.08.2015].

80 Option 1 – 80% of stakeholders, Option 2 – 40% of stakeholders, Option 3 – 75% of stakeholders, Option 4 – 62% of stakeholders.

81 Final Analytical Report on the Green Paper on Consumer Collective Redress…, p. 41.

In view of the aforementioned it was assumed, that the Commission's initiative combined of binding and non-binding proposals, would be preferable solution for further works on collective redress in the area of consumer law[82]. Nevertheless, as the subsequent development of EU debate on group litigation had shown, the general support of the European consumers, public authorities and most of the MS to the idea of group litigation, was not enough to undertake more decisive steps on the analysed issue. Due to the political pressure and lack of coherence between Commission's policies in the area of antitrust and consumer law, following years did not bring legislative proposal on consumer collective redress. While its importance was still recognised by the Commission, often claiming that the group litigation formed one of the goals of the European policy[83], the political initiative was still missing in the EU. Moreover, in February 2011 another debate on group litigation was launched in the EU, causing a lot of confusion as far as the future of collective redress was concerned.

2.4. Public consultation "Towards coherent European Approach to collective redress" – preserving a *status quo*?

Due to the failure of previous initiatives in the area of group litigation, and in view of the uncoordinated development of collective redress at the national level[84], the Commission decided to undertake another action in the area of collective redress. This time its goal was to establish common European approach to group litigation, covering various areas of law, *inter alia* competition law and consumer law, and taking into consideration current national experience in the area of collective actions[85].

The public consultation entitled *"Towards a Coherent European Approach to Collective Redress"*[86] was initiated by the Commission in February 2011. As the Commission stated in a consultation paper, its main objective was to identify common legal principles underpinning national legal traditions on collective redress, and to determine whether it is possible to introduce

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82 *Ibidem*, p. 22.

83 See for example speech of J. Almunia from 15 October 2010, *Common standards for group claims across the EU*, SPEECH/10/554, available at: http://europa.eu/rapid/press-release_SPEECH-10-554_fr.htm?locale=EN [access: 19.08.2015].

84 At the beginning of 2011, sixteen MS had their own mechanisms of group litigation. However, according to different reports, none of them was similar and they differed as far as many substantial issues were concerned, e.g. scope of application, types of available remedies, competent courts or issue of financing.

85 See in details M. Gac, *The road to collective redress in the European Union*…, pp. 93–108.

86 EC Public consultation, *Towards a Coherent European Approach to Collective Redress*…

such instrument at the European level[87]. It was supposed to be achieved by two means: consultation paper and public hearing.

Without going into detailed analysis of all questions asked within the public consultation (34 questions) and answers received by the Commission, it is worth mentioning that in the period from 4 February to 30 April 2011, the Commission received 310 replies by institutional and corporate stakeholders, and 19000 letters from European citizens. Moreover, almost 300 participants selected from more than 500 applicants took part in the public hearing. Those numbers demonstrate how huge the interest was in the issue of collective redress in the EU. Nevertheless, they also show how difficult it had to be for the Commission, to get to a coherent conclusion within such great number of responses[88].

Moving to the evaluation of public consultation it shall be underlined at the beginning, that each group of stakeholders (national governments, public authorities, lawyers, business representatives, consumers and their organisations) had their own view on the character and necessity of introduction of discussed instrument in the EU. Generally, we can say that consumers, majority of public authorities and legal experts supported introduction of a collective redress mechanism at the European level. They agreed with the Commission by claiming that the collective redress could be considered as a remedy to current shortcomings of EU law enforcement[89]. As they have stated while answering to Question 1 (*"What added value would the introduction of new mechanisms of collective redress have for the enforcement of EU law?"*), the Commission's initiative in the area of group litigation would strengthen enforcement of EU law, increase consumers trust in a single market and discourage unlawful business conduct[90]. Nevertheless, a large group of stakeholders, composed mostly of business representatives and some national governments (German, Austrian and Hungarian), claimed in opposite, and held that EU initiative on collective

87 *Ibidem*, pt. 12.

88 For more details on the results of public consultation see Evaluation of contributions to the public consultation and hearing: "Towards a Coherent European Approach to Collective Redress", Study JUST/2010/JCIV/CT/0027/A4, available at: http://ec.europa.eu/competition/consultations/2011_collective_redress/study_heidelberg_overview_en.pdf [access: 23.08.2015].

89 EC Public consultation, *Towards a Coherent European Approach to Collective Redress…*, pt. 6.

90 See Evaluation of contributions to the public consultation and hearing: "Towards a Coherent European Approach to Collective Redress" (Executive Summary), Study JUST/2010/JCIV/CT/0027/A4, p. 5.

redress would have no legal value, and would infringe rules of subsidiarity and proportionality[91].

The second area of incoherence may be observed as far as the form of legal action is concerned. Majority of public consultation participants (most of national governments, great majority of sector regulators, clear majority of legal experts and all consumers) argued in favour of legally binding approach at the European level. In their opinion, it would ensure legal uniformity across the EU, provide better standard of protection for individuals, and guarantee full efficiency of the introduced solution[92]. However, a high number of participants – mostly business representatives, encouraged Commission to adopt a non-binding instrument in the form of best practices or guidelines. According to their standpoint, it would guarantee greater flexibility and ensure a respect to the procedural autonomy of MS[93].

The third important issue concerned safeguards against the abusive litigation. Contrary to two preceding problems, the stakeholders' responses were rather consistent on such questions as opt-in versus opt-out, financing of claims or judicial control of collective redress. Firstly, all stakeholders agreed that the abusive, US-style litigation must be avoided in Europe. They argued that a strict admissibility control by a judge may act as a basic safeguard[94]. Moreover, they unanimously agreed on the general application of "loser-pays" principle, being regarded as a principal filter of unfounded claims. Finally, most of the stakeholders opposed to the opt-out mechanism, claiming that it would violate basic principles of national law, constitutional guarantees of MS and provisions of European Convention on Human Rights[95].

The last important group of questions asked within the consultation concerned a scope and level of legal action. The majority of public authorities and legal experts expressed their support for a horizontal approach of general scope, in order to ensure the internal cohesion of European and national procedural law[96]. However, some national governments, the majority of business representatives, and many scholars have favoured a sector-specific approach. In their opinion, each sector was different and required particular type of instrument. It especially concerned competition

91 *Ibidem*, p. 5.
92 *Ibidem*, pp. 6–7.
93 *Ibidem*, p. 7.
94 *Ibidem*, p. 10.
95 *Ibidem*, p. 8.
96 *Ibidem*, p. 14.

law, with its unique relationship of private-public enforcement, leniency programs and calculation of damages[97].

As far as the issue of level of intervention was concerned, the stakeholders' opinions were highly divided. Many participants gave voice to their concern that the EU may not be competent to legislate on collective redress mechanism. They argued that MS are better suited to deal with the issue of law enforcement[98]. In contrast, all consumer organisations, a clear majority of lawyers and academics, as well as all citizens agreed, that the European action on collective redress would be highly desirable and would comply with the principles of subsidiarity, proportionality, effectiveness and conferred powers. Nevertheless, the condition was that the European action on group litigation should have a form of directive setting minimum standards[99].

To summarise the results of public consultation it may be stated, that due to the divergence of opinions expressed within the debate, strong conflict between consumers and business representatives, and a lack of common standpoint on such fundamental issues as legal form and scope of Commission's initiative, the wide European debate on group litigation raised more questions than answers. For these reasons, many authors were questioning the necessity of launching a public consultation which outcome was possible to foresee on the basis of previous works and surveys[100]. Even the Commission stated in a consultation paper that: *"stakeholders' positions on many issues are known: most consumer organisations are in favour of EU-wide judicial compensatory collective redress schemes, whereas many representatives of industry fear the risks of abusive litigation."*[101] Finally, as many speakers underlined during the public hearing, the fact that Commission at the beginning of 2011 was still in a phase of consultation, resembled rather turning in a circle, than taking a step forward[102].

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97 *Ibidem*, p. 14.

98 *Ibidem*, p. 6.

99 *Ibidem*, p. 6.

100 N. Heaton, P. Chaplin, *Is the European Commission's Consultation on Collective Redress Trying to Fix an Antitrust Litigation Landscape That is Not Broken?*, Antitrust Chronicle, 2011, Vol. 4; A.M. Galvin, *Collective Redress, More Consultations at the European Level But are We Getting Closer to Consensus?*, Antitrust Chronicle, 2011, Vol. 4.

101 EC Public consultation, *Towards a Coherent European Approach…*, p. 11.

102 Detailed minutes of the public hearing "Towards a coherent European approach to collective redress" held in Brussels on 5 April 2011, pp. 9–11, available at: http://ec.europa.eu/competition/consultations/2011_collective_redress/study_heidelberg_hearing_en.pdf [access: 28.08.2015].

Therefore, it may be claimed that at the end of 2011 the future of collective redress in Europe was still a mystery, and a consultation aiming to determine common principles for EU mechanism of group litigation, raised important concerns. It found a confirmation in the words of EU Justice Commissioner Viviane Reading, who while commenting the outcome of public consultation and explaining a road map for future activities of the Commission in the area of collective redress stated: *"I see a number of options before us. The first would be to conclude the exercise with this Communication, on the basis that the arguments in favour of further EU level intervention are not compelling. The second possibility would be to conclude that there is a good case to try to steer developments in the Member States by issuing a Recommendation. The third possibility would be a legislative intervention, either a sectoral initiative or a more horizontal instrument."*[103]

2.5. European Parliament resolution on "Towards a Coherent European Approach to Collective Redress" – a new voice in the European debate on group litigation

The public consultation was followed by the EU Parliament's resolution on collective redress[104]. Based on the complex works of Parliamentary commissions initiated already in 2010, as well as different reports and studies[105], the resolution constituted important voice in the European discussion on collective redress and the Parliament's response to the Commission's proposal.

The Parliament's resolution supported establishment of the European mechanism of collective redress. As it held: *"action is needed at EU level in order to improve the current EU regulatory framework so as to allow victims of infringements of EU law to be compensated for the damage they sustain and thus contribute to consumer confidence and smoother functioning of the internal market."*[106] In the opinion of Parliament, development of collective redress in the EU could bring several benefits to consumers, enterprises and judicial system. It would concern higher level of enforcement, lower costs of legal actions, greater legal certainty and better judicial economy[107].

[103] V. Reading, *Collective Redress: Examining the way forward*, SPEECH/11/517, available at: http://europa.eu/rapid/press-release_SPEECH-11-517_fr.htm?locale=en [access: 28.08.2015].

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

[105] See for example *Overview of existing collective redress schemes in EU Member States*…

[106] European Parliament resolution of 2 February 2012 on 'Towards a Coherent European Approach to Collective Redress', 2011/2089(INI), pt. 4.

[107] *Ibidem*, pt. 6.

Apart from expressing its general support to the Commission's activity in the area of group litigation[108], the EU Parliament formulated also specific elements of collective redress mechanism, which in its opinion, shall form the basis of the European approach to group litigation.

First, the EU Parliament strongly opposed to the American style class actions, claiming that: *"Europe must refrain from introducing a US-style class action system or any system which does not respect European legal traditions."*[109]

Secondly, it argued in favour of development of strong safeguards against abusive litigation, allowing to ensure that the European system of collective redress would not lead to excess[110].

Finally, it underlined that the divergence between national systems of group litigation should be avoided, and that common approach to collective redress should be established in Europe. Because as it stated: *"national collective redress mechanisms are widely divergent, in particular in terms of scope and procedural characteristics, which may undermine the enjoyment of rights by citizens."*[111]

The aforementioned standpoint of EU Parliament constituted important voice in the European debate on collective redress. It confirmed that the process of establishment of group litigation in the EU initiated at the beginning of 21st century cannot be stopped, and both financial and intellectual investments that have already been made, shall form a fundament for further development in the area of collective redress. It also confirmed, that continuous debate on group litigation and uncoordinated development of collective redress mechanisms by MS may lead to undesirable results, which may lead in turn to limited efficiency of EU citizens' protection and undermine proper functioning of the European system of law enforcement. Therefore, as the EU Parliament signalised, the more decisive standpoint of the Commission was required, and introduction of a clear-cut solution on the issue of group litigation became more than necessary.

2.6. Communication and Recommendation on collective redress – a final word in the European debate on group litigation?

The last stage of development in the area of group litigation falls for the period from 2012 to 2013. During this time, the Commission tried to establish the European instrument of collective redress, being response to

[108] *Ibidem*, pt. 1.
[109] *Ibidem*, pt. 2.
[110] *Ibidem*, pt. 20.
[111] *Ibidem*, pt. 3.

the results of public consultation and the EU Parliament's resolution. The works undertaken by the Commission led to publication of two documents in June 2013, i.e. Communication[112] and Recommendation[113] on collective redress. The entirety of these documents may be regarded as a most complex approach of the Commission to the issue of group litigation, and a summary of works conducted in the course of last decade. Moreover, it formed a part of the Commission's "package" in the area of private enforcement, and together with the Damages Directive[114] and Practical Guide on quantifying harm in actions for damages[115], it aimed to respond to the problem of limited efficiency of private method in the enforcement of competition law provisions[116].

Referring first to the Communication on collective redress it may be stated, that it was result of a deep analysis on group litigation undertaken by the Commission, aiming to answer how the problem of limited efficiency of group litigation may be effectively addressed in the EU. The Communication referred to the results of public consultation and the Parliament's resolution.

Firstly, the Communication recognised a great interest given to the group litigation in the EU, and a diversity of opinions expressed during the public consultation[117]. Secondly, it pointed out on advantages of group litigation mechanism, as well as possible risks of common European approach to collective redress[118]. Finally, being aware of all the difficulties concerning

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112 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Economic Committee of the Regions "Towards a European Horizontal Framework for Collective Redress", COM(2013) 401 final.

113 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, OJ L 201, 26/07/2013, p. 60–65.

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

115 See Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, C(2013) 3440, 11.6.2013; Commission Staff Working Document – Practical Guide on Quantifying Harm in Actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, SWD(2013) 205, 11.6.2013.

116 A. Piszcz, *„Pakiet" Komisji Europejskiej dotyczący powództw o odszkodowanie…*, p. 54.

117 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Economic Committee of the Regions "Towards a European Horizontal Framework for Collective Redress", COM(2013) 401 final, pp. 5–7.

118 *Ibidem*, pp. 7–8.

group litigation in the EU, the Commission argued that all MS should have national collective redress systems based on a common European principles[119]. In the Commission's opinion, only such solution would ensure that the access to justice would be increased, law enforcement would be fully effective and incoherence of national solutions on group litigation could be overcome[120].

Apart from assessing the results of public consultation and expressing its general support to the group litigation in the EU, the Commission referred also to several problems of collective redress.

Firstly, it recognised that the EU legislation, international agreements and national legal solutions were lacking coherence on the issue of collective redress. In the Commission's opinion, such diversity might lead to limited protection of individuals against EU law infringements and inefficiency of European system of law enforcement[121].

Secondly, it determined particular problems that had to be resolved in order to ensure greater efficiency of collective redress, and in order to protect national jurisdictions from the abuse. In this matter, the Commission referred to such issues as legal standing, formation of a group, admissibility of a claim, financing of collective action and relationship with public proceedings. In the Commission's opinion, all of them required specific and coherent approach provided at the European level.

Finally, the Commission underlined that due to the complexity of subject matter and divergence of national solutions on collective redress, a common European initiative in the area of group litigation was the most appropriate solution[122]. As it claimed, only complex horizontal approach to group litigation might address the aforementioned problems, and allow avoiding the risks of uncoordinated sectorial and national initiatives[123].

While the Communication expressed only a general standpoint of the Commission on the issue of group litigation, specific elements of the EU approach to collective redress were provided in the Recommendation.

Recommendation on collective redress is a non-binding legal document, setting out series of principles on collective redress which shall be adopted voluntarily by MS. As the Recommendation stipulates, its purpose is to: *"facilitate access to justice, stop illegal practices and enable injured parties to obtain compensation in mass harm situations caused by violations of rights*

119 *Ibidem*, pp. 3–4.
120 *Ibidem*, pp. 7–9.
121 *Ibidem*, pp. 4–5.
122 *Ibidem*, p. 16.
123 *Ibidem*, p. 16.

granted under Union law."[124] Moreover, as the Recommendation adds, while it aims to increase access to justice and grant better protection to individuals injured by EU law infringements, its goal is also to *"take into account the legal traditions of the Member States"*[125] and *"ensure appropriate procedural safeguards to avoid abusive litigation."*[126] Finally, the Recommendation recognises the principle role of public method in the enforcement of law provisions and evokes that: *"the possibility for private persons to pursue claims based on violations of such rights [aut.: rights granted under EU law] supplements public enforcement."*[127] Therefore, it may be claimed that the Recommendation tries to find a balance between European and national approach to collective redress, between private and public method of law enforcement, and finally between European and American model of group litigation.

Referring to the specific elements of Recommendation, we may observe that they confirm a standpoint already expressed by the Commission during debate on collective redress.

Firstly, the Commission argues in favour of wide safeguards against the abuse. It rejects solutions foreign to European legal systems, such as punitive damages, pre-trial discovery procedures and jury awards[128]. Instead, it proposes several mechanisms intended to protect national jurisdictions from the massive and unfounded litigation. As such we can evoke: limited right of standing[129], judicial control of collective claims[130], loser-pays principle[131], opt-in mechanism[132] and prohibition of contingency fees[133]. In the Commission's opinion, such elements may ensure that the judicial collective redress established in the EU will be effective, and will not attract abusive litigation having detrimental effects to the internal market[134].

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124 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, OJ L 201, 26/07/2013, p. 60–65, pt. 1.

125 *Ibidem*, pt. 10 of the Preamble.

126 *Ibidem*, pt. 1.

127 *Ibidem*, pt. 6 of the Preamble.

128 *Ibidem*, pt. 15 of the Preamble; see also pt. 31 as far as prohibition of punitive damages is concerned.

129 *Ibidem*, pt. 4–7.

130 *Ibidem*, pt. 8–9.

131 *Ibidem*, pt. 13.

132 *Ibidem*, pt. 21–24.

133 *Ibidem*, pt. 29–30.

134 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Economic Committee of the Regions

Secondly, the Commission undertakes an attempt to find a balance between public and private method of law enforcement. In the opinion of the Commission, it is required in order to ensure that both systems of law enforcement will be able to attain their different objectives (deterrence and punishment in case of public enforcement and compensation in case of private method). Moreover, in the opinion of the Commission, finding a balance between public and private enfacement is necessary in order to guarantee that these two methods will not lead to conflicting results[135]. In order to put it in concrete terms, the Commission proposes two solutions aimed to ensure equilibrium between public and private method. First, concerns introduction of collective follow-on actions. Second, refers to the prohibition of punitive damages.

The first solution aims to coordinate conduct of public and private proceedings. As it follows from the Recommendation, the MS shall guarantee that where a public authority is empowered to adopt a decision finding that there has been a violation of EU law, the collective actions should start only after any proceedings of public authority have been concluded.[136] Whereas, in case when the public proceedings are launched after the commencement of the collective action, the court shall have a right to stay the collective action until the proceedings of the public authority have been terminated[137].

The above solution undoubtedly increases the level of coherence between collective actions and public proceedings. Moreover, it significantly limits a risk of contradictory decisions and permits a court deciding on collective claim to refrain from giving a judgment which could conflict decision contemplated by public authority. Finally, once read in conjunction with the Art. 9 of the Damages Directive, stating that the final decision of national competition authority claiming the existence of anticompetitive behaviour shall be binding upon national court deciding on damages, it significantly increases chances of collective follow-on actions and takes the important burden off plaintiffs claiming for damages.

The second solution evoked by the Commission as aiming to ensure a balance between public and private enforcement, concerns the rejection punitive damages. As the Commission argued in the Communication:

"Towards a European Horizontal Framework for Collective Redress", COM(2013) 401 final, p. 3.

135 *Ibidem*, p. 10.

136 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, OJ L 201, 26/07/2013, p. 60–65, pt. 33.

137 *Ibidem*, pt. 33.

"Collective damages actions should aim to secure compensation […] The punishment and deterrence functions should be exercised by public enforcement."[138] Such standpoint leads the Commission to the conclusion that: *"There is no need for EU initiatives on collective redress to go beyond the goal of compensation: Punitive damages should not be part of a European collective redress system."*[139] In consequence, the Recommendation clearly prohibits punitive damages and claims that: *"The compensation awarded to natural or legal persons harmed in a mass harm situation should not exceed the compensation that would have been awarded, if the claim had been pursued by means of individual action."*[140] Such solution seems to correspond to the European legal tradition and a principle of "full compensation" established in all national jurisdictions[141].

The last characteristic of the Commission's Recommendation may be described as an attempt to respond to current shortcomings of group litigation in the EU. Recognising the need of increasing efficiency of collective redress[142], the Commission argues in favour of several innovative mechanisms intended to facilitate collective actions, limit their costs and increase individuals' knowledge on possible claims. As such solutions we can evoke a possibility of a third party funding[143], increased importance

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138 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Economic Committee of the Regions "Towards a European Horizontal Framework for Collective Redress", COM(2013) 401 final, p. 10.

139 *Ibidem*, p. 10.

140 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, OJ L 201, 26/07/2013, p. 60–65, pt. 31.

141 The principle of "full compensation" is also confirmed in the Art. 3(1) of the Damages Directive which states: *"Member States shall ensure that any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm"* and in the Art. 3(2) of the Damages Directive providing that: *"Full compensation shall place a person who has suffered harm in the position in which that person would have been had the infringement of competition law not been committed. It shall therefore cover the right to compensation for actual loss and for loss of profit, plus the payment of interest."*

142 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Economic Committee of the Regions "Towards a European Horizontal Framework for Collective Redress", COM(2013) 401 final, p. 2.

143 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, OJ L 201, 26/07/2013, p. 60–65, pt. 14–16.

of alternative methods of disputes resolution (hereinafter "ADR")[144], establishment of national registries of collective actions[145], or a possibility to prolong or suspend a time during which collective claim may be brought[146]. All these proposals confirm that the Commission aims not only to ensure coherence among national solutions on group litigation, and provide required balance between public and private enforcement, but also tries to take a step forward, and adapt its proposal to the current needs of EU citizens and enterprises.

To sum up we can state that the recent Commission's initiative in the area of collective redress constitutes a step forward in the European debate on group litigation. It recognises current achievements of group actions in the EU and confirms a need of its development within the whole EU. Nevertheless, the more detailed of Commission's proposal shows that the aforementioned step is limited, and a full response to the problem of low efficiency of collective redress in the EU is still missing.

Firstly, the Commission argues in favour of a wide European approach to collective redress based on the same principles in all MS. In order to achieve this goal, the Commission proposes a soft-law instrument and recommends the MS to introduce its specific proposals within the period of two years from its publication (till 26 July 2015). Undoubtedly, such approach guarantees greater flexibility to MS and allows avoiding political conflict within the EU, however, we may have doubts if current divergence of national solutions on collective redress may be overcome by such mechanism[147]. These concerns are even greater in the area of antitrust law, because as the Damages Directive states in Point 13 of its Preamble: *"This Directive should not require Member States to introduce collective redress mechanisms for the enforcement of Articles 101 and 102 of the Treaty."*[148]

Secondly, the character of solutions proposed by the Commission, e.g. opt-in mechanism or exclusion of contingency fees, seems to be more preservative than the instruments already developed in the national legal orders. When we compare it with opt-out mechanisms functioning in Netherlands, Portugal and Denmark, or success fees permitted under the

144 *Ibidem*, pt. 25–28.

145 *Ibidem*, pt. 35–37.

146 *Ibidem*, pt. 33–34.

147 See in more details Part II Chapter 2 Point II(1).

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

British and Polish law, we may have impression that Commission's fear of abusive litigation forms important obstacle to development of more effective solutions in the area of collective redress.

Finally, the new mechanisms of group litigation proposed by the Commission, i.e. third party funding, increased role of ADRs and national registers of collective actions, construe only limited response to the current shortcomings of group litigation, such as high costs of proceedings, limited access to proofs and low knowledge of individuals about possible collective claims. Moreover, as certain authors underline, their application in practice may be hard to achieve, and despite legitimacy of pursued goals, they may struggle with their appropriate fulfilment[149].

In view of the above it may be claimed, that the latest proposal of the Commission in the area of collective redress raises many uncertainties, and does not provide a long desired clear-cut solution to the problem of limited efficiency of group litigation in the EU[150]. Undoubtedly, its efficiency strongly depends on the will of MS and development of national mechanisms of group litigation, nevertheless, as the current experience shows, the construction proposed by the Commission may struggle to effectively address current problems of group litigation in the EU[151]. Due to its conservative character and proposed legislative method, the divergence between national approaches to collective redress risks to be preserved in Europe.

Therefore, as it is argued, the recent Commission's proposal in the area of group litigation is probably not a final word in the discussion on collective redress[152]. Such standpoint finds also a confirmation in the Recommendation itself, which in a final point of its Preamble states: *"Within four years after publication of this Recommendation, the Commission should assess if any further action, including legislative measures, is needed, in order to ensure that the objectives of this Recommendation are fully met. The Commission should in particular assess the implementation of this Recommendation and*

[149] See A. Piszcz, *„Pakiet" Komisji Europejskiej dotyczący powództw o odszkodowanie*…., p. 67; M.T. Vanikiotis, *Private antitrust enforcement*..., pp. 1670–1673.

[150] See also on this point D. Geradin, *Collective Redress for Antitrust Damages in the European Union: Is This a Reality Now*, George Mason Law Review, 2015, vol. 22:5, p. 1101.

[151] The assessment of Recommendation on collective redress shows that despite being encouraged to introduce group litigation procedure, none of the MS have recently decided to establish a mechanism in the form proposed by the Commission. Moreover, all of the countries which already possessed a group litigation mechanism at the moment when the Recommendation was published, did not decide to adapt its systems to the proposal of the Commission; see in more details Part II Chapter 2 Point I(1).

[152] See for example R.H. Lande, *The Proposed Damages Legislation*…, pp. 123–124.

its impact on access to justice, on the right to obtain compensation, on the need prevent abusive litigation and on the functioning of the single market, the economy of the European Union and consumer trust."[153] Therefore, a further debate on group litigation in Europe seems to be only a question of time.

II. The main characteristics of European approach to group litigation

As it was showed above, the European approach to group litigation evolved in a particular legal and political environment. On the one hand, it was strongly influenced by the American system of class actions which from the early 1960s was showing that the effective protection of individuals against law infringements, especially in the area of antitrust law, may be achieved if collective mechanisms of disputes resolution are provided to injured parties. On the other, it was marked by a fear of abuse, which according to the American experience, could be a consequence of uncontrolled development in the area of group litigation. Therefore, while trying to ensure greater access to justice, higher level of judicial economy and better functioning of the internal market, the EU institutions initiating discussion on collective redress were persuaded that a legal transplant of US class action mechanism shall be avoided in Europe. In their opinion, it was crucial not only to differ from the American legal practice, but also to ensure that the litigation culture would not be established in Europe[154]. As a result, the so-called "European approach" to group litigation, characterised by the rejection of several elements of US-style class actions, introduction of strong safeguards against abusive litigation and a constant attempt to ensure coherence between different national legal traditions, was established in the EU. While such approach shall be regarded as very ambitious and far reaching, the question is:

"Does it provide effective response to the limited efficiency of private enforcement in Europe?

Or in other words:

"Does the European mechanism of collective redress constitute appropriate answer to the needs of EU citizens and enterprises injured by the competition law infringements?

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153 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, OJ L 201, 26/07/2013, p. 60–65, pt. 26 of the Preamble.

154 N. Kroes, *Enhancing Actions for Damages for Breach of Competition Rules…*

1. Rejection of US-style class actions

As it was previously described, the American system of private enforcement may be regarded as the most developed approach to the issue of individuals' participation in the application of competition law provisions. Thanks to its specific legal solutions and well-established mechanisms of enforcement, it allowed to overcome individuals' reluctance to pursue anticompetitive behaviours, and to ensure greater participation of private parties in the system of antitrust law enforcement. According to the recent data, more than 75% of antitrust proceedings conducted in the US are initiated by individuals. Moreover, most of the proceedings are held in the form of class actions, being regarded as the most effective mechanism of private enforcement in the United States[155].

Despite the great success of American approach to private enforcement, and significant achievements of US legal system in the area of group litigation, the European institutions from the beginning of a debate on group litigation tried to find an alternative path for development of collective actions in Europe. They were underlining a need of establishment of the EU-like approach to group litigation, being a response to the American mechanism of class actions[156]. As M.T. Vanikiotis claims, it was mainly motivated by the fact that the US approach to group litigation was viewed in the EU as contradictory to the legal traditions of MS[157]. Mechanisms such as opt-out, wide discovery rules or contingency fees, were regarded as irreconcilable with a civil law legal tradition[158]. Moreover, it was argued that the US-style class actions lead to abuse, and once introduced in the EU would jeopardise required balance between the interests of consumers, undertakings and competition authorities[159]. Therefore, all the proposals on group litigation were based on a wide consensus that the US-style class actions are undesirable, and that the European mechanism of collective actions must be tailored in a different manner[160].

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155 A. Foer, R.M. Stutz, *Private Enforcement of Antitrust Law in the United States*, Edward Elgar 2012, pp. 14–15.

156 D. Corapi, *Class Actions…*, p. 196.

157 M.T. Vanikiotis, *Private antitrust enforcement...*, pp. 1651–1652.

158 D. Corapi, *Class Actions...*, pp. 192–193.

159 V. Pinotti, D. Stepina, *Antitrust Class Actions in the European Union: Latest Developments and the Need for a Uniform Regime*, Journal of Competition Law & Practice, Vol. 2, No. 1, pp. 25–26.

160 J. Bees und Chrostin, *Collective redress and class action arbitration in Europe: where we are and how to move forward*, International Arbitration Law Review 2011, Vol. 14(4), p. 115.

Such reasoning may be firstly observed in a wording applied in the European debate on group litigation. While the term "class actions" was used to describe the American approach to collective claims, the EU institutions from the very beginning of a debate on group litigation tried to establish EU-relevant vocabulary. Instead of using the notion of "class actions", the Commission referred to the term of "collective actions" or "collective redress". In the opinion of C. Hodges, it signified a political desire to distance from the American notion of "class actions" which was regarded in Europe as a "toxic term"[161].

The aforementioned reasoning may be observed in the Green Paper on damages actions, where the Commission stated: *"A collective action differs from an opt-out class action, where an individual can bring an action on behalf of an unidentified class of persons"*[162]. Also the White Paper on damages actions underlined that: *"The collective action mechanism under Policy Option 2 would not take the form of an "opt-out" class action, but, instead, of "opt-in" collective action, where only victims who have decided to join the group seeking compensation are included in the action."*[163] As C. Hodges claims, such approach to the issue of wording was supposed to illustrate that the American notion of class actions is not only irrelevant in the EU, but also that its content differs from the European understanding of group litigation[164].

Secondly, as the European debate on collective redress shows, it was strongly based on the criticism of specific elements of American-style class actions. Already in 2005 N. Kroes, while referring to the American mechanism of class actions, stated that the goal of European Commission shall be to foster a competition culture, not a litigation culture, and that the excess generated by the US-style class actions shall be avoided in Europe[165]. Three years later, the standpoint of the Commission became even more firm, and as it held in the memorandum on consumer collective redress: *"US style class action is not envisaged. EU legal systems are very different from the US legal system which is the result of a "toxic cocktail – a combination of several elements (punitive damages, contingency fees, opt-out, pre-trial discovery*

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161 C. Hodges, *Current discussion on consumer redress…*, p. 15.

162 Commission Staff Working Paper – Annex to the Green Paper – Damages actions for breach of the EC antitrust rules, SEC(2005) 1732, ref. no 122.

163 Commission staff working document accompanying document to the White paper on damages actions for breach of the EC antitrust rules – Impact assessment, /* SEC/2008/0405 final */, pt. 115.

164 C. Hodges, *Current discussion on consumer redress…*, pp. 15–16.

165 See N. Kroes, *Enhancing Actions for Damages for Breach of Competition Rules…*

procedures.)[…] This combination of elements – "toxic cocktail" – should not be introduced in Europe."[166]

The Commission's reasoning was followed by the EU Parliament. In its resolution on collective redress it noted that the American system of class actions led to abuse, and that the Commission while undertaking works on collective redress in the EU shall *"refrain from introducing a US-style class action system or any system which does not respect European legal traditions."*[167]

The above standpoint of the EU Parliament finds its confirmation in the latest Commission's proposals on collective redress. Both in the Communication and the Recommendation on collective redress, the Commission argued against adoption of US-style class actions in Europe. In its opinion, the goal of national legislators should be to develop genuinely European approach to the issue of collective redress, preventing negative effects of the American solution[168]. As the Commission claims in the Communication: *"'Class actions' in the US legal system are the best known example of a form of collective redress but also an illustration of the vulnerability of a system to abusive litigation. Several features of the US legal system have made class actions a particularly powerful instrument that is, however, feared by those on the defending side, namely trade and industry as it can be used as a forceful tool to compel them to settle a case, which may not necessarily be well-founded."*[169] The consequence of such reasoning is a rejection of the main elements of American system of class actions, such as opt-out mechanism, broad discovery rules, contingency fees or treble damages. Instead, the Commission proposes opt-in solution, third party funding and a principle of full compensation. Moreover, it argues in favour of introduction of safeguards against the abuse, which goal is to guarantee that massive and unfounded claims will not develop in Europe.

In view of the aforementioned it can be stated, that a criticism of American system of class actions became a starting point for the formulation of European approach to collective redress. It determined its

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166 Green Paper on Consumer Collective Redress – Questions and Answers, MEMO/08/741, p. 4.

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

168 *Ibidem*, pt. 1.1.

169 Communication from the Commission to the European Parliament, the Council, the European Economic And Social Committee and the Committee of the Regions "Towards a European Horizontal Framework for Collective Redress", COM(2013) 401 final, pt. 2.2.2.

main characteristics, and led to establishment of an alternative mechanism of group litigation in the EU. Nevertheless, while the attempts of EU institutions to limit the abuse and protect European system against flow of massive and unfounded claims shall be positively evaluated, certain authors wonder, if the fear of US-style class actions did not lead to *"throwing of a class action baby together with a bath"*[170]. In other words, it may be asked if the rejection of solutions working effectively in practice in the US, did not deprive Commission from a possibility to introduce effective system of group litigation in the EU?

2. Introduction of strong safeguards against the abuse

The second characteristic of European approach to collective redress concerns development of wide safeguards against the abusive litigation. The abusive litigation, defined by the Commission as claims *"intentionally targeted against law-abiding businesses in order to cause reputational damage or to inflict an undue financial burden on them"*[171], was regarded as a main shortcoming of class action mechanism, and a risk that shall be avoided in Europe at all costs. Because, as the Commission stated in the Communication, development of abusive litigation in the EU could result in unjust settlements, over-deterrence, elimination of smaller economic operators and imbalance in the position of market participants[172]. Therefore, it became particularly important to propose solutions able to ensure equilibrium between the interests of both parties to the proceedings, and create a barrier against a flow of massive and unfounded claims in Europe.

2.1. Opt-in mechanism

As the first safeguard against abusive litigation the Commission proposed an opt-in mechanism. While the American system of class-actions was strongly based on the opt-out solution, the Commission from the beginning of its works on collective redress argued in favour of the opt-in mechanism. Already in the Green Paper on Consumer Collective Redress it held that:

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170 R. Mulheron, *The Class Action in Common Law Legal Systems…*, p. 23.

171 Communication from the Commission to the European Parliament, the Council, the European Economic And Social Committee and the Committee of the Regions "Towards a European Horizontal Framework for Collective Redress", COM(2013) 401 final, pt. 2.2.2.

172 *Ibidem*, pt. 2.2.2.

"Opt-out solutions […] are often viewed negatively in Europe due to the perceived risk of encouraging the excessive litigation experienced in some non-European jurisdictions. Any collective redress system should be designed to avoid such a risk."[173] It continued this reasoning in the White Paper on damages actions, where it claimed: *"opt-in collective action should be preferred to an opt-out collective action in which a person can bring an action on behalf of a class of unidentified persons."* In the opinion of the Commission, the opt-out mechanism was causing several problems which could lead to detrimental effects both on the side of consumers and on the side of enterprises[174].

Firstly, the Commission argued that the opt-out mechanism would construe a principal-agent problem[175]. As previously described, it concerned a situation in which due to the very large number of victims covered by a claim, and lack of direct links between the representative plaintiff and individuals forming a group, the injured individuals would not be able to control plenipotentiaries acting on its behalf[176]. Such loss of control might lead to unsatisfactory resolution of cases and increased risk of abusive litigation[177]. This negative consequence of opt-out mechanism could have been observed in the American system of class action. As J. Coffee underlines, lack of control over representative plaintiffs led in many cases to situations when the class actions lawyers "*under-invested in their work"* and *"'sold out' members of their class when negotiating class settlements"* [178]. Moreover, as many commentators argued, due to the limited control over the activity of lawyers and a possibility of obtaining high profits by the mean of settlements, the American attorneys turned in the course of time many into entrepreneurs, seeking rather for their own profit, than for the

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173 European Commission, Green Paper on Consumer Collective Redress, COM(2008) 794 final, pt. 56.

174 Commission Staff Working Paper accompanying White Paper on damages actions for breach of EC antitrust rules, /* SEC/2008/0404 final */, pt. 67; see also R. Gaudet, *Turning a blind-eye: the Commission's rejection of opt-out class actions overlooks Swedish, Norwegian, Danish and Dutch experience,* European Competition Law Review, 2009, Vol. 30(3), pp. 107–110.

175 Commission staff working document accompanying document to the White paper on damages actions for breach of the EC antitrust rules – Impact assessment, /* SEC/2008/0405 final */, pt. 151, Table 2.

176 See in details Part I Chapter 3 Point I(4.1).

177 M.T. Vanikiotis, *Private antitrust enforcement*..., pp. 1652–1655.

178 E. Brunet, *Two Phases of Class Action Thinking: The Dam Period is Replaced by the Present Coffee Era*, 74 Tulane Law Review, June 2000, pp. 1920–21.

best protection of their clients[179]. As a result, the individuals' rights were threatened and a risk of abusive litigation significantly increased.

Secondly, the Commission was claiming that the introduction of the opt-out mechanism in the EU could raise constitutional concerns in most of the MS[180]. It referred in particular to the risk of violation of a principle of party's disposition and a due process rule, underlying procedural traditions of all civil law jurisdictions[181]. According to the aforementioned rules, each individual shall have a right to initiate and terminate judicial action, and shall be entitled to participate in the proceedings in order to protect its interests. In the opinion of the Commission, such right could be limited once confronted with the opt-out mechanism.

Finally, the Commission argued that the opt-out solution would be more expensive for the system of justice and would provoke excessive costs to the internal market. On the one hand, it would result from the increased costs of litigation, involving greater number of claimants and higher attorney's fees. On the other, it would be a consequence of an excessive burden imposed on undertakings, being obliged to face massive collective claims and often forced to settle in a fear of paying high damages[182].

The above-mentioned shortcomings of opt-out mechanism, induced the Commission to oppose to its introduction in the EU. As a possible safeguard against the abuse, the Commission proposed an opt-in solution, guaranteeing in its opinion better protection of interests of both parties to the proceedings and greater coherence with legal traditions of MS. As the Commission stated in the White Paper on damages actions: *"analysis in the field of competition suggests that an opt-in collective action should be preferred to an opt-out collective action…"*[183] This standpoint was further

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179 M.T. Vanikiotis, *Private antitrust enforcement*..., pp. 1652–1653; C. Smithka, *From Budapest to Berlin: How implementing class actions lawsuits in the European Union would increase competition and strengthen consumer confidence*, Wisocnsin Law Journal, Vol. 27, No 1, pp. 177–178; M. Gilles, *Exploding the Class Action Agency Costs Myth…*, claiming that: *"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."*

180 Commission staff working document accompanying document to the White paper on damages actions for breach of the EC antitrust rules – Impact assessment, /* SEC/2008/0405 final */, pt. 151, Table 3.

181 D.P.L. Tzakas, *Effective collective redress in antitrust and consumer protection matters…*, p. 1135.

182 C.I. Nagy, *Comparative collective redress from a law and economics perspective: without risk there is no reward!*, Columbia Journal of European Law, Vol. 19(3), 2013, pp. 482–485.

183 Commission Staff Working Paper accompanying White Paper on damages actions for breach of EC antitrust rules, /* SEC/2008/0404 final */, pt. 67.

confirmed by the EU Parliament which held that: *"the European approach to collective redress must be founded on the opt-in principle, whereby victims are clearly identified and take part in the procedure only if they have expressly indicated their wish to do so, in order to avoid potential abuses"*[184].

The above reasoning is continued by the Commission in its latest proposal on collective redress. As the Recommendation stipulates: *"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)."*[185] Because as the Communication explains: *"The 'opt-in' system respects the right of a person to decide whether to participate or not. It therefore better preserves the autonomy of parties to choose whether to take part in the litigation or not."*[186]

While the aforementioned position of the European institutions on the issue of opt-out mechanism seems to correspond to the voice of majority of stakeholders expressed in public consultation[187], the still pending question is:

"Does the Commission provide sufficient justification for the rejection of opt-out solution and ensure establishment of its effective alternative in Europe?"

First, as some commentators underline, the rejection of opt-out mechanism by the Commission does not provide sufficient empirical support[188]. Neither in the White paper on damages actions, nor in the Recommendation on collective redress, the Commission provided data confirming that the legal and economic costs of opt-out solution are higher than in the case of opt-in mechanism. While the theoretical arguments, based mostly on the criticism of American-style class actions seem to be convincing, the Commission does not confront them with the European legal reality. It shall be kept in mind that due to the existence of loser-pays principle, lack of contingency fees and treble damages, the European legal

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184 European Parliament resolution of 2 February 2012 on 'Towards a Coherent European Approach to Collective Redress' 2011/2089(INI), pt. 20.

185 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, OJ L 201, 26/07/2013, pt. 21.

186 Communication from the Commission to the European Parliament, the Council, the European Economic And Social Committee and the Committee of the Regions "Towards a European Horizontal Framework for Collective Redress", COM(2013) 401 final, pt. 3.4.

187 See Evaluation of contributions to the public consultation and hearing: "Towards a Coherent European Approach to Collective Redress", Study JUST/2010/JCIV/CT/0027/A4, pp. 10, 22, 33, where majority of national governments, public authorities, legal practitioners and almost all business representatives argued in favour of introduction of opt-in mechanism in Europe.

188 R. Gaudet, *Turning a blind-eye: the Commission's rejection of opt-out class actions…*, pp. 107–110.

system creates different environment for development of group litigation, what significantly limits the risk of excessive costs of opt-out mechanism.

Secondly, the Commission's and Parliament's position on the issue of opt-out seems to undermine the recent European experience in the area of group litigation. As it shows, while the level of participation in most of the opt-in collective actions is relatively low, the opt-out solution tends to guarantee effective response to the individuals' reluctance in joining collective proceedings. According to the analysis conducted by R. Gaudet, the level of consumers' participation in the opt-in proceedings in Europe does not exceed in average 1%[189]. Whereas, in Portugal and Netherlands, where the opt-out collective actions are allowed, the level of consumers' participation in collective proceedings attains in some cases between 97% and 100%[190].

Finally, the Commission's argument stating that the opt-out solution could violate national legal traditions of many MS, does not find a confirmation in the recent European experience with group litigation. As the examples of Netherlands, Denmark, Norway, Portugal and Great Britain illustrate, introduction of opt-out mechanism does not necessarily lead to abuse and violation of basic provisions of civil procedure[191].

Therefore, it may be argued that the question of opt-in versus opt-out is still opened in the EU, and the Commission's standpoint on this matter may require further reconsideration. The door for such discussion seems also to be opened by the Commission. Because while it argued in favour of opt-in solution in the Recommendation, it also held that the exception to this principle may be admissible at national level[192]. In the opinion of certain scholars, existence of such an exception may lead to the situation, where one of main safeguards against the abuse, i.e. opt-in mechanism, will lose its practical significance once confronted with a need of ensuring greater participation of individuals in private enforcement of antitrust law[193].

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189 The 1% refers to the number of consumers injured by certain infringement and entitled to compensation, who undertake a decision to join the collective claim and enforce their rights in court.

190 R. Gaudet, *Turning a blind-eye: the Commission's rejection of opt-out class actions…*, p. 109; see also on this issue R. Mulheron, *Study on «the reform of the collective redress in England and Wales: a perspective of need»*, Civil Justice Council of England and Wales, 2008.

191 See also on this issue S.O. Pais, P*rivate Antitrust Enforcement...*, pp. 23–30.

192 See pt. 21 of the Recommendation on collective redress which states: *"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."*

193 C. Hodges, *Collective Redress: A Breakthrough or a Damp Sqibb?…*, p. 78.

2.2. "Loser-pays" principle and the issue of funding

The second safeguard against the abusive litigation proposed in Europe concerns the issue of funding. While the American system of class actions was based on contingency fees and "cost-shifting" rule, the aforementioned solutions were considered in Europe as undesirable. As the Commission underlined in its several documents on collective redress, by establishing strong incentives to sue and significantly limiting the costs of litigation, contingency fees and "cost-shifting" rule were increasing potential risk of frivolous claims. Therefore, in order to protect the European legal system against the abuse, they were supposed to be rejected and replaced by a well-established "loser-pays" principle.

Referring first to the contingency fees it shall be stated, that the Commission's approach to this method of funding evolved in the course of time. While the Green Paper on damages actions did not exclude contingency fees from the scope of possible solutions, and confirmed that they construe a strong incentive to sue[194], the Green Paper on Consumer Collective Redress and White Paper on damages actions were already more critical on this matter. In the Green Paper on Consumer Collective Redress the Commission argued that the European approach to group litigation *"should avoid elements which are said to encourage a litigation culture […] such as punitive damages, contingency fees and other elements."*[195] It recognised that high costs of proceedings may prevent consumers and consumer organisations from engaging in the collective actions, however, in its opinion, a risk of unmeritorious claims, significantly increased by contingency fees, should be avoided at first[196]. The same tone derives from the Commission's standpoint expressed in the White Paper on damages actions. As the Commission noticed herein: *"Most of the respondents [aut.: to the Green Paper on damages actions] supported the viewpoint that contingency fees, whereby lawyers' fees are calculated as a percentage of any successful claim, should not be encouraged."* In consequence, it suggested MS to avoid introduction of such solution into the national legal order[197].

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194 Commission Staff Working Paper – Annex to the Green Paper – Damages actions for breach of the EC antitrust rules, SEC(2005) 1732, pt. 218.

195 European Commission, Green Paper on Consumer Collective Redress, COM(2008) 794 final, pt. 48.

196 *Ibidem*, pt. 49.

197 Commission Staff Working Paper accompanying White Paper on damages actions for breach of EC antitrust rules, /* SEC/2008/0404 final */, pt. 250–255.

The aforementioned approach to contingency fees finds also its confirmation in the latest Commission's proposal on collective redress. Despite the fact that in the last years several MS have introduced contingency fees or success fees as a possible way of collective claims' financing[198], the Commission strongly opposes to introduction of this mechanism in the EU. As it claims in the Recommendation: *"The Member States should ensure that the lawyers' remuneration and the method by which it is calculated do not create any incentive to litigation that is unnecessary from the point of view of the interest of any of the parties. The Member States should not permit contingency fees which risk creating such an incentive."*[199] The Commission's position on contingency fees seems to correspond to the requirements determined by the European Parliament which in its resolution from February 2012 held that: *"contingency fees are unknown in Europe and should not form part of the mandatory horizontal Framework"*[200].

In view of the above it may be claimed, that the Commission's approach to contingency fees finds strong grounds in the European discussion on group litigation. Moreover, once combined with the "loser pays principle", it significantly limits a risk so-called "entrepreneurial" litigation and a flow of massive and unfounded claims in Europe. Nevertheless, while the rejection of contingency fees construes a strong safeguard against the abuse, in the opinion of some scholars, it may put under question efficiency of European mechanism of collective redress[201]. Some of them even claim that in today's legal systems it is *"difficult […] to design an effective class action procedure in the absence of a contingent fee"*[202].

The aforementioned remarks are particularly important once we confront them with the results of public consultation. As they show, one of the

198 See P. Buccirossi, M. Carpagnano, *Is it Time for the European Union to Legislate in the Field of Collective Redress in Antitrust (and how)?*, Journal of Competition Law & Practice, 2013, Vol. 4, No. 1, p. 6, claiming that: *"12 out of 27 Member States now permit arrangements between claimants and their lawyers on the basis of some form of success fee."*

199 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, OJ L 201, 26/07/2013, pt. 29–30.

200 European Parliament resolution of 2 February 2012 on 'Towards a Coherent European Approach to Collective Redress' 2011/2089(INI), pt. 20.

201 T. Chieu, *Class action in the European Union?: Importing lessons learned from the United States…*, pp. 148–150.

202 See S. Issacharoff, G.P. Miller, *Will Aggregate Litigation Come to Europe?*, *Vanderbilt Law Review*, New York University Law & Econonomics Research Paper Series, Vol. 62, 2009, Working Paper No. 08-46, 2008, p. 199.

main difficulties in launching the group actions in the EU are high costs of collective proceedings[203]. Also the Commission in Communication underlines that: *"one obstacle to access to justice can be the cost of judicial proceedings."*[204] Therefore, we may assume that rejecting contingency fees and transferring the problem of funding to national jurisdictions[205], will not lead to improvement in this matter. In this context the words of P. Buccirossi and M. Carpagno, claiming that while proposing solutions on collective redress the European Commission often struggles to find required balance between "incentives" and "safeguards"[206], acquire particular importance. They confirm that once the issue of funding is concerned, the Commission is able to ensure a strong safeguard against abusive litigation, but in the same time, neglects a need of fostering individuals' incentive to sue. In consequence, due to the lack of appropriate balance between "safeguards" and "incentives", the Commission's approach to the issue of funding risks to create an obstacle in achieving greater efficiency of group litigation in the EU.

Apart from arguing against contingency fees in the course of European debate on group litigation, the Commission was also stating that the "loser-pays" principle should construe one of the core elements of EU approach to collective redress. It was perceived by the Commission as an inherent part of European legal tradition, and a factor providing a strong barrier to unfounded claims.

According to the "loser-pays" principle, a party losing a case is obliged to pay the costs of winning party. Such rule is recognised in most of the MS, and forms a general basis for covering the costs of litigation in Europe. The "loser-pays" principle may be opposed to the American "cost-shifting"

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[203] See Evaluation of contributions to the public consultation and hearing: "Towards a Coherent European Approach to Collective Redress" (Executive Summary), Study JUST/2010/JCIV/CT/0027/A4, p. 9.

[204] Communication from the Commission to the European Parliament, the Council, the European Economic And Social Committee and the Committee of the Regions "Towards a European Horizontal Framework for Collective Redress", COM(2013) 401 final, p. 7.

[205] According to the 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, the EC does not provide any guidelines on possible methods of financing that could be introduced into the national legal order but requires national legislators to introduce provisions concerning third party funding.

[206] P. Buccirossi, M. Carpagno, *Is it Time for the European Union to Legislate in the Field of Collective Redress…*, p. 6.

rule, according to which each party covers its own costs incurred during the proceedings, regardless a result of the case.

The "loser-pays" principle formed important element of the European discussion on collective redress from its very beginning. Already in the Green Paper on damages actions the Commission stated that the "loser-pays" principle construed important safeguard against the abusive litigation. Nevertheless, as it also noticed, while the "loser-pays" principle did not act as a disincentive to sue, in those cases where group claimants could have been reasonably sure about winning a case and recovering incurred costs, its application was more problematic in cases where small amounts of damages were claimed. In such situations, due to the high costs of proceedings and low value of possible compensation, the "loser-pays" principle could have discouraging effect on parties considering initiating private action[207].

This balanced approach to the "loser-pays" principle, recognising its advantages, but also potential drawbacks, was continued by the Commission in the White Paper on damages actions. As it stated: *"The "loser pays" principle, which prevails in the EU Member States, plays an important function in filtering out unmeritorious cases. However, under certain circumstances, this principle could also discourage victims with meritorious claims. National courts may therefore have to be empowered to derogate from this principle, for example by guaranteeing that an unsuccessful claimant will not have to bear the defendants' costs that were unreasonably or vexatiously incurred or are otherwise excessive."*[208]

The aforementioned approach to the "loser-pays" principle shall be positively evaluated. It showed that while the Commission was trying to provide strong safeguards against the abuse, it took also into consideration a need of ensuring incentive to sue. In consequence, the previously mentioned balance between "safeguards" and "incentives" had a chance of being achieved.

The most recent proposal on collective redress does not significantly diverge on the issue of "loser-pays" principle. Nevertheless, while the Commission confirms that the above principle shall apply to collective claims, it does not provide more complex reasoning concerning possible exceptions to this rule. Neither Communication, nor Recommendation on collective redress, do not stipulate that a court deciding on collective action shall have a right to derogate from the "loser-pays" principle, e.g. when

[207] Commission Staff Working Paper – Annex to the Green Paper – Damages actions for breach of the EC antitrust rules, SEC(2005) 1732, pt. 215–217.

[208] See European Commission, White paper on damages actions for breach of the EC antitrust rules /*COM/2008/0165 final*/.

the costs incurred by a collective plaintiff are unreasonable. Although the Recommendation states that: *"The Member States should ensure that the party that loses a collective redress action reimburses necessary legal costs borne by the winning party ('loser pays principle'), subject to the conditions provided for in the relevant national law"*, it does not guarantee that the procedural rules existing in different MS, will empower national courts with the same right to derogate from the aforementioned rule. It is even less certain once we refer to the Communication on collective redress, where the Commission claims that: *"The principle that the losing party should bear the costs of the court proceedings is well embedded in the European legal tradition, although it is not present in every jurisdiction of the European Union and the way in which it is applied differs between jurisdictions."*[209]

In view of the above it may be stated, that while the "loser-pays" principle shall be regarded as an important safeguard against the abusive litigation in Europe, greater level of clarity and legal certainty is missing in the latest Commission's proposal on collective redress. It could be ensured by determining situations in which national courts could have a right to exempt from this rule, or providing guidelines on application of "loser-pays" principle in case of collective actions. Through such solution, a better balance between "incentives" and "safeguards" would be achieved, leading in consequence to greater efficiency of group litigation mechanism proposed by the Commission.

2.3. Judicial control of collective actions

The last safeguard against the abuse concerns judicial control of collective proceedings. While this element seems to be characteristic for both European and American approach to group litigations, the EU institutions gave it particular meaning from the beginning of a debate on collective redress. As they were often claiming, only broad competences of a judge within collective proceedings, and a principal role of a court in deciding on collective claim, may ensure that the risk of abuse will be limited in Europe. The need of strict judicial control was recognised at the stage of filing a claim (admissibility), conducting proceedings (notification of victims, disclosure of evidence), deciding a case and calculating damages. By the application of several judicial filters, a judge was supposed to ensure that

[209] Communication from the Commission to the European Parliament, the Council, the European Economic And Social Committee and the Committee of the Regions "Towards a European Horizontal Framework for Collective Redress", COM(2013) 401 final, pt. 3.9.3.

only well-founded claims will reach the stage of proceedings, and that the interests of both parties to collective action will be properly protected.

When we refer to the provisions of Green Paper on damages actions we may already notice important meaning ascribed by the Commission to the judicial control of group litigation. Although it did not evoke judicial control as a possible safeguard against the abuse, it confirmed a significant role of a court in dealing with a group claim. It concerned judicial participation in disclosure of evidence[210], examination of witness[211], assessing the claim and calculation of damages[212]. In consequence, the judge was supposed to be present at all stages of group proceedings, and ensure that the interests of both parties will be properly protected.

The above reasoning was continued in the White Paper on damages actions. The Commission underlined a need of judicial control at the stage of proving the infringement and calculating damages[213]. Moreover, it showed that once the collective redress was concerned, judge shall have been granted important managerial competences. It referred to the possibility of limiting the costs of proceedings and deciding on out of court settlements. By a possibility to encourage parties to resolve their dispute by the mean of ADR[214], the judge was supposed to limit the cost exposure of parties and increase judicial economy. Therefore, it may be claimed that a role of a judge in collective proceedings started to increase. It was no longer limited to control over proceedings, but a judge was supposed to become an active actor in group litigation process.

The increased role of a judge was also confirmed in the Green Paper on Consumer Collective Redress. Once arguing in favour of safeguards against the abuse, the Commission claimed that judicial control should constitute important complement to such mechanisms as the opt-in solution, "loser-pays" principle and certification procedure. As it stated: *"judge can play an important role by deciding whether a collective claim is unmeritorious or admissible."*[215] As a result, the Commission stated that thanks to the judicial control, unfounded claims might be avoided, judicial

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[210] Commission Staff Working Paper – Annex to the Green Paper – Damages actions for breach of the EC antitrust rules, SEC(2005) 1732, pt. 89–100.

[211] *Ibidem*, pt. 68–72.

[212] *Ibidem*, pt. 147–155.

[213] Commission Staff Working Paper – Annex to the Green Paper – Damages actions for breach of the EC antitrust rules, SEC(2005) 1732, pt. 132–133, 206.

[214] *Ibidem*, pt. 54.

[215] European Commission, Green Paper on Consumer Collective Redress, COM(2008) 794 final, pt. 52.

resources well-allocated and effective justice better achieved[216]. The above standpoint was supported by a comparative analysis conducted by a group of researchers from the University in Leuven, showing that in most of the European jurisdictions, the judge played a crucial role in assessing the claim, determining its admissibility and conducting the action[217]. The aforementioned reasoning finds also its confirmation in the recent European discussion on collective redress.

Firstly, when we look at the position of EU Parliament on the analysed matter, we may observe its strong support to the judicial control of group litigation in the EU. In the opinion of Parliament, judge shall play a role of "gatekeeper", ensuring that the abusive litigation will not develop in the EU. As it follows from the Parliament's resolution on collective redress: *"Member States should ensure that a judge or similar body continues to have discretionary powers taking the form of a preliminary admissibility check of any potential collective action in order to confirm that the qualifying criteria have been met and that the action is fit to proceed."*[218]

Secondly, as the results of public consultation on collective redress illustrate, in the opinion of European governments, public authorities, business representatives, legal practitioners and consumers, judicial control shall constitute essential part of the European system of group litigation, and an important safeguard against the abuse. Once asked to respond to the following question: "*What role should be given to the judge in collective redress proceedings?"*, a great majority of public consultation stakeholders argued that judge shall play a *"very prominent role in the prevention of abusive litigation."*[219] In their opinion, it may be achieved by conferring to a judge a wide discretion to decide on the admissibility of claim, by a strict judicial control over the process of notification of victims, and finally by a judicial control of access to evidence[220]. Furthermore, as many consumer organisations and legal experts underlined, a judge shall be granted managerial functions, allowing to increase its importance in the group litigation process[221]. In their opinion, it could concern control over

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216 *Ibidem*, pt. 52.

217 The Study Centre for Consumer Law – Centre for European Economic Law Katholieke Universiteit Leuven, *An analysis and evaluation of alternative means of consumer redress…*

218 European Parliament resolution of 2 February 2012 on 'Towards a Coherent European Approach to Collective Redress' 2011/2089(INI), pt. 20.

219 See Evaluation of contributions to the public consultation and hearing: "Towards a Coherent European Approach to Collective Redress", Study JUST/2010/JCIV/CT/0027/A4, p. 14.

220 *Ibidem*, pp. 14, 26, 37, 50.

221 *Ibidem*, pp. 37, 50.

funding arrangements, application of "loser pays" principle and supervision of payment of compensation. Through such broad competences, the judge would become not only an impartial observer of collective proceedings, but also an active actor in the system of group litigation in the EU.

The voice of the European Parliament and public consultation's participants seems to find response in the latest Commission's proposal on collective redress. As it follows from the Recommendation: *"In order to avoid an abuse of the system and in the interest of the sound administration of justice, no judicial collective redress action should be permitted to proceed unless admissibility conditions set out by law are met."*[222] Moreover, as the Recommendation stipulates: *"A key role should be given to courts in protecting the rights and interests of all the parties involved in collective redress actions as well as in managing the collective redress actions effectively."*[223] Therefore, the important role of a court is confirmed, and a judge is supposed to ensure another safeguard against the abuse in a modern system of collective redress in the EU.

Nevertheless, apart from arguing in favour of a judicial control of claim's admissibility[224], the Recommendation is missing more decisive solutions concerning the role of a judge in group litigation process. Some precisions may be derived from the Communication which evokes such elements as a need of judicial control of legal standing[225], judicial control of notification process[226], judicial control of out-of-court settlements[227] and the court's ruling on the issue of funding[228]. However, due to the fact that wide discretion concerning introduction of these mechanisms is left to MS, we cannot determine if the same role will be granted to judges in all national jurisdictions. Therefore, it may be claimed, that in order to avoid uncertainty and ensure greater uniformity of the EU approach to group litigation, the European Commission should have provided the MS with clear and comprehensible guidelines on the role of a judge in group litigation process. By refraining from doing so, it runs a risk that one of the most important filters against the abuse, will not have the same significance within a whole Union.

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222 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, OJ L 201, 26/07/2013, pt. 20 of the Preamble.

223 *Ibidem*, pt. 21.

224 *Ibidem*, pt. 8–9.

225 *Ibidem*, pt. 3.3.

226 *Ibidem*, pt. 3.5.

227 *Ibidem*, pt. 3.8.

228 *Ibidem*, pt. 3.9.

3. Rapprochement of national solutions

The last characteristic of the European approach to group litigation may be described as a constant attempt to establish a common position on collective redress within the European Union. That is because, while a need of development of collective redress mechanism was widely accepted among MS, a significant divergence between national jurisdictions could have been observed, as far as the specific elements of group litigation mechanism were concerned. It often referred to such issues as scope of group litigation, type of available remedies, funding of proceedings or admissibility of contingency fees. All these elements had crucial meaning in the discussion on collective redress, and were often detrimental for a shape of particular group litigation mechanism. Within such legal environment, composed of different legal cultures and traditions, the Commission set as its objective the establishment of a common European approach to collective redress. It was supposed to ensure that the European citizens will obtain the same level of protection, and that the access to justice will be equal within the whole European Union.

Firstly, it shall be noticed that at the beginning of 21st century, a great majority of MS had already some experience with a group litigation in the area of antitrust law and consumer law. As the *Ashrust* Report claimed: *"nearly all Member States provide for some collective or representative actions of some type."*[229] However, as it also added: *"The level of diversity in this area means that any attempt of categorization looks very much like shoe-horning and is moreover often inadequate due to the non-equivalence of terms in the different Community languages."*[230] The divergence of group litigation mechanisms in the EU, forced the Commission to undertake steps able to ensure better coherence between national solutions on collective redress.

The first attempt to attain this objective was undertaken in the Green Paper on damages actions. While launching discussion on private enforcement of antitrust law, the Commission underlined that divergence of national solutions on group litigation may cause potential limitations to antitrust damages actions in the EU[231]. In order to overcome the aforementioned problem, the Commission evoked for a first time a possibility of development of EU-level action in the area of collective redress. In its

[229] See D. Waelbrock, D. Slater, G. Even-Shoshan, *Study on the conditions of claims for damages…*, p. 2.

[230] *Ibidem*, p. 2.

[231] Commission Staff Working Paper – Annex to the Green Paper – Damages actions for breach of the EC antitrust rules, SEC(2005) 1732, pt. 195–200.

opinion, it might ensure greater consistency and effectiveness of regulatory framework in the EU[232]. This standpoint led in the following years to several comparative analysis of national mechanisms of group litigation[233], and formulation of specific elements of EU approach to collective redress[234]. In the Commission's opinion, expressed in White Paper on damages actions and Green Paper on Consumer Collective Redress, increasing importance of group litigation could lead to better protection of European consumers and greater efficiency of EU system of law enforcement[235].

Nevertheless, while the Commission argued in favour of development of group litigation within the EU, it did not provide a clear answer on establishing uniform, European mechanism of collective actions. Neither White Paper on damages actions, nor Green Paper on Consumer Collective Redress, did not create basis for the EU initiative in the area of group litigation. While the White Paper on damages actions argued that the aforementioned issue required further debate[236], the Green Paper evoked common European mechanism on collective redress only as a one of four possible ways of development in the area of consumer law[237]. The lack of firm standpoint of the Commission on the issue of EU mechanism of collective redress, led in the following years to uncoordinated development of national solutions on group litigation. Contrary to the Commission's expectations, it did not lead to increase in the protection of individuals against EU law infringements, but rather provoked several risks resulting from deep incoherence of national approaches to group litigation. As it will be described in details below[238], it caused limited legal transparency, risk of inconsistent and varying adjudications, limited efficiency of enforcement system and increased risk of forum-shopping in Europe.

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232 *Ibidem*, pt. 200.

233 The Study Centre for Consumer Law – Centre for European Economic Law Katholieke Universiteit Leuven, *An analysis and evaluation of alternative means of consumer redress…*; European Commission – DG SANCO, *Evaluation of the effectiveness and efficiency of collective redress mechanisms…*

234 See European Commission, Green Paper on Consumer Collective Redress, COM(2008) 794 final and European Commission, White paper on damages actions for breach of the EC antitrust rules /*COM/2008/0165 final*/.

235 European Commission, Green Paper on Consumer Collective Redress, COM(2008) 794 final, pt. 12–15; European Commission, White paper on damages actions for breach of the EC antitrust rules /*COM/2008/0165 final*/, pt. 2.1.

236 European Commission, White paper on damages actions for breach of the EC antitrust rules /*COM/2008/0165 final*/, pt. 2.1.

237 European Commission, Green Paper on Consumer Collective Redress, COM(2008) 794 final, pt. 48–60.

238 See Part II Chapter 1 Point III(2).

Recognising the aforementioned problems, the Commission decided to undertake another initiative towards rapprochement of national solutions on group litigation. By the mean of public consultation launched in February 2011, the Commission aimed to identify common legal principles underpinning national legal traditions on collective redress, and determine whether it is possible to introduce such instrument at the EU level. Nevertheless, as the results of public consultation have shown, finding agreement between MS, public authorities, business representatives, consumers and legal practitioners, on the issue of collective redress, was a task hard to achieve. That is because, the above stakeholders differed not only as far as the specific elements of discussed mechanism were concerned (e.g. opt-in versus opt-out, legal standing, scope of application, financing of claims), but also concerning the need of European intervention in the area of group litigation. While the majority of public authorities, most of legal experts and all consumer organisations argued in favour of EU legislation on collective redress, business representatives and certain MS were against the legal action at the EU-level. In their opinion, it would have no legal value and would infringe rules of subsidiarity and proportionality. Such outcome confirmed that despite 10 years of discussion on collective redress, the EU was still not able to achieve one of its main objectives – establishing coherent approach to group litigation in Europe.

Some limited response to this problem was given by the Commission in June 2013. By publishing Recommendation on collective redress, and determining specific elements of European approach to group litigation, the Commission tried to ensure that all MS would establish collective redress mechanisms based on the same legal principles[239]. As it has argued, the EU horizontal framework for collective redress would allow to *"avoid the risk of uncoordinated sectorial EU initiatives and to ensure the smoothest interface with national procedural rules."*[240] Nevertheless, due the proposed legislative method (soft-law instrument) and scope of proposed changes, the Recommendation seems to construe only limited response to current problems of group litigation in the EU. Due to the fact that MS, according to the Art. 292 of TFEU, are not obliged to adopt proposals provided in

[239] 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, OJ L 201, 26/07/2013, pt. 10 of the Preamble.

[240] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Economic Committee of the Regions "Towards a European Horizontal Framework for Collective Redress", COM(2013) 401 final, p. 16.

the Recommendation, the recent Commission's initiative has limited chances of success. Therefore, the risk of divergence is still a case in Europe and a future of common EU approach to group litigation is highly uncertain.

III. The European approach to collective redress – main shortcomings and still unresolved problems

Before moving to final evaluation of EU approach to collective redress, and proposing a way forward for the European debate on group litigation, it is required to determine its current shortcomings. Only in this manner, a starting point for further analysis may be determined, and *de lege ferenda* proposals included in the last chapter of thesis, may have a chance to address currently existing difficulties of group litigation in Europe.

1. Between safeguarding and efficiency – how to strike a right balance?

The first shortcoming of current approach to group litigation in Europe concerns difficulty with striking a right balance between safeguards against the abuse and incentives to sue. It is especially visible in the recent Commission's proposal on collective redress, which while underlying a need of introduction of common approach to group litigation, refrains from proposing innovative solutions allowing increasing its efficiency. As a result, the proposed mechanism, once introduced in all MS, risks of becoming solution of limited practical significance.

1.1. Group formation – between opt-in and opt-out

The first area in which the aforementioned problem may be observed concerns the issue of group formation. As it was previously explained, the Commission strongly opposes to opt-out mechanism, and argues in favour of opt-in solution. The Commission's reasoning is mainly based on the non-conformity of opt-out mechanism with the European legal tradition, and a risk of abuse created by the aforementioned solution. As the Commission states in the Communication: *"The 'opt-out' system gives rise to more fundamental questions as to the freedom of potential claimants to decide whether they want to litigate. […] In addition, 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."[241] While such reasoning gets applause from most of the business representatives, national governments and legal practitioners, many scholars and consumer organisations underline its potential risks.

First, it is evoked that requesting explicit consent from individuals harmed by certain infringement may limit effectiveness of any group litigation instrument[242]. It is especially possible in the area of antitrust law, where the law violation often harms hundreds, thousands or even millions of consumers, and is often unknown to injured parties. As different authors argue, in such case, even if individual is notified about collective action, his will to join long and complex antitrust proceedings is often limited[243].

Secondly, the opt-in solution may lead to situations where large groups of individuals are deprived of required compensation. It often results from the fact that in small value individual claims, being often a case in the area of antitrust law, the injured parties are reluctant to join the group proceedings and claim from compensation[244]. G. Delatre explains it by a fact that: *"the rate of rational apathy of victims will always be higher than the rate of victims who opt-in."*[245] In consequence, the principle of full compensation is not fully achieved.

Finally, the opt-in solution provides limited response to "access to justice" and in many cases leads to preservation of asymmetry in the position of competition law perpetrators and injured individuals. It is a consequence of lower number of victims joining collective claims and too weak position of groups of claimants. As the example we can evoke a French case brought by consumers' association – *UFC Que Choisir* against three mobile operators (Orange France, SFR and Bouygues Telecom), following a cartel decision of French Competition Authority[246]. As P. Buccirossi and M. Carpagnano

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241 *Ibidem*, p. 12.

242 D.P.L. Tzakas, *Effective collective redress in antitrust and consumer protection matters…*, p. 1136.

243 D.P.L. Tzakas, *Effective collective redress in antitrust and consumer protection matters…*, pp. 1135–1139; R. Mulheron, *The Case for an Opt-out Action for European Member States: A Legal and Empirical Analysis*, Columbia Journal of European Law (2009), Vol. 15, p. 428.

244 See R. Gaudet, *Turning a blind-eye: the Commission's rejection of opt-out class actions…*, p. 109.

245 G. Delatre, *Beyond the White Paper: Rethinking the Commission's Proposal on Private Antitrust Litigation*, Competition Law Review (2011), Vol. 8(1), p. 38.

246 See *Décision n° 05-D-65 du 30 novembre 2005 relative à des pratiques constatées dans le secteur de la téléphonie mobile*, available at: http://www.autoritedelaconcurrence.fr/pdf/avis/05d65.pdf [access: 01.09.2015].

underline, despite the undertaken effort, the *UFC Que Choisir* managed to collect claims only from 12,350 consumers, although according to French Competition Authority, the violation of antitrust law committed by the mobile operators had a potentially negative impact on 20 millions of consumers. Moreover, *UFC Que Choisir* spent nearly 2000 hours preparing a claim and incurred 500,000 euros of legal expenses. Nevertheless, once confronted with the powerful undertakings, the consumers' association was able to recover only 750,000 euros, allowing to pay compensation of 60 euros to each consumer participating in the claim[247].

In view of the aforementioned, many consumer organisations[248], legal experts[249] and EU citizens[250], argued within the public consultation that the opt-out model should not be rejected in Europe out of hand. As they have claimed, by its adaptation to the European legal environment, or introduction of a mixed opt-in/opt-out model, the Commission could have responded to many shortcomings of group litigation mechanism. The consumer organisations pointed out on less bureaucratic character of opt-out solution and its greater efficiency in formulating damages claims[251]. Whereas, different legal experts underlined that the opt-out solution could bring several benefits not only to injured parties, but also to the accused undertakings[252]. It would mainly concern greater legal certainty, resulting from the fact that in case of opt-out mechanism, a risk of re-litigation and conflicting court decisions would be significantly reduced.

The above reasoning seems to find a confirmation in the changes recently introduced in different MS. As the Dutch, Danish, British, Norwegian, and Portuguese legal systems show, the opt-out solution may be successfully established in civil law legal tradition, leading to greater efficiency of group litigation instrument. Referring to Dutch example, where the opt-out class actions settlements for monetary damages were introduced in 2005, we may observe a significant increase in the number of settlements concluded between injured individuals and accused undertakings, as well as greater level of compensation of injured parties. Just to illustrate we may give examples of

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247 See P. Buccirossi, M. Carpagnano, *Is it Time for the European Union to Legislate in the Field of Collective Redress…*, p. 5.

248 Evaluation of contributions to the public consultation and hearing: "Towards a Coherent European Approach to Collective Redress"…, p. 33.

249 *Ibidem*, p. 46.

250 *Ibidem*, p. 57.

251 *Ibidem*, p. 33.

252 *Ibidem*, p. 46.

DES case[253], where the value of settlements reached 35 million US dollars, *Dexia* case[254], with the settlements of 1 billion US dollars and *Royal Dutch Shell* case[255], covering individuals from different MS and leading to collective settlement of 352.6 million US dollars. While the evoked values of settlements seem to be very significant, many commentators underline that there was no flood of litigation or adverse impact of opt-out mechanism on Dutch legal culture[256]. Moreover, it is claimed that the opt-out settlements, allowing for a full compensation of claimants and fast and final resolution of cases, increased an access to justice and ensured greater judicial economy[257].

The aforementioned example illustrates that the introduction of opt-out mechanism in the EU must not necessarily lead to abuse, but under specific conditions, may lead to greater efficiency of collective redress instrument. It also provokes a question if a balance between "safeguards" and "incentives", as far as the issue of group formation is concerned, was properly stroke by the Commission. This question may become particularly important once the Commission's Recommendation is to be implemented in different national jurisdictions. That is because, while the Recommendation argues in favour of opt-in solution, it states also that: *"any exception to this principle (aut.: "opt-in" principle), by law or by court order, should be duly justified by reasons of sound administration of justice."* Therefore, as different scholars claim, the doors for discussion on opt-out are still opened in the EU, and further development on this matter may force the Commission, by the mean of national bottom-up initiatives, to reconsider its current position on the issue of group formation[258].

1.2. Financing of collective claims – the problem of third-party funding

The second area in which Commission struggles to provide required balance between "safeguards" and "incentives", concerns the issue of funding. While the Commission argued in the Recommendation against contingency fees and promoted "loser-pays" principle, it did not provide appropriate solution to one of the main obstacles in launching collective

253 Amsterdam Court of Appeals 1 June 2006, LJN: AX6640 (DES).

254 Amsterdam Court of Appeals 25 January 2007, LJN: AZ033 (Dexia).

255 Amsterdam Court of Appeals 29 May 2009, LJN: BI5744 (Shell Petroleum N.V. and the Shell Transport and Trading Comp Ltd et al v. Dexia Bank Nederland N.V. et al).

256 See I.N. Tzankova, D.F. Scheurleer, *Memorandum to Professor Deborah Hensler and Dr Christopher Hodges*, September 24, 2007, prepared for Oxford Conference on the Globalisation of Class Actions, December 12–14, 2007, p. 19, available at: http://globalclassactions.stanford.edu [access: 01.09.2015].

257 *Ibidem*, p. 22.

258 C. Hodges, *Collective Redress: A Breakthrough or a Damp Sqibb?…*, p. 78.

claims, i.e. high costs of proceedings. As a result, while strong safeguards against the abuse were ensured, the alternatives to the limited efficiency of group litigation are still missing.

Once we analyse the results of public consultation we may clearly observe, that most of the respondents evoke high costs of collective proceedings and limited options of funding as the main obstacles in initiating and conducting group actions. However, once asked to propose solutions to this problem, they opinions strongly differ. While business representatives and public authorities oppose to public methods of funding, all consumer organisations and majority of legal experts speak in favour of public financing of collective claims[259]. Additional controversies concern third party funding, in particular contingency fees, which in the opinion of business representatives and most of public authorities, shall be strictly forbidden in the EU. On the other hand, some consumer organisations and many legal experts evoke third party funding as an important alternative to the problem of limited financial resources of collective claimants, and as a solution able to increase efficiency of group litigation in Europe[260].

While dealing with the aforementioned standpoints, the Commission decided to take rather preservative approach. Although it recognised that a lack of financing might limit an access to justice, it held that funding of group actions should not create incentives for an abuse[261]. Its goal was to establish transparent system of financing, allowing to avoid abusive litigation[262]. In order to achieve this objective, the Commission argued in favour of abolition of contingency fees, rejection of public funding and introduction of very restricted possibility of third party financing. As it held in the Recommendation: *"the claimant party should be required to declare to the court at the outset of the proceedings the origin of the funds that it is going to use to support the legal action."*[263] Moreover, as the Commission claimed, in case when the court would asses that there is a conflict of

[259] See Evaluation of contributions to the public consultation and hearing: "Towards a Coherent European Approach to Collective Redress" (Executive Summary), Study JUST/2010/JCIV/CT/0027/A4, p. 12.

[260] *Ibidem*, p. 12.

[261] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Economic Committee of the Regions "Towards a European Horizontal Framework for Collective Redress", COM(2013) 401 final, p. 15.

[262] *Ibidem*, p. 15.

[263] 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, OJ L 201, 26/07/2013, p. 60–65, pt. 14.

interest between a third party and a claimant, a third party has insufficient resources in order to meet its financial commitments or a claimant has insufficient resources to meet any adverse costs, it should be allowed to stay the collective proceedings[264]. Finally, it clearly stated that: *"The Member States should ensure that the lawyers' remuneration and the method by which it is calculated do not create any incentive to litigation that is unnecessary from the point of view of the interest of any of the parties"*, and that *"contingency fees which risk creating such an incentive"* should be forbidden[265].

It may be held that such restrictive approach to the issue of third party funding, based on the rejection of contingency fees and imposition of important burden on a claimant and a fund provider, may result in a practical inefficiency of the analysed method once introduced at the national level. Due to the lack of innovative proposals on the issue of funding, such as contingency fees, legal costs insurance, flexible third party funding or public financing, the proposed mechanism of collective redress may loose its importance by the simple reason of economic inefficiency. Therefore, faced with a risk of abusive litigation, the Commission once again proposed a safeguard which may constitute an obstacle to development of group actions in the EU.

1.3. Between public and private enforcement – providing an equilibrium

The last area in which Commission struggles to provide a right balance between safeguards and incentives concerns the relationship between private actions and public enforcement. While this issue was widely debated during a discussion on private enforcement of antitrust law[266], its reflection may be also observed in the recent Commission's proposal on collective redress.

As the Commission stated in the Communication, with regard to EU policy fields where the public enforcement plays a major role, *inter alia* competition law, there is a need to provide specific rules allowing to regulate the interplay between private and public method, and to protect the effectiveness of the latter. As far as the antitrust law is concerned, Commission refers to leniency programs and public antitrust proceedings, which in its opinion, may be jeopardised by development of wide and uncoordinated collective actions[267].

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264 *Ibidem*, pt. 15.

265 *Ibidem*, pt. 29–30.

266 See in more details Part I Chapter 2 Point I(1.3) and Point I(2).

267 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Economic Committee of the Regions

In order to strike a right balance between group actions and public proceedings, the Commission proposes two solutions, based on a general assumption that in these areas of law, where the public authority may render decision on violation of legal provisions, the collective actions should not conflict with public proceedings concerning the same infringement.

First solution foresees a general prohibition to initiate collective action if public authority is already dealing with the case[268].

The second solution, concerning a situation when the collective action was initiated prior to public proceedings, argues in favour of a court's prerogative to stay the collective proceedings until the case was finally resolved by the public authority.

The aforementioned approach to the issue of a relationship between public proceedings and collective actions undoubtedly ensures greater coherence of both methods of law enforcement. In case of antitrust law, it limits the risks of conflicting decisions of competition authority and a court. Moreover, it increases chances of follow-on actions, based on a decision finding competition law infringement.

Nevertheless, such construction, once applied in practice, may limit an incentive to undertake collective actions prior to antitrust proceedings (stand-alone actions). Moreover, it significantly decreases the possibility of positive outcome of stand-alone actions, since the court is supposed to stay the proceedings if public authority undertakes the case.

Therefore, once again it is confirmed, that while the Commission provides strong safeguards against the abuse, the efficiency of group litigation mechanism is put under question.

2. Incoherent mosaic of national solutions – how to ensure convergence?

The second difficulty of current approach to group litigation in Europe concerns a lack of coherence between national solutions on collective redress. While the issue of group litigation was discussed in the EU for more than a decade, and led to introduction of collective redress mechanisms in numerous MS, up to now the Commission did not overcome the astonishing diversity of national approaches to analysed issue. As a result, the EU

"Towards a European Horizontal Framework for Collective Redress", COM(2013) 401 final, pt. 3.6.

268 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, OJ L 201, 26/07/2013, p. 60–65, pt. 33.

citizens and enterprises are faced with a complex legal patchwork of national solutions which are applied by some MS but not by others[269]. While group litigation mechanisms may be found in majority of national jurisdictions, its specific elements significantly differ from one state to another, and as the Commission states: *"every national system of compensatory redress is unique and there are no two national systems that are alike in this area."*[270]

The first negative consequence of such scenario is lack of legal transparency and a risk of inconsistent determination of similar cases by the courts of different MS. Since the legal constructions applied in different MS diverge, the level of individuals' protection within the Union is unequal.

Secondly, the incoherence of national solutions on group litigation may lead to development of forum shopping practice in the EU and artificial division of the internal market by undertakings. As J. Bees und Chrostin claims, it may be a consequence of business policies of different enterprises, which while trying to increase their chances in case of potential lawsuits, may decide to move or allocate their investments in these European countries, where group litigation is not developed or less efficient[271].

Thirdly, a lack of common EU approach to collective redress increases litigation costs on the side of plaintiffs and defendants. That is because, the same claims had to be litigated separately in different jurisdictions, e.g. when the consumers from several MS are injured by the same anticompetitive practice. It causes unnecessary burdens to both parties to the proceedings, and often, due to the multitude of claims and a need of preclusion or suspension of proceedings, may lead to prolongation of proceedings and limited economy of justice.

Finally, a lack of coherent approach to group litigation in the EU leads to important problems at the stage of enforcement. That is because, in cross-border cases, even if ruling on collective claim is rendered in one MS, it still has to face the enforcement proceedings in another country. Taking into consideration significant differences among MS on such fundamental issues of group litigation as type of available remedies, right of legal standing or admissibility of contingency fees, the enforcement procedure may often turn out to be very difficult and expensive task[272].

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269 G. Manning, *The Prospects for Convergence of Collective Redress Remedies in the European Union*, International Lawyer, Winter 2013, Vol. 47, Issue 3, pp. 325–342; see also *Overview of existing collective redress schemes…*, p. 13.

270 EC Public consultation, *Towards a Coherent European Approach…*, p. 9.

271 Bees und Chrostin, *Collective redress and class action arbitration in Europe…*, p. 116.

272 *Ibidem*, p. 116.

Recognising the above problems, the Commission decided to issue the Recommendation on collective redress. Its goal was to establish common European approach to group litigation and encourage MS to introduce national collective redress mechanisms based on the uniform principles. Nevertheless, once we try to assess the above-mentioned document from the perspective of legal convergence, we may state that it provides rather unsatisfactory solutions.

First, the soft-law instrument does not ensure that mechanisms proposed by the Commission will be adopted in all MS, and that desired level of coherence will be finally achieved in the whole EU.

Secondly, in many points the Commission proposes solutions which seem to be more conservative than the mechanisms already introduced in different MS (e.g. opt-in solution, limited right of standing, prohibition of contingency fees).

Finally, the Commission's proposal differentiates from the voice expressed by majority of public consultation participants, arguing in favour of legally binding approach in the area of group litigation in the EU. According to the majority of national governments, a great majority of sectoral regulators, almost all consumer organisations, clear majority of legal experts and all EU citizens, legally binding solution would ensure legal uniformity across the EU, and provide for a high standard of protection of individuals against law infringements[273].

In view of the above it may be claimed, that the Recommendation on collective redress provides only limited response to the problem of incoherence between national solutions on group litigation. Moreover, it raises important doubts as far as future of collective redress in the EU is concerned and does not ensure that mechanism proposed by the Commission will lead to establishment of a desired level of individuals' protection against the European and national law infringements.

Certain authors try to argue that in the political situation existing at that time, combined of strong opposition of several MS to binding solution, expiring term of "Barroso II Commission" and a strong need to bring to an end long and controversial debate on group litigation in the EU, the Commission was not able to propose more far-reaching mechanism[274].

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[273] See Evaluation of contributions to the public consultation and hearing: "Towards a Coherent European Approach to Collective Redress" (Executive Summary), Study JUST/2010/JCIV/CT/0027/A4, p. 6–7.

[274] See A. Stadler, *The Commission's Recommendation on common principles of collective redress and private international law issues,* Dutch Journal on Private International Law, Issue 4, 2013, stating that: *"it had been clear for some time that the current political*

Therefore, as A. Stadler claims, the Recommendation became rather a fruit of *"realistic estimation that, for political reasons, nothing else would be possible"*[275], than of a need to establish innovative, coherent and efficient mechanism of group litigation in the EU.

Having this in mind it shall be stated however, that the result of recent approach of the Commission to the issue of group litigation is disappointing. The Recommendation on collective redress does not provide sufficient response to the problem of intra-European divergence, and does not ensure establishment of common EU approach to collective redress. In consequence, it can be expected that further debate on group litigation will need to undertake the analysed problem, and propose a solution able to ensure greater rapprochement of national policies in the area of collective redress.

Conclusion Chapter 1

As it follows from the analysis conducted in Chapter 1, the European discussion on group litigation did not lead up to now to development of a coherent approach to collective redress within the EU. The Commissions' proposals included in the Green Paper and White Paper on damages actions, and in the Green Paper on Consumer Collective Redress, were not able to overcome underdevelopment and astonishing diversity of group litigation mechanisms in MS. This negative scenario was supposed to be addressed by the Recommendation on collective redress, aiming to finally respond to the problem of divergence and inefficiency of group litigation mechanism in the EU. Nevertheless, despite its very far reaching goals, the Commission's proposal construed only limited response to current shortcomings of group litigation in the EU.

Firstly, it left many questions unanswered and transferred a great burden to MS dealing with the issue of collective redress.

Secondly, it proposed rather conservative solutions on group litigation and refrained from taking important step forward in the European debate on collective redress.

Finally, the Commission's proposal took a form of a non-binding instrument, creating a risk that proposed mechanism will not be implemented

situation would not allow a directive or regulation which would impose any obligation on the Member States to implement new instruments for the collective enforcement of damages claims."

275 *Ibidem*, p. 484.

at the national level, and that the current *status quo* will be preserved in Europe.

Therefore, it may be claimed that a future of collective redress in the EU is highly uncertain. It depends strongly on the legislative activity of MS, dealing with the Recommendation, as well as on the conduct of individuals, consumers and their organisations, supposed to refer to the group mechanism of competition law enforcement. Therefore, the fourth scientific hypothesis, stating that: *"The current approach of European Commission to the issue of collective redress does not ensure establishment of an effective mechanism of group litigation in Europe and further steps are required in order to change this scenario",* finds its confirmation in the conducted research.

Chapter 2

Analysis of Selected National Solutions on Collective Redress – from French Dilemmas to Polish Clear-Cut Solution

As the analysis conducted in Chapter 1 shows, the recent development of group litigation in Europe does not ensure establishment of a coherent and uniform approach to collective redress within the whole European Union. In such legal environment, combined of the EU proposals on collective redress and the national practice in the area of group litigation, it seems to be crucial to undertake the analysis of European debate on collective redress from the national perspective. Only in this manner it may be ascertained, if the Recommendation on collective redress is able to increase the individuals' protection against antitrust law infringements and create a "group litigation culture" in Europe. Moreover, by reference to the national experience on collective redress, the Commission's proposal may be fully assessed, and the possible improvements to the current solution may be proposed.

Therefore, the Chapter 2 will aim to assess how the selected national jurisdictions (French and Polish) responded to the European debate on group litigation. The conducted analysis will focus on the assessment of group litigation mechanisms proposed in France and Poland. Moreover, it will refer to empirical experience in the area of collective redress, in both of the aforementioned jurisdictions.

Apart from the comparison between two approaches to collective redress, being a possible source of inspiration for the model solutions in this area of legal practice, the Chapter 2 will also try to confirm how difficult it is to find a coherence between divergent national positions on the issue of group litigation. In this context, it will try to illustrate what may be the negative consequences of a limited approach of the Commission to the issue of collective redress and lack of a binding European solution in this area of legal practice.

I. French way towards group litigation – how to find a proper equilibrium?

Establishment of a collective redress procedure in France has been an issue of a long debate among politicians, scholars and legal practitioners. From the mid-80s supporters of a group action were claiming that the creation of a mechanism allowing to group the interests of individuals injured by the same law violation within one single proceedings would increase their access to justice, guarantee better level of legal protection and would permit to strengthen the efficiency of a whole system of law enforcement. At the same time, the opponents of a group litigation mechanism were trying to prove that development of a discussed instrument would cause a serious risk of violation of rules of civil procedure, constitutional principles, as well as fundaments of French economy. In consequence, despite several calls for reform evoked by the French deputies and different governments, the lack of agreement between group litigation supporters and its adversaries, prevented for a very long time the introduction of a collective redress procedure into the French legal system. Moreover, the long lasting discussion on this issue, raised important doubts concerning its effective functioning once introduced in practice.

Due to the aforementioned reasons, the analysis of French debate on collective redress can be particularly interesting from the point of view of development of a discussed mechanism at the European and national level. It provides us with a case study on the discussion that is being waged, or that will be waged in future, in jurisdictions that do not currently possess a group litigation procedure[1]. Moreover, the French debate on group litigation brings together possible advantages and drawbacks of the analysed instrument, and gives grounds for a critical assessment of a group litigation mechanism. Finally, the French debate can be a source of inspiration for the proposal of more effective mechanisms of collective redress, always requiring a compromise between the group litigation supporters and opponents.

In view of the above, a reference to the French experience seems to be the best way to understand what difficulties may be expected while proposing a collective redress procedure at the European level. It may also help us to look at the issue of group litigation from a different angle, i.e. not limited to its positive influence on individuals, but taking into consideration constitutional, economical and legal problems connected with its introduction. French example can also help us to determine, what

1 P.G. Karlsgodt, *World class actions…*, p. 160.

solutions may be proposed in order to increase the efficiency of group litigation mechanism, without provoking a risk of its negative influence on the whole system of law enforcement.

1. Collective redress – an issue of ongoing debate

As it was already mentioned, the idea of collective redress is not a new concept in the French legal system. Some authors claim that the basis for group litigation were already created at the end of 19th century, with the introduction of collective actions in the French labour law[2]. Nevertheless, the modern debate on group litigation in France dates back to 1984, when the first *Calais-Auloy* report on the consumer law reform was published[3].

From the beginning of French discussion on group litigation the main importance was given to the necessity of guaranteeing better protection of individuals against law infringements. Initially, it focused only on the protection of private parties against consumer law violations. However, in the course of time, the scope of debate has broadened, and comprised also the need to protect individuals against anticompetitive behaviours.

1.1. *Calais-Auloy* reports – proposal of class actions in the French legal system

The first *Calais-Auloy* report, prepared by a group supervised by professor Jean Calais-Auloy, was intended to modernise the French system of consumer law. Its main goal was to guarantee better protection of private parties and reduce the asymmetry in the position of consumers and enterprises acting at the market[4]. The report proposed several solutions envisaged as the means of consumers' protection. Among them we can evoke: increased role of prevention of law violations; complex system of sanctions adapted to the gravity of torts; and extended importance of consumers' organisations in the protection of individuals. Nevertheless, a proposal that attained particular attention, and was supposed to constitute the most decisive step in the protection of consumers, concerned introduction of a group litigation mechanism.

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2 A. Legendre, *Un point sur les débats en France,* in: *L'action collective ou l'action de groupe*, Brussels 2010, pp. 9–10.

3 J. Calais-Auloy, *Propositions pour un nouveau droit de la consommation – rapport final de la commission de refonte du droit de la consommation*, Collection de rapports officiels, April 1985.

4 *Ibidem*, pp. 3–4.

The group litigation mechanism was foreseen in *Calais-Auloy* report as an instrument allowing to group the interests of several consumers injured by the same law infringement within one collective proceedings. It constituted important *novum* in the French legal system, and mainly for that reason, raised wide debate among politicians and legal scholars. Despite the fact this proposal was limited only to the area of consumer law, it gave grounds for a general discussion on the possibility of development of group proceedings in France.

The collective redress procedure proposed in *Calais-Auloy* report drew its inspiration from the North American models of group litigation, i.e. American system of class actions and the group litigation system known in Quebec[5]. While these two models seemed to be foreign to the French civil-law legal system, the authors of report took an attempt to adapt the specific elements of North American model, to the requirements of French legal tradition.

Consequently, the report argued in favour of a procedure in which only the authorised consumer associations would be allowed to initiate an action. Such solution was supposed to guarantee the best possible protection of consumers, and in the same time, a safeguard against the abusive litigation[6]. Moreover, while dealing with the issue of group formation, the report proposed two different procedures, depending on the possibility of victim's identification. If all victims were possible to identify, the report argued in favour of a group action based on the opt-in mechanism. Whereas, when all victims of violation were not identified, a two-step procedure was recommended[7]. In its first stage, the court was supposed to give a judgment on responsibility of the accused undertaking. Once the judgment was rendered and made public, the injured individuals had a right to manifest themselves before the court in order to obtain compensation for the injury suffered. In case of absence or insufficient number of individual claims, the non-identified consumers were losing their right to claim for damages and compensation was paid in favour of the consumers aid fund[8].

The aforementioned proposals of *Calais-Auloy* report constituted important *novum* in the French discussion on consumers' protection. The previously unknown institution of class actions, was presented as a possible

5 *Ibidem*, p. 131.

6 *Ibidem*, p. 131.

7 V. Magnier, *Class Actions, Group Litigation & Other Forms of Collective Litigation Protocol for National Reporters: France (2007)*, p. 4, available at: http://globalclassactions.stanford.edu/sites/default/files/documents/France_National_Report.pdf [access: 28.09.15].

8 J. Calais-Auloy, *Propositions pour un nouveau droit de la consommation…*, p. 133.

solution to the problem of limited protection of individuals against law infringements. However, mainly due to its specific elements, such as the opt-out mechanism or consumer aid fund, and the inspiration drew from the North American legal systems, the chances for the adoption of *Calais-Auloy* report were limited. As a result, the first attempt to introduce a group litigation procedure in France did not succeed. While referred to the Parliamentary Commission, the *Calais-Auloy* report was regarded as being incoherent with the French constitutional principles and the rules of civil procedure, and thus rejected.

Also the second tentative to introduce group litigation in France, undertaken in 1990 by the Commission of codification of consumer law presided by Jean Calais-Auloy[9], resulted in failure. The reasons for its rejection were similar – incoherence of a group litigation mechanism with the French legal order and the national legal tradition. Therefore, while the first stage of development of group litigation in France allowed to raise a discussion on a need of introduction of collective redress procedure, it did not lead to proposal, able to reach wide political consensus required for its adoption.

1.2. Joint representative action – a step towards group litigation

The next step towards development of a group litigation in France, was taken just few months after a failure to adopt the second *Calais-Auloy* report. Recognising the need of increasing individuals' protection against consumer law violations, the Parliamentary law commission started the works intended to develop specific solutions on this matter. As a result, in April 1991, the project of law on strengthening consumers' protection was proposed. After few months of public debate, it was adopted by the French Parliament.

The law No. 92-60 of 18 January 1992[10] significantly modernised the French system of consumers protection.

First, it introduced changes in several legal acts concerning consumers' rights, with a view of strengthening the position of consumers in relation to business undertakings.

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[9] J. Calais-Auloy, *Propositions pour un code de la consommation – rapport de la commission pour la codification du droit de la consommation au Premier ministre*, Collection des rapports officiels, April 1990.

[10] Law no. 92-60 of 18 January 1992 on strengthening the protection of consumers [*Loi n° 92-60 du 18 janvier 1992 renforçant la protection des consommateurs*], Official Journal of French Republic no. 170017 of 21 January 1992, p. 968.

Secondly, it proposed to establish a Consumer code, unifying the rules concerning relations between consumers and professionals.

Finally, the aforementioned law introduced a mechanism allowing to protect the interests of several consumers, injured by the same law infringement. As the Art. 8 of law No. 92-60 of 18 January 1992 provided: *"Where several consumers, identified as natural persons, have suffered individual damages caused by the same business act and which have a common origin, any approved association recognised as being representative on a national level may, if it has been duly authorised by at least two of the consumers concerned, institute legal proceedings to obtain reparation before any court on behalf of these consumers."*

The above described mechanism, known as a joint representative action (fr. *action en représentation conjointe*)[11], was intended to give to the consumer associations, an efficient mechanism in the fight against business undertakings violating consumers rights. Despite the fact that this mechanism was still limited to the consumer law infringements, and could not have been considered as a general instrument of group litigation in France, it was widely regarded as an important step towards development of a collective redress procedure in the French legal system[12].

The joint representative action is currently regulated under Art. L 622-1 to Art. L. 622-4 of the French Consumer Code[13]. Its construction did not significantly change in the course of last 20 years, and it still allows the consumers associations to act before the justice, in order to obtain damages for the individuals injured by the same law infringement. The basic requirement for the association to initiate an action is to be granted a mandate from at least two injured consumers. As many commentators underline, such construction, foreseeing a joint representation of interests of several individuals, constitutes an instrument closely connected to the concept of group litigation[14]. Nevertheless, as they also claim, the conditions

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11 Joint representative action was introduced as a part of Law no. 88-14 of 5 January 1988 concerning the legal actions brought by the registered consumer associations and the information of consumers [*Loi no 88-14 du 5 janvier 1988 relative aux actions en justice des associations agréées de consommateurs et à l'information des consommateurs*], Official Journal of French Republic of 6 January 1988, p. 219.

12 L. Boré, *L'action en représentation conjointe: class action française ou action mort-née?*, Recueil Dalloz 1995, p. 267.

13 Consumer Code (*Code de la consommation*), consolidated version from 1 January 2016.

14 See for example L. Beteille, R. Yung, *Rapport d'information fait au nom de la commission des lois constitutionnelles, de législation, du suffrage universel, du Règlement et d'administration générale (1) par le groupe de travail (2) sur l'action de groupe*, p. 16, available at: http://www.senat.fr/rap/r09-499/r09-4991.pdf [access: 20.09.2015].

for application of joint representative action, as well as the procedural solutions concerning the conduct of proceedings, put in question the practical significance of a discussed mechanism[15].

Firstly, the joint representative action can be launched only by the registered consumer association acting at the national level. In order to fulfil this requirement, an association must have obtained a government approval, must have been in existence for at least twelve months, and must have a large number of members[16]. In consequence, local consumers associations are not entitled to initiate an action. Moreover, several national associations, due to the limited number of members, are deprived of the right to initiate joint representative action.

Second characteristic of a discussed mechanism concerns the conditions for forming a group and launching a claim. As the Art. L 622-1 of French Consumer Code provides: *"any approved association recognised as being representative on a national level […] may, if it has been duly authorised by at least two of the consumers concerned, institute legal proceedings to obtain reparation before any court on behalf of these consumers."* While the fact of obtaining a mandate from injured consumers in order to represent their interests did not lead to particular controversies, the way of obtaining this mandate, was evoked as one of the main obstacles to development of joint representative actions in France.

According to the Art. L 622-2 of French Consumer Code, the association is not entitled to use radio or television publicity, and may not distribute tracts or send personalised letters in order to solicit victims of violation to join the claim. As a result, apart from the press publicity, the association has no other means to inform potential victims about the violation and obtain mandates required to initiate an action.

The aforementioned solution was criticised by the French legal doctrine. As it was often claimed, the distinction between different means of informing consumers about the law infringement had no logical basis[17]. Also the

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15 *Ibidem*, p. 17.

16 Specific conditions for the consumers associations to be entitled to launch a joint representative action are determined by Decree no. 88-586 of 6 Mai 1988 on legal actions brought by registered consumers' associations and on information of consumers [*Décret n° 88-586 du 6 mai 1988 portant application de l'article 2 de la loi n° 88-14 du 5 janvier 1988 relative aux actions en justice des associations agréées de consommateurs et à l'information des consommateurs*] and Decree of 21 June 1988 concerning accreditation of consumers associations [*Arreté du 21 juin 1988 relatif à l'agrément des organisations de défense de consommateurs*].

17 L. Boré, *L'action collective en droit francais,* in: V. Magnier, *L'opportunité d'une action de groupe en droit des sociétés ?,* Collection CEPRISCA 2004, p. 18.

politicians were arguing that forbidding any form of publicity created an important obstacle in development of joint representative action in France[18]. Nevertheless, these criticisms were not supported by the French courts. In several judgments they have confirmed the rigidity of this rule[19], or even went further, as the French Supreme Court in its judgment from 26 May 2011. As it held in the aforementioned ruling, any claim which was made possible thanks to public solicitation, by the way of mass communication or by the personalised letters, would be inadmissible[20].

The last element, often evoked as an obstacle to the efficient functioning of a joint representative action in France, are its costs. As many authors underline, the necessity of carrying heavy financial burden in order to inform the consumers about the violation, prepare a claim and conduct proceedings, is one of the reasons why consumers associations are reluctant towards the use of a discussed mechanism[21].

The above-mentioned limitations of joint representative action find also a confirmation in practice. As the statistics on application of this instrument show, in the course of last 20 years, the consumers associations decided to refer to this procedure only five times[22]. Therefore, due to its inflexibility and strict conditions of application, the joint representative action did not accomplish expected goals. The instrument intended to be a solution guaranteeing efficient protection of large groups of individuals against consumer law violations, became only a good idea hardly achievable in practice.

1.3. Working group on collective redress – a failure of reform

The practical inefficiency of joint representative action was a main reason for the another proposal of reform which came in 2005. The new debate was launched by the former French President Jacques Chirac, who on 4 January 2005, stated: *"We must finally grant consumers the means to defend their rights: today consumers are powerless, because their individual claims are*

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18 L. Beteille, R. Yung, *Rapport d'information fait au nom de la commission des lois constitutionnelles*…, p. 16.

19 See for example the decision of a Paris Court of Appeal from 22.01.2010 in case *UFC Que Choisir v. Bouygues Télécom*, no. 08-09844.

20 Judgment of French Supreme Court (Commercial Chamber) from 26 May 2011, Pourvoi no. 10-15676.

21 L. Boré, *L'action collective en droit francais*..., p. 18.

22 See statistics provided at http://www.senat.fr/rap/r09-499/r09-4991.html [access: 26.09.2015].

not substantial enough to cover the cost of a lawsuit. That is why, I am asking the Government to make a proposal to amend the current legislation so as to enable consumer groups and their associations to bring collective actions against the unfair practices going on in certain markets."[23] The voice of the French President made the necessity of increasing consumers' protection by the introduction of a collective redress instrument very clear. In consequence, in April 2005 the working group was founded, and its goal was to create a proposal of reform in the area of group litigation.

The group governed by Guillaume Cerutti and Marc Guillaume was composed of 17 members representing different environments, i.e. consumers, enterprises, legal practitioners and politicians. The goal envisaged by the French President was supposed to be achieved by the use of comparative method and exchange of different standpoints concerning the issue of group litigation. As Guillaume Cerutti stated in his speech from November 2005, the main idea forming the basis for the activity of a group was that *"persons having initially opposite points of view could base their reasoning at the common knowledge in order to develop acceptable solutions."*[24]

After few months of detailed works, the report on group action was published (so-called *Guillaume-Cerutti* report)[25]. Despite the fact that due to the lack of Parliamentary support and commencement of presidential campaign in 2007 its proposals have never entered into force, it established a new way of thinking on group litigation in France. It formed a path for development of the French model of group litigation, often called as a collective redress *à la française*[26].

The proposals of changes included in the report can be divided into two alternative solutions. First, concerned the reform of currently existing system with a view of guaranteeing its higher efficiency. Second, suggested

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[23] See J. Chirac, *Déclaration sur les priorités de l'action gouvernementale, notamment les politiques en faveur de la croissance économique, de l'industrie, de l'emploi et de la construction européenne*, Paris, January 4 2005, available at: http://discours.vie-publique.fr/texte/057000006.html [access: 27.09.2015].

[24] See G. Cerutti speech delivered at the conference organised by UFC – Que choisir, *Pour de véritables actions de groupe: un accès efficace et démocratique à la justice*, Paris, 10 November 2005.

[25] *Rapport sur l'action de groupe – groupe de travail presidé par Guillaume Cerutti et Marc Guillaume*, submitted to the Minister of Justice and Minister of Economy on 16 December 2005.

[26] S. Méar, *Class action à la française: rapport du groupe de travail ad hoc et nouvelle consultation*, Revue Lamy droit des affaires, no. 2, February 2006, p. 40; V. Magnier, *Presentation du rapport sur les actions de groupe*, Revue Lamy Droit Civil, no. 32, 2006, p. 19.

introduction of a new group litigation mechanism into the French legal order.

The first solution focused mainly on a reform of joint representative action, considered already at that time as an instrument working hardly in practice. The report argued in favour of reform guaranteeing its higher efficiency and practical significance for consumers and their associations. In order to achieve this goal, the report proposed three possible changes to the currently existing construction.

First of all, it emphasised the necessity of increasing the possibilities of soliciting consumers to join the claim. As the authors of report observed, the limited ways of publicity, especially an inability to send personal letters to the potential victims of violation, were the main reason for the limited efficiency of a discussed instrument[27].

Secondly, the report suggested introduction of a possibility of launching joint representative action simultaneously with the action in the common interest of consumers. In the opinion of authors of report, it would strengthen the legal significance of joint representative action and broaden the scope of potential victims of violations claiming for damages[28].

Finally, the report underlined the necessity of guaranteeing a proper protection of consumers' associations itself. The reason for that was the potential civil responsibility of an association towards consumers in case of failure of claim. In order to reduce such risk, often discouraging consumer associations from initiating an action, the report argued in favour of covering consumers' associations with the insurance contracts.

Despite the fact that all the aforementioned proposals constituted positive steps towards increasing the efficiency of joint representative action, it was still far from enough to guarantee establishment of an effective mechanism of group litigation in France. As V. Magnier stated in her commentary to the report: *"the proposed changes were insufficient to establish a real group action à la francaise."*[29] That is why, as more important for development of collective redress we shall consider the second group of proposed changes, i.e. introduction of a group litigation procedure. It presented a new approach to the issue of collective redress in France, and initiated debate conducted among French politicians, scholars and legal practitioners in the following years.

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27 *Rapport sur l'action de groupe…*, p. 26.

28 *Ibidem*, p. 26.

29 V. Magnier, *Presentation du rapport…*, p. 15.

Recognising the need for a collective redress, and at the same time underlining the important risk that can be caused to the French enterprises by the uncontrolled development of the US-style class actions[30], the authors of report proposed two alternative models of group litigation.

The first one focused on a solution based on the American and Canadian experience. It argued in favour of a two-stage procedure that could be initiated not only by consumer associations, but also by all persons injured by the law infringement. Moreover, it argued in favour of the opt-out mechanism, allowing to form a group from previously non-determined consumers. Finally, according to the aforementioned proposal, the division of stages of the procedure was supposed to correspond to the American system of class actions, i.e. decision on admissibility of claim, followed by the assessment of responsibility and division of damages.

The aforementioned proposal, constituting important novelty in the French legal order, was negatively assessed by the French legal doctrine[31]. The main argument against it, was the unconstitutionality of opt-out mechanism. As it was argued, such solution was incoherent with the judgment of French Constitutional Tribunal from 25 July 1989 in which the Tribunal held that: *"collective action would be allowed only under the condition that person concerned was able to give his consent with full knowledge of the facts and remained free to conduct personally the defence of his interests and put an end to this action."*[32] In consequence, the proposal arguing in favour of opt-out solution had limited, if none, chances of success.

The second model of collective redress proposed in the report was an attempt to find a compromise between the instrument of group litigation and the rules of French civil procedure. Moreover, it envisaged a solution intended not only to increase the level of legal protection of consumers, but also aimed to respect the interests of French enterprises. In consequence, it suggested to introduce a two-stage procedure which goal was to guarantee that the protection of consumers would not lead to abusive litigation. In order to achieve this objective, the report proposed to organise the procedure in a way that significantly differed from the American-style class actions.

The first stage of procedure was supposed to be limited to judgment on responsibility. The goal of consumers' association, being the only body entitled to initiate a group action, was to prove that the specific enterprise committed a violation causing a harm to numerous individuals. During this

30 *Rapport sur l'action de groupe…*, p. 28.

31 S. Guinchard, *Une class action à la française?*, Recueil Dalloz 2005, p. 2180; V. Magnier, *Presentation du rapport…*, p. 18.

32 See judgment of the French Constitutional Tribunal of 25 July 1989, no 89-257 DC.

stage of proceedings, the potential victims of violation were not informed about the possibility of obtaining damages. Therefore, before rendering the judgment on responsibility, the group of victims of violation was not formed. As a result, the costs of activity of consumers' association were significantly limited. Furthermore, the interests of enterprises were duly protected, since they were not obliged to face mass claims, before being declared responsible for certain law infringement.

During the second stage of proceedings, starting once the enterprise was declared responsible and did not lodge an appeal against a judgment, or in case of dismissal of its appeal, the victims of violation were obliged to appear before the court in order to obtain compensation. Only at this stage, they were informed about the responsibility of a specific enterprise, and only those who decided to join the claim, were forming a group and claiming for compensation (opt-in mechanism). Those who didn't join the claim, still had a right to initiate the individual proceedings in order to obtain a recovery. In the opinion of authors of report[33] and legal scholars[34], the aforementioned construction was guaranteeing coherence with the principles of French civil procedure, especially with the *nul ne plaide par procureur* rule.

As we can observe from the above reasoning, two proposals evoked by the authors of report significantly differed. While the first one intended to guarantee a possibly most flexible instrument of consumers protection. The second argued in favour of a procedure ensuring the right balance between the injured individuals and accused undertakings. Moreover, it aimed to ensure conformity with the requirements of French legal order. Nevertheless, despite differences in specific elements of both proposals, their common goal was similar – increased protection of individuals by the mean of group litigation.

The last important characteristic of *Guillaume-Cerutti* report was its complexity. Its authors did not limit themselves to the proposal of different instruments of group litigation, but what is most important, referred to several issues concerning collective redress and its limitations. Recognising the novelty of a discussed instrument, and different problems that could have arisen once the group litigation was introduced in practice, the authors of report tried to give a response to such issues as: publicity, financing, competent jurisdiction or finally the scope of application. The latter shall be regarded as having the most important significance from the perspective

33 *Rapport sur l'action de groupe…*, p. 35.

34 V. Magnier, *Presentation du rapport…*, p. 19.

of our research, and for this reason has to be presented in a more detailed manner.

While analysing the scope of application of group litigation mechanism, the authors of report evoked three different proposals of its assessment.

First of all, they considered the possibility of providing a large scope of application which would allow to initiate collective proceedings each time when the consumers' interests were infringed. Secondly, the authors of report referred to the possibility of limiting the scope of application of group litigation mechanism only to the violations of consumer law. Finally, they proposed a solution, according to which the scope of application of group litigation mechanism would be determined by the use of a notion of "economic injury". As the following discussion showed, due to the reasons of legal certainty, predictability and a need of ensuring wider access to justice, the last proposal gained greatest acceptance.

The notion of "economic injury", proposed in order to determine the scope of application of group litigation instrument, was supposed to comprise all the financial losses suffered by individual consumers and caused by an enterprise offering or selling goods/services to those consumers. Such determination of scope of application was supposed to open a possibility to initiate group proceedings each time when the economic interest of several consumers was infringed, without limiting a right to initiate an action to the previously determined number of cases. Moreover, as the authors of report underlined, it would allow opening the door for applying collective redress also in case of competition law infringements[35]. In consequence, for the first time it was recognised that the group litigation mechanism should cover not only consumer law infringements, but also anticompetitive behaviours.

To conclude the reasoning on *Guillaume-Cerutti* report it shall be stated, that the attempt undertaken by its authors significantly changed the course of a debate on group litigation in France. The idea previously regarded as a strange concept, running a serious risk for the French economy and French legal order, thanks to the works of the group, led to development of an original, French way of thinking on collective redress. It could have been observed in the following Parliamentary proposals on the reform of group litigation in France which were often referring to the concepts presented in a *Guillaume-Cerutti* report[36]. Nevertheless, while the report construed

[35] *Rapport sur l'action de groupe…*, p. 37.

[36] See for example Proposal of law on introduction of consumer collective actions presented by M.L. Chatel on 26 April 2006 [*Proposition de loi visant à instaurer les recours collectifs de consommateurs n° 3055, 26 avril 2006*]; Proposal of law on the protection of consumers

important added value to the French discussion on collective redress, it still did not lead to introduction of a group litigation mechanism. As the outcome of report has illustrated, while the attempt to find an agreement between representatives of different environments shall be positively estimated, it may hardly lead to development of a common approach to group litigation. It was confirmed by the Parliamentary works following the publication of report which due to the lack of political support and problems with reaching a common agreement on the issue of group litigation were doomed to failure.

1.4. French Competition Authority – group litigation and antitrust law

The debate on development of a wide group litigation mechanism initiated by the works of *Guillaume-Cerutti* group was continued in the year 2006. In September 2006 the French Competition Authority published its official standpoint on the possibility of introduction of a collective redress procedure into the French antitrust law[37]. The opinion of French Competition Authority was crucial, due to the fact that nearly a year after the publication of *Guilaume-Cerutti* report, the debate on collective redress was still present in France, and the ways of its further development were opened. Moreover, at this time the European discussion on private enforcement of competition law was at its highest stage[38]. For these reasons, the standpoint expressed by the French Competition Authority had an important meaning not only from the national perspective, but had also an impact on the position of France in a debate on introduction of collective redress in Europe.

In its official opinion published in September 2006 the French Competition Authority expressed its general support for the collective redress in the area of competition law. According to its standpoint, the

presented by M. Th. Breton (Minister of Economy) in November 2006 [*Projet de loi en faveur des consommateurs, présenté au nom de M. Dominique de Villepin, Premier ministre, par M. Thierry Breton, ministre de l'économie, des finances et de l'industrie le 14 novembre 2006*]; Proposal of law on the introduction of collective redress in France presented by A. Montebourg, J.-M. Ayrault and other deputies on 24 October 2007 [*Proposition de loi relative à l'introduction de l'action de groupe en France présenté par M.A. Montebourg, M.J.-M. Ayrault et d'autres deputés le 24 octobre 2007*].

37 Opinion of French Competition Authority from 21 September 2006 on introduction of collective actions in the area of competition law, pt. 25, available at: http://www.autoritedelaconcurrence.fr/doc/classactions.pdf [access: 30.09.2015].

38 See European Commission, Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM(2005) 672 final.

introduction of a group litigation mechanism could have positive effect on the enforcement of competition law for two main reasons[39]. Firstly, it could guarantee better compensation of injuries suffered by individuals in case of competition law violations. Secondly, it would allow individuals to better understand competition law and its principles, what in consequence, could led to increase in the general level of deterrence.

The above standpoint of French NCA was supported by several arguments, all claiming that in order to reduce the asymmetry in the position of individuals and enterprises, as well as in order to guarantee appropriate protection of consumers, collective redress shall have been established.

Moreover, the French Competition Authority emphasised the positive effect of a collective redress on the whole system of competition law enforcement and stated that: *"private enforcement and in particular group litigation can help to enhance the efficiency of competition law by making the victims of violations, in particular consumers, a real actors and an allies of the public authorities in the fight against anticompetitive practices."*[40]

Nevertheless, the general support to the idea of collective redress in the area of antitrust law expressed by French NCA was not unconditional. As it stated in the second part of its opinion, the introduction of a collective redress instrument would not resolve all problems of competition law enforcement[41]. Moreover, it would create a new legal reality, requiring to deal with several issues in order to guarantee effective functioning of collective redress. Therefore, the French Competition Authority identified several problems that could have not been ignored, while discussing the issue of group litigation in the area of antitrust law.

Firstly, it pointed out on the specific character of competition law, and difficulties that civil courts may face while dealing with the collective proceedings concerning antitrust law infringements. As the French NCA stated: *"Competition law has a specific and technical character which requires particular knowledge from the courts. Economic analysis of the market functioning is atypical in comparison with the other areas of law, such as commercial law and civil law."*[42] Moreover, in the opinion of French NCA, those difficulties were aggravated by the fact that civil courts had limited powers of investigation, what often deprived them of possibility

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39 Opinion of French Competition Authority from 21 September 2006 on introduction of collective actions…, pt. 25.

40 *Ibidem*, pt. 29.

41 *Ibidem*, pt. 40.

42 *Ibidem*, pt. 43.

to discover hidden cartels or abuses of dominance[43]. For those reasons, the French Competition Authority argued in favour of development of collective follow-on actions, which in its opinion, would help to resolve the aforementioned problems. As it claimed, it would allow the courts, as well as individuals participating in group litigation, to take advantage of the proofs gathered and the assessment made within public proceedings. Because as the French NCA stated: *"Civil proceedings can be efficient only when the case was previously treated by the Competition Authority. In this case, the problem of expertise and proof do not appear in the same manner, due to the investigative powers and economic analysis possessed by specialised authorities."*[44]

Secondly, the French Competition Authority referred to the general problem of private enforcement, i.e. the issue of causality, which in its opinion could have not been ignored while arguing in favour of collective redress in the area of antitrust law. In the opinion of French NCA, it could cause serious difficulties both for individuals trying to prove the antitrust injury, and the courts supposed to give a judgment in a specific case. In order to resolve this difficulty, the French Competition Authority proposed once again to base the system of group litigation on follow-on actions. As it claimed: *"in the case when a decision of Competition Authority would have been taken before civil proceedings, the analysis conducted by this authority could have brought important elements for the evaluation of a causality link between the injury and anticompetitive practice and could have been used by a judge as a presumption of causality."*[45]

And finally, the French Competition Authority emphasised precautions which should be taken, once a decision on introduction of collective redress procedure in the area of competition law was made.

First of all, the group litigation should have a subsidiary role to the mechanisms of public enforcement.

Secondly, the group litigation should not create limitations to the leniency programs, being an important instrument of public authorities in the fight against cartels.

Finally, as far as the relationship between public and private proceedings was concerned, collective actions should have taken the form of follow-on actions, initiated only once the public proceedings have been terminated.

43 *Ibidem*, pt. 47.
44 *Ibidem*, pt. 51.
45 *Ibidem*, pt. 56.

The aforementioned position of French Competition Authority, confirmed a balanced approach of French NCA to the issue of collective redress. On the one hand, it agreed that broadening the scope of group litigation to the area of competition law might have beneficial effects on the protection of consumers against antitrust infringements. But on the other, it claimed that introduction of group litigation in the area of competition law was not a process deprived of risks. For those reasons, the French Competition Authority tried to emphasise several difficulties connected with a group litigation in the area of antitrust law, and provided solutions intended to guarantee a right balance between public and private system of competition law enforcement. Therefore, it shall be stated that the standpoint of French Competition Authority was an important voice in the debate on collective redress, crucial for its further development in France.

1.5. *Yung-Beteille* report – towards collective redress *à la francaise*

Despite the support to collective redress expressed by the French Competition Authority, the next years after the publication of its opinion did not lead to the proposal of a new project of law on group litigation. Moreover, the political situation has changed and the newly elected President, Nicolas Sarkozy, was more reluctant to the idea of group litigation. As he stated on 20 April 2007: *"As far as class actions, I am favourable to them in general. […] Nevertheless, I do not wish to reach an excessive situation in which the victims have the right of life or death on our companies. I am not in favour of either the importation into the French law of punitive damages or the adoption of a procedure that would allow any victim to obtain damages without restriction and without appearing in court."*[46] Few months later he expressed his concerns about the impact of group litigation on companies, and declared that the introduction of a collective redress mechanism into the French legal order required further consideration[47].

The aforementioned reluctance of French authorities towards the concept of collective redress changed in 2010. The increasing European pressure[48], as well as the advancement of works on collective redress in the French

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[46] N. Sarkozy, speech delivered on 20 April 2007, available at: http://www.candidats.fr/post/2007/04/20/71-reponses-de-nicolas-sarkozy-au-questionnaire-candidatsfr [access: 15.02.2013].

[47] P.G. Karlsgodt, *World class actions…*, p. 161.

[48] In the period from 2007 to 2009 following documents were published at the European level: European Commission, Green Paper on Consumer Collective Redress, COM(2008) 794 final; European Commission, White paper on damages actions for breach of the

Senate, forced the government to change its attitude towards a discussed matter. As Jean-Marie Bockel, Secretary of State in the Ministry of Justice declared: *"The "politique de l'autruche" is over […] I will commit myself to this project."*[49]

The first chance for the French government to commit to the project of group litigation came in May 2010, when the *Yung-Beteille* report was published. The report had as its main objective to give an answer to the fundamental question: "Can the group litigation procedure be introduced into the French legal system, and in case of affirmative, under which conditions?"

The response to this question, as well as analysis conducted in *Yung-Beteille* report, may be regarded as the most complex proposal on collective redress issued in France, and a milestone in development of collective redress *à la francaise*.

The report was composed of 27 recommendations, supported by a detailed analysis of the currently existing instruments of individuals' protection. It presented also different reasons for and against development of group litigation in France, as well as solutions allowing to adjust the collective redress mechanism to the French legal and economic reality.

In its first part, the report stated that the lack of a real group litigation procedure in France constituted an important drawback in the protection of French citizens against law violations[50]. As it claimed: *"a lack of group action in the French law is often put forward as a reason preventing de facto compensation of injuries of damages of small amount suffered by consumers, which concern acts of a daily life."*[51] Moreover, it argued that a lack of financial interest of individuals to act in order to protect their rights, mostly due to the high costs of individual proceedings, led to the situation in which *"the activities of enterprises being the source of injuries are likely to continue due to the fact that they are not challenged in court and therefore are not punished."*[52]

For those reasons in its second part, the report argued in favour of the establishment of a procedure, being a sort of a compromise between

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EC antitrust rules /*COM/2008/0165 final*/, both of which were arguing in favour of development of group litigation mechanism at the national and European level.

49 *"Politique de l'autruche"* can be literally translated as the politics of ostrich and is similar to the English reference to politicians with their heads buried in the sand.

50 L. Beteille, R. Yung, *Rapport d'information fait au nom de la commission des lois constitutionnelles*…, p. 14.

51 *Ibidem*, p. 18.

52 *Ibidem*, p. 19.

injured individuals and enterprises, afraid of mass claims. The main idea was to create the French-style collective actions (collective redress *à la francaise*), being on the one hand efficient and cost-limited instrument of individuals' protection, but on the other, a mechanism giving respect to the competitiveness of French enterprises. Because as the report stated: *"Between those two extremes [aut.: fear of American-style class actions and a refusal of group litigation], there exists a middle way that allows creating a real group litigation à la française, meeting in the same time the expectations of consumers, the need of economical and legal security of enterprises and the principles of French law."*[53] In order to achieve this goal, the report proposed a solution composed of 27 recommendations. Each of the recommendation was regarded as a mean by which the French concept of collective redress could be fulfilled.

First of all, the report argued in favour of a procedure which scope would not be restricted to specific parties (consumers or professionals), but would cover economic injuries resulting from the contractual disputes[54]. Such a construction was intended to broaden the scope of group litigation not only to consumer law violations, but also to the infringements of bank law, financial law and competition law.

As far as the antitrust law was concerned, the authors of report referred to the standpoint of European Commission and French Competition Authority, both claiming that the effective protection of individuals injured by competition law violations required establishment of a group litigation mechanism[55]. Moreover, as the report stated, there were several practical arguments speaking in favour of covering injuries resulting from competition law violations with the scope of group litigation. As such the report evoked: the risk of "forum shopping", leading to a situation in which foreign judges would be able to resolve competition law cases closely connected to French territory, and the risk of European dominance, which in the lack of French approach to collective redress could result in imposing certain solutions by the European Union[56]. Finally, as the report stated while referring to the issue of group litigation in the area of competition law: *"it would be incoherent, once we set as an objective the efficient consumers protection,*

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53 L. Beteille, R. Yung, *Rapport d'information fait au nom de la commission des lois constitutionnelles...*, p. 40.

54 P.G. Karlsgodt, *World class actions…*, p. 163; L. Beteille, R. Yung, *Rapport d'information fait au nom de la commission des lois constitutionnelles…*, p. 44.

55 L. Beteille, R. Yung, *Rapport d'information fait au nom de la commission des lois constitutionnelles...*, pp. 47–48.

56 *Ibidem*, p. 48.

to exclude anticompetitive practices from the scope of application of group litigation, since economical injury suffered by consumers often results from the violation of competition law."[57]

After determining the scope of application, the report proposed several solutions intended to protect the French legal system against abusive litigation.

First of all, it argued in favour of applying general rules on civil responsibility, such as the rule of causality or the principle of full compensation, to the group litigation proceedings.

Moreover, it suggested to limit the responsibility of enterprises only to the material injuries caused to individuals.

Finally, it argued in favour of restricting a right to initiate the group action only to consumers' associations. As the report stated, such construction would create a sort of a filter, allowing distinguishing well founded claims from those having no chances for success, and in consequence, preventing against mass claims and abusive litigation[58].

The third group of solutions proposed in the report concentrated on the organisation of group litigation procedure. Their main goal was to guarantee highest efficiency, time economy and equality of collective proceedings. In order to achieve this objective, the report proposed a two-stage procedure based on the concept already evoked in *Cerutti-Guillaume* report. Its main idea was to reverse the order of proceedings known from the American-style class actions, so that the judgment on responsibility preceded formation of a group. The court was supposed to render a judgment on responsibility at the basis of different examples of violation presented by consumers' association initiating an action. Subsequently, the judgment would be made public and potential victims of violation could join the claim. The advantages of such construction were supposed to be as follows: limited costs of proceedings, relative quickness, and respect to the economic interests of enterprises. As the report argued, the postponement of a moment in which a group was established, until issuance of a judgment on responsibility, would allow the consumers' associations to avoid unnecessary costs of proceedings, and would permit the enterprises to face the eventual mass claims only when the liability for certain violation was approved by the court[59].

The second stage of proceedings, starting once the group of claimants was formed, would be aimed at compensating plaintiffs, either by the mean

[57] *Ibidem*, p. 49.
[58] *Ibidem*, pp. 56–57.
[59] *Ibidem*, pp. 65–66.

of mediation, or by the court judgment. Its costs and time would be limited, due to the fact that judgment on responsibility was already rendered. Moreover, as the report underlined, the judgment on responsibility would be recognised in all proceedings concerning the same law violation, so even in case of subsequent individual claims, the consumers would take advantage of a group action initiated by consumers' association[60].

The further proposals of report concentrated on specific issues concerning competent court, publicity, creation of a group, financing of a claim and finally the relationship between group action and other proceedings. As those particularly important from the point of view of competition law, we can evoke recommendations speaking in favour of opt-in mechanism and follow-on actions, already evoked by the French Competition Authority as the best alternative for development of collective redress in the area of antitrust law.

As we can observe from the aforementioned reasoning, the *Yung-Beteille* proposal constituted the most complex approach to the issue of group litigation presented under the French law. It pictured a model that was taking into consideration the interests of parties most concerned by the pending discussion, i.e. consumers and enterprises.

Nevertheless, once again the political arguments took advantage over the interests of a society. As it stems from the discussion in Senate succeeding the publication of report[61], as well as projects of reform proposed by Laurent Beteille in July and December 2010[62], French deputies were still far from accepting the introduction of a group litigation procedure into the French legal order. In consequence, the project intended to introduce the French-style group litigation, became only the good material for analysis for lawyers and legal scholars, without any practical meaning for the most interested parties, i.e. individuals injured by law infringements.

1.6. Bonnefoy amendment – preserving *status quo*

The subsequent project of reform foreseeing introduction of a group litigation mechanism into the French legal order was the subject of works of the Parliament at the end of 2011. It concerned the amendment proposed

60 *Ibidem*, p. 63.

61 Available at: http://www.richardyung.fr/question-economie-senateur-yung/1588-examen-de-la-proposition-de-loi-sur-le-recours-collectif.html [access: 05.10.15].

62 Proposal of Law no. 201 et 202 aiming to strenghten protection of consumers by the establishment of group litigation based on the voluntary accession (*Propositions de loi n° 201 et n° 202 tendant à renforcer la protection des consommateurs par la création d'une action de groupe fondée sur l'adhésion volontaire*).

by Senator Nicole Bonnefoy[63] and accepted by Senate[64], which argued in favour of introduction of a group litigation mechanism to the law on consumers protection[65].

The amendment proposed by N. Bonnefoy foreseen a creation of a two-stage procedure, based on the judgment on responsibility and judgment on division of damages. The group litigation instrument was supposed to cover with its scope all the material injuries suffered by individuals due to the consumer or competition law violations. As far as its specific elements were concerned, the proposal repeated recommendations previously stipulated in the *Yung-Beteille* report[66]. The general interest for the proposal of such amendment was to guarantee that the protection of consumers would not be only a pointless word, but the idea actually put into practice[67]. Moreover, as N. Bonnefoy stated: *"creation of such procedure was the only way to fill one of the most serious gaps in the protection of consumers existing in the French law."*[68]

Despite the common support to this amendment in Senate and its adoption already in first reading, the project of consumer law reform has never entered into force. Once again, the idea of providing French citizens with more effective mechanism of their protection, did not overcome political reluctance. The project was not voted till the end of March 2012 and lost its importance once Presidential elections took place in May 2012. The official reason for such an outcome was the lack of time to adopt the new law, but in the opinion of certain scholars, it was rather a consequence of a lack of political will to adopt such reform[69].

1.7. "Hamon Law" – a final voice in the French debate?

The last stage of development in the French debate on group litigation falls for the period from 2012 to 2016. With the election of a new President – François Hollande, the doors for introduction of a collective action

63 Amendment no. 12 to the law adopted by French National Assembly enforcing the rights, protection and information of consumers, N° COM-207, 6.12.2011.

64 Reform proposal no. 41 modified by the French Senate on 22 December 2011.

65 Text no 742 adopted by French National Assembly on 11 October 2011.

66 Standpoint presented in the name of Commission of constitutional laws and legislation on the project of law adopted by French National Assembly enforcing the rights, protection and information of consumers by Nicole Bonnefoy, p. 23.

67 *Ibidem*, p. 22.

68 *Ibidem*, p. 117.

69 E. Flachier-Maneval, *Action de groupe: le rebond?*, Option Finance, January 2012, no. 1157.

mechanism in France were opened again. Because as it was already stated during his presidential campaign: *"Justice must be given to the service of law, of the Republic and of the French citizens. For this reason collective actions shall be introduced and give a chance to the groups of French citizens, who are victims of the same violation, to obtain compensation."*[70] The argument evoked by François Hollande during the presidential campaign was also repeated after his election in May 2012. This time the French Ministry of Justice – Christian Taubira, has claimed that: *"Justice shall be closer to citizens and group litigation shall be established with a view of effective protection of victims of small law violations."*[71]

The aforementioned reasoning has led to the new debate on introduction of collective redress in France. In November 2012 a public consultation on introduction of a group litigation procedure was launched[72]. As it showed, a great majority of stakeholders (93%) argued in favour of introduction of group litigation procedure in France. Among 7165 responses received from individuals, and 70 standpoints of professional stakeholders, a clear majority confirmed a need for more decisive steps towards establishment of a discussed procedure in France.

The strong public support to the idea of group litigation created important basis for the government's legislative activity in the analysed matter. Already in May 2013 the guidelines for the project of consumer law reform were published[73], and few months later the proposal for a new law in the area of consumer protection was submitted to the works of a Parliament. Differently than in the previous scenarios, where the consecutive projects of reform were stuck in the works of parliamentary commissions, the reform proposed by Benoit Hamon, the Minister of Social Economy and Solidarity, obtained the required support in the French Parliament. In consequence,

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70 See speech delivered by F. Hollande on 2 February 2012, available at: http://www.lejdd.fr/Election-presidentielle-2012/Actualite/Hollande-veut-mettre-en-place-les-class-action-484697 [access: 12.10.2015].

71 See interview with C. Taubira published on 22 June 2012, available at: http://www.leparisien.fr/faits-divers/christiane-taubira-veut-autoriser-les-class-actions-22-06-2012-2060771.php [access: 12.10.2015].

72 Public consultation on group litigation organised by B. Hamon, available at: http://proxy-pubminefi.diffusion.finances.gouv.fr/pub/document/18/13504.pdf [access: 12.10.2015].

73 Project of law concerning consumers presented by P. Moscovici on 2 Mai 2013 [*Projet de loi relatif à la consommation présénte au nom de M. Jean-Marc Ayrault, par M. Pierre Moscovici, ministre de l'économie et des finances*], available at: http://www.assemblee-nationale.fr/14/projets/pl1015.asp [access: 12.10.2015].

the Consumers Affairs Act No. 2014-344, so called "Hamon Law" (*fr. "Loi Hamon"*)[74], was adopted by the French Parliament on 17 March 2014.

Among several changes intended to balance the powers between consumers and entrepreneurs[75], the "Hamon Law" proposed introduction of a group litigation mechanism. It was regarded by the authors of reform as a tool able to restore the equality of arms between economic actors, prevent against exploitation of weaker parties, and ensure greater innovation and competitiveness within the market[76]. The group litigation mechanism was introduced in the Art. L. 423-1 to Art. L. 423-26 of French Consumer Code (currently the Art. L 623-1 to Art. 623-32). Additionally, in order to ensure better functioning and understanding of group litigation mechanism, the "Hamon Law" was supplemented by a Decree No. 2014-1081 of 24 September 2014 concerning a group action in the area of consumer law[77], and by a Circular of 26 September 2014 providing guidelines on application of a mechanism of group litigation in France[78]. All the aforementioned documents formed together a complex approach of French government towards the group litigation mechanism, and allowed to finally introduce a legal solution in the area of collective redress in France[79].

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74 Law no. 2014-344 of 17 March 2014 concerning consumption [*Loi n° 2014-344 du 17 mars 2014 relative à la consommation*], Official Journal of French Republic from 18 March 2014, p. 5400.

75 See Project of law "Strengthening the rights of consumers and empowering all with a real economic citizenship" (*Projet de loi consommation «Renforcer les droits des consommateurs et donner à tous les moyens d'une réelle citoyenneté économique»*), p. 8, available at: http://www.economie.gouv.fr/files/DP-pdl-conso-web.pdf [access: 13.10.2015].

76 *Ibidem*, p. 2; see also on this issue T. d'Alès, A. Constans, *Le futur arsenal au bénéfice des victimes de pratiques anticoncurrentielles – . – Ou quand l'office du juge n'est plus de juger mais d'indemniser*, La Semaine Juridique Entreprise et Affaires n° 14, 2 Avril 2015, 1164.

77 Decree n° 2014-1081 of 24 September 2014 concerning a group action in the area of consumer law [*Décret n° 2014-1081 du 24 septembre 2014 relatif à l'action de groupe en matière de consommation*], Official Journal of French Republic no. 0223 of 26 September 2014, p. 15643, text no. 6.

78 Circular of 26 September 2014 concerning provisions of Law n° 2014-344 of 17 March 2014 concerning consumers and Decree n° 2014-1081 of 24 September 2014 concerning a group action in the area of consumer law [*Circulaire du 26 septembre 2014 de présentation des dispositions de la loi n° 2014-344 du 17 mars 2014 relative à la consommation et du décret n° 2014-1081 du 24 septembre 2014 relatif à l'action de groupe en matière de consommation*], NOR: JUSC1421594C.

79 See also on this issue A-S. Choné-Grimaldi, *L'action de groupe à la française: tout vient à point à qui sait attendre!*, Responsabilité civile et assurances, 2014, étude n° 14; E. Claudel, *La procédure d'action de groupe explicitée*, Revue Trimestrielle de Droit Commercial, 2015, pp. 80–82.

Referring to the specific elements of "Hamon Law" it shall be firstly stated that its objective was not only to propose a mechanism able to respond to the needs of consumers, but it aimed to establish a balanced system, taking into consideration interests of all market participants. As it was held in the guidelines to the project of reform, the goal of a new solution was to establish: *"A balanced system, responding to the need of consumers protection and legitimate legal and economic interest of enterprises."*[80] In the opinion of authors of reform, it was necessary to introduce a solution able to strengthen the position of "weakest market participants", but in the same time, allowing to avoid the abuse. Consequently, the principles such as restricted scope of application of group litigation mechanism, limited legal standing and the opt-in procedure, were to be preserved. Therefore, it may be stated that the "Hamon Law" reflected once again a prudence of French approach to collective redress, and a constant attempt to find an equilibrium between all market participants.

After the introduction of "Hamon Law", three additional acts dealing with group litigation were adopted in France, i.e. Law of 26 January 2016 on the modernisation of health system[81], Decree of 26 September 2016 concerning the group litigation in health matters[82] and Law of 18 November 2016 on a modernisation of justice in 21st century[83]. Their entry into force allowed to broaden the scope of application of group litigation mechanism to the matters not initially covered by "Hamon Law" (see Point 1.7.1 below). It concerned health system (Law of 26 January 2016 on the modernisation of health system and Decree of 26 September 2016 concerning the group litigation in health matters), discrimination, environment protection and protection of personal data (Law of 18 November 2016 on a modernisation of justice in 21st century).

Nevertheless, due to the scope of this thesis, the above acts will not be analysed herein. The further analysis will focus on the provisions of "Hamon Law", which sets the current framework for collective redress in the area of competition and consumer law.

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80 See Project of law concerning consumers presented by P. Moscovici on 2 May 2013…

81 Law no. 2016-41 of 26 January 2016 concerning the modernisation of health system [*L. n° 2016-41 du 26 janv. 2016 de modernisation de notre système de santé*], Official Journal of French Republic from 27 January 2016, no. 0022.

82 Decree No. 2016-1249 of 26 September 2016 concerning the group litigation in health matters [*Décret n° 2016-1249 du 26 sept. 2016 relatif à l'action de groupe en matière de santé*], Official Journal of French Republic from 27 September 2016, no. 0025.

83 Law no. 2016-1547 of 18 November 2016 on a modernisation of justice in 21st century [*Loi n° 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXIe siècle*], Official Journal of French Republic from 19 November 2016, no. 0269.

1.7.1. Scope of application

Concerning the scope of application of group litigation mechanism, the "Hamon Law" followed a line set in *Guilaume-Cerutti* report, and aimed to limit the group actions only to the restricted number of issues.

According to the current wording of Art. L. 623-1 of Consumer Code, a group action may be initiated exclusively by a consumer association, in order to obtain a compensation for the injury suffered by several consumers, as a result of law infringement or breach of contract committed by one or several enterprises. As the Art. L. 623-1 of Consumer Code further specifies, such an infringement may be a consequence of the improper provisions of services or sale of goods, or may result from the anticompetitive practice committed by the accused undertaking.

Therefore, the scope of application of group litigation mechanism allows to cover the injuries resulting from consumer and antitrust law violations[84]. What shall be also underlined, is that group actions are available only in consumer-business relationships (claims brought by professionals are excluded from the scope of application), and could be brought only to recover material injuries suffered by the victims of violations (personal injuries may not be a subject of collective proceedings).

1.7.2. Legal standing

The second element of "Hamon Law" requiring further assessment concerns the persons entitled to bring a group action. Similarly as the previous projects of reform, the "Hamon Law" argued in favour of a limited legitimacy to initiate collective proceedings.

According to the Art. L. 623-1 of Consumer Code, the only entity able to initiate and conduct collective proceedings is the consumer association registered at the national level. In consequence, the actions brought directly by injured consumers or *ad hoc* associations will be excluded.

In the opinion of certain scholars, while such solution allows to ensure greater level of professionalism in formulating a claim and conducting proceedings, it may also significantly restrict an access to justice[85]. Due to the exclusive competence of registered consumers' associations to bring a claim, a great number of victims of law infringements may be deprived

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84 M. Béhar-Touchais, *L'action de groupe en droit de la concurrence (ou la patience de Pénélope)*, Banque et droit 2014, Hors-série, n° 9, p. 38.

85 See for example D. Mainguy, *L'action de groupe en droit français après la loi Hamon du 17 mars 2014,* Gazette du Palais, Lextenso éditions, 2014, pp. 43–56.

of the appropriate protection. It may be especially a case when the number of consumers' associations is limited[86], their financial resources are modest, and the number of law infringements causing injuries to multiple consumers is relatively high.

1.7.3. Rules on group formation and organisation of collective proceedings

The third characteristic element of "Hamon Law" concerns the rules on group formation and organisation of collective proceedings. While the solution proposed in "Hamon Law" does not depart from the previous debate on collective redress, and argues in favour of a system based on the opt-in mechanism, the important novelty is proposed in the construction of group proceedings. By a division of proceedings into three stages, differing as far as the rules on group formation are concerned, the French solution may be regarded as the original approach to the question of opt-in versus opt-out.

According to the Art. L. 623-4 to Art. L. 623-6 of Consumer Code, group proceedings are divided into three stages.

The first stage has as its goal to determine the existence of a responsibility of an accused undertaking(s). At this stage the consumer association bringing a claim is not required to determine each victim of violation individually, but may define the group in an abstract manner, e.g. victims of certain anticompetitive practice committed by the accused undertaking within specific period of time. Nevertheless, in order to justify a claim, the consumer association has to provide individual examples of infringements committed by the accused undertaking. Moreover, the association shall present the proofs of infringement, evoke grounds for conferring the responsibility to certain undertaking and prove the existence of a causal link between the injuries and a violation. This complex evaluation shall give a judge the grounds to decide if a responsibility for certain infringement may be conferred upon accused undertaking. In case of a positive assessment of the issue of responsibility, the first stage of proceedings terminates with a judgment on responsibility which specifies the potential victims of violation (e.g. consumers which bought a product covered by a price-fixing agreement), the scope of suffered injuries (e.g. value of excessive price) and determines the criterions for joining a group (measures of publicity and a time limit to join the group).

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[86] Currently in France 16 consumer associations are registered at the national level and entitled to initiate group proceedings under Art. L. 623-1 of French Consumer Code.

The second phase of collective proceedings concerns the execution of judgment on responsibility. During this stage, the victims of infringement, after being informed of a judgment on responsibility, may undertake a decision to join a group and obtain compensation[87]. According to the Circular of 26 September 2014 providing guidelines on application of a mechanism of group litigation in France[88], this phase shall in principle take place out of court. As the Circular provides, due to the fact that judgment on responsibility specifies the conditions for joining a group, as well as the scope of possible compensation, the scheme required to grant compensation to consumers deciding to join a group is precise enough, to be dealt with by the consumer association and the responsible undertaking[89]. However, according to Art. L. 623-19 of Consumer Code, in case of any problems concerning division of damages, the judge may be seized in order to resolve the potential difficulties. Moreover, by the mean of Art. L. 623-19, any additional claims for damages, concerning consumers which were not covered by a judgment on responsibility and wish to join a group, may be brought at this stage.

Finally, the last part of the proceedings, being described in a Circular as a third stage of group litigation process, concerns closing of proceedings. The group proceedings are closed once a judgment foreseen in Art. L. 623-19 of Consumer Code is rendered, or in case when no difficulties or additional claims appeared during the phase of execution of judgment on responsibility, by a judgment on termination of instance which may be rendered by a court at the basis of Art. 769 of the Code of Civil Procedure.

As the aforementioned analysis shows, the French solution constitutes a departure from the classically known group litigation models. As different author state, by dividing proceedings into three stages, and opening a possibility to join a group only once the judgment on responsibility was

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87 See on this issue E. Jeuland, *Substitution ou représentation? – À propos de l'action de groupe,* La Semaine Juridique Edition Générale n° 37, 9 Septembre 2013, 927; N. Fricero, *Aspects procéduraux de l'action de groupe: entre efficacité et complexité,* Droit et patrimoine 2015, n° 243, p. 36.

88 Circular of 26 September 2014 concerning provisions of Law n° 2014-344 of 17 March 2014 concerning consumers and Decree n° 2014-1081 of 24 September 2014 concerning a group action in the area of consumer law [*Circulaire du 26 septembre 2014 de présentation des dispositions de la loi n° 2014-344 du 17 mars 2014 relative à la consommation et du décret n° 2014-1081 du 24 septembre 2014 relatif à l'action de groupe en matière de consommation*], NOR: JUSC1421594C.

89 *Ibidem*, p. 7.

rendered, the French solution introduces a model being a combination of opt-in and opt-out regime[90].

The first stage of group proceedings, provided in Art. L. 623-4 of Consumer Code, which does not require individual identification of victims of violation, may be regarded as the example of "opt-out" solution. The judge renders a judgement on responsibility only at the basis of several examples of violation, and covers by its ruling the abstract number of individuals. Whereas the second stage of proceedings, requiring the victims to express their will in order to join the group and obtain compensation, constitutes a pure opt-in model.

While the aforementioned solution facilitates bringing a group action by the consumer association, and may in consequence enhance efficiency of group mechanism, it is also criticised by several authors.

First, it is underlined that a lack of precise identification of victims of violation at the first stage of proceedings may cause important difficulties to the judge, required to render a judgment, assess the scope of injuries and specify potential victims of violations even before the victims are precisely defined.

Secondly, certain authors evoke that the opt-in construction proposed in "Hamon Law", significantly departs from the classically known opt-in models and limits importance of victims of violation[91]. While traditionally the opt-in model was intended to allow interested parties to join the proceedings, participate in the action and benefit from its eventual outcome, the French proposal foresees the opt-in mechanism only as a mean to execute the judgment on responsibility. Due to the very wide scope of judgment on responsibility, covering not only the question of liability, but also the issue of scope of damages and its division, the opting-in does not allow an injured individual to influence the court's proceedings in a significant manner. Therefore, As V.L. Boré claims, the construction foreseen in "Hamon Law" may be regarded as an "offer of compensation". If the victims, once informed about the judgment on responsibility, will decide that joining a group is beneficial, they will claim for compensation. In opposite, if the amount of possible damages is not satisfactory, they will be able to refrain from joining a group and initiate individual action for damages[92]. Undoubtedly, while such solution allows to accelerate the

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90 N. Molfessis, *L'exorbitance de l'action de groupe à la française*, Recueil Dalloz n° 16, 1 May 2014, pp. 948–950, pt. 8.

91 *Ibidem*, pt. 9–0.

92 V.L. Boré, *Le projet d'action de groupe: action mort-née ou premier pas?*, Gazette du Palais, 16 May 2013, p. 29.

proceedings and ensures a strict control of a judge over group litigation process, it may lead to undesirable results from the perspective of the accused undertakings (limitation of a right to defence) and victims of violation (limited influence on the conduct of proceedings).

Apart from the aforementioned construction of group litigation proceedings, the "Hamon Law" foresees also three specific manners in which the group proceedings may be organised.

First concerns simplified procedure which may be applied once all victims of violation are known at the moment of rendering a judgment on responsibility. In such a case, instead of setting a scheme for information of victims and joining a group, a judge may oblige the law perpetrator to compensate the victims directly, without launching a second phase of collective proceedings described above (see Art. L. 623-14 of Consumer Code).

The second solution, foresees a possibility to refer a dispute to alternative techniques of dispute resolution, such as mediation or arbitration. Specific provisions for ADRs are provided in Art. L. 623-22 and Art. L. 623-23 of Consumer Code. They foresee a control of a judge only over the process of information of victims of violation about the possibility of joining the ADR and the conditions for joining a group.

The third solution concerns cases involving competition law infringements. In such situations, the general regime is applicable, with two important reservations. According to the Art. L. 623-24 Consumer Code, the claim may be brought only when there is a final decision of competition authority (French NCA, NCA of other MS or the European Commission) confirming the existence of antitrust infringement. Moreover, as the Art. 623-25 of Consumer Code provides, such claim may be brought only within a period of 5 years after the above decision became final. As a result of such approach, the follow-on actions concerning competition law infringement are allowed, while the stand-alone actions, brought by consumer associations prior to the decision rendered by competent competition authority, are excluded.

1.7.4. "Hamon Law" – partial response to the problem of group litigation

Apart from the specific proposals concerning the scope of group actions, parties entitled to bring a claim, rules on group formation and organisation of group proceedings, the "Hamon Law" does not deal with many crucial issues concerning collective redress. The questions such as access to proofs of violations, financing of claim or division of damages are left without

a response[93]. Therefore, while the "Hamon Law" constitutes an attempt to bring to an end long discussion on group litigation in France, it does not seem to ensure establishment of the effective mechanism of collective redress. Due to the omission of several important problems concerning the group litigation (e.g. access to proofs of violations, financing of claim or division of damages) and proposal of rather conservative solutions (e.g. exclusive competence of consumer associations to initiate group proceedings or follow-on actions in the area of antitrust law), it establishes a mechanism that will hardly increase protection of individuals against mass injuries. Undoubtedly, it is still too early to evaluate the practical efficiency of changes introduced by the "Hamon Law", however the mere construction of a new group litigation mechanism, allows us to raise doubts concerning its practical significance from the perspective of antitrust law enforcement.

Therefore, further changes may be expected in the French mechanism of group litigation, and the long discussion on collective redress, risks to require a new opening. The grounds for such a discussion seems also to be established by the French legislator itself, because as it stated in the Art. 2(VI) of "Hamon Law": *"At latest 30 months after promulgation of this law (aut.: March 18, 2014), the Government will submit to the Parliament a report on the evaluation of practical application of group litigation mechanism and will present the eventual proposals of reform."*

2. The reasons for French reluctance towards collective redress

The debate on collective redress conducted in France during the last 30 years, has illustrated several difficulties concerning introduction of a discussed instrument into the French legal order. They mostly referred to the lack of governmental support for certain projects of reform, reluctance of French politicians to the idea of collective redress and the problems with guaranteeing solution respecting the interests of all members of the discussion, i.e. public authorities, enterprises and consumers.

Furthermore, the French debate on collective redress led to establishment of several arguments, being often used as the reasons why group litigation shall not be established in a specific legal system. They had different nature, i.e. legal, ethical, economic or political, but all of them drew important attention to problems of collective redress which are often neglected once this legal instrument is discussed in different jurisdictions.

[93] H. Le Borgne, *Action de groupe «à la française», nouvelle gamme et fausses notes, in Dossier – Action de groupe: les premiers pas*, Droit et patrimoine 2015, n° 243, p. 48.

That is why, the analysis of French debate on group litigation seems to be a perfect way to understand what obstacles can be expected, once the introduction of a collective redress mechanism is put under question. Moreover, it can be crucial to determine what kind of solutions shall be proposed in order to guarantee compromise between different groups of interests. And what is most important from the European perspective, French debate on group litigation may give us an answer, what way shall be chosen by the EU legislator, in order to develop common European approach to collective redress, being a compromise between the legal traditions of all Member States.

2.1. The fear of violation of legal principles

The first group of arguments evoked against the establishment of a group litigation procedure under the French law concerned the incoherence of a discussed instrument with the French legal order. As it was often argued, the introduction of a collective redress mechanism would violate the main principles of civil procedure, and in consequence, would lead to legal uncertainty and limited protection of French citizens and enterprises. As the main legal obstacles to the introduction of group litigation in France the following were recalled: due process rule, *nul ne plaide par procureur* rule and the principle of equality of arms. In the opinion of group litigation opponents, the development of discussed mechanism, especially in the form of American-style class actions, would undermine the aforementioned rules and run a serious risk of their violation[94].

2.1.1. An endanger to due process rule

The first risk evoked by the opponents of group litigation steamed from a debate having the most fundamental meaning for development of collective redress procedure in each legal system. That is a discussion between the opponents and supporters of opt-out solution.

As it was already mentioned in the Point 1 of this Chapter, the French proposals on collective redress evolved from those arguing in favour of opt-out mechanism, as *Calais-Auloy* report or certain proposals of *Cerruti-Guillaume* report, to the solutions suggesting introduction of an opt-in system (*Yung-Beteille* report, *Bonnefoy* amendment, "Hamon Law"). The discussion on the rules of group formation conducted once each project of reform was proposed, perfectly illustrated the reasons of fear of an opt-out

[94] See on this issue S. Amrani Mekki, *Action de groupe, mode d'emploi*, Procédures 2014, étude 16.

solution. One of them, being often a ground for the rejection of certain proposals on group litigation, was the risk of a due process rule violation.

Due process rule constitutes one of the universal principles of French justice[95]. Having its origins in the Art. 6 of the European Convention on Human Rights and Fundamental Freedoms, and in the Art. 14 and 15 of French Code of Civil Procedure[96], it became a source of inspiration for different rights granted to individuals in order to protect their interests. One of them, having particular importance in the context of a debate between supporters and opponents of opt-out system, was a guarantee that the individual cannot be made plaintiff without his knowledge[97].

In the opinion of opponents of group litigation, the aforementioned guarantee was a clear obstacle for development of the opt-out collective actions in the French legal system. Moreover, as they were underlining, the opt-out mechanism, permitting to include into the group of claimants individuals who were not previously informed about a law infringement, would limit the constitutional principle of individual liberty, guaranteeing to each individual a right to express his will before exercising his rights[98].

The above-mentioned reasoning was also confirmed by the French Constitutional Tribunal (fr. *Conseil constitutionnel*) at the end of 80s. As it held in its judgment from 25 July 1989: *"collective action would be allowed only under the condition that person concerned was able to give his consent with full knowledge of the facts and remained free to conduct personally the defence of his interests and put an end to this action."*[99] Moreover, as it added, the concerned person shall be *"informed by registered letter with acknowledgment of receipt in order to allow him to object to the union's initiative."* In the opinion of the majority of French legal doctrine, this judgment closed a way for development of opt-out collective actions in France, and brought to an end a debate between its supporters and opponents[100].

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95 V. Magnier, *Class Actions, Group Litigation & Other Forms…*, p. 13.

96 Art. 14 of the French Code of Civil Procedure states: *"A party may not be judged without having been heard or called."* Art. 15 stipulates: *"Parties must disclose in due time to one another factual arguments supporting their claims, the means of evidence they produce and the legal arguments they rely upon so that each party may organize his defense."*

97 V. Magnier, *Class Actions, Group Litigation & Other Forms…*, p. 13.

98 P.G. Karlsgodt, *World class actions…*, p. 166.

99 See judgment of the French Constitutional Tribunal from 25 July 1989, no 89-257 DC.

100 V. Magnier, *Class Actions, Group Litigation & Other Forms…*, p. 13.

2.1.2. The risk of nul ne plaide par procureur rule violation

Analogically as in the case of due process principle, the fear of opt-out system was the main reason for the opponents of group litigation to claim that the introduction of such mechanism would cause a serious risk of *nul ne plaide par procureur* rule violation. Consequently, in the opinion opponents of group litigation, *nul ne plaide par procureur* rule formed another obstacle in the establishment of a discussed mechanism in France.

The aforementioned rule has its roots in the French Code of Civil Procedure. According to the Art. 31 and 32 of French Code of Civil Procedure, the claim is only admissible when a particular person has a legitimate interest in its success or dismissal[101] and was not deprived of a right of action[102]. Therefore, each person involved in the legal proceedings shall be properly identified, informed and represented throughout the entire lawsuit. In order to do so, a writ of summons has to mention the identity of a claimant[103]. Moreover, a plenipotentiary representing the individual in the course of proceedings, shall be granted a mandate to act on his behalf.

The aforementioned elements form the basis of *nul ne plaide par procureur* which shall be understood as a requirement to properly identify, inform and obtain consent of an interested person, prior to the exercise of his rights before the court. Consequently, the *nul ne plaide par procureur* rule is violated once the person having a personal interest in the success or dismissal of claim, is deprived of his right of action, due to the fact of not being identified, properly informed or represented in the course of a lawsuit.

In the opinion of opponents of group litigation, the *nul ne plaide par procureur* rule created an obstacle to the introduction of opt-out collective

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[101] Art. 31 of the French Code of Civil Procedure states: *"The right of action is available to all those who have a legitimate interest in the success or dismissal of a claim, without prejudice to those cases where the law confers the right of action solely upon persons whom it authorizes to raise or oppose a claim, or to defend a particular interest."*

[102] Art. 32 of the French Code of Civil Procedure states: *"Any claim raised by or against a person deprived of the right of action is inadmissible."*

[103] According to Art. 648 of the French Code of Civil Procedure: *"Every process served through a bailiff must state, further to other particulars as otherwise prescribed:*
[…]
2° a) if the petitioner is a natural person: his surname, first names, occupation, domicile, nationality, date and place of birth;
b) if the petitioner is a corporate entity: its form, denomination, address of its registered head office and the body serving as its legal representative.
[…]
These particulars will be prescribed under penalty of nullity."

actions in France[104]. As they have underlined, the necessity of identifying and informing each person injured by the law infringement about the possibility of joining a claim, was in contradiction with the idea of opt-out mechanism. Moreover, the requirement set by *nul ne plaide par procureur* rule, according to which a mandate from each single person was required in order to represent his interests, would be infringed once the opt-out system was to be applied.

2.1.3. The principle of equality of arms

The last rule evoked by the opponents of group litigation as an obstacle to the introduction of collective redress mechanism in France was the principle of equality of arms. Having its origins in the Art. 6 of the European Convention of Human Rights, it forms an inherent part of the rule of fair trial, and guarantees parties to legal proceedings an equal procedural footing.

According to the aforementioned principle, each party to the proceedings must be granted a fair opportunity to present his case before the court and none of the parties may enjoy an unfair procedural advantage. Such understanding of the analysed principle was also confirmed by the European Commission of Human Rights which held that: *"right to a fair hearing, both in civil and criminal proceedings, contemplates that everyone who is a party to such proceedings shall have a reasonable opportunity of presenting its case to the Court under conditions which do not place him at a substantial disadvantage vis-à-vis his opponent."*[105] The practical consequence of such principle is that each party to the proceedings shall have a possibility to present his arguments before the court, and must have a right to challenge the validity of an unfavourable opinion. Moreover, the situation in which one party would have more advantageous position than the other, is strictly forbidden under the principle of equality of arms.

Such interpretation of the equality of arms principle, in the opinion of the opponents of group litigation, formed an obstacle to the introduction of a collective redress procedure into the French legal order. That is because, collective redress procedure, especially based on the opt-out system, would create an asymmetry between a defendant and a plaintiff. It would be provoked by the fact that the single enterprise, faced with the numerous claimants, would have a limited possibility of preparing its

[104] S. Brunengo-Basso, *L'émergence de l'action de groupe…*, p. 250.

[105] *X v. Sweden*, App. No. 434/58, 30 June 1959, *Yearbook*, volume 2, 1958–1959, p. 370.

defence, especially in case when not all of the potentially injured parties were properly identified. Moreover, the situation of injured individuals would be also unequal, since the claimants non-informed about the proceedings would be deprived of their right to appear before the court, and in consequence, might be placed in the worst position against the defendant than the other members of a group. For those reasons, the group litigation opponents, tend to claim that the mechanism of collective redress, especially based on the opt-out principle, would run a serious risk to the equality of arms principle, and could not be allowed under the French law.

As we can observe from the aforementioned reasoning, the risk of violation of legal principles formed an important weapon for the collective redress opponents in the fight against introduction of a discussed instrument in France. Most of the evoked arguments were referring to the universal principles of justice which would be put at risk once a group litigation instrument would be established. Nevertheless, as we can also notice, the recalled arguments were mostly pointing on the negative consequences of opt-out collective actions, which in the course of time were put aside in the French debate on group litigation.

Despite this fact it shall be stated, that the French debate on group litigation was not limited only to the general questions concerning protection of individuals and efficiency of law enforcement, which were most often evoked during the European discussion, but went much further in its reasoning. It did not neglect the fundamental questions, concerning coherence of the proposed mechanism with the fundamental principles of French legal order. Moreover, it took an attempt to resolve the most crucial problems of group litigation, i.e. opt-in versus opt-out, equality of parties to the proceedings and a right to be heard. All that confirms, that the legal debate conducted in France in the course of last decades, cannot be ignored once the European instrument of collective redress is going to be established. Its content may be used as a guideline, once the model solution on group litigation is discussed in the EU.

2.2. The risk of lawyers' ethical standards violation

The second group of arguments evoked by the opponents of group litigation referred to the lawyers' ethical standards. Their main goal was to prove that the introduction of a discussed instrument into the French legal order would not only violate universal principles of law, but would be incoherent with the rules of legal profession. Two main issues evoked

during the debate on collective redress concerned the remuneration of legal attorneys and the problem of publicity.

As it was previously mentioned, one of the main characteristics of group litigation is the limitation of costs of legal proceedings. It can be achieved by several means, such as limitation of court fees, establishment of financing fund or transfer of specific costs to the defendant. However, one of the most often evoked solutions, usually regarded as the constructive element of a group litigation mechanism, concerns the introduction of contingency fees. Despite the fact that it can bring a lot of benefits for individuals initiating collective claim, it can also cause several difficulties once applied in a specific jurisdiction.

According to the Internal Regulation of French Advocates, the contingency fees are prohibited in France[106]. As the Art. 11.3 of the aforementioned document states: *"It is forbidden for an advocate to determine his remuneration at the basis of dequota litis agreement",* understood as: *"an agreement concluded between a lawyer and his client before the final judgment of a court, which sets all of lawyer's fees at the basis of the result of the court case."* In consequence, French lawyers can be paid either previously agreed sum of money, or the amount determined at the basis of an hourly rate. Remuneration based on the outcome of case is only permitted if it forms a portion of the total fees and is not excessively high[107]. Consequently, a solution foreseeing to stipulate the remuneration of lawyer as a percentage of damages ordered by the court (contingency fees) is incoherent with the French lawyers' ethical standards.

Such conclusion formed one of the arguments used by the group litigation opponents in France. As they were often stating, since *dequota litis* agreements are contradictory with the French deontology of legal profession, introduction of a mechanism usually based on contingency fees, would run a serious risk of lawyers' ethical standards violation[108]. On the other hand, proposal of other solution, i.e. not foreseeing contingency fees as a mean of collective claims financing, would significantly limit the efficiency of group litigation, and deprive this instrument of a practical significance. Therefore, the possibility of existence of a group litigation mechanism in the French legal order would be restrained.

The second element, evoked as a potential obstacle to the introduction of a collective redress in France concerned the issue of publicity. According to the

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106 *Règlement Intérieur Unifié de la profession d'avocat*, consolidated version from 21 November 2015, available at: http://cnb.avocat.fr/docs/RIN/RIN_Consolide+Commentaire%5bVersion-a-date%5d.pdf [access: 01.12.2015].

107 *Board of the Paris bar association,* April 24, 2001, Disciplinary Decision no. 20.2741.

108 V. Magnier, *Class Actions, Group Litigation & Other Forms…*, p. 24.

Art. 15 of the Decree on rules of conduct for lawyers[109], legal attorneys are not allowed to solicit clients. As a result, any advertising by lawyers, with a view of obtaining advantage over the other legal professionals, is strictly forbidden. In the opinion of opponents of group litigation, such rule causes serious limitation to development of collective procedure in France. That is because, while a group action requires for its efficiency flexible methods of publicity and different possibilities of informing potential victims of violation about a claim, French solution significantly restricts lawyers in their activity. Moreover, such provision, once confronted with the mechanism of group litigation, may lead to several uncertainties as far as lawyers ethical standards are concerned. And as the recent case law illustrates, this standard of legal profession can cause important obstacle to development of group litigation in France.

The aforementioned case law arose on the grounds of *ClassAction.fr* case. *ClassAction.fr* was an internet website launched in May 2005 by a group of French lawyers. Its goal was to enable any person to find information about currently pending court proceedings, and join it once considered as being covered by a claim. In order obtain sufficient degree of information concerning the case, each person had a possibility of consulting the writ of summons and the legal grounds of a case, both of which were available on-line. Once a person decided to join the civil action, it was enough to pay a limited contribution and grant a mandate to lawyer conducting specific proceedings.

The mechanism proposed by *ClassAction.fr* website was heavily criticised by the French legal professionals. In their opinion, it run a risk of lawyers' ethical standards violation and endangered the fundaments of legal profession in France. Consequently, in May 2005 the Lille Bar Association condemned the founders of *ClassAction.fr* before the Paris Court of Appeal for the violation of lawyers' ethical standards. In its opinion from June 2005, the Paris Court of Appeal agreed with the standpoint of Lille Bar Association. It held that the practice conducted by *ClassAction.fr* run a serious risk of lawyers' ethical standards violation and infringed the non-publicity principle. Moreover, the Court pointed out on other risks connected with the activity of the discussed website, i.e. the risk of individuals' rights violation and a breach of *dequota litis* agreements prohibition. The consequences of Paris Court of Appeal opinion were burdensome for the owners of *ClassAction.fr* website. The action initiated by Lille Bar Association resulted in several

[109] Decree n° 2005-790 of 12 July 2005 concerning deontology of legal profession of an advocate [*Décret n°2005-790 du 12 juillet 2005 relatif aux règles de déontologie de la profession d'avocat*], NOR: JUSC0520196D.

lawsuits filed by lawyers and consumer associations against *ClassActions.fr*, what led to the prohibition of functioning of the discussed website.

The *ClassAction.fr* affair brought a new element to the French discussion on collective redress. It confirmed that the group litigation mechanism is not only a chance for individuals and consumers associations to effectively exercise their rights, but may also create a serious risk to the principles of law and ethics. Moreover, it put in question the project of reform developed in the same time by the French government[110], and gave strong arguments for its opponents to claim that group litigation is incoherent with the French legal order. Finally, the *ClassAction.fr* case, as well as the reasoning developed at its grounds, confirmed that the French legal system was not fitted for collective claims initiated by lawyers. Therefore, as V. Magnier stated in her report on group litigation in France: *"Many changes in Ethics and amendments in the law would need to occur before group litigation could exist in France."*[111]

2.3. An obstacle in the economic growth

The third group of arguments raised against introduction of a group litigation procedure in France can be classified as economical. The main reason for their appearance was the fear of massive litigation, which in the opinion of French enterprises, could limit innovation, slow-down the economic growth and lead to the bankruptcy of several business undertakings[112]. This black scenario was outlined from the beginning of French discussion on collective redress, and in the opinion of business representatives, formed one of the main arguments against introduction of a discussed instrument into the French legal order.

The first economic risk, evoked as an argument against introduction of a group litigation in France, was a limitation of economic growth and competitiveness of French enterprises. As Pierre Simon, the former President of Chamber of Commerce and Industry stated: *"Class actions could have important economic consequences. They relate to the competitiveness of enterprises, but also, in some cases, to their actual existence. While big enterprises are situated in the front line in the case of class actions, the small and*

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110 See *Rapport sur l'action de groupe – groupe de travail presidé par Guillaume Cerutti et Marc Guillaume*, submitted to the Minister of Justice and Minister of Economy on 16 December 2005.

111 V. Magnier, *Class Actions, Group Litigation & Other Forms…*, p. 27.

112 Conference organised by CCIP and MEDEF, *Faut il ou non une class action à la française?*, 13 April 2005, the document available at: http://www.etudes.cci-paris-idf.fr/evenement/46 [access: 09.11.2015].

medium enterprises can be also significantly affected by their development."[113] In the opinion of business representatives, this negative impact of collective actions could result from the high costs of legal proceedings, the risk of numerous claims and unfavourable position of enterprises in conflicts against numerous individuals[114]. In consequence, the position of French enterprises would be weakening, and their competitiveness in comparison with other European undertakings would be limited.

The second economic risk concerned the limitation of innovation. As the business representatives have argued, so-called "legalisation" of economy, would have a negative impact on the activities of enterprises devoted to research and development[115]. First of all, the risk of massive claims would result in the necessity to transfer important financial resources into the fight against potential claims. Secondly, the costs of research activities would need to be increased, since the jeopardy of mass claims in case of potential injury to several consumers would require higher scrutiny from enterprises at the stage of development of products[116]. And finally, in certain businesses in which the risk of an injury by a specific product is particularly high, e.g. pharmacy or medicine, the attempts of introduction of innovative solutions would be put into question.

The last economic risk evoked by the French business representatives referred to consumers, being at the end of economical chain[117]. As it was argued, a risk of potential mass litigation would oblige enterprises to devote significant financial resources for prevention, as well as elimination of negative effects of law infringements. In consequence, the increased costs of business activity would be often transferred to consumers, through the increase in prices, limitation in development and restriction of competition at the market. As a result, the consumers instead of obtaining an efficient instrument in the fight against violation of their rights, would be required to carry the financial burden of introduced reform.

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113 *Ibidem*, p. 4.

114 S. Brunengo-Basso, *L'émergence de l'action de groupe…*, pp. 247–248.

115 X. Fontanet, *Faut il ou non une class action à la française…*, p. 29.

116 S. Brunengo-Basso, *L'émergence de l'action de groupe…*, p. 248.

117 J.P. Betbeze, *Faut il ou non une class action à la française?*, a speech delivered during the conference organised by CCIP and MEDEF, p. 27.

2.4. The risk for public enforcement policies

The last group of arguments against introduction of group litigation in France referred to the consequences of collective redress for the whole system of law enforcement. According to the opponents of a discussed instrument, its establishment under the French law would require a fundamental change in the manner of enforcement of law provisions. The system based on public enforcement would be forced to leave an important space to private initiatives, often limiting public policies concerning application of legal provisions, e.g. leniency programs in the area of competition law. As it was mentioned by V. Magnier in her report on group litigation in France: *"Theoretically, class actions device would blur public/private and civil/criminal distinctions. It would lead to delegate the attorney general functions to private lawyers and would contravene some French principles of justice."*[118]

This reasoning found also its confirmation in the attitude of French enterprises towards collective redress. As they were often underlining, the concept according to which private procurer pursued public purposes for its own benefit was unknown to the European model of law enforcement[119]. The principles such as state's responsibility for public order and the protection of citizens, formed basis of the European legal tradition. In consequence, in the opinion of group litigation adversaries, the coherence between public enforcement and collective actions, aiming to fulfil competitive goals, was impossible to be achieved[120]. Moreover, as the French enterprises were underlining: *"The accumulation of both systems would be economically disastrous and legally unreasonable."*[121]

For all these reasons it was argued, that the group litigation mechanism could not be introduced to the French legal system, and its eventual establishment would have negative results on the legal organisation of French society.

The aforementioned reasoning illustrates that a fear of group litigation in France has manifested at all levels of state's activity. The potential risks evoked by the group litigation opponents went from the main principles of law, through the lawyers' ethical standards, to the possible limitations of the French economy and a system of law enforcement. In consequence, as the critics of group litigation were often underlining, the introduction of group litigation mechanism in France would provoke an

118 V. Magnier, *Class Actions, Group Litigation & Other Forms…*, p. 23.
119 Conference organised by CCIP and MEDEF, *Faut il ou non une class action…*, p. 16.
120 S. Brunengo-Basso, *L'émergence de l'action de groupe…*, p. 251.
121 Conference organized by CCIP and MEDEF, *Faut il ou non une class action…*, p. 16.

important disequilibrium to the whole state's organisation[122]. Moreover, the procedure having a foreign character to the French legal order, would not only require fundamental changes in the rules of civil procedure, but also reconsideration of French constitution and legal deontology. Finally, its novelty and unpredictability would run a serious risk for all members of French society, i.e. public authorities, enterprises and consumers.

This black scenario presented by the opponents of group litigation was probably exaggerated. Nevertheless, during the period of political instability (presidential or parliamentary election) and economic crisis, it played important role in the discussion on introduction of group litigation in France. It also put a different light on the debate on collective redress which was no longer limited to the benefits of discussed solution, but had also to take into consideration possible risks provoked by the group litigation mechanism.

3. Collective redress *à la francaise* – an alternative for the EU?

The specific elements of a so-called collective redress *à la française* can be found in different projects of reform proposed in France during the last 30 years. They are also reflected in "Hamon Law", being regarded as an attempt to reconcile the idea of collective redress with the French legal, social and economic reality. The aforementioned concept is based on the general presumption that the group litigation, limited to the specific areas of law, shall play a subsidiary role to the public system of law enforcement. Moreover, the mechanism of group litigation is supposed to guarantee proper protection of interests of private parties injured by law infringements, and enterprises, being faced with the risk of massive litigation. And finally, the French proposal argues that without guaranteeing equilibrium between the interest of consumers, enterprises and public authorities, an effective and coherent mechanism of group litigation cannot be established. For those reasons, collective redress *à la française* can be regarded as an important added value to the European discussion on group litigation, and a construction worth analysing from the perspective of European system of antitrust law enforcement.

[122] D. Mainguy, *A propos de l'introduction de la class action en droit français*, Recueil Dalloz 2005, p. 1282.

3.1. Specific based approach – consumers and competition protection

As the first characteristic of French approach to the issue of group litigation we can evoke a scope of application of collective redress mechanism. This matter is often a starting point for the discussion on collective redress, and already at this stage various groups of interests, by the enlargement or limitation of the scope of application, are trying to achieve their goals. In consequence, the group litigation can take a form of a general instrument of civil procedure, applying to all violations of individual rights. It may be also stipulated as a mechanism limited to certain areas of law, such as consumer, competition or financial law. Finally, the collective redress procedure can be restricted only to the domain of consumer protection, which is commonly regarded as the best adapted for the application of a discussed mechanism.

The French model argues in favour of a specific based approach and limited scope of application of group litigation mechanism. Nevertheless, in the same time it illustrates a multitude of possible solutions on the discussed issue.

First, it concerns the standpoint expressed by French consumers and legal professionals, that from the beginning of French debate on collective redress were arguing in favour of a broad scope of application, allowing to cover with the collective actions not only consumer law violations, but also infringements of competition, environmental and financial law.

At the same time, French deputies were trying to find a common ground between private actions initiated by individuals and public proceedings conducted by state authorities. Their goal was to guarantee that public method of law enforcement will not be impeded by the development of group litigation mechanism. In consequence, in several proposals they were arguing in favour of the establishment of a collective redress procedure in the area of consumer law, while its eventual development in the domain of competition or financial law was certainly limited.

Finally, French enterprises were claiming that due to the risk of negative influence of collective redress on the French economy and public system of law enforcement, the scope of application of group litigation shall be limited. Therefore, in their opinion, if group litigation would be introduced in France, it shall be restricted only to financial damages incurred by individuals as a result of consumer law infringements.

Those different standpoints expressed in the French debate on collective redress forced the authors of consecutive reforms to look for equal opportunities, satisfying all groups of interests, and guaranteeing highest

practical importance of the introduced mechanism. From the beginning it became clear that proposing group litigation as a general mechanism of civil procedure, without limiting its scope to specific areas of law, would not achieve a common acceptance[123]. As a result, the need to limit collective redress to certain areas of law became a pre-condition for its eventual establishment in France.

From the beginning of 90s it was obvious for the French scholars, politicians and legal professionals that the collective redress had the highest chances of being accepted in the area of consumer law. As it was later explained in the *Yung-Beteille* report, consumer law was a domain that worked perfectly with a group litigation mechanism[124]. It resulted from the fact that consumers' injuries were easily identifiable, law violations were possible to be determined, and the number of individuals suffering injuries was usually high. In consequence, the grounds for group litigation were fulfilled. Moreover, the fact that massive consumers injuries had most often low individual value, spoke in favour of collective redress instrument in the area of consumer law.

Nevertheless, in the course of time, and due to the increasing European pressure on development of group litigation mechanism[125], the French politicians started to consider the eventual broadening of the scope of application of collective redress instrument. In consequence, starting from the *Guillaume-Cerrutti* report, French proposals on the analysed issue were arguing in favour of covering with a scope of group litigation not only consumer law, but also competition law, bank law or financial law. As it was later argued in the *Yung-Beteille* report, collective actions, in order to be efficient in the modern economy, could not have been limited only to consumer law, but must have protected individuals at all levels creating possible endanger to their interest[126].

As far as the possibility of application of group litigation to matters involving antitrust law was concerned, the *Yung-Beteille* report developed a reasoning which can be regarded as a perfect example of French approach

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123 S. Guinchard, *Une class action à la française…*, p. 2180; Y. Picod, *L'action de groupe: âge d'or des implants ou modèle français?*, Recueil Dalloz 2006, p. 2865.

124 L. Beteille, R. Yung, *Rapport d'information fait au nom de la commission des lois constitutionnelles...*, p. 43.

125 European Commission, Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM(2005) 672 final; European Commission, Green Paper on Consumer Collective Redress, COM(2008) 794 final; European Commission, White paper on damages actions for breach of the EC antitrust rules /*COM/2008/0165 final*/.

126 L. Beteille, R. Yung, *Rapport d'information fait au nom de la commission des lois constitutionnelles...*, p. 44.

to the issue of scope of application of collective redress. It can be described as an attempt to find a balance between the two principles, effective protection of individuals on the on hand, and the general interest of the enforcement system on the other. The reasoning conducted in *Yung-Beteille* report formed also a basis for "Hamon Law", which in the similar way as its predecessor, argued in favour of a limited scope of application of group litigation, covering violations stemming from consumer law and antitrust law.

As a departure point the *Yung-Beteille* report stated: *"in the French law there is no useful and efficient mechanism allowing consumers to obtain compensation for competition law violations."*[127] Subsequently, it referred to the position of CJEU, European Commission and French Competition Authority, all claiming that the idea of private enforcement of competition law, required from national authorities to develop effective mechanisms of individuals protection against anticompetitive practices. In consequence, as a possible response to the aforementioned obligation, it proposed development of a group litigation in the area of competition law, being a sort of compromise between the need of efficient protection of individuals and the requirements of French enforcement policy. This compromise was supposed to be guaranteed by a highly prudent approach to the issue of group litigation in the area of antitrust law. Because as the *Yung-Beteille* report stated: *"it would be incoherent, once we determine as our objective the efficient protection of consumers, to exclude anticompetitive practices from the scope of application of group litigation, since very often consumers harm finds its origins in the violation of competition law."*[128] Nevertheless, as it also recognised: *"covering anticompetitive practices with the scope of application of group litigation is not an attempt without difficulties."*[129]

First of all, the aforementioned difficulties were resulting from a technical character of antitrust law, which for its application often required special expertise, being a combination of judicial and economic analysis. Therefore, private actions, often limited in financial resources and specific knowledge, risked to be inefficient, once complicated cases concerning competition law violation were involved. Moreover, according to the French standpoint, development of a group litigation in the area of competition law could run a risk for the proper functioning of public enforcement policies. It included the risk of incoherence between civil actions and public proceedings, the

[127] *Ibidem*, p. 47.
[128] *Ibidem*, p. 49.
[129] *Ibidem*, p. 48.

problem of communication between courts and competition authority, and finally the risk of limited efficiency of leniency programs.

Due to the aforementioned reasons, the French proposal on collective redress argued in favour of a specific based approach, additionally adapted to the limitations of each area of law. Only such approach could have assured that development of a new mechanism of law enforcement would not impede the principles of already existing system. And as far as competition law was concerned, the solutions such as follow-on actions, subsidiary role of group litigation or *amicus curiae* procedure were proposed. All of them were intended to guarantee that the application of a discussed mechanism in the area of antitrust law, will not impede its proper functioning.

To conclude it can be stated, that the French position on the scope of application of collective redress may be characterised by a reluctance towards the idea of development of group litigation as a general instrument of law enforcement, but in the same time, by the support for its development as a particular instrument of individuals protection in certain areas of law. As it stems from the French concept, only specific based approach, limiting the scope of application of group litigation to the areas of law well adapted for its use, can be a solution guaranteeing equilibrium between the interests of victims of law violations, enterprises and a state. However, as it follows from the French proposal, development of group litigation in those areas of law must take into consideration its specificities and limitations, in order to guarantee that a new mechanism of law execution will not cause incoherence to the whole system of law enforcement.

3.2. Representative organisation as an enforcement agent

The second characteristic element of French approach to collective redress concerns the issue of standing. From the beginning of French debate on group litigation, one of the main principles accepted both by its supporters and opponents, was the limitation of a right to initiate a group action only to specialised organisations. Such a construction was considered as a guarantee of the best level of individuals protection, and in the same time, as a safeguard against the abusive litigation[130].

For the first time the solution foreseeing a limitation of mandate to initiate group actions only to specialised organisations was proposed in *Calais-Auloy* reports. Both projects of consumer law reform argued in favour of American-style class actions, adapted however to the French reality. As

[130] Y. Picod, *Le charme discret de la class action*, Recueil Dalloz 2005, p. 657.

one of the means guaranteeing equilibrium between the American model and the French legal system, the reports proposed to limit the legitimacy to initiate group action only to specialised bodies. Such a solution was supposed to ensure that a need of individuals protection would not lead to abusive and unfounded litigation, being one of the main drawbacks of the American-style class actions. Specialised organisations, playing a role of a filter in the selection and initiation of claims, were intended to create a safeguard against massive claims, being a particular risk for the French enterprises.

Despite the fact that *Calais-Auloy* reports have never entered into practice, they formed a path for the future development of French discussion on group litigation. All the subsequent attempts of introduction of group litigation procedure in France were referring to the aforementioned solution, as a response to the question of legitimacy. Also a joint representative action, regarded as a procedure most closely connected to the concept of group litigation, was based on the same principle[131]. And finally, all the recent proposals foreseeing introduction of a collective procedure into the French legal order, argued in favour of limitation of a right to initiate group action only to specialised organisations[132].

First of all, as it stems from the "Hamon Law", limitation of a right to initiate group action only to representative organisations allows to restrict the eventual risk of abusive litigation. As it states, such construction ensures that the representative organisations would play a role of a filter, eliminating unfounded claims before the commencement of the proceedings. In consequence, the eventual risk of abusive litigation, leading often to overload of the courts and economic problems of enterprises, may be significantly restricted.

Secondly, as the authors of recent reform argue, a limitation of right to initiate group litigation only to specialised bodies, or more precisely to consumer associations registered at the national level, is supposed to guarantee higher level of professionalism. It results from the fact that the consumers associations possess specific knowledge in the area of their

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[131] Art. L 622-1 of French Consumer Law stipulates that only: *"approved association recognized as been representative on a national level in application of the provisions of the part I may, if its has been duly authorized by at least two of the consumers concerned, may institute legal proceedings to obtain reparation before any court on behalf of these consumers."*

[132] *Rapport sur l'action de groupe – groupe de travail presidé par Guillaume Cerutti et Marc Guillaume*..., p. 34; L. Beteille, R. Yung, *Rapport d'information fait au nom de la commission des lois constitutionnelles*..., p. 56.

practice, which is often indispensable for the proper conduct of complex collective actions. Moreover, as far as collection of evidence or constitution of group are concerned, such bodies possess required experience and sufficient financial resources, which are often missing to individuals initiating a claim. Finally, the expertise of specialised bodies does not only permit to better prepare a claim or organise a group, but what is most important, guarantees higher efficiency of collective action.

The last argument evoked by the supporters of discussed solution is that limitation of a right to initiate group proceedings only to specialised organisations would allow eliminating the risk of *nul ne plaide par procureur* rule violation. As it was already stated in *Guillaume-Cerutti* report: *"their statutory purpose allow them [aut.: specialised bodies] […] to respond to the requirement of a legitimate interest to act and, as an exception to the nul ne plaide par procureur rule, regard them as entities having a quality to represent a group of consumers without prior identification of victims of violation."*

The above-mentioned approach to the issue of legitimacy confirms once again, that the collective redress *à la française* tries always to find a compromise between the need of consumers protection and the interests of enterprises and public authorities. The solution evoked in different projects of reform, and finally introduced by the "Hamon Law", was supposed to guarantee higher stability of group litigation process and a limited risk of abusive litigation. Nevertheless, as certain scholars claim, the exclusive competence of consumer associations registered at the national level to initiate collective action, may also lead to important limitations[133]. That is because, each restriction of a right to act before the court, must raise doubts concerning the access to justice.

The existence of the aforementioned threat was recognised by the French Bar Association. In its commentary to the project of reform proposed by the *Yung-Beteille* report it stated: *"the monopoly of action [aut: the limitation of right to initiate an action only to representative organizations] can be regarded as a limitation in the access to justice guaranteed by the Art. 6.1 of the European Convention on Human Rights and Fundamental Principles."*[134] Moreover, as the French attorneys claimed, limiting the right of action only to consumers associations could lead to the situation in which instead of filtering unfounded claims, the above-mentioned entities would select the claims responding to their needs or current preferences. In consequence,

[133] D. Mainguy, *A propos de l'introduction de la class action en droit français*…, p. 1282; S. Guinchard, *Une class action à la française*…, p. 2180.

[134] L. Beteille, R. Yung, *Rapport d'information fait au nom de la commission des lois constitutionnelles...*, p. 57.

certain group of individuals could be deprived of proper protection, and a main goal of introduced mechanism could be impeded.

The aforementioned fears of French Bar Association illustrate that finding a compromise between the interests of consumers and enterprises is a particularly difficult attempt. Moreover, as the example of joint representative action shows, the limitation of right to initiate collective proceedings only to specialised bodies can result in its limited practical significance. That is why, many French authors argue that without guaranteeing a wide access to group litigation procedure, covering injured individuals and *ad hoc* representative bodies, the discussed instrument will not play a significant role in the protection of individuals against law infringements[135].

3.3. 2-stage procedure – from judgment on responsibility to compensation

The French proposal on group litigation can be also characterised by a new approach to the organisation of collective proceedings. While the previously known systems envisaged two-stage procedure, initiated by a judgment on admissibility followed by judgment on responsibility, French concept argues in favour of a reversed hierarchy. *L'action déclaratoire de responsabilité*, already foreseen in *Calais-Auloy* reports, subsequently developed in *Cerutti-Guillaume* and *Yung-Beteille* reports, and confirmed by the "Hamon Law", proposed a solution according to which judgment on responsibility shall precede formation of a group.

According to the aforementioned model, the first stage of group proceedings shall be limited to the judgment on responsibility. Therefore, at this stage of proceedings a consumer association initiating an action is obliged only to prove that a practice of a specific enterprise led to injury of several individuals. In order to achieve this goal, it shall present several cases, confirming that a behaviour of enterprise constitutes infringement of legal provision resulting in the injury of numerous individuals. The specificity of such construction is that at this stage of proceedings, the court does not decide whether an enterprise is responsible for each single injury, but its goal is only to assess if certain undertaking can be held liable for similar injuries caused to several individuals. In consequence, as it was explained in the *Yung-Beteille* report: *"a responsibility on which the court decides during*

[135] A. Du Chastel, *L'action de groupe en France: mythe ou réalité?*, La Semaine Juridique Edition Générale no. 36, September 2012, p. 926; G. Decocq, *Le réveil du «private enforcement»?*, Contrats Concurrence Consommation no. 6, June 2012, pt. 6.

the first stage is an "objective" responsibility, in the sense that it is based only on the identical elements of all presented individual cases, which are necessary for its establishment."[136]

The "subjective" responsibility, being regarded as a liability of an enterprise for a specific injury, is determined during the second stage of proceedings – starting once an enterprise was held liable for a law violation. The goal of a second stage, initiated with the construction of a group of claimants, is to determine what amount of damages, if any, shall be granted to each individual being a member of a group.

As we can observe, the aforementioned construction significantly differs from the previously described models of group litigation (American and European). Despite the fact that the final outcome of all collective proceedings is similar, i.e. injured individuals are granted compensation from an enterprise violating the law, their specific elements often oppose. Moreover, the reversed hierarchy changes the position of enterprises, individuals and consumer associations within the civil proceedings. And finally, the importance of individuals, playing the role of private procurers in the system of group litigation, is considerably decreased.

The analysis of specific elements of French proposal shows however, that a two-stage procedure is another attempt to adapt group litigation procedure to the French reality. Its goal is to guarantee a proper balance between the interests of enterprises and injured individuals. Moreover, the aforementioned proposal aims to respond to several fears of group litigation opponents, often evoked as obstacles to introduction of a collective redress procedure in France.

First of all, the construction foreseeing that the judgment on responsibility precedes the creation of a group guarantees better protection of interests of enterprises. That is because, no publicity, having often negative impact on reputation of accused business undertaking, takes place before issuing a judgment on responsibility. Moreover, prior to determining its responsibility for certain law violation, the enterprise is protected against a necessity of facing a mass claim. And finally, the risk of unfounded claims is limited, since a French style two-stage procedure allows a judge to control the claim before the so-called "massification" of proceedings.

Secondly, the limitation of a first stage of proceedings only to the judgment on responsibility, allows to limit the costs of legal action and facilitates the activity of consumers' association. That is because, the number

[136] L. Beteille, R. Yung, *Rapport d'information fait au nom de la commission des lois constitutionnelles...*, p. 67.

proofs required at the first stage of proceedings is restricted only to those which confirm the existence of "objective" responsibility. Moreover, in order to initiate an action, the consumers' association is not required to obtain a mandate from each single individual injured by law infringement, but is only supposed to prove that certain behaviour of enterprise constitutes infringement of rights of numerous individuals.

Thirdly, the two-stage procedure brings important benefits for individuals injured by law infringements. They consist of greater simplicity of second stage of proceedings, limited only to the division of damages, and higher certainty as far as a possibility of obtaining compensation is concerned.

Finally, the French proposal on collective redress constitutes a response to several legal problems evoked by group litigation adversaries.

Firstly, it concerns the eventual conflict between the group litigation and a due process rule. As it was previously stated, a due process rule would be infringed once the individual would not have a right to express his will to join an action before the commencement of the proceedings[137]. The French-style two-stage procedure allows answering this problem, without limiting the efficiency of group litigation mechanism at the same time. It is achieved by a construction according to which the opt-in solution is applied only once a judgment on responsibility was rendered, while the formation of a group is not required in order to initiate an action. Due to such solution, none of the individuals injured by law infringement is included into the group proceedings without its previous consent, and can always refrain from joining a group if the judgment on responsibility would not be satisfactory. On the other hand, consumer association is more flexible in initiating an action, because while launching a claim it is not required to precisely determine victims injured by illegal behaviour of accused undertaking.

The second legal principle, evoked as a potential limitation to the development of group litigation proceedings, is a rule of equality of arms[138]. Also in this case, the French-style two-stage procedure brings an answer to group litigation opponents. At the first stage, it is achieved by a construction foreseeing that an enterprise is not obliged to face mass claim, but is confronted with consumers' association acting in the general interests of individuals. At the second stage, the equality of arms is ensured by the application of an opt-in mechanism which allows identifying all members

[137] See in details Part II Chapter 2 Point I(2.1.1).
[138] See in details Part II Chapter 2 Point I(2.1.3).

of a group and placing claimants and defendant at the same procedural footing.

The aforementioned advantages of French-style two-stage procedure undoubtedly confirm its usefulness for the system of group litigation. The reversed hierarchy constitutes a response to the fears of enterprises, often being the main opponents to the introduction of collective redress instrument. Nevertheless, it shall be also mentioned, that the proposed solution can raise certain difficulties once introduced in practice. It concerns the limited number of proofs being in the possession of consumers' association at the first stage of proceedings. It also refers to the problem of determining the "objective" responsibility of enterprise only at the basis of exemplary individual cases. And finally, it concerns an issue of financing, which due to the fact that consumers' association solely initiates an action, can often construe an economic obstacle in launching a claim.

3.4. Group litigation as a complement to public enforcement

The question of a relationship between group litigation and public enforcement was raised in France, once the proposed scope of collective redress mechanism started to cover the new areas of legal practice. The proposals to introduce the aforementioned instrument also in the area of competition law or financial law, in which the activity of regulatory bodies formed the basis of law enforcement, forced the authors of different projects of reform to create a solution guaranteeing coherence between private actions and public proceedings. Also the public authorities raised their fears concerning the possible influence of group litigation on their enforcement policies[139]. In consequence, the French position on collective redress had to evolve and give an answer to this crucial issue. This response was particularly interesting from the point of view of competition law, being regarded as a domain in which the relationship between public and private enforcement should have been given particular attention.

For the first time the aforementioned issue was raised by the French Competition Authority in September 2006. In its official standpoint on the possibility of introduction of collective redress into the French legal order, it argued in favour of a group litigation playing a subsidiary role to public system of competition law enforcement. The support was given to follow-on

[139] See in details Part II Chapter 2 Point I(1.4).

actions, initiated only after termination of public proceedings[140]. In the Competition Authority's opinion, such construction, giving a possibility to refer to the decision of competition authority in order determine the existence of law violation, would facilitate the activity of courts deciding on damages claims. Moreover, it would support specialised organisations in bringing the claims and limit the costs of their activity. Because as the French NCA argued: *"Even if, under the French law, the decision of Competition Authority is not binding for the judge deciding on damages, it can be taken by the latter as a useful element in building its conviction on the existence and character of violation."*[141] Finally, as the French Competition Authority underlined, the aforementioned construction would guarantee greater coherence between public and private proceedings, and limit the risk of a negative influence of private enforcement on national antitrust policies[142].

The consequences of such standpoint of French NCA were crucial for further discussion on group litigation in France. On the one hand, the French Competition Authority gave a green light for the development of collective redress in the area of competition law, but in the same time, it argued in favour of its limitation, in order to guarantee coherence between public enforcement and collective redress. In consequence, all the following projects of reform advocated for introduction of a group litigation procedure having complementary character to public method.

Just to give an example we can refer to *Yung-Beteille* report which emphasised the necessity of a coherence between group litigation and public enforcement. It claimed that in the domains where public authority is responsible for the enforcement of legal provisions, it is necessary to guarantee that group action will be properly structured with the procedures initiated by state bodies[143]. As possible solutions the *Yung-Beteille* report proposed two mechanism, i.e. *amicus curiae* role of competition authority and a possibility to stay the collective proceedings once the action was undertaken by public body. Both mechanisms were regarded by the authors of report as striking the right balance between the effective protection of individuals, and a need of preservation of public enforcement policies.

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140 Opinion of French Competition Authority from 21 September 2006 on introduction of collective actions…, pt. 78.

141 *Ibidem*, pt. 78.

142 *Ibidem*, pt. 86–91.

143 L. Beteille, R. Yung, *Rapport d'information fait au nom de la commission des lois constitutionnelles...*, p. 85.

While the proposals of *Yung-Beteille* report, allowing both stand-alone and follow-on actions in the area of antitrust law, seemed to be moderate and finding a right equilibrium between group litigation and public enforcement, the "Hamon Law" decided to argue in favour of more restrictive approach. As far as the group actions involving violations of antitrust law were concerned, the "Hamon Law" proposed a specific solution, according to which a group action could be initiated only when the final decision confirming the existence of antitrust infringement was rendered by competition authority (French NCA, NCA of other MS or European Commission)[144]. In other words, the stand-alone groups actions were excluded, and the consumer associations wishing to initiate group proceedings in case of competition law infringements were fully dependent on the activity of competition authority.

The dependence of group litigation on the public mechanism of competition law enforcement was additionally confirmed by the limitation of time in which a collective claim may be brought (five years from the date when decision of competition authority became final – Art. L. 623-25 of Consumer Code), by the prejudicial effect of competition's authority decision on the court (Art. L. 623-24 *alinea* 2 of Consumer Code), and by the obligation of a court to stay the proceedings, if a group action was initiated prior to the final decision on competition law infringement rendered by competition authority.

All the aforementioned solutions confirmed that the "Hamon Law", once the infringements of antitrust law were concerned, aimed to subordinate the group litigation mechanism to the public method of law enforcement. Therefore, it may be claimed that such approach significantly reduces chances that the group litigation will become important mechanism of competition law private enforcement in France.

First, it is a consequence of prolongation of time in which group action could be brought. Secondly, it results from the exclusion of possibility to bring a collective claim in situations when antitrust law infringements are not discovered or prosecuted by public authorities. Finally, it significantly limits, or even excludes, individuals' and consumers associations' will to discover and prosecute the anticompetitive behaviours, since all their activities are dependent on the activity of NCA.

In view of the aforementioned it can be stated, that the evolution of French position on the relationship between group litigation and public enforcement is very disappointing. While in most of the EU jurisdictions

144 See Art. L. 623-24 of Consumer Code.

the group litigation is regarded as a complementary mechanism of antitrust enforcement, the "Hamon Law", by subordinating a group litigation to public enforcement, significantly undermines its role in the area of antitrust law. Therefore, further debate on this issue shall be expected in France, and the reassessment of current approach would be desirable.

3.5. Important role of mediation

The last characteristic of French approach to collective redress concerns the role of mediation in settling the disputes between business undertakings and individuals. As it was evoked through the entire debate on group litigation in France, the development of collective redress shall be accompanied by the establishment of effective mechanisms of mediation, able to limit the costs of proceedings, increase the access to justice and guarantee the best protection of interest of individuals and enterprises. Nevertheless, as it was also stipulated within different projects of reform, development of mediation cannot be regarded as an alternative to group litigation, but rather as its important complement[145].

From the beginning of the debate on group litigation in France, business representatives were trying to argue that the proper construction of mediation, allowing to form a platform for discussion between enterprises and individuals, could replace the mechanism of group litigation[146]. As they were claiming, the possibility to limit the costs of proceedings and avoid long judicial trials, would bring significant benefits for both parties to eventual disputes. Moreover, as they were underlying: *"we shall promote economy of partnership, based on trust and discussion, and not economy of blackmail."*[147] Therefore, in their opinion, development of private actions should rather concentrate on increasing access to mediation and strengthening its importance, than on creating a new instrument of non-consensual dispute resolution.

The slightly different standpoint was presented by consumers' organisations. As they were arguing, the development of alternative methods of dispute resolution could give to individuals additional instruments in the fight against violations of their rights. However, differently than the

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[145] *Rapport sur l'action de groupe…*, p. 27; L. Beteille, R. Yung, *Rapport d'information fait au nom de la commission des lois constitutionnelles…*, p. 77.

[146] L. Ascensi, S. Bernheim-Desvaux, *La médiation collective, la solution amiable pour résoudre les litiges de masse ?*, Contrats Concurrence Consommation no. 10, October 2012, étude 10.

[147] Conference organised by CCIP and MEDEF, *Faut il ou non une class action…*, p. 23.

business representatives, the consumers' organisations did not argue in favour of a solution envisaging replacement of group litigation by the mechanism of ADR, but they were rather supporting the coexistence of both instruments[148].

The aforementioned reasoning found also its reflection in the French proposals on collective redress. Already in the *Cerrutti-Guillaume* report it became clear that establishment of effective mediation would allow to resolve many disputes without necessity of complex judicial proceedings[149]. However, as the *Yung-Beteille* report claimed, the efficiency of mediation would be limited, if the group litigation procedure would not be in force[150]. That is because, the existence of an alternative method of dispute resolution, without the eventual possibility of judicial proceedings, would be too strongly dependent on a good will of enterprises. Moreover, as the authors of report have underlined: *"creation of group litigation procedure would constitute a strong initiative for enterprises to develop internal mechanism of mediation allowing to effectively respond to the demands of consumers."*[151]

The importance of a mediation in the French approach to collective redress was finally confirmed in the "Hamon Law". In the newly introduced provisions of the Art. L. 623-22 and Art. L. 623-23 of Consumer Code, it provided for a supplementary mechanism of mediation, to which parties may refer in order to resolve a dispute involving multiple victims of the same infringement.

As far as specific solutions on this matter are concerned, the French proposal argues in favour of a mediation that can be initiated at each stage of collective proceedings. In the same time, it opposes to the concept of mandatory mediation, being contradictory to the main principle of ADR, i.e. voluntary character. And finally, in order to guarantee the highest efficiency of discussed instrument, the "Hamon Law" argues in favour of a judicial control over mediation scheme (the scope of mediation and the measures of informing multiple victims on the possibility to join mediation need to be approved by the court) and the judicial recognition of mediator's decision.

In the opinion of French supporters of group litigation, the construction described above perfectly responds to the interests of enterprises and individuals, and in the same time, guarantees higher efficiency of the law

148 V. Magnier, *Réflexions croisées ces actions de groupe*, Reveue Lamy Droit Civil, 2006 (32).

149 *Rapport sur l'action de groupe…*, p. 27.

150 L. Beteille, R. Yung, *Rapport d'information fait au nom de la commission des lois constitutionnelles...*, pp. 77–78.

151 *Ibidem*, p. 78.

enforcement process. Moreover, its development within the previously described two-stage procedure, permits to create necessary coherence between the court proceedings and ADRs. That is because, the eventual decision on the objective responsibility of a particular enterprise – issued by the court after first stage of group proceedings, can be important initiative for the commencement of a mediation. As it was already explained in the *Yung-Beteille* report, in such a case: *"the necessity of compensation would be no longer put under the question and it would be necessary for an enterprise to settle the dispute as soon possible."*[152]

All the evoked arguments confirm, that the group litigation and the mediation formed important compliments in the French debate on collective redress. Their coexistence was supposed to ensure establishment of a mechanism able to reduce the costs of law enforcement process and create proper balance between the interests of accused undertakings and injured individuals.

4. Evaluation of French proposal

As it stems from the conducted analysis, the French concept of collective redress can be characterised by the constant attempt to find a balance between the interests of different actors of modern society, i.e. consumers, enterprises and public authorities. All the proposals on group litigation evoked in the course of last decades, were intended to establish solutions being a compromise between the aforementioned groups. In consequence, they were trying to increase the level of consumers protection, e.g. by broadening the scope of group litigation or extending the role of mediation, but in the same time, they were aiming to preserve the interests of French enterprises and public authorities, e.g. by limiting a right to initiate group action to consumer associations or by arguing in favour of follow-on actions in the area of antitrust law. Undoubtedly, such approach shall be positively estimated from the point of view of political debate, however, the question is:

"Whether such concept can lead to introduction of a group litigation mechanism working effectively in practice?"

The response to this question is given by the French system itself. After almost 30 years of a debate on group litigation, the French legislator introduced a solution full of limitations and procedural constraints. In

[152] *Ibidem*, p. 79.

order to preserve the interests of public authorities and enterprises, the proposed solution took rather conservative form.

First, it is confirmed by the rules on a legitimacy to bring a group action, which instead of giving a broad mandate to injured individuals or *ad hoc* representative bodies, limit such right to consumers' associations registered at the national level.

Secondly, the preservative approach to the issue of collective redress is confirmed by the lack of solutions concerning financing of collective actions, access to proofs of violations or participation of lawyers in the proceedings. As previously conducted analysis confirms, lack of solutions on these issues may cause significant difficulties to parties deciding to undertake collective claims, and especially in the area of antitrust law, may hamper efficiency of group method of enforcement.

Thirdly, the important limitation results from the exclusion of business undertakings, especially small and medium enterprises, from a possibility to refer to the group litigation mechanism.

Finally, the French approach to the relationship between group litigation and public enforcement in the area of antitrust law shall be regarded as disappointing. Due to the exclusion of stand-alone collective actions in the case of competition law infringements, the importance of group litigation for private enforcement of antitrust law may be significantly reduced.

All these arguments allow us to claim that the recent French solution in the area of group litigation has limited chances of success. Undoubtedly, it is still too early to assess its practical significance, due to the fact that the provisions of "Hamon Law" on collective redress entered into force on 1 October 2014, and led only to 9 collective claims brought in the period between 1 October 2014 and 31 December 2016[153]. However, due to the aforementioned limitations and procedural constraints, as well as in the

[153] See analysis prepared by National Institute for Consumer Affairs (fr. *Institut National de la Consommation*) according to which 9 collective actions were introduced after the entry into force of "Hamon Law" till September 30, 2015, and concerned violation of consumer rights in 5 domains of legal practice: rental housing (case *UFC-Que Choisir v. Foncia*, case *SLC-CSF v. Paris Habitat-OPH*, case *CNL v. Immobilière 3F*); financial markets (case *CLCV v. Axa-Agepi*; case *UFC-Que Choisir v. BNP Paribas;* case *CLCV v. BNP Paribas Personal Finance*); electronic communication (case *Familles Rurales v. SFR*); provision of services (Familles Rurales v. Manoir de Ker an Poul).; sale of goods (*CLCV v. BMW Motorrad France*). The analysis is available at: http://www.conso.net/content/laction-de-groupe-consommation-9-actions-introduites-en-deux-ans [access: 30.12.2016]; see also on this issue M.J. Azar-Baud, S. Carval, *L'action de groupe et la réparation des dommages de consommation: bilan d'étape et préconisations*, Dalloz 2015, p. 2136.

view of low popularity of group litigation mechanism in the first year of functioning, the perspectives for its greater efficiency in the area antitrust law enforcement are rather doubtful.

Therefore, the French debate on group litigation seems not to be over, and the reassessment of current approach to collective redress in France seems to required. The doors for such reassessment are opened by the French legislator itself, because as it states in the Art. 2(VI) of the "Hamon Law": *"30 months after its promulgation (aut.: March 17, 2014), the government shall present a report to Parliament, in which the consequences of introduction of law on collective redress will be assessed, and the possible ways of its reform will be proposed."*

In the opinion of certain scholars, such wording of "Hamon Law" confirms that the authors of reform were not fully convinced, if the proposed solution would work effectively in practice[154]. Therefore, it may be claimed that the further debate on group litigation in France is only a question of time, and the current solution has to be enhanced, in order to ensure better protection of individuals against consumer and competition law violations.

II. Polish solution on collective redress – a step towards protection of individuals against competition law violations

1. Collective redress in the Polish legal system

Differently than in France, where the issue of group litigation was discussed for more than 30 years, the Polish tradition of collective redress is much shorter. While certain scholars argue that the elements of a doctrinal discussion on group litigation can be traced back to 80s and 90s[155], when different authors were claiming in favour of the development of collective redress in order to increase the individuals' access to justice[156], the issue of group litigation did not form a part of legal or political discussion in Poland till the end of 20th century. The general presumption was that the

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154 F. Ferrand, *Collective Litigation in France*, in: V. Harsagi, C.H. van Rhee (eds.), *Multi-Party Redress Mechanisms in Europe: Squeaking Mice?*, Intersentia 2014, p. 144.

155 M. Niedużak, *Postępowanie grupowe…*, p. 90.

156 I.B. Mika, D. Kasprzycki, *Class action…*, p. 20; Z. Reisch, *Istota procesu cywilnego,* Warszawa 1985, p. 251; T. Misiuk, *Współczesne tendencje ochrony interesów zbiorowych i rozproszonych w postępowaniu zbiorowym,* in: E. Łętowska (ed.), *Proces i prawo. Rozprawy prawnicze. Księga pamiątkowa ku czci profesora Jerzego Jodłowskiego,* Wrocław 1989, pp. 170–171.

execution of legal rights granted to private parties shall have an individual character, and had to be performed by the mean of civil, administrative or criminal proceedings[157]. In consequence, till the end of 20th century the collective means of law enforcement were only rare exceptions in Poland, and had a minor significance for the execution of legal provisions[158].

The aforementioned situation changed in 2007. At that time, the newly elected government of Donald Tusk published a strategy of Consumer's Policy for the years 2007–2009[159]. Among several solutions proposed to enhance the protection of consumers, it evoked a group litigation, considered by the authors of strategy as a mean able to ensure effective mechanism of individuals' protection. In consequence, the debate on collective redress has started in Poland, and nearly in two years, it led to introduction of a group litigation mechanism into the Polish legal system.

The reasons for the aforementioned change were multiple. First, it was a consequence of development of new government's policy, intended to ensure better protection of consumers against law infringements. Secondly, it resulted from the discussion conducted at the EU level, which more and more often pointed out on the need of establishment of innovative mechanisms of individuals' protection. Finally, it was a consequence of increasing public discussion on the ways of enhancing efficiency of judicial system, in order to enable greater access to justice to injured individuals[160]. All these factors led to development of a new Polish approach to group litigation, described by certain scholars as a complete *novum* at the *terra incognita* of collective redress in Poland[161].

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157 P. Grzegorczyk, *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym. Ogólna charakterystyka*, Warszawa 2011, p. 11.

158 As such we can evoke the proceedings initiated by a State, community or environmental organisation in case of a risk of causing harm to the environment, governed by the Art. 323(2) of the Act of 27 April 2001 on the Protection of the Environment [*Ustawa z dnia 27 kwietnia 2001 r. Prawo ochrony środowiska*], Journal of Laws of 2001, No. 25, item 150 as amended, and the proceedings on recognising provisions of standard contracts as inadmissible, governed by the Art. 479^{36} – 479^{45} of the Act of 17 November 1964 Code of Civil Procedure [*Ustawa z dnia 17.11.1964 r. Kodeks postępowania cywilnego*], Journal of Laws of 1964, No. 43, item 296 as amended; see also on this issue M. Rejdak, P. Pietkiewicz, *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym…*, p. 10–11.

159 The strategy of consumer's policy for the years 2007–2009 [Strategia polityki konsumenckiej na lata 2007–2009], available at: https://uokik.gov.pl/download.php?id=686 [access: 01.10.2015].

160 P. Grzegorczyk, *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym…*, p. 11.

161 P. Grzegorczyk, *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym…*, p. 17; T. Jaworski, P. Radzimierski, *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym…*, p. VII.

1.1. The law of 17 December 2009 on collective redress litigation – a new instrument of individuals' protection

1.1.1. Historical background

The Polish law on collective redress adopted on 17 December 2009 (hereinafter "Law on collective redress") was a completely new project in the area of national legal practice. It was a fruit of 2-years political and legal debate which showed a great need for introduction of a group litigation mechanism in Poland. While the debate raised voices for and against introduction of a collective redress instrument, its comparative analysis with the French discussion allows us to claim that the Polish debate on group litigation was relatively short and uncontroversial.

The Polish debate on collective redress started at the beginning of 2007. The main responsibility for preparing a project of law on collective redress was conferred by the Ministry of Justice to the Civil Law Codification Commission (hereinafter "Codification Commission"). The body composed of judges, legal scholars and legal practitioners, was supposed to propose a solution able to increase the protection of individuals against the law infringements, without disturbing coherence with the already existing mechanisms of law enforcement in Poland.

The works on the project of reform were conducted by the Codification Commission in the period from 2007 to 2009. The Codification Commission applied a comparative approach to the issue of group litigation, and in order to create a project of law, it referred to different legal systems where the collective redress mechanisms were already functioning[162]. Therefore, a reference to the European model, American model, as well as solutions existing at that time in different MS formed basis for the Polish proposal on collective redress. However, despite the reference to the foreign legal systems, it shall be underlined that Polish approach to collective redress was not entirely based on none of the existing models. It rather construed an attempt to propose an original solution, able to adapt the group litigation mechanism to the Polish legal reality.

The works of the Codification Commission led to elaboration of a project of law on collective redress which was submitted by the government to the works of the Parliament in March 2009[163]. After being discussed and

[162] P. Grzegorczyk, *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym…*, p. 16.

[163] Project of law on collective redress litigation [*Projekt ustawy o dochodzeniu roszczeń postępowaniu grupowym*], available at: http://ww2.senat.pl/k7/dok/sejm/045/1829.pdf [access: 30.10.2015].

amended in the Parliamentary commissions, it was voted by the Polish Parliament on 17 December 2009, and entered into force on 19 July 2010.

The Law on collective redress introduced into the Polish legal system was a completely new and modern mechanism of collective redress, which in the opinion of many commentators expressed at that time, was able to significantly change the way in which the law would be enforced in Poland.

1.1.2. Reasons for introduction

The reasons for the adoption of Law on collective redress may be found in a justification to the project of reform submitted to the works of the Parliament. It refers to the need of increasing access to justice, ensuring better protection of individuals against law infringements and promoting greater efficiency of the judicial system. Additional arguments speaking in favour of development of group litigation in Poland stem from a debate conducted in the Codification Commission and the Parliament. It concerns such issues as reduction of asymmetry between enterprises and consumers, ensuring greater efficiency of the enforcement process or providing new means of individuals' protection. All of the analysed arguments confirm the existence of a strong need for the introduction of group litigation mechanism in Poland, regarded as a necessary step in the achievement of full protection of individuals against law infringements.

1.1.2.1. Increasing access to justice

As the first argument speaking in favour of the adoption of a group litigation mechanism in Poland we can evoke a need of increasing access to justice. As certain scholars argue, increasing access to justice was recognised as the fundamental advantage of group litigation mechanism, forming axiological basis for the Polish discussion on collective redress[164].

As it stems from the justification to the project of Law on collective redress: *"The aim of the group proceedings is to allow settlement of many similar cases of different actors in one single proceedings. Group litigation facilitates access to the courts in situations where the enforcement of claim in such proceedings is more favourable to the claimant than bringing the individual action (e.g. in case of claiming very small amount of damages from one party which caused an injury), and thus increases the effectiveness*

[164] M. Niedużak, *Postępowanie grupowe…*, p. 89.

of judicial protection."[165] In the opinion of authors of reform, the access to justice might have been broadened by lowering the costs of proceedings, by increasing access to proofs of violation and by limiting duration of judicial actions, all of which might have been achieved once the group litigation mechanism was put in force[166].

The aforementioned reasoning, does not seem to depart from the arguments evoked in the French and European debate on group litigation. As it was often claimed, individuals' will to initiate court proceedings was significantly limited due to the high costs of judicial process, long duration of the proceedings and low value of potential damages. Therefore, in order to mitigate these problems, the group litigation mechanism seemed to be the best adapted solution. Moreover, as it was confirmed by different surveys, individuals were more keen to undertake the legal action if they had a possibility to join the group, share the costs of proceedings and claim for compensation collectively[167].

1.1.2.2. Increasing efficiency of a judicial system

Apart from the benefits offered to injured individuals, the justification to the project of reform pointed also on the another reason for introduction of collective redress in Poland. As it was stated: *"The objectives pursued by the group litigation are important not only for the parties to disputes, but also for the system of justice as such. First of all, we should point out on such advantages of group proceedings as judicial economy and uniformity of decisions in similar cases. By the use of group litigation, the courts are relieved from resolving many similar cases of various entities, and the costs of proceedings are reduced."*[168]

Therefore, the group litigation mechanism aimed not only to ensure better protection of individuals against law infringements, but its introduction was

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165 Project of law on collective redress litigation [*Projekt ustawy o dochodzeniu roszczeń postępowaniu grupowym*], pt. I, pp. 2–3.

166 M. Sieradzka, *Dochodzenie roszczeń w postępowaniu grupowym…*, p. 47.

167 See for example Eurobaromètre Spécial, *La protection des consommateurs dans le Marché interiéur,* Eurobaromètre Spécial 252, September 2006, according to which 79% of the European consumers claimed that they would be more willing to defend their rights in court if they could join a collective action; see also Flash Eurobarometer, *Consumer attitudes towards cross-border trade and consumer protection,* Flash EB Series # 299, according to which almost 80% of the European consumers responded in the same manner.

168 Project of law on collective redress litigation [*Projekt ustawy o dochodzeniu roszczeń postępowaniu grupowym*], pt. I, p. 3.

supposed to bring several benefits to the whole system of law enforcement. As such, greater coherence of judicial proceedings, lower costs of judicial process, greater efficiency of law enforcement and greater economy of justice were evoked.

As different commentators underlined, these "universal" reasons for introduction of a group litigation mechanism were able to bring numerous benefits to the whole society, which was ultimately responsible for covering the costs of State's functioning[169]. Moreover, it confirmed that the group litigation mechanism was regarded not only as the another tool granted to individuals in order to enhance their protection against law infringement, but as an instrument able to ensure better functioning of the legal and social organisation in Poland.

1.1.2.3. Ensuring better achievement of internal market purposes

Finally, the last of the evoked reasons for introduction of the group litigation mechanism in Poland had the European dimension. While the discussed project of reform had purely internal character, the authors of reform did not omit the European discussion on private enforcement, and a need of establishment of more effective means of individuals' protection evoked by the Commission.

Therefore, as it was stated in a justification to the project of Law on collective redress, the reason for introduction of the group litigation mechanism in Poland was also improving the functioning of internal market, which could have been achieved by greater judicial protection of consumers and wider access to justice[170].

Such approach of Polish legislator to the issue of group litigation confirmed, that it aimed to propose a complex solution, able to mitigate not only temporary problems of Polish consumers, but intended to correspond to the European policy on group litigation and private enforcement.

The analysis of reasons for introduction of group litigation in Poland may lead us to the conclusion that they mirror the arguments already evoked within European and French discussion on collective redress. Nevertheless, what makes a difference between the Polish approach to collective redress and the previously analysed legal systems, are the specific elements of a group litigation mechanism. In order to ensure greater protection of

169 M. Niedużak, *Postępowanie grupowe…*, p. 91.

170 Project of law on collective redress litigation [*Projekt ustawy o dochodzeniu roszczeń postępowaniu grupowym*], pt. I, p. 3.

individuals, wider access to justice and greater economy of judicial system, the Polish legislator proposed a series of original solutions which could not have been commonly found in other jurisdictions. Therefore, in order to properly describe the Polish system of group litigation and assess its significance from the perspective of competition law enforcement, a detailed analysis of its construction is required. As it will show, despite a lack of legal tradition in the enforcement of legal provisions by the mean group actions, the Polish approach to collective redress may construe an original alternative to the European discussion on collective redress, and a source of inspiration for model solutions in the area of group litigation.

2. Main characteristics of Polish approach to collective redress

2.1. Position of collective redress within the national legal order

The group litigation mechanism was introduced in Poland as a separate judicial procedure. In the opinion of authors of reform, such solution was necessary due to the innovative character of collective redress, difficulties with adapting it to the currently existing solutions, and a need of legal stability, which could be put a risk, if a group litigation mechanism, forming a part of general rules of civil procedure, would require changes shortly after its introduction. As it was claimed in a justification to the project of reform: "*It was decided not to include the rules on group litigation into the Code of Civil Procedure, due to the fact that this new institution of civil procedure required verification in practice. The experience gained in this manner may lead to changes in regulation. Therefore, in order to ensure greater stability of the Code of Civil Procedure […] it will be better if in the initial period of functioning of the provisions on group litigation it will be included outside the Code."*[171]

The aforementioned solution was criticised by different participants of a debate on group litigation. It was underlined, that through such construction the collective redress would be governed by two different legal texts, i.e. Law on collective redress and Code of Civil Procedure, causing a risk of incoherence and limited legal transparency[172]. Nevertheless, as a 6-year practice in the application of Law on collective redress confirms, the solution proposed by the authors of reform was duly justified.

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[171] *Ibidem*.

[172] M. Sieradzka, *Dochodzenie roszczeń w postępowaniu grupowym…*, p. 31.

First, leaving a group litigation mechanism outside the Code of Civil Procedure granted greater flexibility to Polish legislator, and allowed to introduce eventual changes more easily in the course of time. Secondly, the exclusion of group litigation from the Code of Civil Procedure did not run a risk of incoherence, since according to the Art. 24 of Law on collective redress, in matters not covered by the scope of discussed act, the Code of Civil Procedure was to be applied. Finally, the innovative character of Law on collective redress required to propose a solution,which would not overrule the currently existing system of law enforcement, but would rather propose a mechanism opened for its further assessment and eventual modification in future.

In view of the above it may be claimed, that a solution chosen by the Polish legislator was carefully deliberated and well adapted to the Polish legal reality. However, the "pilot" character of Law on collective redress allows us to claim that in case of a positive assessment of its functioning, the provisions on group litigation may be moved in the course of time from the specific legal instrument to the Code of Civil Procedure. Such solution would ensure greater transparency and clarity in the area of collective redress, and could increase the general importance of group litigation mechanism for the enforcement of legal provisions.

2.2. Scope of application

According to the Art. 1(1) of Law on collective redress, it applies to civil proceedings in cases involving claims of the same type, covering at least 10 persons and based on the same or similar factual basis. Moreover, as the Art. 1(2) specifies, the provisions of Law on collective redress apply only to claims concerning consumers' protection, product liability and delicts (illicit acts), excluding claims concerning violation of personal rights. Therefore, the scope of application of group litigation mechanism is limited both by the personal and material criterions.

2.2.1. Personal scope

As far as the personal scope is concerned, the Law on collective redress applies only when the claim covers 10 persons or more. The goal of such solution is to limit the scope of application of group litigation mechanism only to cases involving multiple claimants. The choice of 10 persons as a minimum number of group members was a question of convention, and was decided by the Polish legislator as being the optimal. As it was held in

the project of reform: *"The conduct of "normal" civil proceedings in which 10 parties would be involved could be extremely difficult in practice. This by itself is enough to claim that the number of 10 members of a group is not too small."*[173]

Apart from providing for a minimum number of group's members, the Law on collective redress requires also the existence of a personal and substantial link between the persons forming a group.

The existence of a personal link is fulfilled once all persons forming a group were injured by the same law infringement. In such a case, the group members claim for a compensation from the same defendant.

The existence of a substantial link refers to the factual basis for bringing a claim, which according to the Art. 1(1) of Law on collective redress, has to be the same or similar. According to different scholars, the substantial link is fulfilled once the claims of all members of a group have homogenous basis, e.g. claims resulting from a purchase of goods contract concluded with the accused undertaking, even if the character and scope of claims differ[174]. Therefore, it may be claimed that the substantial link is fulfilled once the claims of group members result from the same or similar relationship with the accused undertaking[175], what shall be assessed by the court in each single case.

Additionally, the Art. 1(1) of the Law on collective redress provides that the claims brought by members of a group have to be of similar type. It means that no matter what type of claims are covered by a group action (monetary claims, non-monetary claims, *ex contractu* claims, or *ex delicto* claims) they have to be similar to all members forming a group.

2.2.2. Subjective scope

As far as the subjective scope is concerned, the Law on collective redress applies only to claims concerning protection of consumers, product liability and delicts (illicit acts), excluding claims concerning violation of personal rights.

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[173] Project of law on collective redress litigation [*Projekt ustawy o dochodzeniu roszczeń postępowaniu grupowym*], p. 15.

[174] See M. Sieradzka, *Dochodzenie roszczeń w postępowaniu grupowym…*, pp. 67–71; T. Jaworski, P. Radzimierski, *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym…*, pp. 38–39; M. Rejdak, *Jednorodzajowe roszczenia w postępowaniu grupowym*, Przegląd Prawa Handlowego 2010, No. 8, pp. 12 and following.

[175] See also at this point the decision of District Court in Warsaw from September 3, 2013, case II C 88/13, not published, where the court held that claims in order to be based on the same or similar factual basis have to result from the same event or from the events having similar character.

It shall be underlined at this point, that in the project of reform prepared by the Codification Commission and submitted to the works of the Parliament, such limitation to the scope of application was not foreseen. The Codification Commission argued in favour of a horizontal group litigation mechanism which could be applied once all the conditions of Art. 1(1) were fulfilled. Nevertheless, during the works in the Parliamentary commissions, the subjective scope of application of group litigation mechanism was narrowed, what in the opinion of certain scholars, run counter to the initial objective of a project of reform[176].

First, as P. Grzegorczyk claims, instead of ensuring a broad mechanism of group litigation, it provides an exclusive list of matters which are covered by the Law on collective redress. Secondly, as the author argues, it establishes the material criterions for a selection of cases which may raise important interpretational problems once applied by a court (e.g. consumer, delict). Thirdly, the matters selected as governed by the Law on collective redress may often interfere with each other (e.g. consumer cases and delicts), what may raise interpretational difficulties and lead to disputes between the parties already at the initial stage of proceedings. Finally, as P. Grzegorczyk points out, the justification of introduced changes, i.e. limiting the risk of abusive litigation[177], does not seem to be appropriate, since such a risk does not seem to be lower in matters finally covered by the Law on collective redress.

Despite the aforementioned critics, the above limitations to the scope of application of group litigation mechanism were finally introduced. In consequence, the Law on collective redress will be applicable only in three types of cases, under the condition that the requirements of Art. 1(1) are fulfilled.

The first situation in which the group litigation mechanism may be applied concerns cases brought in order to protect consumers' interests. According to the interpretation provided by a District Court in Warsaw in its decision from 28 February 2013[178], the case concerns the issue of consumers' protection, under the meaning of Art. 1(2) of Law on collective redress, each time when it involves a claim brought by a consumer against

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176 P. Grzegorczyk, *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym…*, pp. 29–30.

177 See justification to the resolution of Senate from December 3, 2009, concerning the law on group litigation, available at: http://www.senat.gov.pl/k7/dok/uch/045/698uch.pdf [access: 13.10.2015].

178 See decision of District Court in Warsaw from February 28, 2013, case I C 984/12, not published.

a professional, regardless if such a claim is based on consumer law provisions or not. As a result, the claims for consumer protection covered by the Art. 1(2) of Law on collective redress will cover all claims brought by consumers against the professionals, regardless the legal provision forming a basis for such claims[179].

The second situation when a group litigation mechanism may be applied covers claims brought by the persons injured by a defective product against manufacturers and distributors of such product. The detailed provisions of Polish law on product liability, forming a basis for claims under Art. 1(2) of Law on collective redress, may be found in Art. 449^1–449^{11} of Civil Code, but due to the subject of thesis, will not be analysed herein.

The last group of matters covered by a group litigation mechanism refers to the claims brought in case of delicts (illicit acts). This very vast category of claims covers situations in which a delict committed by the accused undertaking resulted in the injury of at least 10 individuals, and according to the specific legal provision, these individuals may claim for a remedy. Among different situations covered by such scenario, we may evoke violations of antitrust law, resulting in the injury on the side of multiple victims.

As it is commonly agreed, the provision of Art. 1(2) of Law on collective redress shall be interpreted as giving basis to collective claims in case of antitrust law infringements[180]. It may concern both the infringements of Polish antitrust law, i.e. Art. 6 and 9 of Act of 16 February 2007 on Competition and Consumer Protection[181], and the European rules on competition law, i.e. Art. 101 and 102 of TFEU. In such a case, the basis for a collective claim will be the Art. 415 of Civil Code, obliging the law perpetrator to remedy the injury caused by an illicit act[182]. As a result,

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179 K. Flaga-Gieruszyńska, in: A. Zieliński (ed.), *Kodeks postępowania cywilnego. Komentarz*, Warszawa 2008, p. 117.

180 T. Jaworski, P. Radzimierski, *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym…*, p. 91; M. Sieradzka, *Dochodzenie roszczeń w postępowaniu grupowym…*, p. 155.

181 Act of 16 February 2007 on Competition and Consumer Protection [*Ustawa z dnia 16 lutego 2007 r. o ochronie konkurencji i konsumentów*], Journal of Laws 2007 No. 50, item 331, amendments: Journal of Laws 2007 No. 99, item 99; Journal of Laws 2007 No. 171, item 1206 as amended.

182 M. Kozak, *Private enforcement of competition rules under Community and Polish law – comments after accession*, International Business Law Journal 2005, No. 3, p. 382; M. Sieradzka, *Pozew grupowy jako instrument prywatnoprawnej ochrony interes konsumentów…*, p. 279; see also on this issue M. Bernatt, *Prywatny model ochrony konkurencji oraz jego realizacja…*, pp. 448–449 and P. Podrecki, *Porozumienia monopolistyczne i ich cywilnoprawne skutki*, Kraków 2000, Chapter IV, Letter B, both

the mechanism of group litigation may be effectively used in the area of antitrust law and constitute a mean of private enforcement of its provisions.

It shall be also underlined at this point, that the Art. 1(2) of Law on collective redress expressly excludes violation of personal rights from the scope of application of group litigation mechanism, and aims to cover only material injuries suffered by multiple claimants.

In order to sum up the reasoning on the scope of application of collective redress mechanism, it can be held that the Law on collective redress applies if the following conditions are jointly fulfilled:

1) claim is brought before a civil court;
2) claim covers at least 10 persons;
3) claims of members of a group are of similar type and are based on the same or similar factual basis;
4) claim concerns protection of consumers, product liability or delict (illicit act);
5) claim concerns material injury suffered by the members of a group.

2.2. Organisation of group proceedings

The group proceedings are divided in Poland into three stages. At this point the stages of collective proceedings will not be described in details[183]. The goal is however, to present specific elements of the group procedure which will be analysed in details in the following points.

The first stage of collective proceedings refers to the certification of claim. This stage, governed by the Art. 10 of Law on collective redress, has as its objective to determine if a claim is admissible and may be recognised by the court in a form of group proceedings. In case of a positive assessment of the admissibility of claim, the judge issues an order on recognition of case in group proceedings and moves to the second stage.

The second stage of group proceedings is devoted to the formation of a group. The potential victims of the infringement are informed on a possibility to join a group and submit declarations on joining the action.

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claiming that a right for compensation in case of competition law infringements may be derived from the Art. 415 of Civil Code (tort liability).

[183] For more details see M. Rejdak, P. Pietkiewicz, *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym…*, pp. 13–15; M. Niedużak, *Pozwy grupowe po pierwszym roku funkcjonowania*, Raporty, Opinie, Sprawozdania, Helsińska Fundacja Praw Człowieka, Warszawa 2011, pp. 5–6.

Upon a completion of time for joining a group, the group is finally formed and approved by the court. The second stage terminates once the court issues a judgment on the group's composition.

The last stage is hearing of case. At this stage the proofs are provided, parties are heard and the case is assessed by the court.

If the responsibility of an accused undertaking is established, the proceedings may be terminated by rendering a judgment on responsibility, or a judgment finally resolving a dispute. However, if the parties agrees to settle, the case may be also terminated by the conclusion of settlement agreement between the parties to the proceedings.

If the liability of an accused undertaking is not determined, the court renders a judgment in favour of a defendant and obliges a loosing party to cover the costs of court proceedings.

As it can be observed, the Polish construction of collective proceedings corresponds to the traditional models of group litigation. It also differs from the French solution, where the formation of a group is preceded by a judgment on responsibility. Nevertheless, while the general construction of a group litigation does not provide any novelties in the area of collective redress, the specific elements of Polish proposal can construe an interesting alternative to the previously analysed models. In consequence, the following analysis will try to point out on the particularities of Polish approach to collective redress which could be taken into consideration once the European mechanism of group litigation is discussed.

2.4. Parties entitled to bring collective claim

2.4.1. Parties entitled to initiate a lawsuit

According to the provision of Art. 4(1) of Law on collective redress, the group claim can be brought only by the group's representative. By bringing a claim the group's representative initiates the proceedings and becomes a claimant. In the same time, the members of a group, on whose behalf the claim is brought, do not become a party to the proceedings. This original construction, which may be described as a procedural subrogation[184], causes important consequences to the relationship between the group's members and the group's representative, and thus requires further analysis.

[184] See in details on this issue M. Sieradzka, *Dochodzenie roszczeń w postępowaniu grupowym*…, pp. 196–197; T. Jaworski, P. Radzimierski, *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym*…, pp. 145–150.

As far as the group's representative is concerned, the Art. 4(2) of Law on collective redress states that such a role may be conferred to the person being a group member or to the district (municipal) consumers' advocate. What is important to underline at this point, is that the group's representative does not decide unilaterally on performing such a role, but has to be selected by all members of the group. The Law on collective redress does not specify the form in which such selection shall be made, however, as different authors argue, in matters not governed by the scope of Law on collective redress, the general rules of Civil Code shall be applicable[185]. In consequence, as the practice shows, the most common form of selecting group's representative and determining the scope of its activity is the agreement concluded between the members of a group and the selected person.

As it was mentioned above, two types of persons may be granted a role of the group's representative.

First, is a member of a group selected by the other group's participants as a person entitled to bring a collective claim and represent their interests within the proceedings. The unquestionable advantage of such solution is the personal interest of the group's representative in a positive outcome of case. As M. Sieradzka claims, such solution may lead to greater efficiency of group proceedings, since the group's representative, wishing to win the case and achieve its personal interest, will use all its best efforts to properly formulate a claim and conduct proceedings[186]. Therefore, a similarity of interests of the group's representative and the group's members may have a positive impact on the efficiency of a collective claim.

The second solution foresees that the role of group's representative may be granted to the district or municipal consumers' advocate. The aforementioned solution aims to ensure the coherence of Law on collective redress with the already existing legal provisions, in particular with the Art. 63^3 of Code of Civil Procedure which grants to the consumers' advocate a right to initiate civil lawsuit on behalf of consumers once their interests are infringed. The right of consumers' advocate to represent a group in collective proceedings is also justified by the mere construction of such an authority, which shall undertake all possible efforts in order protect the interests of consumers. The important advantage of selecting the consumers' advocate as a person entitled to bring a collective claim, apart from his specialised knowledge in matters concerning the protection of consumers, refers to the costs of collective proceedings. That is because, differently than in case

185 M. Sieradzka, *Dochodzenie roszczeń w postępowaniu grupowym…*, pp. 190–191.
186 *Ibidem*, pp. 191–192.

of a claim brought by the member of a group, once the action is initiated by the consumers' advocate, the costs of bringing a claim do not have to be incurred[187]. As M. Sieradzka states, this important privilege granted to the consumers' advocate may be often decisive factor in choosing such a person as the group's representative[188].

As we can observe from the aforementioned analysis, the Law on collective redress does not foresee that the role of group's representative can be granted to the consumer association, social organisation or other representative body. Such solution significantly differs from the previously analysed systems, especially the French one, which conferred the sole or principal responsibility for bringing a claim to the consumers' associations. Nevertheless, the exclusion of the aforementioned bodies from entities able to bring a collective claim was a deliberate decision of Polish legislator. As it was stated in a justification to the project of Law on collective redress: *"The solution according to which a social organisation could represent a group was deliberately abandoned. The social organisations do not have sufficient experience and financial resources to conduct such cases."*[189]

Therefore, due to the reasons of judicial efficiency, better protection of individuals and greater economy of justice, the legal standing of consumers' associations and other social organisations was excluded by the Polish legislator. However, as it was also added in the aforementioned justification: *"if in practice it turns out that granting of such a right to social organisations proves to be justified, it will be possible to amend the project in order to enable social organisations to bring collective claims"*[190]. As a result it can be argued, that broadening the scope of group's representatives also to the specialised organisations is not excluded in Poland, and future discussion on group litigation shall undertake this issue[191].

2.4.2. Parties covered by a collective claim

Referring to the persons that may be covered by a group claim, the Law on collective redress presents very flexible approach. Once we analyse its

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[187] See Art. 24(2) of Law on collective redress read in conjunction with Art. 96(1) pt. 11 of Act of 28 July 2005 on costs of civil proceedings [*Ustawa z dnia 28 lipca 2005 r. o kosztach sądowych w sprawach cywilnych*], Journal of Laws 2005, No. 167, Item 1398.

[188] M. Sieradzka, *Dochodzenie roszczeń w postępowaniu grupowym…*, pp. 193–194.

[189] Project of law on collective redress litigation [*Projekt ustawy o dochodzeniu roszczeń postępowaniu grupowym*], p. 16.

[190] *Ibidem*, p. 16.

[191] M. Sieradzka, *Dochodzenie roszczeń w postępowaniu grupowym…*, p. 204.

provisions we may come to the conclusion that the group claim may cover not only consumers and other natural persons, but the Law on collective redress opens a possibility to bring a collective claim also to enterprises and legal persons. Such interpretation is justified due to the fact that the Polish legislator uses in the Art. 1 of the Law on collective redress a notion of "person" which encompasses both consumers and legal entities.

The first category of parties which may be covered by the group litigation mechanism are consumers. The definition of a consumer under the Polish law is provided in Art. 22^1 of Civil Code, according to which the consumer is a natural person performing a legal action not directly related to its business or professional activity. As a result, the legal entities are excluded from the scope of a notion of consumer. Moreover, the notion of consumer takes into consideration the type of activity performed by a particular person, which according to the aforementioned provision cannot be related to his business or professional activity. In consequence, in order to asses if a specific person may be regarded as a consumer, the court shall take into consideration not only a character of such person (natural person), but also the specific elements of legal relationship between the consumer, being the member of a group, and the undertaking, accused of certain infringement.

The second category of parties that may be covered by a group claim are entrepreneurs. Differently than in France, where the collective actions are limited exclusively to cases involving consumers, the Polish legislator provides for a broad personal scope of collective redress. Such solution may be particularly important from the perspective of private enforcement of antitrust law, which as the practice shows, is often launched by business undertakings harmed by the anticompetitive conduct.

Referring to the notion of entrepreneur under the Polish law, its definition may be found in the Art. 4 of Act on Freedom of Business Activity[192] and in the Art. 43^1 of Civil Code. According to both of the aforementioned provisions, the entrepreneur may be defined as a natural person, legal person or organisational unit not having a legal personality, which performs on its own behalf business or professional activity. In consequence, the notion of entrepreneur may cover legal persons, natural persons or organisational units, under the condition that they perform business activity[193].

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[192] Act of 2 July 2004 on Freedom of Business Activity [*Ustawa z dnia 2 lipca 2004 r. o swobodzie działalności gospodarczej*], Journal of Law 2004, No. 173, Item 1807 as amended.

[193] See in details on the notion of "enterpreneur" under Polish law: G. Materna, *Pojęcie przedsiębiorcy w polskim i europejskim prawie ochrony konkurencji*, Oficyna a Wolters Kluwer business, Warszawa 2009 and M. Etel, *Pojęcie przedsiębiorcy w prawie*

The aforementioned catalogue of parties which may be covered by the group litigation mechanism is very broad and construes important *novum* in the discussion on collective redress. The solution proposed by Polish legislator shall be positively evaluated.

First, it allows to avoid the exclusion of small and medium enterprises, being often the victims of competition law infringements and possessing limited resources to conduct individual proceedings, from the scope of group litigation mechanism.

Secondly, it creates chances for a wider use of group litigation instrument, which may be applied not only in consumer-business scenarios, but also in business to business relationships.

Finally, it opens a door for greater use of collective redress mechanism in the area of private enforcement of antitrust law, which as the practice shows, is most often initiated not by the consumers, but by the business undertakings injured by anticompetitive practices.

2.4.3. Relationship between the group's representative and the group's members

While the construction proposed by Polish legislator, providing for a procedural subrogation and a separation of roles between the group's representative and group's members, offers several advantages from the point of view of economy of justice (limited number of parties participating in court proceedings), duration of the proceedings (shorter time devoted for exchange of information) and organisation of judicial dispute (easier identification of parties to the proceedings), the aforementioned solution may also lead to the principal-agent problems and loss of control over collective action by the members of a group. In order to avoid such risks, the Polish legislator tries to determine in advance the roles performed by both parties to collective action, and ensure their mutual balance.

2.4.3.1. Position of the group's representative

While the specific provisions on the scope of obligations of the group's representative are missing in the Law on collective redress, we can easily distinguish its main responsibilities.

First, the group's representative is responsible for determining the rules on the participation in a group and reassembling multiple claims within one

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antymonopolowym, in: A. Giedrewicz Niewińska, A. Piszcz (eds.), *System ochrony prawnej konkurencji – zagadnienia wybrane*, Toruń 2012.

proceedings. Secondly, it formulates a claim and determines the grounds justifying its admissibility. Thirdly, it organises collective proceedings, determines the remuneration of lawyer and provides the means for financing a claim. Finally, the group's representative is responsible for bringing a claim, conducting proceedings and ensuring exchange of information between the parties to the group.

As far as the position of group's representative is concerned, it is strongly dependent on the will of members of a group. First, its legitimacy to act is granted by all members of a group. Secondly, the scope of action of group's representative is determined by the agreement concluded with the persons covered by a collective claim. Finally, the group's representative mandate to represent a group may be revoked in the course of proceedings[194].

The last solution aiming to ensure better control of group's members over the activity of group's representative concerns a compulsory representation of a group by the professional attorney. As the Art. 4(4) of the Law on collective redress provides: *"In the group litigation the representation of claimant by advocate or legal counsel is obligatory, unless the claimant as an advocate or legal counsel."* The goal of such solution is to ensure greater professionalism in the group litigation process and a full protection of interests of injured individuals. As the authors of reform have claimed, the compulsory representation by lawyer is justified by: *"the need of professionalism in conduct of the proceedings in order to ensure rights and interest of group members, which do not participate in court proceedings."*[195]

While such solution is well justified by the reasons of better conduct of collective proceedings and greater protection of group's members, one may ask if the compulsory representation by lawyer, will not lead to the increase in costs of the proceedings, and in consequence, will limit the availability of a group litigation mechanism to many individuals. Such argument was raised during the Polish debate on group litigation, and as the Polish Confederation of Private Employers has claimed, the compulsory representation by lawyer would benefit the professional attorneys and force many enterprises to settle in order to avoid high costs of the proceedings[196].

The current experience with the group litigation mechanism in Poland does not seem to confirm the aforementioned fears. However, further debate on the

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[194] See Art. 18 of the Law on collective redress according to which: *"At the request of more than half of the members of the group the court may change the group's representative."*

[195] Project of law on collective redress litigation [*Projekt ustawy o dochodzeniu roszczeń postępowaniu grupowym*], pt. III, p. 6.

[196] M. Sieradzka, *Dochodzenie roszczeń w postępowaniu grupowym…*, pp. 43–44.

issue of compulsory representation by lawyer seems to be justified. Its goal shall be to answer, if such solution ensures greater efficiency of collective redress, or is rather another obstacle in bringing collective claims in the area of antitrust law.

2.4.3.2. Position of the group's members

As it was already mentioned, the members of a group, despite being direct beneficiaries of a collective action, are not parties to the proceedings. Moreover, by joining the group and agreeing on the person of representative, they transfer important part of their procedural prerogatives to the group's representative. Therefore, while the material and procedural consequences of a judgment rendered in the collective proceedings are crucial for the group's members, their role in collective proceedings is limited.

Despite the limited role of group's members in the collective redress proceedings, we can still distinguish certain rights that are granted to the members of a group. As such we can evoke a right to make a declaration on joining a group or leaving a group (Art. 12 and Art. 17 of Law on collective redress), a right to agree on a person of group's representative (art. 4 of Law on collective redress), a right to change the group's representative (Art. 18(1) of Law on collective redress), a right to withdraw, waive or limit a claim and a right settle a dispute (Art. 19(1) of Law on collective redress), a right to be heard within the proceedings (Art. 20 of Law on collective redress), and a right to initiate execution of judgment (Art. 23(2) of Law on collective redress).

In view of the above we can state, that the position of group's members, even if very limited, has still crucial meaning as far as selection of group's representative, control over his activity, and the final outcome of the case are concerned. Therefore, by such construction, the Polish legislator confirms its attempt to limit the risks of principal-agent problem, and ensure a proper balance between the interests of the group's representative and the group's members.

2.5. Standardisation of claims and certification – the first stage of collective proceedings

2.5.1. Standardisation of claims – a particularity of Polish approach to collective redress

Standardisation of claims may be regarded as a particularity of Polish approach to collective redress. Its main objective is to increase the efficiency of group litigation proceedings and limit long, complex and difficult assessment of individual value of damages. Nevertheless, while

the general objectives of the introduced solution shall be appraised, its practical application raises important problems.

Standardisation of claims is foreseen in the Art. 2(1) of the Law on collective redress. As it provides: *"Group proceedings concerning monetary claims are permissible only when the amount of claim of each member of the group was standardised, taking into consideration the common circumstances of the case."* In consequence, the standardisation of claims may be regarded as a pre-condition for bringing collective claim, which needs to be fulfilled in order initiate collective proceedings.

Standardisation of claims may be defined as determining the specific amount of damages that will be awarded to each member of a group if the responsibility for the law infringement will be conferred upon the accused undertaking. As the Art. 2 provides, the standardisation of claims is required only if a claim has monetary character, and shall be performed prior to bringing a claim to the court. Additionally, a standardisation of claims is required once the new members are joining a group, after rendering the court's decision on recognition of case in group proceedings.

In view of the above it can be stated, that the standardisation of claims is crucial at the stage of formulating a claim and forming a group. In case of lack of agreement between the group's members concerning the standardised amount of damages, the group proceedings cannot be initiated, or the new members may not join the group. The consequences of standardisation of claims are also crucial for each member of a group. That is because, by accepting the proposed amount of damages and joining a claim, they refrain from a possibility to bring a claim individually. Moreover, in case when the standardised amount of damages is lower than the value of suffered harm, the claimants deprive themselves of a possibility to obtain full compensation for the loss suffered[197].

The general objective of a mechanism of standardisation of claims is to avoid difficulties caused by the individual assessment of damages. Moreover, it aims to simplify and accelerate the proceedings, since the problematic issue of division of damages is to be decided already at the moment of bringing a claim. Finally, due to the fact that standardisation of claims is required prior to the commencement of the proceedings, and remains under a strict control of a judge, it ensures that the mass and unfounded claims will be eliminated already at the initial stage of proceedings.

[197] P. Pogonowski, *Postępowanie grupowe…*, p. 157; J. Panowicz-Lipska, *Kilka uwag do projektu ustawy o dochodzeniu roszczeń w postępowaniu grupowym (projekt z dnia 17.3.2008 r.)*, materials from the conference concerning group litigation organized by KKPC, 18–19 January 2007, p. 1.

Concerning the method of standardisation, the Law on collective redress is rather laconic. It provides only, than in order to standardise the claims the common circumstances of a case shall be taken into consideration. As different authors underline, such approach of the Polish legislator to the issue of standardisation may cause important interpretational difficulties, resulting especially from the fact that the Law on collective redress does not define the notion of "common circumstances of case"[198]. Moreover, it is underlined that the lack of more specific guidelines on standardisation of claims, may run a risk that the principle of full compensation will not be achieved. As different authors claim, it may happen when the standardised claim is lower than the value of suffered injury (under-compensation), or when the standardised claim exceeds the value of injuries suffered by some of the group's members (over-compensation)[199].

Despite the aforementioned difficulties, the mechanism of standardisation of claims does not seem to stay in contradiction with the general principles of compensation and the rules of civil procedure. In order to confirm such standpoint, we may refer to the Art. 322 of Code of Civil Procedure, which also allows for the award of the "appropriate amount damages", in case when a judge has difficulties with its specific assessment.

Among the specific solutions concerning the standardisation of claims provided by the Polish legislator, we may evoke a possibility of standardisation of claims within subgroups and a possibility to limit the claim to judgment on responsibility.

The first solution refers to a situation in which the value of injuries suffered by members of a group differs, what justifies its assessment within different groups of claimants. In such scenario, the Art. 2(2) of Law on collective redress allows to divide members of a group into different subgroups, characterised by the common circumstances of a case and similar value of suffered injuries. As a result, the standardisation of claims, normally impossible within a whole group of claimants, will be achieved within the several smaller sub-groups.

The second solution intended to mitigate the difficulties with standardisation of claims is provided in the Art. 2(3) of Law on collective

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198 See M. Sieradzka, *Dochodzenie roszczeń w postępowaniu grupowym…*, p. 168; T. Jaworski, P. Radzimierski, *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym…*, p. 168; A. Kubas, R. Kos, *Opinia w sprawie projektu ustawy o dochodzeniu roszczeń w postępowaniu grupowym…*, pp. 3–4; J. Panowicz-Lipska, *Kilka uwag do projektu ustawy…*, p. 1.

199 A. Kubas, R. Kos, *Opinia w sprawie projektu ustawy o dochodzeniu roszczeń w postępowaniu grupowym…*, p. 4; T. Jaworski, P. Radzimierski, *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym…*, p. 110.

redress. As it states: *"In cases involving monetary claims, the action may be limited to the assessment of a liability of the defendant."*As M. Sieradzka argues, the systematic interpretation of Law on collective redress allows us to claim that due to the introduction of a possibility to claim for a judgment on responsibility in the Art. 2(3), the legislator aimed to ensure that such solution may be chosen by a claimant once the standardisation of claims is not possible[200]. In such a case, instead of claiming for compensation, what would require to standardise the monetary claims within groups or subgroups of claimants, the group's representative may ask the court to render a judgment on responsibility of accused undertaking. The advantage of such solution is the assessment of liability of a defendant, which may open a path for the subsequent individual claims for damages.

As we can see at the grounds of the aforementioned analysis, the instrument of standardisation of claims constitutes original and innovative approach of Polish legislator to the issue of division of damages. It introduces a specific solution which goal is to mitigate one of the main obstacles in bringing collective claims, i.e. problem of the individual assessment of damages. This characteristic of Polish approach to group litigation may be particularly important once the private enforcement of antitrust law is concerned. Because as it was stated before, one of the main obstacles in bringing the claims for damages in case of competition law violations are difficulties with the specific assessment of value of individual loss. Therefore, thanks to the possibility of standardisation of claims, already at the stage of bringing a claim, the efficiency of group litigation in the area of private enforcement of antitrust law may be increased.

Nevertheless, despite several advantages of such solution, its practical application shows numerous difficulties with the standardisation of claims. As it will be discussed in details afterwards, the standardisation of claims is often very difficult task, requiring complex legal and economical knowledge from the group's representative. As a result, in case of complex damages claims, standardisation can make a judicial action a particularly burdensome experience. Therefore, without further reform, aimed to better adapt the instrument of standardisation of claims to the specificities of group proceedings, the discussed mechanism may construe an obstacle to development of group litigation in Poland.

[200] M. Sieradzka, *Dochodzenie roszczeń w postępowaniu grupowym…*, p. 170.

2.5.2. Certification of claim – a similarity with American class action model?

The issue of certification is governed by the Art. 10 of Law on collective redress. It constitutes a first stage of group proceedings which starts once the claim is brought to the court. The goal of this stage is to determine if a claim is admissible and may be recognised in collective proceedings. The certification of claim has purely formal character and aims to determine if the conditions for recognition of claim in group proceedings are fulfilled. In consequence, during the stage of certification, the judge has no competence to assess the case materially, or rule if the case is legitimate or not[201].

The construction of certification under the Polish law may lead to its comparisons with the American system of class actions which also foresees that a claim prior to being recognised has to be certified by a court. Nevertheless, while the American mechanism of certification aims to ensure that the class action procedure will not violate the interests of injured individuals and the accused undertakings, the certification procedure proposed in Poland has purely formal character, and is limited to the control of admissibility of claim. Therefore, the main and sole objective of certification under the Polish law, is to assess if formal conditions for recognition of case in group proceedings are fulfilled.

As it was mentioned above, the certification starts once a collective claim is brought to the competent court by the group's representative. As the competent court we shall understand the District court of the place of residence or of a statutory seat of claimant (Art. 3 of the Law on collective redress read in conjunction with Art. 27–30 of Code of Civil Procedure), the District court of the place where the contract was performed or was to be performed (Art. 3 of the Law on collective redress read in conjunction with Art. 34 of Code of Civil Procedure), or in case of delicts, the District court of a place where the event giving rise to damage occurred (Art. 3 of the Law on collective redress read in conjunction with Art. 35 of Code of Civil Procedure).

During the stage of certification a judge needs to assess if the conditions specified in the Art. 1 of the Law on collective redress are fulfilled. In consequence, it has to determine if the claim covers at least 10 persons, if it concerns one of the issues falling under the scope of Art. 1(2) of Law on collective redress, and if the claims of all members of a group are of the similar type and are based on the same or similar factual basis.

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[201] See at this point judgment of the District Court in Warsaw from March 9, 2015, case XXV C 531/13, available at: www.orzeczenia.com.pl/orzeczenie/g6nn2/sa,XXV-C-531_14,uzasadnienie_sad_okregowy_w_warszawie_xxv_wydzial_cywilny/9/ [access: 15.11.2015].

Additionally, in case of monetary claims, the judge has to assess if the claims were properly standardised (Art. 2 of the Law on collective redress).

As most of the commentators evoke, at this stage of proceedings the claim is regarded as a whole. Therefore, if at least one of the members of the group does not fulfil the conditions to be covered by the collective action, the claim has to be rejected[202].

This strict approach to the issue of certification is however criticised by certain scholars[203]. As M. Sieradzka argues, such strict approach to the question of certification shall be alleviated in cases when the analysis of claim gives grounds to state that only its partial rejection would be justified. In the author's opinion, such standpoint may be based on the provisions of Law on collective redress and the general rules of civil procedure, none of which prohibit a partial rejection of a claim when only some members of a group do not fulfil conditions to join the action (e.g. lack of declaration to join the group provided by some of group's members)[204]. While this issue is still a question of debate, the solution proposed by M. Sieradzka seems to ensure greater flexibility to the court, what in consequence, may lead to greater efficiency of group litigation mechanism. Therefore, the standpoint arguing in favour of greater flexibility of the court at the stage of certification of claim, shall be appraised.

Referring to the goal of certification process, it may be defined as providing an answer by the court on the issue of admissibility of a group claim. In case of a positive assessment on the admissibility of claim, the judge renders a decision on the recognition of case in collective proceedings and opens a second stage of the process. In case of the negative assessment on the admissibility of claim, the claim is rejected and the collective proceedings may not be undertaken.

While the rejection of claim brought by group's representative closes the door for the collective assessment of case, it shall be stated however, that it does not deprive members of a group from bringing individual claims for recovery. Moreover, as the Art. 10(3) of Law on collective redress provides, if the individual action is brought by a group member within the period of 6 months after the rejection of a group claim, and covers the same issues as a group action, the individual action may benefit from the consequences

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202 M. Rejdak, P. Pietkiewicz, *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym…*, pp. 167–169; T. Jaworski, P. Radzimierski, *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym…*, p. 250.

203 See for example M. Sieradzka, *Dochodzenie roszczeń w postępowaniu grupowym…*, pp. 269–273.

204 *Ibidem*, pp. 270–271.

resulting from a collective claim, e.g. interruption of a limitation period. In the opinion of authors of reform, such a solution was necessary in order to ensure a full protection of victims of the infringement and to avoid a situation in which they would refrain from bringing collective claim due to the fear of negative consequences of its rejection. As it was stated in the justification to the project of reform: *"Rejection of group claim as inadmissible to be recognised in group proceedings may not affect the protection of individual rights of members of the group."*[205]

As we can see from the above reasoning, the stage of certification has crucial meaning both for the members of a group, and the whole judicial system.

First, it construes a sort of prejudicial proceedings, which determine if a specific claim may be covered by the collective action or not[206].

Secondly, by giving a right to control the admissibility of claim to the judge, it ensures that the risk of abusive litigation is limited, and that unfounded claims are eliminated prior to the initiation of a long and complex judicial process.

The aforementioned construction of Polish mechanism of group litigation seems to correspond to the requirements set in the Commission's Recommendation on collective redress. As the Recommendation stipulates in Point 8 and 9: *"The Member States should provide for verification at the earliest possible stage of litigation that cases in which conditions for collective actions are not met, and manifestly unfounded cases, are not continued. To this end, the courts should carry out the necessary examination of their own motion."*[207] Therefore, the certification procedure, ensuring the control of a judge over collective claim already at the pre-judicial stage, seems to fulfil the standard required by the Commission.

In order to sum up we may claim, that the stage of certification introduced into the Polish procedure grants to the judge a role of a gate-keeper in the group litigation process, and ensures important safeguard against the abusive litigation. It also responds to the requirements set by the European legislator, and guarantees a coherence between the Polish approach to group litigation and the one developed at the EU level.

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[205] Project of law on collective redress litigation [*Projekt ustawy o dochodzeniu roszczeń postępowaniu grupowym*], pt. VII, p. 8.

[206] M. Sieradzka, *Dochodzenie roszczeń w postępowaniu grupowym…*, p. 269.

[207] Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU), OJ L 201, 26.7.2013, p. 60–65, pt. 8–9.

Nevertheless, it shall be also remembered, that if interpreted too strictly by the Polish courts, the certification process may run a risk that numerous claims will be rejected, and that the possibility of bringing collective claims will be limited. Therefore, the application of Art. 10 of Law on collective redress shall aim to ensure the widest possible flexibility to the judge at the stage of certification (e.g. a possibility of partial rejection of claim). Only in this manner, both objectives of group litigation, i.e. the limitation of abusive litigation and wider access to justice, may be jointly achieved.

2.6. Rules on group formation – the core element of collective action

2.6.1. Opt-in principle

The Polish mechanism of group litigation is based on the opt-in principle. In consequence, the victims of law infringement are not covered by the collective action, unless they manifest they will to join the group of claimants. As the justification to the project of reform shows, the Polish legislator analysed in details different models of group litigation, and recognised the risks and benefits offered by the opt-in and opt-out mechanism[208]. The choice of opt-in solution was widely supported by all the participants of a debate on collective redress, and did not cause particular problems once the issue of group litigation was discussed in Poland. Also the legal doctrine positively appraised the choice made by the Polish legislator, and regarded the opt-in solution as the best adapted to the Polish legal tradition[209].

2.6.2. Conditions for joining a group

The persons wishing to participate in a group action have three possibilities to join the proceedings under the Law on collective redress.

First, concerns a situation when a person injured by certain infringement decides to participate in the action prior to bringing a claim to the court. In such a case, a will to participate in the action is manifested by the interested person directly to the group's representative, once the claim

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[208] Project of law on collective redress litigation [*Projekt ustawy o dochodzeniu roszczeń postępowaniu grupowym*], pt. I, pp. 1–2.

[209] M. Sieradzka, *Pozwy grupowe – rozwiązania i wątpliwości*, Kancelaria 2010, no. 3, pp. 34–35; M. Sieradzka, *Dochodzenie roszczeń w postępowaniu grupowym…*, pp. 93–94; T. Jaworski, P. Radzimierski, *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym…*, pp. 271–273; differently A. Kubas, R. Kos, *Opinia w sprawie projektu ustawy o dochodzeniu roszczeń w postępowaniu grupowym…*, arguing in favour of opt-out mechanism and evoking it as a model for the Polish approach to group litigation.

is prepared. Such a possibility is confirmed by the Art. 6(2) of Law on collective redress, which provides that a claim brought to the court shall include declarations of the group members to join the group.

The second scenario foresees that a person may join the group after the claim was brought to the court. This "classical" opt-in situation is provided in the Art. 11 of the Law on collective redress, which stipulates that in the specific period of time (not shorter than 1 month and not longer than 3 months), running after the publication of court's order on recognition of case in group proceedings, the interested individuals may manifest their will to join the group. Moreover, the Art. 11 of Law on collective redress specifies the measures of informing potential victims of violation on a possibility of joining a group.

According to the Art. 11(1) of Law on collective redress, once the order on recognition of case in group proceedings becomes final, the court orders a publication of information concerning collective claim. The goal of such publication is to inform the potential victims of violation on a possibility to join the group, and to provide them with data required to undertake a decision on joining an action or refraining from doing so. Among the required data, the Art. 11(2) of Law on collective redress evokes: the information on a competent court, the information on parties to the proceedings, the rules on remuneration of lawyer, the information on a binding character of judgment rendered in collective proceedings, and a time limit to join the group. In order to ensure greater efficiency of such publication, the Art. 11(3) of Law on collective redress requires publishing information on collective action in a popular nationwide newspaper. It shall be underlined however, that the court may refrain from ordering a publication if it concludes that all the possible members of a group have already joined the action (Art. 11(4) of Law on collective redress).

The aforementioned solution, concerning the publication of information on collective claim, construes a complex approach of Polish legislator towards the issue of group formation. Nevertheless, as different scholars argue, the usefulness of such mechanism is limited. While it prolongs the duration of collective proceedings and raises its costs, it does not lead to important increase in the number of group members. As judge K. Sieheń claims, the current experience with the group litigation in Poland shows limited efficiency of a publication mechanism[210]. First, it is confirmed by a very limited number of victims of violation which undertake a decision to join the group after

[210] See the opinion expressed by K. Sieheń in: M. Niedużak, M. Szwast, *Pozwy grupowe – doświadczenia po czterech latach funkcjonowania*, Helsińska Fundacja Praw Człowieka, Warszawa 2014, pp. 16–17.

being informed on such a possibility. Secondly, it results from a prolongation of time and costs of the proceedings which may be regarded as the additional obstacles to bringing claims by injured individuals.

It shall be also added at this point, that the Polish solution, providing for a limited time in which individual main undertake a decision on joining a group, stays in contradiction to the Recommendation on collective redress. As the Recommendation provides: *"Natural or legal persons claiming to have been harmed in the same mass harm situation should be able to join the claimant party at any time before the judgement is given or the case is otherwise validly settled, if this does not undermine the sound administration of justice."*[211] Therefore, by limiting a time in which a will to join a group may be expressed (maximum 3 months after the publication of information), the Polish solution runs counter to the EU model of collective redress, and does not seem to be justified by a need of ensuring sound administration of justice[212].

The last scenario in which an individual may join a group action, concerns a situation when the individual had initiated solely an action, prior to the commencement of group proceedings concerning the same infringement. In such a case, according to the Art. 13(2) of Law on collective redress, such an individual may declare to join a group claim, prior to the termination of group proceedings before the court of 1st instance. The consequence of such solution, which constitutes an exception to the Art. 11(5) of Law on collective redress (a time limitation to join the group), is a discontinuance of individual proceedings and a reformulation of group of claimants. In the opinion of certain scholars, the aforementioned solution may create important procedural difficulties, prolong the group proceedings and create uncertainty on the side of group members and accused undertaking[213]. Therefore, as it was also evoked during the discussion on collective redress in Poland, the provision of Art. 13(2) of Law on collective redress shall be negatively evaluated, and its eventual removal shall be considered.

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211 Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU), OJ L 201, 26.7.2013, p. 60–65, pt. 23.

212 See also on this point M. Sieradzka, *Dochodzenie roszczeń w postępowaniu grupowym…*, pp. 278–279.

213 M. Sieradzka, *Dochodzenie roszczeń w postępowaniu grupowym…*, pp. 295–302; T. Jaworski, P. Radzimierski, *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym…*, pp. 312–319.

2.6.3. The elements of declaration on joining a group

The next issue that needs to be explained concerns a form and elements of a decision on joining a group. Since it construes a crucial step in the group formation, the Polish legislator precisely determines the requirements that need to be fulfilled in order to join the group.

According to the Art. 12 of Law on collective redress, the declaration on joining a group expressed by a victim of an infringement shall not only consist an individual's will to join the collective action, but shall also include the following elements:

- the character of claim brought by an individual joining a group;
- the justification of claim;
- the conditions justifying fulfilment of group membership;
- the required proofs.

As the Art. 12 of Law on collective redress provides, only the declaration comprising of all the aforementioned elements, may be assessed by the court and give grounds for joining a group by the interested party.

The important advantage of such solution is the protection of interests of a defendant which may clearly determine the group's members and prepare its defence.

Moreover, it gives a defendant an opportunity to contest the group membership. Because, as the Art. 15 of Law on collective redress provides, the defendant once obtained an information on group composition, may raise an objection concerning the participation in a group of certain individuals. Such objection will force a claimant to justify the right to participate in a group action of a specific person (Art. 16 of Law on collective redress).

Finally, once regarded from a perspective of a whole judicial system, the complex declaration on joining a group may allow to avoid mass and unmeritorious claims, covering wide group of victims without clearly justified grounds. Therefore, the Polish solution concerning the declaration on joining a group, shall be positively assessed.

2.6.3. Consequences of joining a group

Once the party decides to join the group, regardless the stage of the proceedings at which such a decision is made, it is covered by a collective claim and bound by its outcome. Moreover, the party participating in a group action loses a possibility to undertake an individual claim.

In case when the individual decides not to join the group, it is not bound by the judgment rendered by a court in group proceedings, and has

a possibility to bring an individual claim according to general rules of law. In consequence, in the opt-in scenario, an individual has always a possibility to join the group and participate in the collective action, or refrain from joining a group and undertake a decision to initiate an individual claim.

2.6.4. Court's decision on a group formation

The last issue that needs to be explained at this point concerns the court's judgment on group formation. According to the Art. 17 of Law on collective redress, after the submission of a list of group members by the group's representative, and recognition of the eventual objections to the group composition raised by the defendant, the court issues a decision on group formation. The consequences of such ruling are crucial for the group proceedings, since only at this time the group is finally formed and the collective claim may be heard by the court. It signifies that the stage of procedural recognition of case and formation of a group is brought to the end, and the stage of material assessment of claim may be opened. Only from this moment, the parties are heard and the claim is assessed by the court.

Apart from important consequences for the conduct of collective proceedings, rendering a decision on group formation is also crucial for the group's members. Because, as the Art. 17(3) of Law on collective redress provides, from this moment the group's members are no longer entitled to leave the group and initiate an individual action.

The later solution was criticised by many scholars and legal practitioners in Poland. As it was argued, such solution would oblige individuals to participate in group proceedings and limit their freedom to determine a procedural position[214]. Nevertheless, as the legislator rightly justified, arguing in favour of the opposite solution, i.e. granting to individuals a right to leave the group at any stage of the proceedings, could destabilise the group proceedings, prolong its duration, and in consequence decrease its efficiency. Therefore, the limitation of time in which a party may leave the group till the moment of rendering by a court a judgment on group formation, seems to be well justified[215].

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[214] D. Stojek, *Poszkodowani będą mogli składać pozwy zbiorowe*, Gazeta Prawna, March 10, 2009, No. 48, pp. 2 and 10.

[215] See also at this point M. Sieradzka, *Dochodzenie roszczeń w postępowaniu grupowym…*, pp. 321–322.

2.7. Different ways of dispute resolution

The last stage of group proceedings concerns the hearing of case and rendering a judgment. While the way in which proceedings are conducted at this stage does not differ from the classical organisation of civil lawsuit, certain specificities concerns the ways in which proceedings may be terminated. Therefore, the analysis of possible ways of dispute resolution shall be performed.

2.7.1. Judgment on responsibility

The first type of judgment which may be rendered by the court in group proceedings is the judgement on responsibility (Art. 2(3) of the Law on collective redress). It may be rendered by a court only when the collective claim has monetary character and the party claims for such a ruling.

The main objective of Polish legislator, who decided to introduce a judgment on responsibility in group proceedings, was to limit the possible difficulties with the standardisation of claims. Because as it was argued before, and as it stems from the justification to the project of Law on collective redress, the judgment on responsibility will be used when, due to the factual elements of the case, the standardisation of claims is not possible. As the authors of reform held: *"The plaintiff's claim, in cases concerning pecuniary claims, may aim to issue a judgment on responsibility of defendant, without determining its value. Such situation may occur, if the circumstances referring to each member of the group are so diverse that it is not possible to standardise the amount of individual claims."*[216]

The judgment on responsibility terminates the collective proceedings, by claiming that the defendant is liable for the accused violation. The consequences of such ruling are crucial for these members of the group, who decide to claim for compensation in the subsequent individual claims. First, the judgment on responsibility has a prejudicial character and is binding on the court deciding in the individual damages action. Secondly, the individuals claiming for damages are no longer required to conduct complex reasoning in order to prove the existence of violation. Finally, the judgment on responsibility opens a path for the out-of-court settlements, which in the opinion of many scholars, will be the solution preferred both by the liable undertakings and injured individuals (lower costs of

[216] Project of law on collective redress litigation [*Projekt ustawy o dochodzeniu roszczeń postępowaniu grupowym*], pt. II, p. 4.

the proceedings, shorter duration and confidentiality)[217]. Therefore, it may be claimed that thanks to the judgment on responsibility, the chances for the effective compensation are increased, while the costs and duration of eventual subsequent actions are significantly reduced.

The introduction of judgment on responsibility to the Law on collective redress shall be positively assessed. It allows to effectively mitigate the problem of standardisation of monetary claims. Moreover, it provides an effective solution in situations when the infringement causes mass harms, because in such cases the specific assessment of damages may become particularly burdensome activity. Finally, it opens a path for more effective enforcement, since the prejudicial effect of judgment on responsibility may facilitate subsequent private actions for damages or encourage parties to out-of-court settlements.

The importance of judgement on responsibility may be also crucial from the perspective of antitrust collective claims. Since such cases often involve multiple victims and raise important difficulties at the stage of standardisation of claims, a reference to judgment on responsibility may mitigate numerous difficulties of individual actions, e.g. limited access to proofs, costs of proceedings, information asymmetry, and thus increase the efficiency of private enforcement of antitrust law.

2.7.2. Judgment resolving a dispute

The second way of termination of collective proceedings concerns a judgment resolving the dispute. This time, differently than in a case of judgment on responsibility, the court's ruling terminates the proceedings by determining the liability of an undertaking and providing a remedy to the case. Moreover, if the group action concerns monetary claims, the judgment determines a scope of compensation that should be paid to each individual forming a group.

The goal of a judgment resolving a dispute is to bring a lawsuit to the end and resolve all possible issues concerning the case, i.e. liability of accused undertaking, scope of awarded damages and a question of costs of the proceedings. Due to the fact that judgment resolving a dispute covers numerous claimants, according to the Art. 21(1) of Law on collective redress, it shall specify all the persons forming a group and/or subgroups. Moreover, if the claim involved monetary claims, the Art. 21(2) of Law

[217] T. Jaworski, P. Radzimierski, *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym…*, p. 124.

on collective redress obliges a court to specify the amount of damages awarded to each individual forming a group.

Concerning the consequences of such ruling it shall be stated, that it covers all members of the group, and once final and valid, it deprives all individuals forming a group of a possibility to initiate a court action concerning the same issue. In consequence, even if from the procedural perspective only the group's representative is party to the proceedings, the ruling brings consequences to all members of the group[218]. The goal of such solution is to ensure the fulfilment of *res iudicata* principle and to avoid the risk of over-compensation.

2.7.3. Settlement agreement

The last way in which a dispute may be brought to an end concerns the conclusion of a settlement agreement. According to the Art. 7 of Law on collective redress, the court may, at any stage of the proceedings, refer the parties to the mediation. Moreover, according to the general provisions of Code of Civil Procedure, parties may agree to refer their dispute to the mediation, even before the case was brought to the court. Due to the fact that the specific provisions concerning the mediation in group proceedings are missing in the Law on collective redress, the provisions of Art. 183^1–183^{14} of Code of Civil Procedure will be applicable to the mediation ordered by a court or agreed by the parties.

The first issue that needs to be resolved concerns a person entitled to represent a group in the mediation proceedings. Due to the fact neither Art. 7 of the Law on collective redress, nor specific provisions concerning mediation stipulated in the Code of Civil Procedure, do not provide an answer to this question, two possible solutions are evoked in a legal doctrine.

First, concerns granting a sole mandate to represent a group within the mediation proceedings to the group's representative[219]. Second, provides that within the mediation proceedings, the representation of a group by

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[218] See at this point M. Sieradzka, *Dochodzenie roszczeń w postępowaniu grupowym*…, pp. 352–354 and T. Jaworski, P. Radzimierski, *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym*…, pp. 405–405, who refer to the notion of "expanded validity of judgment" in order to describe the broad consequences of judgment rendered in collective proceedings.

[219] T. Jaworski, P. Radzimierski, *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym*…, pp. 208 and following.

its representative is no longer valid, and if no additional agreement is concluded, all members of the group may represent their interests[220].

While both of the aforementioned solutions have its supporters and opponents, the first proposal, i.e. a legitimacy of the group's representative to conduct the mediation, seems to be more logical.

First, it ensures greater coherence between the court proceedings and the mediation. Secondly, it guarantees greater efficiency of a mediation process. Finally, it results from a mere construction of the group's representative mandate which is supposed to ensure a group's representation within the entire group litigation process (comprising also subsidiary or settlement proceedings). Nevertheless, due to the fact that such standpoint has only theoretical character, addressing the issue of representation in the Law on collective redress would be desirable. It would ensure greater legal clarity, and would allow to avoid the potential conflicts between the group's representatives and the group's members at the stage of mediation.

The second issue concerning the settlement agreements refers to the time in which the mediation can be conducted. According to the Art. 7 of Law on collective redress, the mediation can be conducted at any stage of the proceedings. It can be a consequence of court's ruling referring the parties to the mediation, or of the agreement on mediation concluded between the parties. In both of the scenarios, either the decision of the court or the agreement concluded between the parties, shall specify the scope of mediation, parties to the mediation and a person of mediator.

The last issue refers to the consequences of mediation. Once the mediation is terminated and the agreement is reached, the mediator shall submit to the court competent to hear the case a settlement agreed between the parties. If the court approves such settlement, the collective proceedings are terminated and the court renders a judgment on discontinuance of proceedings. In such a case, the settlement approved by the court has the same consequences as a judgment resolving a dispute described above. In case of the opposite, i.e. when the settlement is not approved by the court, the collective proceedings are undertaken. As the possible grounds for the refusal of recognition of settlement the Art. 19(2) of the Law on collective redress evokes: contradiction with law, contradiction with good customs, risk of circumvention of legal provisions or flagrant violation of interests of group's members.

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220 M. Sieradzka, *Dochodzenie roszczeń w postępowaniu grupowym…*, p. 241; O. Filipowski, *Mediacja w polskim postępowaniu grupowym*, Kwartalnik ADR 2011, No. 1, p. 12.

To sum up, it shall be stated that the introduction of a mechanism of mediation into the Law on collective redress shall be positively evaluated. As the foreign legal practice shows, the importance of the mediation for the resolution of collective disputes is crucial. Just to give the American example, 95% of cases covered by class actions are finally decided by the settlements agreement concluded between the collective claimants and accused undertaking(s)[221]. The importance of the mediation seems also to be recognised by the European Commission. As it states in the Recommendation on collective redress: *"The Member States should ensure that the parties to a dispute in a mass harm situation are encouraged to settle the dispute about compensation consensually or out-of-court, both at the pre-trial stage and during civil trial […] The Member States should ensure that judicial collective redress mechanisms are accompanied by appropriate means of collective alternative dispute resolution available to the parties before and throughout the litigation."*[222] Also the Damages Directive, aiming to increase the importance of private antitrust enforcement in the European Union, speaks in favour of alternative mechanisms of dispute resolution, and obliges the MS to introduce ADRs in the area of competition law enforcement[223]. Therefore, the introduction of a possibility to refer to mediation in the Law on collective redress shall be positively evaluated. Nevertheless, as the Polish practice shows, the importance of this mechanism, especially in the area of antitrust law, is still very limited.

2.8. Rules on financing of collective claim

The last specificity of Polish approach to collective redress concerns the rules on financing. The Law on collective redress proposes rather innovative and modern approach to this problematic issue. It tries to address the crucial problem of parties initiating collective lawsuits, i.e. lack of financial resources to undertake an action, which was already recognised in different jurisdictions as the main restraint for development of an effective mechanism

[221] See the interview with S. de Cazotte, *Nie kopiujcie naszego systemu pozwów zbiorowych*, Gazeta Prawna, October 14, 2009.

[222] Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU), OJ L 201, 26.7.2013, p. 60–65, pt. 25–26.

[223] See Art. 18–19 of the Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance, OJ L 349, 5.12.2014, p. 1–19.

of collective actions. Two solutions are proposed by the Polish legislator in order to introduce effective mechanism of financing, i.e. contingency fees (Art. 5 of Law on collective redress) and reduced fees for bringing collective claim (Art. 25 of Law on collective redress).

2.8.1. Contingency fees agreements

Contingency fees were previously evoked as one of the main particularities of the American mechanism of class actions[224]. They were also evoked during the European discussion on group litigation, however in Europe, the contingency fees agreements were regarded as one of the possible reasons for the abusive litigation, and a factor which may potentially lead to the "Americanisation" of a group litigation process[225].

Despite the general criticism by the European Commission and the unfamiliarity of Polish legal practice with the contingency fees, the authors of Law on collective redress decided to introduce this mechanism into the national legal order. In consequence, the introduction of contingency fees in Poland may be regarded as a departure from the general European trend in the area of collective redress, and the important novelty in the Polish practice of financing of court proceedings.

The possibility of contingency fees agreements is foreseen in the Art. 5 of Law on collective redress. According to this provision, the group's representative, prior to the commencement of collective proceedings, shall conclude a contract with a legal attorney representing a group in which the conditions for a remuneration of lawyer will be specified. The existence of such agreement is necessary in order bring the collective action to the court, because as the Art. 6(2) of Law on collective redress states, it forms an integral part of a claim, which will be rejected in case of lack of the agreement on the remuneration of lawyer. While the requirement of a contract setting conditions for remuneration of legal attorney does not create important *novum* in the national legal system, what raised more questions, and led to wide debate among politicians, scholars and legal practitioners, concerned the rules on remuneration provided in the Art. 5 of Law on collective redress.

According to this provision, the remuneration of lawyer representing a group in collective proceedings may be set as a percentage of damages awarded to the claimant. In consequence, the Law on collective redress

[224] See in details Part I Chapter 3 Point II(2.4).
[225] See in details Part II Chapter 1 Point II(2.2).

opens a possibility of *pactum de quota litis* agreements (contingency fees agreements). Such solution, giving the parties a possibility to set the remuneration of lawyer in a speculative manner, depending on the final outcome of case, construes a departure from the classical rules on the lawyers' remuneration existing in Polish civil procedure. Mainly for this reason, it was widely criticised during the discussion on introduction of collective redress in Poland.

First, it was held that the contingency fees agreements would stay in contradiction to the lawyers ethical standards and would cause incoherence with the internal rules of Advocates and Legal Advisors Bar in Poland[226]. Because, as the Codes of Ethics of both legal professions were stating, the contracts concluded between the legal attorney and its client, making the remuneration of lawyer contingent on the final outcome of case, were inadmissible[227].

Secondly, the contingency fees were regarded as a possible source of abusive litigation and the so-called "Americanisation" of justice, which could cause important risk to the traditional organisation of judicial system and the interests of both parties to the proceedings[228].

Finally, the contingency fees were considered as the unknown legal concept which could cause a lot of uncertainties once applied in practice.

Despite the aforementioned criticism, the possibility of concluding contingency fees agreements was introduced into the Law on collective redress. As it was argued by the authors of reform, the contingency fees were necessary in order to overcome the limitations of traditional rules on financing, and encourage lawyers to participate in complex collective proceedings[229]. Moreover, as it was evoked during the Parliamentary discussion on the project of reform, such solution could motivate individuals to initiate collective claims and mitigate one of the main obstacles for bringing group actions, i.e. high costs of the proceedings combined with the problems of financing[230].

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226 T. Jaworski, P. Radzimierski, *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym…*, pp. 162–163; M. Rejdak, P. Pietkiewicz, *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym…*, p. 129.

227 See at this point Resolution of the Polish Bar Council No 2/XVIII/98, as amended by the Resolution of the Polish Bar Council No. 32/2005 from November 19, 2005 and the Resolution No. 5 of the 8th National Congress of Legal Advisers from November 10, 2007.

228 M. Sieradzka, *Dochodzenie roszczeń w postępowaniu grupowym…*, p. 214.

229 Project of law on collective redress litigation [*Projekt ustawy o dochodzeniu roszczeń postępowaniu grupowym*], pt. IV, p. 6.

230 P. Grzegorczyk, *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym…*, pp. 91–92.

In order to adapt the contingency fees mechanism to the Polish legal reality and mitigate its potential risks, the authors of reform decided to limit the maximum percentage of damages which can be granted to the lawyer. As the Art. 5 of Law on collective redress states: *"The agreement governing the remuneration of agent can set the remuneration in relation to the amount awarded to claimant, not more than 20% of this amount."* The limitation of possible contingency fees to 20% of damages awarded to the group claimant was positively assessed in Poland. In the opinion of different scholars, it was ensuring greater balance between the interest of injured individuals and professional attorneys, and allowed to avoid the risk of so-called "entrepreneurial" litigation[231]. Undoubtedly, the amount of 20% can be criticised as being too low, or too high, nevertheless, the chosen limit seems to be rather a question of convention, which does not exclude its possible changes in future.

Assessing the contingency fees mechanism from a 6-year perspective, it shall be stated that it neither lead to abuse, nor to important change in the Polish approach to the issue of financing. Polish advocates are still reluctant to contingency fees, and as is stems from the most recent interpretation of contingency fees agreements provided by the Polish Bar Council, such agreements may be allowed only as a measure providing for a supplementary remuneration[232]. Therefore, the Polish Bar Council argues in favour of contracts setting the precise amount of lawyer's remuneration (independent of the final outcome of case) and the eventual additional remuneration which would be paid if the case had a positive outcome.

While the advocates seem to preserve the previous *status quo* as far as financing of collective redress is concerned, the important change may be observed once the approach of legal advisors to the contingency fees agreements is concerned.

Initially the legal advisors were arguing in the same manner as the advocates, and allowed only for the supplementary remuneration of legal representative based on the outcome of case[233]. Nevertheless, the recent changes in the Code of Ethics of legal advisors seem to overrule this traditional principle. As the Art. 36(3) of Legal Adviser Code of Ethics from 22 November 2014 provides: *"Legal adviser cannot conclude with his client an*

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231 T. Jaworski, P. Radzimierski, *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym…*, p. 164.

232 See at this point Resolution of the Polish Bar Council No. 52/2011 from November 19, 2011.

233 See Resolution No. 8/VIII/2010 of the National Congress of Legal Advisers from December 28, 2010.

agreement under which the client obliges himself to pay the remuneration for the conduct of case only in case of its positive outcome, unless something else is provided in law."[234] In the opinion of many scholars, the contingency fees agreements concluded within the group litigation cases may be regarded, under the Art. 36(3) of Legal Adviser Code of Ethics, as a legal exception to the general prohibition of *pactum de quota litis* agreements[235]. Therefore, the path for development of contingency fees agreement is opened, and the time will show if it may change the traditional way of financing of collective redress in Poland.

The Polish attempt to introduce contingency fees shall be positively assessed. It may be also regarded as a guideline for the European discussion on financing of collective actions. Because, while the Commission did not support contingency fees agreements in the Recommendation, it did not prevent MS from proposing such solution. As it stated in Point 30 of the Recommendation: *"The Member States should not permit contingency fees which risk creating such an incentive. 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."* Therefore, by leaving a margin of appreciation for MS as far as contingency fees are concerned, the Commission opened a path for bottom-up initiatives, able to change the European approach to this method of financing.

2.8.2. Reduced fees for bringing collective claim

The second way in which the individuals referring to the collective method of disputes settlement are supposed to be relieved, concerns the limitation of costs of legal action.

According to the general provisions on costs of civil proceedings applicable in Poland, the claimant bringing a case to the court shall incur a fee of 5% of the value of subject matter of dispute. The goal of such provision is to ensure that the costs of civil proceedings will be covered and that abusive claims will be limited.

The Law on collective redress introduces exception to this general rule. The Art. 25 of Law on collective redress provides that: *"Court's fee in case concerning monetary claims pursued in group proceedings amounts 2% of the*

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234 See Resolution No. 3/2014 of the National Congress of Legal Advisers from November 22, 2014, concerning the adoption of a New Code of Ethics of Legal Adviser.

235 M. Sieradzka, *Dochodzenie roszczeń w postępowaniu grupowym…*, p. 215.

value of dispute or subject of the appeal, but not less than 30 zlotych and not more than 100,000 zlotych." As a result, the value of court's fee that has to be incurred by the group's representative bringing collective claim is reduced to 2% of the value of subject matter, and may never exceed 100,000 PLN. Moreover, once a collective claim is initiated by the consumers' advocate, the costs of bringing a claim do not have to be incurred at all[236].

The above solution may be regarded as in important novelty in the general regime of financing of collective actions. As it was held by the authors of reform, such solution was justified due to the fact that group claim covered multiple claimants and the costs of bringing a claim were already high[237]. Also different authors underlined, that the lowering fees for bringing collective claims could increase the popularity of collective actions and mitigate one of the main obstacles in bringing collective claims, i.e. high costs of the proceedings[238].

The above proposal of Polish legislator shall be positively assessed. It may be regarded as an attempt to promote group litigation mechanism in Poland and ensure its greater efficiency once applied by individuals.

2.8.3. Guaranty deposit as the another safeguard against the abuse

The last issue which shall be raised in this section concerns a guaranty deposit. According to the Art. 8 of Law on collective redress, a defendant, prior to the commencement of group proceedings, may ask a court to render a decision obliging a claimant to pay a guaranty deposit to secure the costs of the process. The objectives of such solution are two-folded.

First, the guaranty deposit aims to preserve the interests of a defendant, and ensure that in case of winning a case, he will be able to recover the costs of proceedings.

Secondly, the aforementioned solution aims to ensure the stability of a judicial system and avoid the risk of abusive litigation. Because as it was stated in the justification to the project of Law on collective redress: *"Group action is a strong element of pressure on the defendant, which due to commencement of collective proceedings is often put under a strong public pressure and is often obliged to foresee important amounts of money in order to protect its interests. Recognising the risks stemming from the eventual abuse*

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236 See Art. 24(2) of Law on collective redress read in conjunction with Art. 96(1) pt. 11 of Act on the costs of civil proceedings, Journal of Laws 2005, No. 167, Item 1398.

237 Project of law on collective redress litigation [*Projekt ustawy o dochodzeniu roszczeń postępowaniu grupowym*], pt. XIV, p. 11.

238 M. Sieradzka, *Dochodzenie roszczeń w postępowaniu grupowym…*, p. 370.

of group litigation instrument, the project foresees a possibility to secure the costs of proceedings by the way of guaranty deposit."[239]

While the previously evoked safeguards against the abusive litigation concerned the procedural constraints in initiating collective action (e.g. minimum number of claimants) and judicial control over group proceedings, the Art. 8 of Law on collective redress provides for the economical constraint imposed on a group claimant which aim is to ensure that the abusive or speculative claims will not be brought to the court. It construes also important complement to the previously described rules on financing, and constitutes a counterbalance to the rules of Art. 5 (contingency fees) and Art. 25 (limited costs of bring a claim) granting important procedural advantage to the group claimant.

While the *ratio legis* for introduction of guaranty deposit is justified, in the opinion of certain scholars, the existence of such solution in the system of group litigation may also construe a factor limiting its efficiency[240]. It may happen if individuals, once faced with a risk of paying important sum of money in order to undertake the proceedings, will refrain from bringing collective action. Therefore, the guaranty deposit, once read in conjunction with the compulsory representation by lawyer and an obligation to incur fees for bringing a claim, may construe an obstacle in bringing collective claims and run counter to the general goals of a legislator.

Referring to the specific elements of a guaranty deposit it shall be stated that the provision of Art. 8 of Law on collective redress leaves very wide margin of appreciation to the court. While it provides that the maximum amount of deposit shall not exceed 20% of the value of a subject matter of dispute, it is silent as far conditions for granting a deposit are concerned. In consequence, it will be up to the court to decide in each single case if a guaranty deposit is justified and what shall be its amount. As the current practice shows, the courts are rather reluctant to oblige claimant to pay a guaranty deposit, and if they decide so, the value of a deposit is very low[241].

Other provisions dealing with the guaranty deposit concern the elements which shall be taken into consideration by the court while setting the amount of deposit (the probable amount of costs incurred by defendant), the time of

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[239] Project of law on collective redress litigation [*Projekt ustawy o dochodzeniu roszczeń postępowaniu grupowym*], p. 7.

[240] M. Sieradzka, *Dochodzenie roszczeń w postępowaniu grupowym…*, p. 246.

[241] M. Sieradzka, *Dochodzenie roszczeń w postępowaniu grupowym…*, p. 264; see for example judgment of District Court in Warsaw from January 24, 2013, III C 491/12 (not published); decision of District Court in Warsaw from February 23, 2013, I C 984/12 (not published).

payment of guaranty deposit (at least one month after the court's decision on deposit payment), and the method of payment of deposit (in cash).

In general, the provisions on guaranty deposit may be regarded as another characteristic of Polish approach to group litigation. Nevertheless, while the *ratio legis* of such solution is justified, its practical consequences may lead to negative effects on the efficiency of group litigation mechanism. Mainly for that reason, the instrument of a guaranty deposit was heavily criticised during the Polish debate on collective redress[242]. Fortunately, as the practice shows, the courts are rather reluctant to grant a guaranty deposit. It allows us to believe, that the injured individuals will not be discouraged from initiating collective claims, due to the obligation of paying a guaranty deposit[243]. However, as it will be argued in Point 3 of this Chapter, in order to increase efficiency of group litigation mechanism and ensure greater transparency as far as the costs of judicial action are concerned, further reform of the provisions on guaranty deposit would be desirable.

3. Collective redress and Polish practice

The goal of the last part of this Chapter is to assess the practical consequences of introduction of the collective redress mechanism in Poland. While the formulation of its specific elements raised a wide debate among opponents and supporters of group litigation mechanism, the 6-year experience in the functioning of Law on collective redress shows that its introduction led neither to development of abusive and unfounded litigation, nor to important change in the enforcement of law provisions in Poland. It may be rather held that despite the novelty of the group litigation instrument and its far-reaching goals, its empirical assessment shows a limited practical significance of the collective redress in Poland.

3.1. Collective redress in Poland – empirical assessment

According to data provided by the Polish Ministry of Justice, in the period from 2010 to 2016, 225 group litigations were initiated before Polish courts[244]. While the total number of group proceedings seems to be

242 M. Sieradzka, *Dochodzenie roszczeń w postępowaniu grupowym…*, pp. 42–43.

243 *Ibidem*, p. 264.

244 See statistics of the Polish Ministry of Justice for the period 2010–2016, *Pozwy zbiorowe w latach 2010–2016*, available at: https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/ [access: 19.11.2016].

significant, their detailed analysis shows that great number of initiated claims were dismissed or rejected, not allowing individuals to protect their rights in court. Among 225 group claims brought to Polish courts in the period between 2010 and 2016, 105 claim were rejected or dismissed. Moreover, 61 claims are still waiting to be decided by the courts. Therefore, only 59 out of 225 group claims brought to the Polish courts in the analysed period were examined and led to rendering a judgment by the court.

Apart from the high rate of rejection and dismissal of group claims, it shall be also noted that even if accepted by the court, most of the lawsuits proved very long and caused major difficulties for the group plaintiffs, due to the formalised character of conditions for conducting proceedings[245].

Finally, it shall be also mentioned that only few cases concerned violations of unfair competition rules[246], and none of the lawsuits referred to the violation of antitrust provisions[247].

Among the most important cases involving application of group litigation mechanism we can evoke:

- the claim initiated against BRE Bank by a group of individuals who suffered an injury as a result of violation of mortgage credit agreement (hereinafter "BRE Bank case");
- the claim initiated against a State by the families of victims of a collapse of the International Trade Hall in Katowice, claiming for compensation of harm resulting from the serious deterioration of life situation;
- the claim initiated against the insurance company "LINK4" by a group of 35 insurance intermediaries, alleging the defendant for the unfair advertising under the Law on Unfair Competition (hereinafter "LINK4 case");
- the claim initiated against a State, Social Insurance Institution (ZUS) and pension societies, concerning injuries suffered as a result of depreciation of assets gathered within the Open Pension Fund.

Despite the fact that none of the aforementioned cases concerned violation of antitrust law provisions, the short reference to two of the aforementioned proceedings, i.e. BRE Bank case and LINK4 case, will

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245 I. Gabrysiak, *Postępowanie grupowe w polskim prawie*, Fundacja Instytut Praw Publicznych, Warszawa 2014, pp. 23–24; M. Dębiak, *Postępowanie grupowe – analiza regulacji w wymiarze teoretycznym i praktycznym po czterech latach jej funkcjonowania*, Forum Prawnicze, No. 6 (26), 2014, pp. 35–36.

246 See results of a debate: *Pozwy zbiorowe – prawo i pratyka,* organized by PAP on 16.01.2014, available at: http://www.bankier.pl/wiadomosc/Pozwy-zbiorowe-w-liczbach-3038473.html [access: 21.11.2015].

247 A. Jurkowska-Gomułka, *Comparative competition law private enforcement...*, p. 3.

aim to illustrate specificities of Polish mechanism of group litigation. It will try to show the problems which may arise once the collective redress mechanism is applied in practice.

3.1.1. BRE Bank case

The BRE Bank case was a result of a claim brought by the Warsaw municipal consumers' advocate – Małgorzata Rohert, on behalf of 776 consumers injured by the violation of mortgage credit agreements by BRE Bank. The dispute concerned contracts concluded with BRE Bank in the period between 2004 and 2007. According to the aforementioned agreements, which value was valorised in Swiss francs, the bank was entitled to unilaterally change the value of interests, depending on the change in a reference rate or the change in financial parameters of a capital market. While enjoying such right, the BRE Bank was raising the value of interests during the time when the economic factors (e.g. currency exchange rate) were non-preferential for its clients, and refrained from lowering the value of interests during the period when a situation on the market was changing in favour of clients. In the opinion of clients, by such practice BRE Bank unduly fulfilled its obligations resulting from the mortgage credit agreement, and forced the clients to pay the interests higher than the interests foreseen in the initial contract.

The group claim concerning the aforementioned infringement was brought to the District Court in Łódź on 20 December 2010. However, already at its initial stage, it showed important problems that the group's representative had to face.

First, it concerned the formation of a group. That is because, even before an information on a possibility to join the group was published, the group had already covered 800 persons injured by the illegal practice of BRE Bank.

The second difficulty concerned the standardisation of claims. As M. Rohert admitted, within such large group of claimants, suffering financial injuries resulting from different contracts concluded with the defendant, the standardisation of claims turned out to be impossible task[248]. Due to this reason, the municipal consumers' advocate representing a group refrained from claiming for compensation, and limited its claim only to a declaratory relief (judgment on responsibility).

[248] M. Niedużak, M. Szwast, *Pozwy grupowe – doświadczenia po 4 latach*, Raporty, Opinie, Sprawozdania, Helsińska Fundacja Praw Człowieka, Warszawa 2014, p. 10.

After assessing the question of claim's admissibility, the court finally decided that the case may be recognised in group proceedings. In December 2011, it ordered to publish an information on a possibility to join a group. The outcome of publication was astonishing. It showed a huge interests in a claim and confirmed a scale of illegal practice performed by BRE Bank. In the period from 31 January 2012 (date of publication of information), till 31 March 2012 (deadline for joining a group), additional 1247 consumers decided to join a group action. On 6 September 2012, the group was finally approved by the court and the final stage of proceedings could have been started.

Nevertheless, before the judgment on responsibility of BRE Bank was rendered, another year has passed. It was only in June 2013 when the court started the last stage of the proceedings, i.e. hearing of case. One month later the judgment was rendered and on 3 July 2013, the court pronounced a ruling according to which BRE Bank was held liable for the accused violation of mortgage credit agreement[249]. Although the BRE Bank brought an appeal to the ruling of a court of 1st instance, its claim was rejected on 30 April 2014[250], and the judgment of the court of 1st instance became final.

The BRE Bank case, being the first successful group litigation claim brought in Poland, showed multiple difficulties concerning the functioning of group litigation mechanism.

First, it concerns the problem with standardisation of claims. As the BRE Bank case showed, in complex cases involving multiple claimants, the fulfilment of this obligation becomes very burdensome or almost impossible task. As certain scholars underline, the standardisation of claims is undoubtedly possible in straightforward cases, but in more complex scenarios, where the level of damages vary, different approach is required[251].

Secondly, the BRE Bank case showed great formalism of group litigation proceedings in Poland. The process of formulation of a claim, certification of action, notification of potential victims and formation of a group, took in the analysed case more than 18 months. It is especially striking, once we compare it with the time devoted to the material assessment of case by the courts of 1st and 2nd instance which in sum did not exceed 4 months. Additional observation which may be raised at this point, concerns the

[249] Judgment of a District Court in Łódź from July 3, 2013, II C 1693/10.

[250] Judgment of an Appelate Court in Łódź from April 30, 2014, I ACa 1209/13.

[251] M. Tabalecka, *Poland*, British Institute of International and Comparative Law, available at: http://www.collectiveredress.org/collective-redress/reports/poland/general collectiveredressmechanisms [access: 28.11.2015].

duration and costs of group proceedings. While one of the arguments speaking in favour of group litigation mechanism was the acceleration of judicial process and limitation of its costs, the BRE Bank case does not seem to fulfil this objective. It took 40 months before the final judgment in BRE Bank case was rendered, and the costs of proceedings before the courts of 1st and 2nd instance reached almost 100.000 PLN[252].

Finally it shall be mentioned, that despite this long, complex and costly process, individuals injured by BRE Bank are still unable to obtain compensation. It results from the fact that in 2014, BRE Bank (currently named as mBank) filed a successful cassation claim of the aforementioned ruling to the Polish Supreme Court. On 14 May 2015, the Supreme Court accepted the cassation, dismissed the previously analysed judgments of the courts of 1st and 2nd instance, and referred the case for its re-examination by the court of 1st instance[253].

While dealing with the cassation the Supreme Court did not accept mBank's arguments concerning inadmissibility of group action or invalidity of group proceedings, however, it focused on violation of provisions of material law which in its opinion gave grounds for a dismissal of previously rendered rulings. Therefore, despite several judgments rendered by different courts and more than 5 years of civil lawsuit, the final outcome of BRE Bank case is still opened, and the consumers injured by the illegal behaviour of a bank are left without due compensation.

3.1.2. LINK4 case

The second case worth analysing at this point is the LINK4 case. The case was brought to the court by a group of 35 insurance intermediaries represented by one of the group's members, against the Insurance Company LINK4. The LINK4 was alleged for the unfair advertising which in the opinion of claimants constituted violation of the provisions of Law on Unfair Competition. As it was held, the advertising campaign conducted by LINK4 in press and television in 2008, influenced negatively the image of insurance intermediaries and decreased clients' interest in concluding insurance contracts through the intermediaries. As it was calculated by the group's representative, the unfair advertising conducted by LINK4 resulted in the injuries totalling 13.051.860 PLN suffered by the members of a group.

252 Costs of proceedings and costs of legal representation before the court of 1st instance: 64.817 PLN and costs of proceedings and costs of legal representation before the appellate court: 32.400 PLN.

253 Judgment of Polish Supreme Court from May 14, 2015, II CSK 768/14.

Once dealing with the LINK4 case, the courts were faced with three major problems, which showed once again difficulties with applying the group litigation mechanism in practice.

The first problem concerned an issue of guaranty deposit. In the LINK4 case the defendant asked a court to oblige a claimant to pay a guaranty deposit in order to secure the costs of proceedings. As the defendant held, the payment of a guaranty deposit was necessary in order to cover the costs of required economical expertise. The District Court in Warsaw accepted the defendant's demand, and by its decision of 10 May 2012 obliged the claimant to pay 1.664.554,08 PLN as a guaranty deposit[254]. The aforementioned ruling was questioned by the claimant, and led to dismissal of previous court decision on a guaranty deposit. As the court held in its decision of 9 October 2012, the dismissal was justified, due to the fact that the defendant did not prove his legal interest to claim for a payment of guaranty deposit[255].

The second problem concerned the mechanism of mediation. This time the court tried to persuade the parties to resolve their dispute through the out-of-court settlement. Even prior to the commencement of group proceedings, the court decided to refer the parties to the mediation[256]. Nevertheless, despite the reference to mediation, the agreement was not reached, showing inefficiency of this mechanism in complex collective disputes. As a result, due to the negative outcome of a mediation process and problems with certification of claim described hereunder, the court finally decided to dismiss the group claim on 12 July 2013[257].

The last problem which appeared in LINK4 case, and raised most of the concerns, referred to the issue of certification. While the court rightly observed that the claim had monetary character and had to fulfil criterions of Art. 1 and 2 of Law on collective redress in order to be admissible, it conducted assessment running counter to the objectives of Law on collective

254 Decision of District Court in Warsaw XVI Commercial Department of May 10, 2012, XVI GC 595/11, available at: http://orzeczenia.warszawa.so.gov.pl/content/$N/154505000004827_XVI_GC_000595_2011_Uz_2012-05-10_001 [access: 25.11.2015].

255 Decision of District Court in Warsaw XVI Commercial Department of October 9, 2012, XVI GC 595/11, available at: http://orzeczenia.warszawa.so.gov.pl/content/$N/154505000004827_XVI_GC_000595_2011_Uz_2012-10-09_001 [access: 25.11.2015].

256 Decision of District Court in Warsaw XVI Commercial Department of February 14, 2013, XVI GC 595/11, available at: http://orzeczenia.warszawa.so.gov.pl/content/$N/154505000004827_XVI_GC_000595_2011_Uz_2013-02-14_001 [access: 25.11.2015].

257 Decision of District Court in Warsaw XVI Commercial Department of July 12, 2013, XVI GC 595/11, available at: http://orzeczenia.warszawa.so.gov.pl/content/$N/154505000004827_XVI_GC_000595_2011_Uz_2013-08-22_001 [access: 25.11.2015].

redress. That is because, apart from verifying the formal criterions for admissibility of claim, the court went a step further, and already at the stage of certification tried to decide on merits. It concerned the assessment by a court if the injury was actually suffered by the group's members, and if there was a causal link between the violation and a harm. As the court held, the evaluation of this issues at the stage of certification was required in order to determine the existence of similar factual basis of claims and to standardise the claims. The conducted analysis led the court to the conclusion that there was no causal link between the accused violation and a harm, and that the claim should be rejected.

The aforementioned standpoint of the court was criticised in the legal doctrine. It was claimed that the court exceeded the formal interpretation of admissibility of claim provided in Art. 1 and 2 of Law on collective redress, and undertook an individual analysis of claims, what was not allowed at this stage of proceedings[258]. This criticism was also confirmed by the subsequent ruling of the appellate court, which dismissed the judgment of a court of first instance and obliged it to undertake proceedings[259]. In consequence, the LINK4 case is still pending, and it remains to be answered by a court if group proceedings in the aforementioned case are admissible or not.

As the LINK4 case shows, the provisions of Law on collective redress may raise many interpretational problems once applied in practice, and may lead to discrepancies in the courts' jurisprudence. It concerns in particular the formal requirements for bringing a claim, conditions for its admissibility and the issue of standardisation of claims. Moreover, as the LINK4 case shows, also the supplementary issues, such as guaranty deposit or mediation, may lead to serious practical problems once raised before the court. As a result, the procedural barriers may often become reasons for the limited efficiency of group litigation mechanism, and run counter to the objectives set by the authors of reform, i.e. greater simplicity in bringing a claim, limited costs of court action and shorter duration of the proceedings. Therefore, as it will be argued in the following point, the collective redress introduced in Poland is not a solution without limitations, and further reform is required in order to ensure its effective functioning.

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[258] See A. Piszcz, *Czy nieuczciwą konkurencję można zwalczać tylko indywidualnie? Postanowienie Sądu Okręgowego w Warszawie z 12 lipca 2013 r., XVI GC 595/11, Link4*, Internetowy Kwartalnik Antymonopolowy i Regulacyjny 2015, No. 4(4), pp. 142–144; see also Decision of Polish Supreme Court of January 28, 2015, I CSK 533/14, LEX nr 1648177.

[259] See Decision of the Appellate Court in Warsaw from February 18, 2014, IACz 22/14, and Decision of the Appellate Court in Warsaw from March 31, 2015, I ACz 166/15.

The analysis of the aforementioned cases, as well as the general assessment of a 6-year practice in the application of Law on collective redress in Poland, allow us to claim that the Polish mechanism of collective redress is not a solution without drawbacks. Nevertheless, as it also shows, certain mechanisms proposed by the Polish legislator, such as judgment on responsibility or limited costs of group proceedings, allow individuals to bring claims more effectively, and thus increase their access to justice.

Taking the above into consideration, the following point will aim to determine the main advantages and drawbacks of Polish mechanism of collective redress. It will lead us to the conclusion which elements of Polish approach to collective redress could be proposed as model solutions for the European mechanism of collective redress, and which shall be changed or removed in order to ensure more effective system of group litigation in Poland.

3.2. Advantages of Polish approach to collective redress

3.2.1. Positive effects of judgment on responsibility

As the first advantage of Polish approach to collective redress we can evoke the existence of judgement on responsibility. As different authors argued, once such mechanism was proposed in the Law on collective redress, it had potential to mitigate the problems with standardisation of claims, encourage parties to the out-of-court settlement of disputes and increase the efficiency of group litigation mechanism[260].

The 6-years' experience in the application of group litigation mechanism in Poland seems to confirm the aforementioned standpoint. The claim for a declaratory relief (judgment on responsibility) is often chosen by the group plaintiffs as a solution best adapted to the protection of their interest. The reasons for the great popularity of judgment on responsibility are multiple.

First, it results from difficulties with the standardisation of claims. As the BRE Bank case showed, the problems with determining the amount of claim common to all members of a group, or separate subgroups, may often squander the efficiency of collective action. Moreover, in multiple-victims scenarios, the standardisation of claims may become a task impossible to accomplish.

Secondly, as judge W. Kuberska underlines, the great popularity of judgment on responsibility is a consequence of the utilitarian approach of group claimants to the issue of litigation. As she states: *"in the group litigation*

[260] M. Niedużak, *Pozwy grupowe – po pierwszym roku funkcjonowania*…, p. 2.

the easiest solution is to bring a claim for the assessment of responsibility, inter alia because in such a case the obligation of proving legal interest within the meaning of Art. 189 of Civil Code, being very important and difficult to be proved in practice, is removed. Whereas, the judgment on responsibility rendered in group proceedings has prejudicial effect in the individual disputes and creates basis for out-of-court settlements."[261] As a result, it is often more easy, cheaper and efficient for the victims of violation to obtain judgment on responsibility of the accused undertaking, than to launch difficult and highly unpredictable claim for damages.

Finally, the great popularity of judgment on responsibility is also a consequence of the court's approach to this method of disputes settlement. As the practice shows, it is more easy to obtain a judgement on responsibility, since the courts are rather liberal in the assessment of conditions specified in the Art. 2(3) of Law on collective redress. Whereas, the courts are very strict once the issue of standardisation of claims in damages actions is concerned[262].

In view of the above, the judgment on responsibility shall be regarded as the important advantage of Polish approach to group litigation, and a solution worth introducing in the model mechanism of collective actions.

First, it may facilitate the court proceedings and limit the costs of judicial action. Secondly, it can increase the efficiency of collective redress in cases involving numerous claimants (what is especially a case in the area of antitrust law). Finally, by the prejudicial effect of a judgment on responsibility, it may motivate parties to settle a case once the judgment is rendered, and in consequence, lead to lower costs and higher efficiency of the enforcement process.

3.2.2. Limitation of costs of proceedings

The second advantage of Polish mechanism of group litigation concerns the rules on financing. Once the costs of proceedings are often evoked as the main obstacle in bringing collective claims, the Law on collective redress seems to propose an effective solution to this problem. It is especially important in the European scenario, because while the Commission argues in favour of limitation of costs of collective proceedings, it leaves it to MS

[261] See W. Kuberska in: M. Niedużak, M. Szwast, *Pozwy grupowe – doświadczenia po 4 latach…*, p. 14.

[262] *Ibidem,* p. 14.

to decide on this issue[263]. Therefore, the Polish approach to the question of costs may be regarded as a possible response to the problem of financing.

The solution proposed by the Polish legislator is based on two main pillars. The first one concerns reduction of court fees for bringing a claim. The second pillar refers to a possibility to conclude contingency fees agreements in order to finance a court action.

The goal of the first solution is to provide a clear and straight-forward mechanism able to limit the costs of collective proceedings. By lowering the value of court fees for bringing collective action, the Law on collective redress significantly relaxes the financial threshold for initiating a group litigation. Such solution shall be positively assessed, and as the Polish practice shows, it may lead to the increase in number of collective claims brought to the courts. As M. Sieradzka states, the limitation of costs of the proceedings proposed by the Polish legislator led to great popularity of group litigation mechanism, especially in the first two years of its functioning (93 claims were brought in the period between 2010 and 2012)[264].

The second solution, very innovative in "civil law" countries, and mainly due to this reason widely criticised during the Polish discussion on collective redress, concerns the contingency fees agreements. While the Polish legal practice is still reluctant to this mechanism of financing[265], certain claims brought in Poland in the course of last 5 years proved the contingency fees to be an interesting method of financing of collective proceedings[266].

In view of the aforementioned we can claim, that the Polish approach to the question of costs and financing of collective redress constitutes an example of innovative solution in this area of legal practice. Undoubtedly, some elements are still missing in Polish law, e.g. legal aid for group claimants, third party insurance or litigation expenses insurance, and could be considered in further discussion on a potential reform of Law on collective redress. Moreover, the popularity of contingence fees is still limited, and the change in a cultural approach to this method of financing

263 See Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU), OJ L 201, 26.7.2013, pp. 60–65, pt. 13–16.

264 M. Sieradzka, *Dochodzenie roszczeń w postępowaniu grupowym…*, pp. 370–371.

265 M. Niedużak, M. Szwast, *Pozwy grupowe – doświadczenia po 4 latach…*, pp. 20–21.

266 See for example "*Sandomierz flood case"* led a large Polish legal firm (*Kos, Kubas & Gaertner*) and brought by victims of a flood against the State Treasury (precisely: against the Wojewoda of the Świętokrzyski district, as well as the Regional Director of Water Management in Kraków) and local authorities of the Świętokrzyski district responsible for the management and maintenance of water infrastructure in the district.

is required. However, the mere attempt of Polish legislator to lower the court fees and introduce a possibility of contingency fees, shall be positively evaluated and may be regarded as a positive impulse for the European discussion on group litigation in future.

3.2.3. Wide scope of parties covered by the collective actions

The third important advantage of Polish approach to collective redress concerns the wide group of persons covered by the group litigation mechanism. While in many jurisdictions the group proceedings are limited only to consumers, e.g. in France, the Law on collective redress opens a possibility for bringing collective claims also to enterprises and legal persons. Such solution shall be positively evaluated, especially in the context of competition law enforcement which often concerns business-to-business relationships and claims brought by enterprises injured by antitrust law infringements.

Another advantage concerning the personal scope of collective redress in Poland refers to the persons entitled to initiate and conduct collective proceedings (group's representatives). While in France, and in different European jurisdictions, the legitimacy to bring a collective claim is limited only to specialised bodies, e.g. consumers' associations, the Law on collective redress opens a possibility to initiate and conduct collective actions also to group's members and consumers' advocates. Such solution is the another example of modern approach to collective redress which aims to ensure greater efficiency of this mechanism of law enforcement.

Undoubtedly, as certain scholars argue, it may be still considered if some additional bodies should not be entitled to act as group's representatives. As their examples we can evoke ombudsman of insured persons, associations of entrepreneurs and specialised consumers' organisations. As it is argued, granting a mandate to bring collective action to such entities, would increase the efficiency of group litigation process and ensure its greater professionalism, respectively in insurance, competition and consumer cases. This question is still a subject of debate and may be considered as one of the possible ways of reform in the Polish approach to collective redress. Because, as it was already stated in the project of law on collective redress: *"if in practice it turns out that granting of such a right to social organisations proves to be justified, it will be possible to amend the project in order to enable social organisations to bring collective claims."*[267]

[267] Project of law on collective redress litigation [*Projekt ustawy o dochodzeniu roszczeń postępowaniu grupowym*], p. 16.

3.3. Limitations of Polish solution

While the Polish approach to collective redress showed that certain limitations of this mechanism can be effectively addressed (e.g. the problem of funding or limited scope of legal standing), it did not allow to answer all the difficulties of group litigation proceedings. It concerns in particular the issue of standardisation of claims, inefficiency of a guaranty deposit, duration of the proceedings, problems with a notification of victims of violations and limited role of ADR.

Most of the limitations described above were also recognised by the Polish Ministry of Economic Development. In its project of law aimed to amend various legal acts and facilitate the recovery of debts ("Project of law on better recovery of debts")[268], the Ministry proposed to modify specific provision of Law on collective redress. As it claimed in the justification to the Project of law on better recovery of debts submitted to the Polish Parliament on 28 December 2016, the goal was to increase the efficiency of group litigation mechanism by eliminating its main limitations[269]. It is important to underline, that while proposing specific solutions on collective redress the Ministry referred to the Commission's Recommendation on collective redress. As it held, the goal of each MS shall be to ensure fair, equitable, timely and not prohibitively expensive collective redress procedure in the national legal order[270].

Hence, the discussion on reform of Law on collective redress is still opened in Poland and all the proposals aimed to increase the efficiency of a group litigation mechanism shall be welcome.

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[268] See Project of law to amend different laws in order to facilitate recovery of debts [*Projekt ustawy o zmianie niektórych ustaw w celu ułatwienia dochodzenia wierzytelności*], available at: https://legislacja.rcl.gov.pl/docs//2/12287513/12366081/dokument265554.pdf. The project shall be subject of the works of the Polish Parliament in the course of 2017. As the art. 18 of the project foresees it shall enter into force on 1 June 2017 (apart from certain exceptions listed in the project). The project foresees changes to numerous legal acts, i.e. Civil Code, Code of Civil Procedure, Act of 17 June 1966 on enforcement proceedings in administration, Act of 9 April 2010 on giving access to business information and business data exchange, Act of 17 December 2004 on liability for breach of public finance discipline, Act of 27 August 2009 on public finance, Law on collective redress.

[269] As such the Ministry of Economic Development defined: limited material scope of collective redress mechanism; duration of group proceedings; difficulties with recovering monetary claims; interpretational problems concerning the judgment on responsibility; the risk of unjustified payment of guarantee by the claimant.

[270] See *Projekt ustawy o zmianie niektórych ustaw w celu ułatwienia dochodzenia wierzytelności*, p. 59.

3.3.1. Difficulties with the standardisation of claims

The first limitation of Polish mechanism of collective redress concerns difficulties with the standardisation of claims. The solution introduced to mitigate a problem of individual calculation of damages, showed in practice several important limitations. As many legal practitioners underline, the standardisation of claims is often very difficult task, requiring complex legal and economical knowledge from the group's representative. In consequence, the process of bringing collective claim for damages often becomes very burdensome experience. Therefore, while the existence of standardisation of claims shall be positively assessed, further reform is required in order to better adapt this instrument to the specificities of group proceedings. Such standpoint is also confirmed in the recent proposal of reform of the Ministry of Economic Development[271].

The first difficulty results from the fact that the Law on collective redress does not provide precise criterions which need to be taken into consideration while standardising the claims. The Art. 2(1) of the Law on collective redress provides only that in order to standardise the claims the "common circumstances of case" shall be considered. While the goal of such solution was to facilitate the process of standardisation of claims and grant greater flexibility to the court and the group claimant, the practice showed that the lack of precise criterions concerning standardisation of claims may become important obstacle in its performance[272]. As the advocate D. Gałkowski underlines: *"the lack of clear rules concerning standardisation of claims makes this institution important obstacle in formulating a claim and induces to use rather the claim for the assessment of liability provided in Art. 2(3)."*[273] The same reasoning is confirmed by the representatives of jurisprudence. As the judge W. Kuberska claims: *"the most difficult task is to agree within a group on the amount of standardised claim due to each member of a group."*[274] In practice, instead of simply reassembling the individual claims within different groups or sub-groups, the group's representative is required to prove the value of monetary claim of each single member of a group[275]. Moreover, it is required to conduct negotiations with group's members and convince

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271 See *Projekt ustawy o zmianie niektórych ustaw w celu ułatwienia dochodzenia wierzytelności*, p. 65.

272 M. Sieradzka, *Dochodzenie roszczeń w postępowaniu grupowym…*, p. 166.

273 See D. Gałkowski in: M. Niedużak, M. Szwast, *Pozwy grupowe – doświadczenia po 4 latach…*, pp. 13–14.

274 *Ibidem*, p. 14.

275 M. Rejdak, P. Pietkiewicz, *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym…*, pp. 73–74.

them for standardising their claims. It may be particularly difficult task, when the value of injury suffered by individual is actually higher than the amount of damages proposed within the standardised group or sub-group. As a result, in case of many monetary claims, the process of standardisation of claims becomes important obstacle, often leading to the rejection of claim by the court or a decision of the group's representative to claim only for a declaratory relief (judgment on responsibility).

The aforementioned difficulties with the standardisation of claims are confirmed by the practice of lawyers conducting group proceedings. As M. Tabalecka evokes in her report concerning collective redress in Poland: *"If a case involves class members with different levels of damages caused by the same or similar event, the requirement (aut.: standardisation of claims) is circumvented. Lawyers representing class members report that they advise them to limit the claim to declaratory relief only."*[276] As the example of such practice we can refer to *"Sandomierz flood case"*.

The second problem concerning standardisation of claims results from the courts' approach to this element of group proceedings. As it was argued before, each time when the claim has monetary character, the standardisation construes a pre-condition for bringing a case to the court. In case of failure to standardise the claim, the action is rejected and the group's members losses a possibility to bring an individual action (*res iudicata*). While the consequences of inappropriate standardisation of claims are crucial for the parties to the proceedings, this difficult task is additionally aggravated by the interpretation of Art. 2 of Law on collective by Polish courts. As its example we can provide a judgment of the Appellate Court in Cracow from 7 December 2011, where it was held: *"standardisation cannot only take a form of a uniform determination of value of claim for all members of a group at the basis of same or similar factual basis provided in the Art. 1(1) of the Law on collective redress […] The standardisation required by the legislator concerns not only the value of claims, but may be also the consequence of a similar type of the property damage or the commonality of facts, deciding on the similarity of suffered loss."*[277] Also the District Court in Warsaw in its judgment rendered in LINK4 case confirmed the very high standards imposed on group claimants during the process of standardisation. As it held: *"Even if we presume, using the classic formula of the Code of Civil Procedure, that the factual identity of claim occurs already when the group members are bound by the single event giving rise to damage, we cannot forget*

[276] M. Tabalecka, *Poland…*

[277] Judgment of the Appellate Court in Cracow of December 7, 2011, I ACz 1235/11.

about the second condition for bringing collective claim, i.e. standardisation of monetary claims, which in some way is related to the requirement of factual similarity of claims; but here the emphasis is on the inclusion of common circumstances of case. These elements, according to the Court, includes undoubtedly the damage and a causal link."[278]

In view of the above rulings we can claim, that according to the Polish jurisprudence, the process of standardisation may not be limited only to the formal connection of claims within a single group or several subgroups of claimants, but requires to assess material criterions connecting members of a group, such as type of suffered injury, scope of injury or a causal link between the violation and a harm. Such approach to the question of standardisation imposes additional burden on the group's representative which in many cases may be impossible to fulfil at the initial stage of proceedings.

The aforementioned analysis shows that the mechanism of standardisation of claims raises many theoretical, procedural and practical problems. Also the current case law confirms, that the process of standardisation may often construe an obstacle for the effective bringing of case. And while the *ratio legis* for introduction of a mechanism of standardisation of claims is not questioned, many scholars argue that changes need to be introduced, in order to properly adapt the analysed instrument to the needs of collective proceedings[279].

The first change could concern defining a notion of "common circumstances of case". As the current case law shows, due the lack of its clear legal definition, the legal uncertainty and incoherence of courts' jurisprudence occur. Providing the clear legal meaning of a notion of "common circumstances of case" would facilitate the process of standardisation of claims, and would make the group claims easier and faster.

The second possible change would refer to development of a coherent case law on standardisation of claims. As the aforementioned rulings show, the lack of clear legal rules on the standardisation of claims, combined with the flexibility offered to courts during the process of standardisation, may lead to imposition of additional burdens on claimants. Such outcome shall be negatively evaluated, since it runs counter to the initial objective of Polish legislator, which aimed to ensure simplicity of group proceedings, greater economy of justice and acceleration of court's actions. Therefore, in case of lack of legislative intervention in the area of Art. 2 of Law on collective redress, the clear and biding interpretation of the issue of

[278] Decision of District Court in Warsaw XVI Commercial Department of July 12, 2013, XVI GC 595/11, available at: http://orzeczenia.warszawa.so.gov.pl/content/$N/154505000004827_XVI_GC_000595_2011_Uz_2013-08-22_001 [access: 25.11.2015].

[279] M. Niedużak, M. Szwast, *Pozwy grupowe – doświadczenia po 4 latach…*, pp. 13–14.

standardisation would be required from the Polish Supreme Court. It could construe a guideline for the courts of lower instances and ensure a coherence of the courts' jurisprudence concerning the question of standardisation.

The last possible change, probably the simplest one, but in the same time most far-reaching, would concern the replacement of current criterion for standardisation, i.e. "common circumstances of case", by the criterion of value of individual claims. Such solution was proposed by the Ministry of Economic Development, which argued that it would de-formalise collective proceedings, accelerate the judicial action, avoid the interpretational problems already at the stage of assessment of claim, and in consequence, allow for greater efficiency of collective actions. By the limitation of burden imposed on claimant already at the initial stage of proceedings, the Ministry of Economic Development tries to ensure that access to justice will be broaden and more individuals will decide to bring a collective claim[280]. Such proposal shall be positively assessed, as one of the possible solutions to the problem of standardisation.

3.3.2. Inefficiency of guaranty deposit

As the second drawback of Polish mechanism of group litigation we can evoke limited efficiency of the guaranty deposit. The mechanism foreseen as a safeguard against abusive litigation, created many problems once applied in practice. Moreover, it led to incoherence in jurisprudence of Polish courts which often struggled to properly assess the criterions for application of a guaranty deposit. Therefore, as it will be argued underneath, the mechanism of guaranty deposit shall be removed, or at least better adapted to the needs of collective proceedings.

The first group of problems concerning the guaranty deposit refers to its negative influence on a national practice of law enforcement. As it was argued before, the guaranty deposit was introduced in order to protect the interests of a defendant, ensure greater stability of a judicial system and avoid the risk of massive and unfounded claims. While the attempt to achieve the aforementioned objectives seems to be justified, it may be questioned if a guaranty deposit is the best adapted solution.

As many scholars claim, the guaranty deposit runs counter to one of the core objectives of group litigation mechanism, i.e. limited costs of proceedings, and undermines the specific rules on financing of collective actions proposed

[280] See *Projekt ustawy o zmianie niektórych ustaw w celu ułatwienia dochodzenia wierzytelności*, pp. 65–67.

in Poland. While on the one hand, the Law on collective redress proposes financial incentives for bringing group actions (lower court fees, contingency fees agreements), on the other, it introduces important economic obstacle to collective actions (guaranty deposit). In the opinion of many scholars, such solution illustrates inconsistency in the approach to the question of costs and financing of group proceedings[281]. The innovative rules of Art. 5 and Art. 25 of Law on collective redress may be undermined, once combined with the obligation to pay a guaranty deposit by the group claimant. Just to give an example we can refer to the LINK4 case, where the value of guaranty deposit reached the amount of 1,664,554.08 PLN, causing important obstacle to bringing a claim. For that reasons, A. Kubas and R. Kos claim that: *„guaranty deposit may construe a barrier to bringing a claim by a group unable to pay such a deposit."*[282] P. Pietkiewicz goes even further and states that the guaranty deposit: *"construes an additional barrier in access to justice."*[283] Also the judge K. Sieheń confirms such standpoint and claims that: *"guaranty deposit obviously favours defendant in group proceedings and may construe an obstacle in access to justice."*[284] Therefore, the mechanism that aimed to protect the defendant and avoid the abuse, may in practice construe an obstacle to development of the effective mechanism of collective redress.

The second group of arguments speaking against the guaranty deposit refers to the procedural difficulties with its application. As the Polish practice shows, the ambiguity and imprecise character of the Art. 8 of the Law on collective redress, may lead to its negative influence on the efficiency of collective redress proceedings.

The first interpretational problem concerns the moment when a decision on a guaranty deposit shall be rendered. While according to the Art. 8 of Law on collective redress the demand for a guaranty deposit shall be made by a defendant at latest at the first procedural step, the aforementioned provision is silent as far as a time for rendering the court's decision is concerned. In practice, it leads to a situation when the courts prolong a time in which such a decision is rendered, till the moment when a group is finally formed[285]. Such approach of Polish courts to the issue of guaranty

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281 M. Niedużak, *Pozwy grupowe – po pierwszym roku funkcjonowania…*, p. 13.

282 A. Kubas, R. Kos, *Opinia w sprawie projektu ustawy o dochodzeniu roszczeń w postępowaniu grupowym…*, p. 6.

283 M. Rejdak, P. Pietkiewicz, *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym…*, p. 157.

284 See K. Sieheń in: M. Niedużak, M. Szwast, *Pozwy grupowe – doświadczenia po 4 latach…*, p. 15.

285 M. Niedużak, M. Szwast, *Pozwy grupowe – doświadczenia po 4 latach…*, pp. 14–15.

deposit has two negative consequences. It leads to the prolongation of group proceedings and creates an obstacle to the group formation. That is because, a person who undertakes a decision to join a group, does not possess the entire information on costs of group action at that time (the issue of guaranty deposit is pending until the group is finally formed).

The second interpretational problem of Polish courts dealing with the guaranty deposit refers to the criterions which shall be taken into consideration in order to render a decision on guaranty deposit. As it was mentioned before, the Art. 8 of Law on collective redress does not provide the criterions which the court shall apply in order to assess if a payment of guaranty deposit is justified or not. In the opinion of judge K. Sieheń, the Law on collective redress gives to the court the entire freedom to decide on the issue of guaranty deposit, and may run a particular risk to the claimant[286]. That is because, while a guaranty deposit constitutes only additional measure of protection for defendant, in case of a claimant, it may be a decisive factor for the final outcome of case. It results from the construction of Art. 8, which in its paragraph 5 foresees that in case of a non-payment of guaranty deposit in the prescribed period of time, the claim will be rejected and the claimant will lose a possibility to obtain compensation for the injury suffered. In the opinion of K. Sieheń, such a severe consequence of non-payment of guaranty deposit, puts the claimant in a worse procedural footing[287].

The third and final criticism of a guaranty deposit is based on the practice of Polish courts dealing with this legal instrument. As the analysis of Polish case law shows, in the great majority of cases the courts reject defendants' claims for a guaranty deposit[288]. It results mainly from difficulties with proving the legal interest to claim for a guaranty deposit, and problems with the interpretation of criterions for rendering a judgment on guaranty deposit. As a result, despite the introduction of such mechanism, its practical significance from a perspective of group litigation proceedings is very limited. While it can be claimed that such jurisprudence allows to limit the negative consequences of the guaranty deposit, such standpoint is not fully satisfactory. That is because, the mere existence of a possibility to claim for a guaranty deposit by a defendant, and a risk of paying high amount of money by a group plaintiff, may be the reason why in many cases injured individuals will refrain from undertaking a court action. As D. Gałkowski claims: *"the instrument of a guaranty deposit has undoubtedly important meaning for the members*

286 *Ibidem*, p. 15.
287 *Ibidem*, p. 15.
288 M. Sieradzka, *Dochodzenie roszczeń w postępowaniu grupowym…*, p. 264.

of a group from the beginning of group's formation […] the indication that the guaranty deposit shall not exceed 20% of the value of the subject matter of a dispute has strong psychological effect on persons who consider joining a group in a case involving high value of the subject matter of a dispute."[289] In such scenarios, the mere existence of a risk to pay a guaranty deposit, may negatively influence a decision-making process of injured individuals, and make them refrain from bringing collective action.

The aforementioned difficulties concerning the mechanism of guaranty deposit shows the very problematic character of this legal institution. The introduction of guaranty deposit into the Polish law, once combined with a lack of clear legislative solutions on this issue, have led to discrepancies in courts' jurisprudence, limited legal transparency, prolongation of court proceedings and disequilibrium in the procedural position of defendants and group claimants. Just to give an example we can refer to the LINK4 case, where two contradictory rulings on a guaranty deposit were rendered, and it took almost half a year before the final decision on a guaranty deposit was issued by the court.

In view of the aforementioned it can be argued, that the provisions on guaranty deposit shall be removed from the Polish mechanism of collective redress, or at least better adapted to the specificities and goals of group proceedings. As the way of its possible reform we can evoke: specifying the conditions for ordering a guaranty deposit by the court, limiting the time in which a decision on guaranty deposit has to be rendered by the court, limiting the amount of money which may be claimed as a guaranty deposit.

The need of change in this area was also recognised by the Ministry of Economic Development. While it did not decide to entirely remove the guaranty deposit from the Law on collective redress, it proposed solutions which shall be positively assessed. Among them we can evoke:

- determining conditions for ordering a guaranty deposit[290];
- specifying time when request for a guaranty deposit shall be recognised[291];
- limiting the negative consequences of failure to bringing a guaranty deposit[292];

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289 See D. Gałkowski in: M. Niedużak, M. Szwast, *Pozwy grupowe – doświadczenia po 4 latach…*, p. 16.

290 See *Projekt ustawy o zmianie niektórych ustaw w celu ułatwienia dochodzenia wierzytelności*, pp. 82–84, according to which the guaranty deposit shall be ordered if a claim is unjustified and in case of absence of guaranty it would be difficult to recover costs of proceedings.

291 *Ibidem*, pp. 84–85, according to which the request shall be recognised once the group was formed and the value of claim is determined.

292 *Ibidem*, pp. 85–86, according to which prior to rejecting a claim due to the failure to pay a guaranty deposit, the group proceedings shall be stayed and the additional,

3.3.2. Duration of the proceedings and a mechanism of notification

The third drawback of Polish mechanism of group litigation concerns the duration of collective proceedings. The empirical analysis of group actions brought before Polish courts in the period 2010–2016 shows that in many cases, it takes months or even years before a final decision is rendered. The long duration of group proceedings is one of the factors limiting the efficiency of collective actions, because as it is often held, the justice in order to be efficient has to be fast.

Several factors lead to the prolongation of group proceedings, and show what changes could be introduced in order to ensure more effective conduct of judicial process.

The first factor leading to the prolongation of collective proceedings concerns a possibility to claim for a guaranty deposit. As different cases show, bringing such claim by the defendant may lead to the prolongation of case for several months. It results from a fact that the claim for guaranty deposit requires a court to assess the existence of a legal interest for bringing a claim, provide a time limit to pay the deposit or deal with the eventual complaint on a decision on guaranty deposit. As the LINK4 case shows, such process may last for several months, leading to the important prolongation of collective proceedings already at its initial stage.

The second factor leading to the prolongation of collective proceedings is the long time devoted by the court for the analysis of incidental complaints. As the practice shows, multiple complaints are brought by the defendants at the initial stage of a lawsuit, e.g. complaint on a court's decision on a guaranty deposit (Art. 8(6) of Law on collective redress), complaint on a certification of claim and its recognition in group proceedings (Art. 10(2) of Law on collective redress). The outcome of such claims is often the prolongation of time, before the decision on the admissibility of claim is rendered by the court. Such situation may run negative consequences not only for the whole judicial system (lower economy of justice), but also for the potential victims of the infringement. That is because, by the time they are informed on a group action and undertake a decision to join the group, the limitation period for bringing their claim may already expire.

The third factor leading to the prolongation of group proceedings refers to the formation of a group. It concerns in particular the current rules on publication of information on a possibility to join the group. According to the Art. 11 of Law on collective redress, once a decision on the recognition

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3-months period of time shall be given to the claimant in order to fulfil its obligation to pay a guaranty deposit.

of case in group proceedings is rendered, the group's representative has to inform the potential victims of violation on a possibility to join a group. In the opinion of many scholars, the solution proposed by the Polish legislator is inefficient.

It is argued that the publication of information on group action only prolongs the proceedings and does not lead to important increase in the number of victims joining a group[293]. Moreover, it is claimed that such solution transfers important burden on group's representative, and increases the costs of legal action. As M. Rothert, the Warsaw consumers' advocate responsible for bringing BRE Bank case has claimed: *"the costs of publication of information at the first page of most popular nationwide newspaper equals several dozen of thousands zlotys."*[294] Finally, the proposed method of notification, i.e. publication in the nationwide newspaper, is regarded as long, inefficient, and not adapted to current social environment.

As possible solutions to the aforementioned limitations two mechanisms are proposed. First, concerns the absolute removal of a notification process. Second, refers to the introduction of an on-line notification.

While the later solution seems to be too far-reaching and hard to imagine in the Polish opt-in scenario, the former is worth considering. The possibility of on-line notification, by the mean of publication on the Internet website or through the social medias, would have a potential to accelerate the proceedings (shorter time for a publication than in a nationwide newspaper), limit its costs, and would be better adapted to the current social environment, strongly dependent on the Internet and the electronic means of communication.

The last factor leading to the prolongation of group proceedings steams from the mere construction of a group claim. The multitude of injured individuals and the complexity of claim strongly influence the duration of the last stage of proceedings, i.e. hearing of case. While at the previous stages, limited to the defendant and the group's representative, the problem of big number of parties covered by a claim did not occur, at the stage of material assessment of case, it may have negative influence on the duration of a judicial process.

In order to accelerate the last stage of the proceedings, the innovative mechanism of Civil Procedure shall be more commonly used. As such we can evoke wider use of video-conferences or on-line hearings. The goal

[293] M. Niedużak, M. Szwast, *Pozwy grupowe – doświadczenia po 4 latach…*, pp. 16–17.
[294] *Ibidem*, p. 16.

shall be to shorten the proceedings, but in the same time, to preserve a right to defence and a right to be heard for all members of the action.

As the aforementioned analysis shows, the long duration of group proceedings may be important obstacle for the effective functioning of a group litigation mechanism. As the current Polish practice shows, existing solutions are not satisfactory and may often lead to prolongation of court proceedings. Just to give an example we can refer to the BRE Bank case, where it took 40 months before a final judgment was rendered by the court.

The above difficulty was also recognised by the Ministry of Economic Development. As possible solutions to the problem of long duration of collective proceedings it evoked:

- the possibility to decide on admissibility of claim on a closed door hearing[295];
- the limitation of incidental complaints which may be brought by the parties[296];
- the final character of appellate court's ruling on the admissibility of group claim[297];
- the exclusion of a possibility to analyse the admissibility of group claim at further stages of proceedings[298];
- the introduction of a rule according to which a claim brought against the court's ruling on a group formation shall not prohibit the court of 1st instance from recognising the case[299].

Additionally, the Ministry of Economic Development recognised a need to reform the notification process. It proposed the following solutions on this issue[300]:

- empowering the court with a possibility to choose a notification method best adapted to the needs of a particular case;
- introduction of an on-line notification (e.g. on the court's website, on the website of a claimant or his representative);
- establishing public register on group litigation proceedings held by the Ministry of Justice.

While the proposed reform of art. 11 of Law on collective redress (notification process) corresponds well to the needs of group claimants,

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295 See *Projekt ustawy o zmianie niektórych ustaw w celu ułatwienia dochodzenia wierzytelności*, pp. 72–75.
296 *Ibidem*, pp. 75–77.
297 *Ibidem*, pp. 77–79.
298 *Ibidem*, pp. 79–80.
299 *Ibidem*, pp. 80–82.
300 *Ibidem*, pp. 87–89.

and if introduced in Poland may bring several benefits to individuals injured by competition law infringements, the procedural reforms proposed by the Ministry of Economic Development seem to provide only limited response to the difficulties mentioned previously. In the opinion of the author, more far-reaching steps shall be undertaken in order to establish not only widely accessible and cost-efficient mechanism of group litigation, but also to ensure its time-efficiency. It should concern in particular a limitation of time devoted for dealing with incidental complaints and broader use of innovative mechanism of Civil Procedure, video-conferences or on-line hearings.

3.3.2. Limited role of ADR

The last drawback of Polish mechanism of collective redress concerns the low significance of ADR. As it was mentioned before, the Art. 7 of Law on collective redress allows the court to refer the parties to the mediation at any stage of the proceedings. Moreover, as it was also explained, according to the general provisions of Code of Civil Procedure, parties may undertake a decision to settle their dispute out-of-court. While the existence of such solutions shall be positively assessed, their empirical assessment in case of group litigation is rather disappointing. Only in a limited number of cases the parties decided to refer their dispute to ADR. Moreover, as the analysed cases confirm, even if referred by the court to mediation, the parties did not manage to reach the agreement[301]. The reasons for such an outcome are two-folded.

First, it is a consequence of legal construction of mediation proposed by the authors of reform. While the Art. 7 of Law on collective redress introduced a possibility to refer the parties to mediation, it did not provide any specific rules concerning the organisation and conduct of out-of-court proceedings. Undoubtedly, in such a case it is possible to apply general rules of Code of Civil Procedure, however they do not seem to be best adapted to the mediation involving numerous victims.

Secondly, the legislator did not create effective incentives to refer to mediation. As such, certain authors evoke rules on discovery of evidence in judicial proceedings[302]. As the American example confirms, the existence of a disclosure mechanism in court proceedings, may encourage parties to settle the case, avoid long and complex court proceedings, and thanks to the confidential character of mediation, protect the best name of the firm. As

[301] See for example LINK4 case.

[302] M. Niedużak, *Pozwy grupowe po pierwszym roku funkcjonowania…*, pp. 10–12.

the sole incentive for mediation provided in the Law on collective redress we shall consider judgment on responsibility. Rendering such ruling by a court may encourage parties to settle a case and avoid long and complex judicial proceedings.

Finally, the mediation mechanism struggles to gain importance in Poland due to the cultural reasons. As judge W. Kuberska claims: *"mediation is not the best form of settlement in Polish society."*[303] It is often a consequence of low social knowledge on the mediation process, unfamiliarity with this method of disputes settlement, and the uncertainty if a settlement obtained within the mediation proceedings will be fully respected. The example of such approach to the mediation mechanism stems from the BRE Bank case. According to the group's representative, once asked about referring a case to mediation, the group members decided not do so, because of being afraid of violation of their rights and prolongation of dispute. As a result, 95% of group members rejected consensual method of dispute settlement and argued in favour of court proceedings[304].

The aforementioned experience with the mediation in Poland leads us to the conclusion, that in order to increase its efficiency and respond in a positive manner to the expectations of the EU institutions, wide legal and social changes are required.

As the example of legal changes we can evoke introduction of specific rules on the mediation in the Law on collective redress and establishment of a group mediation mechanism. Disappointingly, the Ministry of Economic Development did not propose any solutions on this issue, in its recent proposal to amend the Law on collective redress.

Concerning the social changes greater advocacy would be required. Its goal shall be to increase the social knowledge on the mediation and encourage parties to take advantage of shorter and less expensive methods of dispute settlement. Recently, such attempt was undertaken in Poland. The Polish Ministry of Economy launched a national campaign aiming to promote alternative methods of dispute settlement. It was conducted in media between August 2015 and September 2015 under the title: *"Resolve the disputes with force. Force of mediation"*[305]. While it is too early to evaluate

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[303] See W. Kuberska in: M. Niedużak, M. Szwast, *Pozwy grupowe – doświadczenia po 4 latach…*, p. 22.

[304] *Ibidem*, pp. 22–23.

[305] The campaign results from statistics which show that the most common method of disputes settlements among Polish entrepreneurs are direct negotiations (40,6%) and legal lawsuits (39,9%), while the disputes are not often settled by the use of mediation (12,2%) or arbitrage (7,3%), see statistics available at: http://www.wirtualnemedia.pl/

its results, the sole fact of its commencement, as well as the wide scope of action (advertisements were published in press, television and on the Internet), shall be positively assessed.

Among other limitations of group litigation mechanism, recognised by the Ministry of Economic Development, we may evoke a limited material scope of collective redress mechanism and ambiguous character of provisions on judgment on responsibility. In order to address these difficulties the Ministry of Economic Development proposed to broaden the material scope of group litigation mechanism (according to its recent proposal it shall cover also the claims resulting from the non-performance or undue performance of an obligation, unjust enrichment and certain infringements of personality rights)[306] and provide greater clarity as far as the provisions on judgment on responsibility is concerned (it concerns in particular the elements of claimant's request for a judgment on responsibility and scope of court's ruling)[307].

4. Polish solution on collective redress – a model for the EU?

As the aforementioned analysis shows, despite the short experience in the collective disputes settlement, the Polish legislator was able to establish modern and innovative mechanism of group litigation. Undoubtedly, its practical application is still far from desirable, and further reforms are required in order to improve its efficiency, however numerous solutions proposed in the Law on collective redress could be used as the model examples for the European legislator. As such we can evoke the provisions on certification of collective claims, formation of a group, financing of collective actions or resolution of collective disputes.

In the same time, the Polish experience shows that lack of greater precision in the formulation of group litigation mechanism, and fear of introduction of more innovative solutions in the area of collective redress, may squander the efficiency of group proceedings and preserve the individuals' reluctance to refer to this method of law enforcement. For this reason, the Polish experience concerning the standardisation of claims, notification of victims of violation, conduct of court proceedings and the

artykul/spory-rozwiazuj-sila-sila-mediacji-w-rzadowej-kampanii-do-przedsiebiorcow-wideo# [access: 08.11.2015].

306 See *Projekt ustawy o zmianie niektórych ustaw w celu ułatwienia dochodzenia wierzytelności*, pp. 60–65.

307 *Ibidem*, pp. 67–72.

use of ADR, could be used as a call for further reforms and improvements in the area of collective redress.

In view of the above, we may claim that Polish practice of group litigation gives good basis for further works on collective redress in the EU. If properly assessed, it may construe important added value to the European discussion on group litigation and another example of modern approach to collective redress. Moreover, specific solutions proposed by the Polish legislator may be used as guidelines for the European Commission, and construe bottom-up initiatives in the European proposal on collective redress.

Conclusion Chapter 2

As the analysis of French and Polish approach to collective redress shows, none of the above legal systems construe full and effective response to the needs of individuals injured by competition law infringements.

Once the French mechanism of group litigation is concerned, the limited efficiency of collective redress results from:

- limited legitimacy to bring collective actions;
- exclusion of business undertakings from the scope of application of group litigation mechanism;
- prohibition of stand-alone collective actions in case of competition law infringements;
- lack of specific legal proposals on such issues as financing of collective actions, access to proofs of violations or participation of lawyers in the proceedings.

Due to the above construction, France risks to maintain a mechanism having no practical significance from the perspective of private enforcement of antitrust law. Moreover, it risks to preserve a solution which departs from the EU proposal on collective redress, and runs counter to the general objective of group litigation, i.e. more efficient enforcement of law in multiple-victims scenarios.

On the other hand, the Polish approach to collective redress may be regarded, at the first sight, as more innovative and efficient mechanism of group litigation. It is a consequence of specific solutions introduced by the Polish legislator which construe important step forward in the protection of individuals against competition law infringements. As such we can evoke the provisions on:

- certification of collective claims (strong judicial control of a certification process);
- formation of a group (broad legal standing);
- financing of collective actions (reduced costs of collective claims and contingency fees);
- resolution of collective disputes (possibility of rendering a judgment on responsibility).

Nevertheless, while the above solutions may be positively assessed, the evaluation of a whole system of group litigation in Poland from a 6-year perspective is less positive. As the Polish experience with the group litigation shows, due to the lack of greater precision in the formulation of group litigation mechanism (e.g. standardisation of claims or the issue of guaranty deposit), long duration of court proceedings, and fear of introduction of more innovative solutions in the area of collective redress (e.g. ADR), the individuals are still reluctant to refer to this method of law enforcement. Moreover, they are often faced with important procedural burdens (e.g. standardisation of claims), what significantly limits their access to justice.

When we compare the above national approaches to group litigation with the Commission's Recommendation on collective redress we may also observe that they differ as far as several crucial issues are concerned. As such we can evoke the question of legal standing, the scope of collective actions, the issue financing of collective claims or finally the organisation of group litigation. Therefore, despite the mutual relationship between a debate on group litigation conducted in the European Union, and changes introduced at the national level, the detailed analysis of legislative solutions adopted in France and Poland, does not allow us to claim that a coherent and uniform approach to collective redress was established in the EU. Undoubtedly, such conclusion may not be generalised to all MS, since many national jurisdictions were left outside of the scope of conducted analysis. However, as it will be argued in the last Chapter of thesis, despite development of the European debate on private enforcement and collective redress, in none of the European countries the fully effective mechanism of group litigation able to complement the hybrid model of competition law enforcement was not established in the course of last decade.

Therefore, the conducted analysis allows us to confirm the fifth scientific hypothesis, and claim that the national solutions on group litigation do not ensure effective protection of individuals against competition law infringements. In such a case, further changes are required in order to ensure full protection of individuals against antitrust law violations in the European Union. Moreover, they are necessary in order to avoid a risk of

unequal protection of EU citizens against competition law infringements, resulting from the incoherent approach to collective redress within the EU.

As the possible way of changes the author evokes an adoption of a binding and uniform approach to collective redress at the EU level. On the one hand, it would mitigate a problem of divergent national approaches to collective redress, and on the other, if properly adapted to the needs of private enforcement of antitrust law, it would fill the gap in the European scenario of competition law enforcement.

Chapter 3

The European Way Towards Common Approach to Collective Redress – How to Achieve the Goal?

The analysis conducted in previous Chapters clearly shows that the currently existing system of group litigation in Europe, based on the Commission's Recommendation on collective redress and different national approaches to group litigation, does not construe an effective mechanism of private enforcement in the area of antitrust law. It is confirmed by the empirical data on private enforcement of antitrust law which shows that despite increase in the number of private actions in case of competition law infringements, they have mostly individual character, and numerous parties are left without protection[1]. In many cases, due to the procedural constraints or lack of effective mechanism of law enforcement, the individuals are unable to obtain compensation once suffering the antitrust injury. While the recent steps undertaken by the Commission in the area of antitrust private enforcement (publication of "private enforcement package") aimed to resolve the aforementioned problems, the analysis of its nature and specific elements, forces us to state that the final response to the problem of limited efficiency of private enforcement of antitrust law is still missing in Europe.

First, it is a consequence of a limited scope of the Damages Directive and a character of solutions proposed by the European legislator. Secondly, it results from the exclusion of issue of group litigation from the Damages Directive. Finally, it is a consequence of failure of the Commission to propose binding and innovative instrument of collective redress for all Member States.

Therefore, as E. Silvestri claims: *"the approach taken by the Commission is still tentative, and the prospect of a coherent European approach to collective redress, envisioned by the European Parliament, is not likely to bring about*

[1] See in details Part I Chapter 2 Point II.

a harmonized and uniform model of European group actions any time soon."[2] C. Hodges goes even further in his assessment of recent steps undertaken by the Commission in the area of collective redress, and considers it rather as a damp squib than the real breakthrough in the area of collective redress in Europe[3].

In view of the above we can state, that the European discussion on group litigation and private enforcement of antitrust law is still far from being finished, and the next years will probably bring reassessment of current policy at the European and national level. The doors for such discussion seems also to be opened by the Commission itself, which in the Point 41 of the Recommendation on collective redress stated: *"The Commission should assess the implementation of the Recommendation on the basis of practical experience by 26 July 2017 at the latest. In this context, the Commission should in particular evaluate its impact on access to justice, on the right to obtain compensation, on the need to prevent abusive litigation and on the functioning of the single market, on SMEs, the competitiveness of the economy of the European Union and consumer trust. The Commission should assess also whether further measures to consolidate and strengthen the horizontal approach reflected in the Recommendation should be proposed."* Such wording of the Recommendation, analysed together with its legal character (non-binding solution) and the current experience of MS with the application of group litigation mechanisms, confirms that further changes may be expected in the EU, and that a question of collective redress will be put once again at the table of European negotiations.

In view of the above, the last Chapter of thesis will aim to determine what direction shall be chosen by the European legislator in order to establish effective mechanism of collective redress, and ensure its usefulness for the private enfacement of antitrust law. The last Chapter will consist of specific *de lege ferenda* proposals, which may be taken into consideration while discussing a model solution on collective redress. The proposals will be based on the results of analysis conducted within the thesis, the European experience in private enforcement of antitrust law, as well as the national practice in the application of collective redress. Their main objective will be to find a balance between public and private enforcement of antitrust law (hybrid model), without limiting in the same time the efficiency of collective redress mechanism in the enforcement of competition law provisions.

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2 E. Silvestri, *Towards a common framework of collective redress in Europe? An update on the latest initiatives of the European Commission,* Russian Law Journal(46), 2013, p. 47.

3 C. Hodges, *Collective Redress: A Breakthrough or a Damp Sqibb?…*, pp. 67–89.

I. European directive on collective redress – a step towards harmonisation

1. Directive as a solution for existing differences

The first question that needs to be resolved concerns a form of the legal instrument which shall be adopted within the European Union in order to ensure establishment of the effective mechanism of collective redress. That is because, as the current experience shows, the efficiency of introduced solution depends not only on its content, but also on its legal character (binding or non-binding).

1.1. Limitations of current approach to collective redress

Referring to the current debate on group litigation in the EU we may come to the conclusion that by issuing Recommendation on collective redress the Commission tried to propose a solution acceptable by all MS. Nevertheless, while the chosen legislative method, i.e. non-binding soft law instrument, guarantees greater flexibility to MS and creates chances for a wide political consensus, its efficiency from the perspective of a group litigation and private enforcement is rather questionable. As A. Andreangeli rightly claims: *"relying on a "soft" instrument has an important weakness, namely the uncertainty surrounding the timescale of its implementation as well as the content that domestic measures adopted to this end are likely to have."*[4]

The aforementioned standpoint seems to be confirmed by the assessment of Recommendation on collective redress from a 3-years perspective. As it shows, despite being encouraged to introduce group litigation procedure, none of the MS have recently decided to establish a mechanism in the form proposed by the Commission. Moreover, all of the countries which already possessed a group litigation mechanism at the moment when the Recommendation was published, did not decide to adapt its systems to the proposal of the Commission. In consequence, as M. Shelley states in his analysis of European regimes of collective redress: *"at least 14 of the 28 Member States have a form of class action that conforms to some or all of the Recommendation: Belgium, Bulgaria, Cyprus, Denmark, Finland, France, Italy, Lithuania, Malta, Poland, Portugal, Spain, Sweden, and the*

[4] A. Andreangeli, *Private Enforcement of Antitrust. Regulating Corporate Behaviour through Collective Claims in the EU and US*, Edward Elgar 2014, p. 360.

Netherlands."[5] Other countries still do not possess collective procedure, or have it in the form that diverges from the Commission's proposal (Austria, Germany, United Kingdom)[6]. As a result, the complex legal patchwork of national solutions still reigns in the area of group litigation, running a risk of unequal protection of EU citizens against law infringements, and inefficiency of private enforcement in the area of European and national antitrust law. Therefore, despite the long debate on collective redress in the EU, the words of the Commission expressed in Public consultation on collective redress which held that every national system of collective redress is unique and there are no two national mechanisms that are alike in this area[7], seem to be still actual.

Such an outcome shall be negatively assessed. As it will be argued in the following points, more decisive steps are necessary in order to achieve the main goals of the Commission in the area of collective redress, i.e. establish a coherent system group litigation in the EU and increase the individuals' access to justice. As the solution best adapted for the fulfilment of these objectives, the thesis proposes introduction of a legally binding instrument in the form of directive.

1.2. Advantages of a directive

Among the main advantages of a directive we shall firstly evoke a potential to remove differences among national approaches to collective redress.

As it was already argued, and as the analysis of national systems of group litigation confirms, despite the existence of mechanisms of collective redress in the majority of MS, their schemes often differ with respect to many fundamental issues. Taking into consideration Polish and French example, we can easily state that these two approaches differ as far as the scope of application, right of legal standing or methods of financing are concerned. In consequence, individuals are faced with a complex legal patchwork of solutions which are applied by some Member States but not by others. It often results in a forum shopping, where the plaintiffs try to use different jurisdictions in order to pursue their claims. It also provokes a significant

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5 M. Shelley, *Towards a Uniform European Approach to Collective Redress?*, Newsletter of the Consumer Litigation Committee, International Bar Association Legal Practice Division, May 2015, p. 9.

6 *Ibidem*, p. 9.

7 EC Public consultation, *Towards a Coherent European Approach…*, p. 9.

risk of inconsistent or varying determinations in different jurisdictions, and a lack of legal transparency.

The directive, allowing to harmonise national approaches to collective redress, has a potential to mitigate these problems. Thanks to the binding nature, it enables to ensure that a common and uniform solution would be introduced in all MS. Such advantage of a directive seems also to be recognised by the majority of participants of Public consultation on collective redress, who with a view of ensuring legal uniformity across the EU, and providing a high standard of individuals' protection, argued in favour a legally binding solution[8].

The second advantage of a directive concerns a possibility to resolve a problem of limited legal transparency and low foreseeability of judicial process. That is because, thanks to the implementation of a directive in all MS, the common set of rules would be applicable to all violations of EU law, despite the place where the event giving rise to damage occurred or the injury was suffered. The importance of such an outcome would be especially crucial in the area of competition law, where the violations often cover numerous individuals coming from different states. Due to the possibility of referring to similar collective redress procedure in all MS, greater transparency would be achieved, and the individuals' access to justice would be significantly increased.

Thirdly, thanks to the introduction of the same or similar collective redress procedure in all MS, the equal level of protection of individuals within the whole EU would be ensured. Such an outcome would allow not only to remove the national incoherences in the application of antitrust law, but would also ensure that a risk of forum shopping, often burdensome to the internal market, could be eliminated. It would prevent situations in which the undertakings, in order to avoid effective antirust enforcement, would move the source of their unlawful practice to another country, where the collective redress does not exist or is less efficient.

Finally, thanks to the adoption of a directive, the common standards of civil procedure and legal assessment would be used in all MS. It would allow for greater cooperation between national judges, inter-state judicial aid and better resolution of cross-border disputes.

As the above analysis shows, the directive on collective redress could bring several benefits to the individuals, law enforcers, national legal systems and

[8] See Evaluation of contributions to the public consultation and hearing: "Towards a Coherent European Approach to Collective Redress", Study JUST/2010/JCIV/CT/0027/A4, pp. 7–8.

the internal market. Mainly due to these reasons, such instrument seems to be better adapted for the achievement of EU's goals in the area of collective redress, than the non-binding recommendation. Moreover, the directive, specifying only objective to be achieved, and leaving the MS a freedom to introduce specific solutions adapted to their national legal traditions, seems to better respect the rules of subsidiarity and proportionality than the regulation, which could be also considered as a possible binding approach to the question of collective redress in the EU. As it will be analysed in more details in Point 3 of this Chapter, due to the sensitivity of subject matter (civil procedure), principles of subsidiarity, proportionality and states' autonomy, as well due to the previous experience with development of common approach to collective redress in the EU, the preference shall be given to the directive. The regulation shall be considered as a step too far, and for that reason should fall outside the scope of a discussion on future changes in the area of group litigation in the EU.

2. The character of a directive – finding a balance between states' autonomy and a need of efficiency

The second issue which has to be addressed concerns a character of the proposed directive. As the possible solutions we can consider following options:

- Option 1: sector-specific directive setting minimum standards;
- Option 2: sector-specific directive setting maximum standards;
- Option 3: horizontal directive setting minimum standards;
- Option 4: horizontal directive setting maximum standards.

2.1. Horizontal versus specific approach

Concerning the first criterion, i.e. horizontal versus sector-specific approach, the thesis argues in favour of two alternative options.

First option, more innovative and better adapted to the needs of private enforcement of antitrust law, is the adoption of a sector-specific directive covering collective redress in the area of competition law.

Second option, more moderate and able to reach wider political consensus, concerns introduction of a horizontal directive consisting specific rules on collective actions in the area of antitrust law.

The first solution, i.e. sector-specific directive, would be able to ensure that the specificities of antitrust enforcement, e.g. access to evidence,

passing-on defence, calculation of damages or interaction between public and private enforcement, would be taken into consideration and adapted to the needs of collective proceedings. Moreover, it would allow to limit the difficulties of national courts dealing with antitrust collective actions, which once faced with the private claims in the area of competition law, often struggle to provide effective response to such issues as access to evidence or calculation of damages. Furthermore, it could mitigate several problems of individuals claiming for compensation in case of competition law infringements, and by providing specific rules on group formation or financing of claim, increase their access to justice. Finally, such solution could complement the Damages Directive, and in this way, construe a complex and coherent regime for private enforcement of antitrust law in the EU.

The need for a sector-specific approach was recognised during the Public consultation on collective redress. As it was stated by certain governments, *inter alia* Polish, and few sectoral regulators, sector-specific approach shall be chosen *"because each sector calls for different procedures, follows different rationales and is characterised by different specificities."*[9] Also the EU Parliament, once referring to the results of public consultation, stated that: *"any legally binding horizontal framework must cover the core aspects of obtaining damages collectively […] a limited number of rules relevant to consumer protection or competition law, dealing with matters such as the potential binding effect of decisions adopted by national competition authorities, could be laid down, for instance, in separate articles or chapters of the horizontal instrument itself or in separate legal instruments in parallel or subsequent to the adoption of the horizontal instrument."*[10]

Despite the aforementioned voices, the European Commission tried to propose a "one-size-fits-all" approach to collective redress. While such attempt may be regarded as very ambitious, it is not suitable to fulfil the goal of greater access to justice in case of competition law infringements[11].

First, it does not take into consideration specificities of competition law enforcement and difficulties which have to be addressed in this area of legal practice, e.g. fact-intensive nature of cases, low value of individual injury, strong asymmetry in the position of a claimant and a defendant, low access to proofs.

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9 See Evaluation of contributions to the public consultation and hearing: "Towards a Coherent European Approach to Collective Redress", Study JUST/2010/JCIV/CT/0027/A4, p. 17.

10 European Parliament resolution of 2 February 2012 on 'Towards a Coherent European Approach to Collective Redress', 2011/2089(INI), pt. 17.

11 A. Andreangeli, *Private Enforcement of Antitrust…*, p. 348.

Secondly, it lacks more innovative solutions, such as the opt-out mechanism or contingency fees, which as the previous analysis shows, need to be proposed in order to ensure greater efficiency of collective redress in the area of antitrust law.

Finally, it struggles to provide a right balance between public and private enforcement in the area of antitrust law. While the Commission addresses this issue in the Recommendation on collective redress, it seems to promote public enforcement and significantly limits significance of stand-alone group actions in the area of antitrust law.

In view of the above, the proposal included in the Recommendation shall be negatively assessed. It confirms that a universal solution, not adapted to the specificities of each sector of legal practice, may undermine the efficiency of a proposed legal mechanism. Therefore, in order to ensure greater efficiency of antitrust collective actions, the sector-specific directive covering collective redress in the area of competition law would be desirable.

The second option, being a compromise between the EU's policy in the area of collective redress and a need of greater efficiency of private enforcement of antitrust law, concerns introduction of a horizontal directive containing specific rules on antitrust collective actions. Such solution seems to be favoured by the majority of participants of Public consultation on collective redress, who while referring to the question concerning horizontal or specific approach *"voiced their support for a horizontal approach of general scope in the interest of consistency of legal treatment and in order to benefit a large number of sectors."*[12] As the analysis of responses given within the public consultation shows, in the opinion of majority of stakeholders: *"a sector-specific approach may result in fragmentation and is detrimental to the internal cohesion of the national systems of civil procedure as well as to general access to justice for EU citizens."*[13] This voice may not be neglected, and seems to find confirmation in the national legal practice of collective redress. The great majority of MS, with the notable exception of United Kingdom, have recently established horizontal mechanisms of group litigation in their national jurisdictions[14]. In such scenario, the chances for obtaining a political consensus, may be higher once a horizontal instrument is proposed.

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12 See Evaluation of contributions to the public consultation and hearing: "Towards a Coherent European Approach to Collective Redress", Study JUST/2010/JCIV/CT/0027/A4, p. 17.

13 *Ibidem*, p. 17.

14 A. Andreangeli, *Private Enforcement of Antitrust…*, p. 348.

Referring to the specific elements of a horizontal directive, covering different areas of legal practice, it would be required that once the antitrust collective actions are concerned, more flexible and innovative solutions are available to claimants and national courts. As the issues requiring particular attention, the question of organisation of collective proceedings, group formation, role of a court, access to evidence, relationship with public proceedings, calculation of damages or financing of claim may be evoked. The goal of EU legislator would be to adapt these issues to the specificities of competition law enforcement, and to refrain from introduction of a "one-size-fits-all" approach, able to undermine the efficiency of group ligation in the area of competition law.

In view of the above we can state, that while the sector-specific directive seems to be best adapted to the needs of private enforcement of antitrust law, the further development of EU approach to collective redress may not exclude horizontal directive in the area of group litigation. Nevertheless, in such a case, the directive shall be adapted to the specificities of antitrust law, in order to avoid gaps and uncertainties once the enforcement of competition law by the mean of collective redress is concerned.

2.2. Minimum versus maximum harmonisation

Referring now to the second criterion, i.e. minimum or maximum harmonisation, the preference shall be given to the minimum harmonisation. While the minimum harmonisation sets only the minimum standards and allows MS to introduce more far-reaching rules in their national jurisdictions, the maximum harmonisation leaves no freedom to MS and requires them to enact precise solution proposed in the directive.

The choice of minimum harmonisation would be justified by the current national experience in the application of collective redress, which shows that the group litigation mechanisms introduced in different jurisdictions diverge in certain crucial issues, such as scope of application, rules on group formation or methods of financing. Therefore, with a view of proposing solution acceptable by all MS, and in the same, in order not to undermine national achievements in the area of collective redress, certain flexibility shall be given to MS. While the directive setting minimum standards seems to fulfil the aforementioned objectives, the maximum harmonisation could create a risk that the proposed solution would not be well adapted to the particularities of each national legal order, and therefore, would have limited chances of success.

Referring to the advantages of such approach we can firstly point out on its potential to create the minimum level of coherence between Member States. It would set the minimum requirements and provide for a coherence of national systems once the most crucial elements of collective redress would be concerned. Additionally, the minimum harmonisation would respect the states' autonomy and give to MS a freedom to propose more innovative and far-reaching solutions, e.g. contingency fees or opt-out mechanism. It could also open a path for greater progress in the area of collective redress, and in the longer perspective, create chances for the bottom-up initiatives in this area of legal practice. Finally, once analysed from the perspective of EU law, the directive setting minimum standards would better comply with the principles of subsidiarity and proportionality, and would allow to fully respect the legal traditions of all MS. While the common standards would be set in the directive, the MS would still have a possibility to choose the most appropriate tools in order to adapt it to the national legal and procedural framework.

In view of the above reasoning, concerning the form of legal intervention in the area of collective redress, Option 1 or Option 3 shall be chosen by the European legislator. Nevertheless, once the Option 3 is chosen, the specific rules shall be proposed in the directive, in order to adapt the collective redress procedure to the needs, requirements and particularities of the competition law enforcement.

3. Legal basis for the EU intervention in the area of collective redress

The last issue that needs to be answered at this point refers to the legal basis for EU action in the area of collective redress. It is important not only due to the level of intervention (European), but also because of the character of proposed changes (rules on the civil procedure) which are strongly rooted in the states' autonomy and require careful approach from the European institutions.

The issue of legal basis for EU intervention in the area of collective redress was omitted by the European Commission for a long time. As A. Andreangeli rightly points out, while discussing the issue of collective redress the Commission *"remained silent on key general and "institutional" questions, namely which legal basis this plan for reform (aut.: introduction of collective redress in Europe) should be enacted upon and whether this proposal was consistent principles of subsidiarity and proportionality."*[15] This limitation

[15] A. Andreangeli, *Private Enforcement of Antitrust…*, p. 350.

of the Commission's approach to collective redress was also highlighted by the European Parliament which in its resolution from 2 February 2012 required Commission to: *"demonstrate in its impact assessment that, pursuant to the principle of subsidiarity, action is needed at EU level in order to improve the current EU regulatory framework so as to allow victims of infringements of EU law to be compensated for the damage they sustain and thus contribute to consumer confidence and smoother functioning of the internal market."*[16]

By adopting Recommendation on collective redress, the Commission finally omitted to give a clear answer to the aforementioned issue. Since the adopted document had a non-binding character, the Commission was not required to conduct an impact assessment report and determine the fulfilment of criterions of proportionality and subsidiarity. It has only provided a general statement that: *"Having regard to the Treaty on the Functioning of the European Union, and in particular Article 292 thereof, […] the aim of this Recommendation is to facilitate access to justice in relation to violations of rights under Union law and to that end to recommend that all Member States should have collective redress systems at national level that follow the same basic principles throughout the Union, taking into account the legal traditions of the Member States and safeguarding against abuse."*[17] While in a current situation such approach is satisfactory, and the MS are free to decide whether to adopt the provisions of Recommendation or not, further discussion on collective redress in the EU will need to undertake this issue, especially if the introduction of a directive on collective redress is going to be considered.

While analysing the EU primary law, the provisions of secondary legislation, and the changes introduced recently in the area of European law enforcement, we may come to the conclusion that depending on which approach is chosen, i.e. sector-specific approach or horizontal approach, the Art. 103 and 114 TFEU, or the Art. 81 and 114 TFEU, could respectively construe the basis for the EU intervention in the area of collective redress.

3.1. Art. 101 and 114 TFEU as the legal basis for a sector specific directive

In case of a sector-specific approach, i.e. directive on antitrust collective redress, the logic for the aforementioned legal basis may be justified by the recent legislative initiative undertaken by the Commission in the area

16 European Parliament resolution of 2 February 2012 on 'Towards a Coherent European Approach to Collective Redress', 2011/2089(INI), Recital M4.

17 Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU), OJ L 201, 26.7.2013, p. 60–65, pt. 10.

of competition law private enforcement, i.e. the Damages Directive. As it showed, the joint application of Art. 103 and 114 of the Treaty, may justify the EU action in the area of antitrust law, even if it concerns introduction of the procedural measures strongly influencing states' autonomy.

The first provision, i.e. Art. 103(1) TFEU, entitles the Council to adopt the directives or regulations in order to give effect to the principles set out in Art. 101 and 102 of the Treaty. According to the opinion of the Commission expressed in the Proposal for Damages Directive, Art. 103(1) TFEU constitutes a "straightforward" basis for the adoption of legal acts in the area of antitrust law, which goal is to give full effect to the provisions of Art. 101 and 102 of the Treaty[18]. While this logic seems to be appropriate once common provisions for competition law private enforcement are concerned, it also remains valid once the grounds for introduction of an antitrust collective redress mechanism are analysed. That is because, in the same manner as the Damages Directive, the goal of introduction of the uniform collective redress mechanism in the area of antitrust law would be to ensure greater access to justice, increase efficiency of private enforcement, and thus, ensure full effect to the principles set out in Art. 101 and 102 of the Treaty. As a result, the Art. 103(1) TFEU could be used as a justification for the EU intervention in the area of antirust collective redress.

The second provision, which was evoked as a legal basis for the introduction of the Damages Directive, and which could be also used in case of a sector-specific directive concerning group litigation in the area of competition law, is the Art. 114 TFEU. While proposing the Damages Directive the Commission referred to the Art. 114 TFEU, being in its opinion further justification for the EU intervention in the area of private enforcement. Because, as the Commission stated in a justification to the project of reform: *"Indeed, the aim of the proposed Directive is wider than giving effect to Articles 101 and 102 TFEU. The current divergence of national rules governing damages actions for infringements of the EU competition rules […] has created a markedly uneven playing field in the internal market."*[19] In consequence, in the opinion of the Commission, the goal of the Damages Directive should be not only to provide effective mechanism of private enforcement, but also to approximate national civil procedures, and create an equal level playing field for all market participants. Therefore, as the

[18] Proposal for a directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013) 404, 11.6.2013, pp. 8–9.

[19] *Ibidem*, p. 9.

Commission held, the reference to the so-called "internal market clause" (Art. 114 TFEU), was necessary in order to: *"ensure a more level playing field for undertakings operating in the internal market and to improve the conditions for injured parties to exercise the rights they derive from the internal market."*[20] In the opinion of the Commission, such combined judicial basis would ensure that two objectives of the Damages Directive i.e. full efficiency of antitrust law and approximation of national civil procedures, would be commonly achieved without a necessity of legal fragmentation[21].

The aforementioned logic should be appraised and may be successfully used once a collective redress directive in the area of antitrust law is going to be discussed. In the same manner as the Damages Directive, its objective would be two-folded. On the one hand, by increasing access to justice, reducing asymmetry between claimants and defendants, and enhancing efficiency of private enforcement, it would try to ensure the full efficiency of competition law provisions (Art. 103 TFEU). On the other, the objective of a directive would be to reduce inconsistency between national rules on group litigation, limit the risk of forum-shopping, provide equal level of protection of EU citizens against competition law infringements, and therefore, allow to remove uneven level playing field at the internal market (Art. 114 TFEU).

In view of the above, the introduction of a sector-specific directive in the area of antitrust collective redress could be justified by the joint application of the Art. 103 and 114 of the Treaty.

3.2. Art. 81 and 114 TFEU as the legal basis for horizontal directive

Referring now to the horizontal directive, covering different areas of legal practice, the logic would be slightly different. That is because, the Art. 103 TFEU would be no longer applicable, and the EU action could not be justified by a need of giving effect to the principles set out in the Art. 101 and 102 of the Treaty. Nevertheless, in case of a horizontal approach, the Art. 103 TFEU could be replaced by the Art. 81 TFEU, which was also used by the Commission as a possible ground for the justification of EU actions concerning "civil procedure instruments"[22].

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20 *Ibidem*, p. 8.

21 *Ibidem*, p. 10.

22 See for example Regulation (EC) of the European Parliament and the Council of 17 July 2007 establishing a European Small Claims procedure, [2007] L199/1 and Directive 2009/22/EC of the European Parliament and the Council of 23 April 2009 on injunctions for the protection of consumers' interests, [2009] OJ L110/30.

Art. 81 TFEU entitles the European Parliament and the Council to adopt measures intended to ensure the proper functioning of the internal market and aimed at ensuring, *inter alia*, effective access to justice and elimination of obstacles to the proper functioning of civil proceedings. In the opinion of certain scholars, such provision could be used in order to justify introduction of a directive on collective redress, having as its objective to increase access to justice and afford meaningful and easy-to-attain compensation for the victims of diffuse torts[23].

Additionally, the legal grounds justifying introduction of a horizontal directive could be reinforced by the joint application of Art. 114 TFEU. Since the horizontal directive on collective redress would also aim to reduce inconsistency between national rules on group litigation, reduce the risk of forum-shopping, provide equal level of protection for EU citizens against law infringements, and thus, remove uneven level playing field at the internal market, the Art. 114 TFEU could be used as the additional legal basis for the EU intervention in the area of collective redress. In the opinion of A. Andreangeli, it would *"avoid offering a "safe harbour" for tortfeasors in those jurisdictions that do not provide for similar remedies in their national laws and thereby ensure that the victims of torts with an impact on vast sections of society enjoy fuller access to justice."*[24]

In consequence, by the joint reference to the Art. 81 and Art. 114 of the Treaty, the EU could justify the introduction of a horizontal collective redress directive, aimed to provide a uniform procedure for the group actions brought within the EU.

3.3. Directive and the criterions of subsidiarity and proportionality

Referring at the end to the fulfilment of subsidiarity and proportionality criterions, it may be claimed that the EU intervention in the area of collective redress would be in line with both of the aforementioned principles.

Concerning the principle of subsidiarity, it shall be stated that the current experience with group litigation in the EU shows that MS struggle to ensure wider access to justice by the mean of collective redress. Moreover, each national system differs, and individuals wishing to initiate collective proceedings in case of cross-border disputes are often faced with a complex legal patchwork of national solutions. It is confirmed by the analysis of national approaches to group litigation, which in the opinion of the

23 A. Andreangeli, *Private Enforcement of Antitrust…*, pp. 356–357.

24 *Ibidem*, p. 356.

Commission expressed in Public consultation on collective redress, are unique and there are no two national mechanisms that are alike in this area[25]. Such situation exposes EU citizens to different levels of protection and limited efficiency of law enforcement. Moreover, it leads to inequality between Member States, as far as the level of judicial protection of rights granted by EU law is concerned, and may cause distortions to the proper functioning of the internal market. Finally, the above scenario does not seem to change after the introduction of Recommendation on collective redress, and individuals injured by competition law infringements are still faced with a complex legal patchwork of solutions, which are applied by some Member States but not by others. In such scenario, the EU action, allowing to provide a uniform standard of protection within all MS, and being able to minimise the risk of divergence, justifies that the EU would "do better" in achieving such objectives than the MS acting individually.

Referring to the principle of proportionality we may state that two factors justifies its fulfilment.

First, concerns the character of legal act. As it was argued before, the EU legislator shall rather argue in favour of a directive, being the "least intrusive" mechanism of harmonisation. By setting only a goal to be achieved by MS, the directive would ensure greater freedom of MS in choosing the means for its achievement. It would allow to adapt the new rules on collective redress to the substantive and procedural legal framework existing in each national jurisdiction. Moreover, the MS which already possess group litigation procedure, would be required to take a legislative action only if the existing solutions would not be sufficient to meet the obligations set in the directive. Whereas, the countries having more innovative solutions on collective redress, or wishing to go further in increasing individuals' access to justice, would remain free to do so (obviously, within the limits stipulated in the directive).

The second factor allowing for the fulfilment of proportionality criterion refers to the content of a directive. Here, a respect to the legal tradition of MS, their national civil procedures and already existing national solutions on collective redress would be taken into consideration. As the following analysis will argue, the goal of the directive, in order to ensure full respect to the proportionality criterion, shall be to propose solutions based on the current European and national experience with group litigation mechanism. Moreover, its goal shall be to ensure a balance between the two sides of

[25] EC Public consultation, *Towards a Coherent European Approach.*..., p. 9.

a "collective redress coin", i.e. greater efficiency of law enforcement and a risk of abuse.

In view of the above it may be held, that whether the EU legislator will argue in favour of a sector-specific or horizontal approach to the issue of collective redress, clear and convincing legal basis for the EU intervention may be found in the primary law. Moreover, by choosing a directive as a measure of harmonisation, the EU legislator will ensure that the principles of subsidiarity and proportionality will be fully respected. Therefore, the directive shall be chosen as a method for further legislative changes in the area of collective redress.

II. Main elements of the proposed solution – effective mechanism for the enforcement of antitrust law

As it was underlined in the course of this thesis, the effective enforcement of antitrust law requires introduction of innovative solutions, able to encourage individuals to execute their rights in court, and limit legal, procedural and economic constraints in initiating private actions. In the same time, such solutions shall ensure that the excess will be avoided, and the abusive litigation will not lead to detrimental consequences for the European enterprises and the internal market. Using more illustrative comparison to describe required approach to the issue of group litigation, we could refer to a scale on which two different interests need to balanced. In such scenario, the main objective of European or national legislator, dealing with a group litigation mechanism, is to find a proper balance, and ensure that neither a need of greater efficiency, nor a fear of abuse, will prevail, leading to negative consequences on the functioning of collective redress instrument.

Once we analyse the aforementioned process of balancing, conducted recently by the European Commission, we may come to the conclusion that the "pendulum of group litigation scale" was swung by the Commission to the side of protection against the abuse. By the introduction of numerous safeguards against the abusive litigation, the Commission inherently limited the viability of group litigation mechanism.

In the opinion of certain scholars, such outcome was a result of political compromise. As C. Hodges states: *"the decision was that we say we want collective actions, but we do not want them that much."*[26] And as he further

[26] C. Hodges, *Collective Redress: A Breakthrough or a Damp Sqibb?…*, p. 83.

adds: *"If one wishes to avoid abuse, safeguards are necessary, but they act as barriers, slow things down and increase costs. The extent to which a polity and legal system adopts a particular package of individual regulatory features is a political decision based on the perception of what society wishes by way of achieving a balanced position."*[27]

Other authors claim that the final outcome of Commission's proposal on collective redress was a result of inherent conflict between the need of greater efficiency of collective redress and a fear of American-style litigation culture. As B. Wardgaugh states: *"The European desire to ensure that bearers of EU rights are adequately compensated for any infringement of these rights, particularly in cases where the harm is widely diffused, and perhaps not even noticed by those affected by it, collides with another desire: to avoid the perceived excesses of an American-style system of class actions. The excesses of these American class actions are in European discourse presented as a sort of bogeyman, which is a source of irrational fear, often presented by parental or other authority figures."*[28]

Despite what has laid the grounds for the Commission's preservative approach towards the group litigation mechanism, the outcome remains unsatisfactory. The European citizens are still deprived of the common EU approach to group litigation, and mass injuries, being a consequence of competition law infringements, have limited chances of being effectively redressed.

Having the aforementioned in mind, the following points will aim to propose solutions able to overcome limited efficiency of group litigation mechanism in the EU. Once introduced in the form of EU directive on collective redress, they will be able to promote wider use of collective actions, without a need of creating imbalance between injured individuals and accused undertakings. Undoubtedly, the adoption of these solutions will require wide political consensus, and the reassessment of current EU policy in the area of collective redress. However, as the current experience shows, without more decisive steps in this area of legal practice, the ultimate goals of group litigation and private enforcement, i.e. wider access to justice and increased efficiency of the enforcement process, may not be fully achieved.

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27 *Ibidem*, p. 83.

28 B. Wardhaugh, *Bogeymen, lunatics and fanatics: collective actions and the private enforcement of European competition law*, Legal Studies, Vol. 34, No. 1, 2014, p. 1.

1. Victims of violations, representative organisations and public bodies – broad concept of legal standing

The first objective of group litigation mechanism shall be to broaden the scope of parties entitled to initiate and conduct collective proceedings. Because, as the French example shows, too narrow legal standing may limit efficiency of group litigation mechanism and lead to the situations in which numerous individuals are left without due protection.

The right of legal standing was subject of the European debate on collective redress from its very beginning. As it was often argued, its appropriate determination was required in order to ensure a balance between injured individuals and accused undertakings. Moreover, as the Commission often claimed, a right of legal standing construed another safeguard against the abusive litigation. The goal of EU legislator was to avoid the American excess, where due to the absence of limitations on standing, virtually anybody could bring an action on behalf of an open class of injured parties[29]. Therefore, it became clear that the Commission's objective would be to limit the right of legal standing, and provide the measures for its appropriate control.

Referring to the standpoint of legal scholars, consumers associations, business representatives and national governments expressed in Public consultation on collective redress, we may claim that most of the participants of recent debate on group litigation in the EU argued in favour of a broad concept of legal standing[30].

First, in the opinion of most of the stakeholders, the aggrieved individual, as a direct victim of violation, should have a right to initiate collective actions. Secondly, as a majority of stakeholders claimed, the representative entities, if they fulfil certain criteria, should be entitled to initiate and conduct collective proceedings. Finally, in the opinion of many lawyers and consumer organisations, the right of legal standing should be granted to public bodies, e.g. government agencies or consumer ombudsman, what would ensure greater professionalism and efficiency of collective actions in specific areas of legal practice.

In a response to the aforementioned standpoint, the European Commission presented rather ambiguous approach. It concentrated mainly

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29 Commission Staff Working Document, Public consultation: Towards a Coherent European Approach to Collective Redress, SEC(2011)173 final, pt. 21.

30 See Evaluation of contributions to the public consultation and hearing: "Towards a Coherent European Approach to Collective Redress", Study JUST/2010/JCIV/CT/0027/A4, p. 11.

on the representative actions, and clearly stated in the Recommendation that a right of legal standing should be granted to the previously designated entities, or to the entities certified on an *ad hoc* basis[31]. Moreover, it held that: *"In addition, or as an alternative, the Member States should empower public authorities to bring representative actions"*[32]. Nevertheless, while expressing such opinion, the Commission did not specify which kind of entities should be granted a right of legal standing, and what would be the conditions for bringing a claim by such bodies.

Finally, as far as the collective actions brought directly by injured individuals were concerned, the Commission did not provide a clear response. It can be argued however, that it did not exclude a possibility to grant a right of legal standing to the victims of law infringements. Because, as it stated in Point 17 of the Recommendation's Preamble: *"Legal standing to bring a collective action in the Member States depends on the type of collective redress mechanism. In certain types of collective actions, such as group actions where the action can be brought jointly by those who claim to have suffered harm, the issue of standing is more straightforward than in the context of representative actions, where accordingly the issue of legal standing should be clarified."* Moreover, as the Commission added in the Art. 3(a) of the Recommendation, collective redress shall mean: *"a legal mechanism that ensures a possibility to claim cessation of illegal behaviour collectively by two or more natural or legal persons"* or *"a legal mechanism that ensures a possibility to claim compensation collectively by two or more natural or legal persons claiming to have been harmed in a mass harm situation"*. Therefore, we can conclude that according to the Commission, a right to bring and conduct collective proceedings may be granted also to individuals (natural or legal persons) injured by a competition law infringement.

The above analysis shows that while the Commission aimed to respond in a positive manner to the need of a broad legal standing, it failed to provide clear and comprehensive rules on this issue which could be directly applied in each national jurisdiction. Therefore, the goal of further legislative proposals in the area of group litigation shall be to clearly determine the persons and entities empowered to bring and conduct collective proceedings. Moreover, any legislative intervention shall aim to limit the risk of abuse, by setting comprehensive rules on the assessment of a right of legal standing.

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31 Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU), OJ L 201, 26.7.2013, p. 60–65, pt. 4–6.

32 *Ibidem*, pt. 7.

Finally, in order to avoid the principal-agent problem, the legislator shall stipulate provisions on the relationship between a lead plaintiff and the injured individuals.

1.1. Scope of legal standing

1.1.1. Injured individuals

As far as the scope of persons entitled to bring collective proceedings is concerned, the European and national legislator shall aim to ensure a broad right of legal standing. It shall firstly cover individuals injured by competition law infringements and wishing to bring a collective claim. Only such solution would correspond to the requirements set in *Courage* and *Manfredi* rulings, and ensure that once the infringement of antitrust law occurs, individuals will be able to refer to the effective mechanism in order to obtain a recovery.

Apart from granting a right of legal standing to injured individuals, it would be also necessary to determine who shall be entitled to represent a group of victims of violation. As a model solution to this issue the Polish approach to collective redress could be evoked[33]. In consequence, a right of legal standing could be granted to injured individual being a part of a group, and selected by the other group's members as its representative. It would ensure that a party representing a group and conducting an action would be personally interested in its outcome. As it was already underlined, such solution could lead to greater efficiency of group proceedings, since the group's representative, wishing to win the case and achieve its personal interest, would use all its best efforts to properly formulate a claim and conduct the action[34].

Concerning the character of victims entitled to bring a claim it shall be argued that all victims of competition law infringement, despite their legal or organisational character, shall be entitled to initiate collective proceedings. In consequence, both legal and natural persons, consumers and business undertakings, shall be able to claim for compensation if injured by the antitrust infringement. Moreover, in order to avoid additional difficulties at the initial stage of proceedings, no limitations shall be introduced as far as the business undertakings are concerned. Therefore, despite their size, turnover or market share, they shall be entitled to participate in collective action and claim for compensation. The advantage of such solution would be

33 See in details Part II Chapter 2 Point II(2.4).

34 M. Sieradzka, *Dochodzenie roszczeń w postępowaniu grupowym…*, pp. 191–192.

that all victims of antitrust infringements would be potentially covered by the collective redress. Moreover, the enterprises, which as the practice shows, initiate most of the private antitrust cases, would not be excluded from the scope of group litigation mechanism. Finally, the broad legal standing of injured individuals would increase efficiency of private enforcement, since the number of actors involved in the detection and prosecution of anticompetitive behaviours would be greater.

The aforementioned standpoint does not seem to run counter to current Commission's approach in the area of collective redress. Because as it stated in the Recommendation, collective redress shall mean a legal mechanism that ensures a possibility to claim cessation of illegal behaviour or compensation, collectively by two or more natural or legal persons injured in a mass harm situation. Therefore, the Commission seems to recognise the right of legal standing of all victims of competition law infringement, despite their legal or organisational character[35].

1.1.2. Representative organisations

The second group of entities empowered to bring a collective claim shall be the representative organisations. Such solution seems to correspond to the Commission's proposals expressed in the Recommendation, and the national legal practice of most of the Member States. The main argument behind granting a right of legal standing to such bodies would be their knowledge, experience, as well as human and financial resources required to discover the antitrust violation, formulate a claim and conduct collective proceedings. Therefore, the role of such bodies would be crucial in cases where the individual value of suffered injury is relatively low, the level of complexity of case is rather high, and the number of victims of violation is significant.

Differently than in France, where the legal standing is limited only to consumers associations registered at the national level, the mandate to bring a collective claim by the representative organisation shall be broad. Both the *ad hoc* bodies, certified by a court for the purpose of specific proceedings, and the previously registered organisations, fulfilling criterions set in law, shall be allowed to bring the collective claims.

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35 Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU), OJ L 201, 26.7.2013, p. 60–65, pt. 3(a).

Finally, once the activity of representative bodies is concerned, the goal shall be to ensure the basis for their participation in cross-border claims. Therefore, despite where the violation was committed, where the injury was suffered and where the claim was brought, the representatives bodies should be able to effectively protect the interests of victims of violation. As the ground for co-operation and exchange of information between the representative bodies we could use the European networks, such as Enterprise Europe Network or European Consumer Centres Network.

Moreover, as the Commission rightly observed in the Recommendation, the goal shall be to ensure a mutual recognition of representative organisations between the MS. It would correspond to the requirements of "area of freedom, security and justice" and would guarantee equal and effective protection of EU citizens against competition law infringements. As a model approach to this issue we can evoke the provision stipulated in Point 18 of the Recommendation, which states: *"Any representative entity that has been officially designated in advance by a Member State to have standing to bring representative actions should be permitted to seize the court in the Member State having jurisdiction to consider the mass harm situation."* Undoubtedly, such solution would require introduction of common standards for the assessment of representative bodies, however, if agreed among MS and stipulated in a binding legal act, the mutual recognition of representative bodies could be achieved.

1.1.3. Public bodies

The last group of bodies entitled to bring collective claim shall be the public authorities. While the Commission evokes such a possibility in the Recommendation, it remains silent as far as specific solutions are concerned. Therefore, the reference to the national experience may be crucial. The inspiration could be drawn from the Polish practice of collective redress, where such solution is foreseen and works effectively in practice.

As it was previously described, according to the Art. 4(2) of Law on collective redress, the legal standing to bring collective action is granted to consumers' advocate (consumers' ombudsman). Such entity cannot decide unilaterally on performing the role of group's representative, but has to be selected by all members of the group. Moreover, scope of its activity is be determined in the agreement concluded between the members of a group and the selected body. The advantages of such solution are multiple.

First, it concerns greater level of expertise of such authority in a specific area of law, the human and financial resources being at its disposal, and the experience required to prepare a claim and conduct proceedings.

Secondly, it refers to the impartial character of public body, and the public objective of its activity. It allows to ensure that the selected entity will act only in the best interests of a represented group, and will undertake all possible efforts to win the case.

Finally, once analysed from the perspective of a whole system of enforcement, the representation by public body may ensure greater professionalism, limit the costs of law enforcement and guarantee greater coherence between private and public enforcement. Therefore, by granting a mandate to public body, such as consumers' ombudsman or government's agency, the efficiency of group litigation mechanism may be increased.

1.2. Assessment of legal standing

The second group of issues that need to be addressed once the provisions on legal standing are concerned, refers to the rules on the assessment of legal standing. Here, the main objective shall be to precisely determine who can bring a claim, what are the conditions that need to be fulfilled in order to prove a legal standing, and who shall assess the fulfilment of such conditions.

In order to achieve the aforementioned objectives, the directive shall firstly specify that only injured individuals selected by all members of a group, representative bodies and the specific public authorities, may bring a claim and conduct collective proceedings.

Moreover, the directive shall determine the criterions for the assessment of legal standing. In case of claims brought by injured individuals, it shall be a fact of being injured by the same law violation, and selected by all members of a group as a lead plaintiff. In case of claims brought by the representative bodies, the fulfilment of specific criterions, such as non-profit character of representative organisation's activity, direct link between the scope of activity and the subject of collective action, and the sufficient resources allowing to conduct a claim, shall be assessed. Finally, once the claims are brought by public bodies, it shall be possible to assess that such entity is one of the public authorities determined in law, as having a right to initiate collective proceedings.

The assessment of legal standing shall be conducted by a court, prior to the commencement of collective proceedings. The negative assessment of the court as far as the right of legal standing is concerned, shall lead to the rejection of claim.

1.3. Relationship between a lead plaintiff and the injured individuals

The last issue that has to be addressed concerns a relationship between the victims of violation and a lead plaintiff. Due to the differences existing in national legal orders on this issue, the directive shall provide a clear and comprehensive solution.

First, it should introduce a requirement according to which a claim brought to the court shall be accompanied by the "representation agreement", specifying the scope of representation, powers conferred upon a lead plaintiff, costs of representation and the eventual mechanism of a withdrawal of mandate. Such solution would aim to ensure that the principal-agent problem would be avoided, and that the relationship between a lead plaintiff and injured individuals would remain under a strict control of the court.

Additionally, different safeguards against the abuse shall be foreseen in the directive. As such we can evoke: a right of represented individuals to change the group's representative; a right to withdraw, waive or limit a claim; a right to agree on the settlement of a dispute; a right to be heard within the proceedings. The goal of such solutions would be to ensure, that despite not being a party to collective proceedings, the individuals will still retain control over the most sensitive matters of dispute[36].

Finally, as the last safeguard against the abuse we can evoke a mandatory representation by lawyer. The mechanism analysed in details once Polish approach to group litigation was concerned, could be used as model solution in case of EU discussion on collective redress. Nevertheless, it shall be stated, that while the mandatory representation by lawyer construes interesting alternative, it should not form a part of obligatory proposals. Due to the differences existing among national jurisdictions on this issue, and the sensitivity of subject matter, the MS should have a possibility to introduce such a solution, but shall remain free to do so. Such approach would ensure greater respect to the state's procedural autonomy, and would allow to avoid possible conflicts once the provisions of a directive are to be discussed.

As the above analysis shows, the issue of legal standing raises many problems which have to be resolved by the European legislator while discussing the way of further development in the area of collective redress. The complexity of this issue requires very prudent approach, combined of multiple elements, and aiming to increase the efficiency of collective redress, without creating a risk of abuse. Certain direction was already set

[36] See in details on this issue Part II Chapter 2 Point II(2.4).

by the Commission in the Recommendation, however due to the vague and imprecise character of its proposals, further discussion on this issue seems to be required. The aforementioned proposals aim to address the most important questions concerning the issue of legal standing, and provide model solutions for the European and national legislator.

2. Organisation of collective proceedings – towards greater flexibility

The second issue that needs to be addressed concerns the organisation of collective proceedings. It was only partially answered in the Recommendation, and further discussion seems to be required in order to ensure full efficiency of collective redress mechanism. In this matter a reference to the national experience may be crucial, because as the French and Polish legal systems show, modern and innovative solutions can be proposed in order to increase the efficiency of group litigation mechanism, without running a risk of abuse.

Once we talk about the organisation of collective proceedings we have in mind different stages of the process, a role of the parties and the court within the proceedings, and finally the possible outcome of collective action. The Recommendation deals with these issues only in a limited manner, proposing rather a patchwork of solutions, than the complex approach to the question of organisation of collective redress proceedings.

2.1. Certification

According to the Recommendation, each proceedings shall start by the certification of claim. As the Recommendation provides in Point 8 and 9: *"The Member States should provide for verification at the earliest possible stage of litigation that cases in which conditions for collective actions are not met, and manifestly unfounded cases, are not continued. To this end, the courts should carry out the necessary examination of their own motion."* While such standpoint is fully justified, and construes a first stage of collective proceedings in great majority of national jurisdictions, the Commission's proposal is missing greater precision. The Commission does not provide criterions for certification which are crucial in the assessment of each single claim. Therefore, the goal of further discussion shall be to precisely determine what elements of collective claim are to be assessed by the court at the stage of certification, what are the consequences of a negative assessment of claim, and how the interests of both parties to the proceedings shall be protected at this stage of litigation.

As far as the above issues are concerned the important experience can be drawn from the Polish legal system. According to the Polish approach, the stage of certification has purely formal character and aims to determine if the conditions for recognition of claim in group proceedings are fulfilled. In consequence, during the stage of certification the judge has no competence to assess the case materially, or rule if the case is legitimate or not. Such approach shall be appraised, and seems to be in accordance with the interests of both parties to the proceedings. While it ensures a filter against unfounded claims, and in this manner protects the interests of a defendant, it does not impose additional burden on a claimant, being required at this stage of proceedings to determine only fulfilment of formal criterions for bringing a claim.

The second objective of the provisions on certification shall be to clearly determine what elements are to be assessed by the court in order to certify a claim. As the minimal threshold which shall be required in all MS we shall consider: number of victims forming a group (numerosity criterion), similar character of claims (similarity criterion), and the common factual basis for bringing a claim (commonality criterion). Additionally, it may be required than once a claim is brought, a plaintiff shall submit to the court a "representation agreement" and the agreement on funding, e.g. contingency fees agreement. Such solution would allow the court to ensure, already at the initial stage of proceedings, that the entrepreneurial litigation would be avoided and a risk of principal-agent problem would be limited.

As far as the consequences of certification are concerned, the initial assessment of claim shall lead to a decision on admissibility (if the conditions for certification are fulfilled) or on the rejection of claim (if the conditions are not fulfilled). However, following the Polish experience, the greater flexibility shall be granted to the court at this stage of proceedings. Therefore, if some members of a group do not fulfil the conditions to be covered by the collective action, it shall not automatically lead to the rejection of a whole claim, but the court shall have a right of its partial rejection (under the condition that the numerosity criterion would be still fulfilled).

The last element of specific provisions on certification shall refer to the influence of a rejection of claim on the individuals' right to bring action for damages. Once again a useful experience can be drawn from the Polish Law on collective redress, where the refusal of certification does not deprive members of a group from bringing individual claims for recovery. Moreover, as the Polish law foresees, in such a case, if the individual

action is brought by a group member within the specific period of time and covers the same issues as a group action, the individual action may benefit from consequences resulting from a collective claim, e.g. interruption of limitation period. Such solution is worth considering in the model solution on collective redress. It allows to ensure a full protection of victims of the infringement, and permits to avoid a situation in which due to the fear of negative consequences of rejection of claim, individuals would refrain from bringing collective action.

2.2. Other stages of collective proceedings

The second group of solutions shall refer to other stages of collective proceedings. While the Recommendation provides certain proposals on the notification of victims of violation, formation of a group and control of the proceedings by the court, it does determine how the proceedings shall be organised and what may be its final outcome. These issues seem to be crucial from a perspective of group litigation, and would require further attention.

As far as the organisation of collective proceedings is concerned it shall be argued, that once a claim is certified, the court shall order notification of victims of violation. Here, depending on which model is chosen, i.e. opt-in or opt-out, the consequences of notification will differ. As it will be argued afterwards, the preference shall be given to the opt-out mechanism or a hybrid regime. The parties which do not manifest their will to exclude themselves from the collective action, shall be generally covered by its scope.

Moreover, once the issue of notification is concerned, more innovative solutions on the information of victims of violations shall be foreseen. The directive shall argue in favour of on-line notification system, by the mean of publication on the Internet website or through the social media. Such solution would have a potential to accelerate the proceedings, limit its costs, and would be better adapted to the current social environment, strongly dependent on the Internet and the electronic means of communication.

After the accomplishment of a notification process, the group shall be formed, approved by the court and the final proceedings shall start. The goal of a final stage of collective proceedings shall be to answer if certain undertaking is responsible for accused violation, and how the eventual damages shall be divided.

2.3. Possible outcome of collective claim

Concerning the possible outcome of case the following solutions shall be foreseen:

- judgment on liability of a defendant and division of damages;
- judgment on liability of a defendant without division of damages (rendered in case when the individual assessment of injuries suffered by each individual wouldn't be possible);
- judgment on the approval of settlement agreed between parties to the proceedings;
- judgment on the rejection of claim due to the non-liability of a defendant.

All of the aforementioned rulings would refer to different scenarios and would provide a complex approach to the issue of outcome of collective proceedings.

Undoubtedly, the most desirable solution from the perspective of both parties to the proceedings would be the first ruling. The judgment on liability of a defendant and division of damages would bring a dispute to an end, satisfy the interest of claimant, and release a defendant from any further claims.

Nevertheless, due to the complexity of collective claims, especially in the area of antitrust law, it is also necessary to foresee a judgment which could be rendered, if the individual assessment of value of injury suffered by each individual forming a group is not possible, or excessively difficult to perform. In such a case, following the French and Polish experience, the court shall have a possibility of rendering a judgment on responsibility of accused undertaking for law infringement. Such ruling could construe basis for further individuals proceedings, or a settlement of dispute between the parties to the collective action.

Finally, two additional situations shall be also recognised in the model solution on collective redress, i.e. settlement agreement concluded by the parties and a non-liability of a defendant. In such situations the court shall be also entitled to render appropriate ruling.

2.4. Role of the court in collective proceedings

The last issue requiring particular attention would concern the role of a court in collective proceedings. While this issue will be analysed in more details in Point 4 of this Chapter, it shall be stated at this point that once the organisation and conduct of a collective redress process is concerned, the principal role should be granted to the court. It follows from the statement expressed by the Commission in the Recommendation, where

in Point 21 of the Preamble it held: *"A key role should be given to courts in protecting the rights and interests of all the parties involved in collective redress actions as well as in managing the collective redress actions effectively"*. Moreover, such solution construes the best safeguard against the abuse, and corresponds to the unanimous opinion of the participants of Public consultation on collective redress, who held that: *"The judge should have a central role as a case manager and gatekeeper. He shall not only scrutinise the admissibility and decide on compensation but also decide on the adequacy of representation, on the application of the loser-pays-principle and on the appropriateness of opt-in/opt-out proceedings. Finally, he may also determine how to notify victims adequately."*[37]

In order to sum up, we may state that providing clear and comprehensive rules on the organisation of collective proceedings may be necessary not only in order to ensure coherence between all MS, but also to increase the efficiency of collective actions. Undoubtedly, since the issue of organisation of court proceedings is deeply rooted in the national procedural autonomy, certain flexibility shall be given to MS. Therefore, while the European legislator shall try to provide common standards, it shall refrain from a maximum harmonisation, and shall leave to MS a possibility to adapt the procedural requirements to their national legal tradition. However, such issues as certification, notification process, a possibility to render a judgment on responsibility and the principal role of a judge in collective proceedings, shall be foreseen as the essential elements of further proposal on collective redress from which no departure should be allowed.

3. Opt-out mechanism or a hybrid model – towards the effective system of group's formation

The next element of a group litigation mechanism, causing probably most controversies in the European discussion on collective redress, concerns the rules on group formation. While most of the national governments, sectoral regulators, business representatives and the Commission argue in favour of opt-in model[38], such solution, at least in the area of antitrust law private

[37] See Evaluation of contributions to the public consultation and hearing: "Towards a Coherent European Approach to Collective Redress", Study JUST/2010/JCIV/CT/0027/A4, p. 12.

[38] See Evaluation of contributions to the public consultation and hearing: "Towards a Coherent European Approach to Collective Redress", Study JUST/2010/JCIV/CT/0027/A4, p. 8.

enforcement, seems to be inefficient. In the field of competition law, the violation is usually unknown to the injured party, so that the proof or even an estimation of loss might be unfeasible[39]. Moreover, even if informed about the violation, the individuals are often unwilling to join the action. It results from a simple rational apathy which often appears in the scenarios when the harm is small, and the costs of attempting to rectify the injury are high[40]. As different scholars underline, the opt-in regime is not able to effectively address these difficulties[41].

First, it requires the victims of competition law infringements to undertake an effort of joining the action. Depending on the solution chosen, e.g. filling out and posting a letter, completing the form on-line, or contacting a group representative in person, the victims are required to incur additional costs and devote additional time to join the claim. As the practice shows, it is often enough to discourage individuals from joining a claim.

Secondly, the opt-in solution does not lead to global resolution of claims and full achievement of compensation principle. The opt-in actions cover only the parties who decided to join the claim, while other injured individuals remain out of its scope. It leads not only to the risk of non-compensation of certain victims of the infringement, but once analysed from a perspective of a defendant, it may cause uncertainty on possible future claims concerning the same violation (brought by parties who did not join a group).

Finally, the deterrence effect of group litigation is limited. Since the size of collective action composed at the basis of opt-in solution is smaller, and

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39 D.P.L. Tzakas, *Collective Redress in the Field of EU Competition Law: The Need for an EU Remedy and the Impact of the Recent Commission Recommendation*, Legal Issues of Economic Integration, Vol. 41, No. 3 (2014), p. 236.

40 B. Wardhaugh, *Bogeymen, lunatics and fanatics…*, p. 21; in the Polish legal doctrine problem of rational apathy is recognised by B. Nowak-Chrząszczyk, *Roszczenie odszkodowawcze w postępowaniu w sprawie o naruszenie wspólnotowego prawa konkurencji*, in: E. Piontek (ed.), *Nowe tendencje w prawie konkurencji UE*, Oficyna a Wolters Kluwer business, Warszawa 2008, p. 396.

41 D.P.L. Tzakas, *Collective Redress in the Field of EU Competition Law…*, pp. 225–242; B. Wardhaugh, *Bogeymen, lunatics and fanatics…*, pp. 1–23; G. Jones, *Collective Redress in the European Union: Reflections from a National Judge,* Legal Issues of Economic Integration, Vol. 41, No. 3 (2014), pp. 289–304; Z. Juska, *Obstacles in European competition law enforcement: a potential solution from collective redress*, European Journal of Legal Studies, 2014, Vol. 7, No.1, pp. 125–153; W. Waller, O. Popal, *The Fall and Rise of the Antitrust Class Action*, (2016) 39 World Competition, Issue 1, pp. 29–55; see also on this issue Part II Chapter 1 Point III(1.1).

numerous individuals are left outside the group of claimants, the pressure on current and potential law perpetrators is limited.

The aforementioned limitations of an opt-in regime are confirmed in practice. Here we can refer to the previously evoked *UFC Que Choisir v. Orange France, SFR, and Bouygues Telecom* case[42]. The action brought by consumer association against three French mobile operators, who concluded price-fixing agreement, was supposed to cover over 20 million consumers potentially injured by the antitrust violation. However, due the problems at the stage of group formation (restrictive rules on notification, problems with informing victims on collective action) and the rational apathy on the side of injured individuals, the *UFC Que Choisir* managed to group only 12.350 consumers injured by violation, and obtain compensation of 750.000 euros, i.e. 60 euros to each consumer participating in the claim.

The similar example comes from England and concerns *Replica Football Shirts* case[43]. Here, the consumer association named *Which*?, brought a collective action on behalf of consumers who overpaid for football shirts due to a price-fixing cartel. Despite the great number of potential victims of the infringement, *Which?* managed to collect the claims only from 600 consumers, considered to be a tiny part of the harmed individuals[44]. After this failure, *Which?* announced that it would not take part in collective actions in future, if it would be based on the opt-in solution[45].

In view of the above, it is often underlined that the more flexible and innovative solution shall be proposed in the area of antitrust law[46]. As such two possible solutions are evoked. First, concerns introduction of the opt-out regime. Second, refers to the establishment of a mixed (hybrid) opt-int/opt-out model. Also the Commission, once arguing in favour of the opt-in collective redress, does not entirely exclude the opt-out solutions from the scope of European discussion on group litigation. As it states in Point 21 of the Recommendation: *"The claimant party should be formed on the basis of express consent of the natural or legal persons claiming to have been*

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42 See in details Part II Chapter 1(III).

43 Case No. 1078/7/9/07, *Consumers Association v. JJB Sports Plc*, registered March 5, 2007, CAT. No judgment was ultimately delivered since the case was settled; see also on this case D. Fairgrieve, G. Howells, *Collective Redress Procedures…,* pp. 379 and 397; C. Hodges, *The Reform of Class and Representative Actions in European Legal Systems,* Hart Publishing 2008, pp. 24–26; G. Howells, *Collective Consumer Redress Reform – Will it be a Paper Tiger?*, in: F. Cafaggi, H. W. Micklitz (eds.), *New Frontiers of Consumer Protection*, Antwerpen, Intersentia 2009, pp. 332–333.

44 D.P.L. Tzakas, *Collective Redress in the Field of EU Competition Law…*, p. 236.

45 See Z. Juska, *Obstacles in European competition law enforcement…*, pp. 143–144.

46 See for example A. Adreangeli, *Private Enforcement of Antitrust…*, pp. 379–385.

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." Therefore, by leaving a margin of appreciation concerning the rules on group formation, the Commission did not close long and complex debate on opt-in versus opt-out. Further discussion on this issue may be expected in future, and two of the options evoked above, i.e. opt-out mechanism and hybrid model, may be proposed as the elements of future collective redress regime in the area of antitrust law.

3.1. Opt-out mechanism

The first option, i.e. opt-out mechanism, was already described in details in Part I Chapter 3 of thesis. As it was stated, thanks to the greater simplicity in joining a claim, it ensures wider access to justice and limits the costs of collective actions. Moreover, by creating a chance to cover the greater number of victims of violation by a scope of collective action, it significantly reduces asymmetry in the position of victims of infringement and accused undertaking(s). It also strengthens the chances for full compensation and increases the level of deterrence of antitrust infringements.

Nevertheless, despite the aforementioned advantages and its wide application in most of the common law jurisdictions, the opt-out model struggles to gain importance in the European Union. Due to the political, legal and economic reasons, it is constantly rejected by the Commission, considering the opt-out mechanism as an element of "American class action toxic cocktail". Nevertheless, while the Commission opposes to such solution, its arguments seems not to be valid.

First, while rejecting the opt-out regime and arguing in favour of opt-in solution, the Commission states in the Communication on collective redress that: *"it should be ensured that the represented group is clearly defined so as to allow the court to conduct the proceedings in a manner consistent with the rights of all parties, and in particular with the rights of the defence."*[47] Such argument does not seem to be fully convincing, since also in the opt-out scenario, the group will be clearly defined. It will cover those persons or legal entities who have suffered the same loss or damage, despite the way in which the group was formed.

[47] See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Towards a European Horizontal Framework for Collective Redress, COM(2013)401/2, p. 12.

Second, the Commission argues that the opt-in regime *"better preserves the autonomy of parties to choose whether to take part in the litigation or not"*[48], and for that reason shall take precedence over the opt-out solution. This argument is also weak, since the opt-out regime does not seem to exclude individuals' right to decide to participate in group proceedings. As its construction foresees, individual has a possibility to opt-out from the proceedings, and in this way determine its procedural position. Therefore, while the form of individuals' procedural step changes, i.e. active manifestation of will in case of opt-in model and passive behaviour in case of opt-out regime, its outcome remains the same. Moreover, as G. Jones underlines: *"Even if that right is not exercised [aut.: the right to opt-out], the individual's position is entirely unaffected, save that he/she notionally remains a member of the class."*[49]

Finally, the Commission is of the opinion that the opt-in regime ensures that: *"the value of the collective dispute is more easily determined, since it would consist of the sum of all individual claims"*[50], while the opt-out system is not *"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."*[51] Also these arguments cannot be appraised, because in the opt-out model the value of the collective dispute will always need to be known or ascertainable, even where all the persons suffering loss are not identified.

In view of the aforementioned it may be claimed, that the grounds for rejection of opt-out mechanism evoked by the Commission are not fully convincing. While the Commission tries to preserve European system against the abuse, it proposes a safeguard, that without clear justification, may limit or even exclude the efficiency of antitrust collective redress in Europe. Because as D. P. L. Tzakas claims: *"Providing for opt-out proceedings constitutes an essential and indispensable feature for any future collective redress instrument relating to the compensation of low-level damages suffered by consumers or small businesses. In the absence of such possibilities, any legislative act would be a paper tiger operating only in favour of large claims which – as already shown – are apt to be brought before court."*[52] In consequence, the discussion on opt-out solution shall be undertaken, and such regime could be proposed as an alternative to the European rules on collective redress.

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48 *Ibidem*, p. 12.

49 G. Jones, *Collective Redress in the European Union*…, p. 301.

50 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions,Towards a European Horizontal Framework for Collective Redress, COM(2013)401/2, p. 12.

51 *Ibidem*, p. 12.

52 D.P.L. Tzakas, *Collective Redress in the Field of EU Competition Law*…, p. 236.

3.2. Hybrid model

The second possible solution concerning the rules on group formation, which is regarded as more moderate and able to reach wider agreement within the EU, refers to the introduction of a hybrid (mixed) opt-in/opt-out model. Such solution works effectively in Denmark and Norway, its elements may be found in France, and it is currently debated in Poland[53]. Despite the initial phase of debate (pre-consultation) launched by the Polish Ministry of Economic Development, the mere fact that the issue of opt-out was raised and evoked as one of the methods to increase the efficiency of group litigation mechanism, allows to claim that there is a room for discussion on introduction of hybrid mechanisms within the EU.

The hybrid model shows that a middle way in the rules on group formation is possible. It also confirms that without putting at stake the individuals' right of defence the desired goal of increased efficiency of collective redress may be achieved. Finally, it construes effective response to the constitutional fears evoked during the discussion on collective redress and complies with the requirement of Article 6 of the European Convention for Human Rights (ECHR). That is because, in all of the analysed hybrid models the opt-out solution is under the strict control of a judge, applied only in exceptional and duly justified circumstances and does not run counter to the individuals' right to be heard (individuals are always informed about the proceedings and have a right to leave the group).

As it was already described in Part I Chapter 3, the mixed system of collective redress aims to combine opt-in and opt-out solution within one single mechanism. The important advantage of a mixed system is that while it allows for the increased efficiency of collective redress, it does not depart from a civil law legal tradition. Moreover, it grants important role to the judge in the group litigation process, ensuring its control over the group formation. Based on the analysis of legal systems where mixed systems work in practice, we may evoke two possible solutions in which opt-in and opt-out regimes may be combined.

First, which may be observed in Denmark and Norway, concerns the establishment of a system in which opt-out regime will be regarded as an exception to the general opt-in principle. In such a system, it will be up to the judge to decide which method of group formation will be applied in a particular case. At the basis of different criterions, e.g. number of

[53] See the document published by the Polish Ministry of Economic Development on 6 June 2016 entitled: *Postępowanie grupowe w modelu opt-out – materiał do pre-konsultacji*, available at: http://www.konsultacje.gov.pl/node/4247 [access: 28.11.2016].

victims of violation, value of individual injuries or costs of notification process, the judge will be obliged to determine which solution is better adapted to the specific proceedings. Such solution exists under the Danish law, where the court may decide that a group will be formed at the basis of opt-out principle, when due the value of individual prejudice, number of victims injured by certain infringement and costs of notification process, the opt-in solution would not be appropriate. Also in Norway it is possible for the court to choose the opt-out solution, if the claims on their own involve amounts or interests that are so small that it must be assumed that a considerable majority of them would not be brought as individual actions. The indisputable advantage of such solution is the strict control of a court over the rules on group formation, and a flexibility granted to the judge as far as the method of group formation is concerned. It allows that the excess will be avoided, but in the same time, that the rules on group formation will be best adapted to each single scenario. As A. Andreangeli underlines: *"leaving to the discretion of […] court, the choice of allowing a specific action to be litigated via the opt-in or opt-out mechanism, could provide and additional safeguard against unfairness and lead to a "fair balance" being struck between observance of due process and adjudicative efficiency in the circumstances of the individuals case."*[54]

The above solution is also supported by the Polish Ministry of Economic Development. As it states, the opt-out mechanism shall be regarded as an exception[55], applied under the strict control of a judge (specialised court)[56], on a justified demand of a claimant and only in situations when the opt-in method would seem to be ineffective[57]. Moreover, in the opinion of Polish Ministry of Economic Development, the opt-out mechanism shall be limited to the specific types of claims (*inter alia* antitrust damages actions)[58] and of a limited individual value (maximum 200 euros in case of consumers' claims and 500 euros in case of claims brought by undertakings)[59]. Hence, in

54 A. Adreangeli, *Private Enforcement of Antitrust…*, p. 380.

55 Polish Ministry of Economic Development, *Postępowanie grupowe w modelu opt-out...*, pt. IV.1.

56 *Ibidem*, pt. IV.7.

57 *Ibidem*, pt. IV.1. However, the problem is that the Polish Ministry of Justice does not determine the circumstances in which it could be considered, that the opt-in mechanism is ineffective to pursue a claim. Such issue is crucial in order to properly apply a hybrid model, and therefore, shall be determined within the further discussion on hybrid model in Poland.

58 *Ibidem*, pt. IV.2.

59 *Ibidem*, pt. IV.3.

the opinion of Ministry of Economic Development, the opt-out mechanism shall become a complement to the currently existing opt-in model.

The second solution, existing in Brazil, but also in France, concerns establishment of a two-stage procedure, within which different rules on group formation would be applicable. According to this solution, the collective proceedings would be divided into initial stage, during which liability of the accused undertaking would be assessed, and the final stage, within which the damages would be awarded. At the initial stage the precise formation of a group would not be required. The claim would cover all potential claimants injured by certain violation, and the court would assess the issue of liability at the basis of several individual examples provided by claimant. Such solution would allow to determine the existence of violation, without a need of incurring high costs of notification and facing the problems of forming a group. On the other hand, the second stage, concerning the court's decision on eventual damages and its division, would require precise determination of injured individuals and formation of a group. Here, contrary to the first stage, during which a lead plaintiff acted on behalf of unidentified group of members (opt-out), the parties injured by the infringement and interested in obtaining compensation would be required to join a group by expressing its will (opt-in). Such solution, allowing to cover the widest possible group of victims by the scope of group action, would ensure that the rights of each victim of the infringement would be fully protected. That is because, if it would decide not to opt-in, it wouldn't be bound by a judgment on division of damages, and would have a possibility to initiate individual action. Moreover, due to the strict control of a judge over collective proceedings, the risk of abuse would be limited. Finally, the judgment on responsibility would construe a filter against the abuse, and would prevent a flow of massive and unfounded claims.

As the aforementioned analysis shows, the mixed approach to the group formation, once combined with the previously described control function of a judge, may construe effective response to the limited utility of opt-in solution in the antitrust cases. It may also prevent against the abuse and construe effective response to the critics of opt-out solution. Therefore, the mixed system can be regarded as an alternative to the currently existing rules on group formation, and a possible direction for the European and national legislator.

In the light of the foregoing, it is argued that the European collective redress mechanism shall be based on the opt-out solution or the hybrid model, while the pure opt-in mechanism shall be avoided.

4. Manager and gatekeeper – increasing role of a judge

The next element of a desired regime of collective redress refers to the role of a judge in a group litigation process. It is especially important in the context of increasing efficiency of collective redress, which on the on hand, requires introduction of more innovative mechanisms of group litigation, but on the other, needs to strike a right balance between the interests of both parties to the proceedings. In such scenario, where the two opposite interests are to be confronted, the role of a judge becomes crucial. The judge becomes not only a manager of collective proceedings, ensuring its appropriate conduct, but plays also a role of gatekeeper, preventing the process of law enforcement against the abuse. Therefore, the modern and effective system of collective redress may not be established, if the principle role in its functioning is not awarded to the judge.

The aforementioned feature of a modern regime of group litigation seems to be recognised by the European Commission. As it states in the Recommendation on collective redress: *"A key role should be given to courts in protecting the rights and interests of all the parties involved in collective redress actions as well as in managing the collective redress actions effectively"*[60]. In consequence, the Commission grants a key role to the court at the stage of certification of claim, conduct of collective proceedings and the assessment of case. Such approach seems also to correspond to the voice of EU citizens, legal scholars, consumer associations, business representatives and national governments expressed within the public debate on collective redress. As they have unanimously stated: *"The judge should have a central role as a case manager and gatekeeper. He shall not only scrutinise the admissibility and decide on compensation but also decide on the adequacy of representation, on the application of the loser-pays-principle and on the appropriateness of opt-in/opt-out proceedings"*[61]. Therefore, the principal role of a judge does not seem to be questioned. However, what still has to be done, is to precisely determine how the managerial and gatekeeping function have to be performed by a judge.

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60 Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU), OJ L 201, 26.7.2013, p. 60–65, pt. 21 of the Preamble.

61 Evaluation of contributions to the public consultation and hearing: "Towards a Coherent European Approach to Collective Redress", Study JUST/2010/JCIV/CT/0027/A4, p. 12.

4.1. Certification of claim and a role of a judge

First, the judge shall perform the initial filtering of collective claims. It shall take place at the stage of certification, during which the court has to assess if a claim is admissible for the recognition in collective proceedings.

As it was mentioned before, while the stage of certification has purely formal character, its meaning is crucial for the protection of both parties to the proceedings. First, the certification stage allows to prevent a defendant against unfounded and abusive claims. Secondly, it aims to ensure the appropriate protection of victims of violation.

Among the key functions awarded to the judge at the stage of certification we shall evoke:

- assessment of the admissibility of claim;
- assessment of the "representation agreement";
- assessment of the agreement on funding.

The goal of the assessment of admissibility of claim is to verify if an action brought by a claimant fulfils all the criterions to be recognised in the collective proceedings (numerosity, similarity, commonality). While being purely formal analysis, it construes the first and crucial filter against the abuse. Thanks to the initial assessment, the judge ensures that the individual claims forming a part of a group action are of the same type, and are based on the same or similar factual basis. Therefore, it ensures the existence of a link between a violation and a harm, which will be further assessed by the court. Moreover, it prevents against a massive litigation, since already at this initial stage of proceedings, the claims which do not fulfil minimum threshold of similarity and commonality, may be excluded from the group action.

The second function performed by a judge at the stage of certification shall concentrate on the assessment of internal relationship within the group of claimants. Here, the judge shall be able to verify if a lead plaintiff was properly empowered to represent a group, and if all victims of violation agreed on a person of representative. Moreover, already at this stage of proceedings, the judge shall have a possibility to assess the method of financing of collective claim.

The goal of a judicial control over the "representation agreement" and the agreement on funding would be two-folded. On the one hand, it would construe another filter against speculative claims, motivated only by the desire of profit (entrepreneurial litigation). On the other, it would ensure the best possible protection of victims of violation, and allow to limit the risk of a principal-agent problem.

4.2. Formation of a group and a role of a judge

The second stage of collective proceedings, at which the judge shall play a pivotal role, concerns the group's formation. Here, two crucial functions shall be granted to the judge.

The first function refers to the method of group formation. As it was mentioned before, the modern system of collective redress shall argue in favour of opt-out approach, or a hybrid solution remaining under a strict control of a court. While in the case of opt-out solution, the role of a judge would be limited only to setting requirements for notification and approval of a group, the hybrid mechanism would require greater involvement of a court in the group's formation. That is because, once the claim would be certified, the judge would be required to determine which method shall be applied in order to form a group (opt-in or opt-out). Depending on circumstances of case, such as the value of individual injuries, number of victims of violation or costs of notification process, the judge would be required to choose a method best adapted to the needs of a specific claim. The advantage of such solution, granting greater flexibility to the judge at the stage of group formation, would be a possibility to increase the efficiency of collective redress, without leading to the abuse. By specifying criterions for opt-in or opt-out, and leaving it to the judge to assess its fulfilment in each single case, the rights of parties to the proceedings could be properly protected.

The second function performed by a judge at the stage of group formation would concern the notification process. It would be up to the judge to order the appropriate method of information of victims of violation on a possibility to join a collective claim. The general objective would be to inform the widest possible group of victims of violation at the lowest possible costs. However, also at this stage, the balancing of interests of both parties to the proceedings would be required. That is because, the court would be obliged to choose such method of notification which would not have negative impact on the reputation of a defendant, or the adverse effects on its economic standing. As the Commission already observed in the Communication on collective redress: *"the provision of information to potential claimants should balance concerns regarding freedom of expression and the right to access information with the protection of the reputation of the defendant."*[62] In such a case, the role of a judge would be once again crucial. By deciding on method of notification, it would influence not only

[62] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions,Towards a European Horizontal Framework for Collective Redress, COM(2013)401/2, pt. 3.5.

the costs of collective proceedings, but also the interest of parties to dispute, and the efficiency of collective action. The goal of EU legislator would be to provide the widest possible flexibility to the court, and by establishing a broad scope of possible means of notification, e.g. publication in press, information in radio, publicity in TV or information on the Internet, allow the court to choose a method best adapted to each single case.

4.3. Assessment of claim and a role of a judge

The third stage of collective proceedings, at which the judge shall play a crucial role, concerns the assessment of case. While at this stage of proceedings the central role of a judge remains out of the question, one issue, i.e. disclosure of evidence, would require particular attention.

Following recent CJEU's case-law[63], as well as changes introduced in the Damages Directive[64], it shall be argued that the judge recognising collective action should have a possibility to deal with the disclosure claims, and assess whether defendant or a third party shall be obliged to provide certain information for the purpose of collective proceedings. The appropriate assessment of disclosure demands would be particularly important in antitrust cases, characterised by a fact-intensive nature and the information asymmetry between the claimants and defendants. The role of a judge would be to mitigate difficulties of collective claimants with access to proofs of violation, but in the same time, to avoid the excessive disclosure. Because as the Commission argued in the Proposal for Damages Directive: *"aim is to ensure that in all Member States there is a minimum level of effective access to the evidence needed by claimants and/or defendants to prove their antitrust damages claim and/or a related defence"*, but at the same time, *"to avoid overly broad and costly disclosure obligations that could create undue burdens for the parties involved and risks of abuses."*[65]

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63 See Judgment of the Court of 14 June 2011, Case C-360/09 *Pfleiderer AG v Bundeskartellamt* and Judgment of the Court of 6 June 2013 in Case C-536/11 *Bundeswettbewerbsbehörde v Donau Chemie AG and Others*.

64 Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, /* SWD/2013/0204 final */, Art. 5–8.

65 Proposal for a directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013) 404, 11.6.2013, pt. 4.2.

Therefore, the disclosure of evidence held by the opposing party or a third party shall be ordered only upon court's approval, and should be subject of a strict judicial control based on the rules of proportionality and efficiency.

4.4. Division of damages and a role of a judge

The fourth stage of collective proceedings requiring an increased activity of the court concerns division of damages. While this issue raises most of the problems once complex collective actions in the area of antitrust law are concerned, the effective response may be provided if a judge is empowered with more flexible mechanisms of calculation of damages.

As such we can evoke economic analysis or experts' opinions, which could be used by a court in order to determine the value of compensation due to each victim forming a group.

Moreover, the court shall be empowered with a possibility to estimate the value of damages, in cases when the precise determination of the value of injury suffered by each individual forming a group would be excessively difficult or impossible to perform. Such solution, granting greater flexibility to the court dealing with the antitrust case, was already foreseen in the Damages Directive. As it was stipulated in Art. 17(1): *"Member States shall ensure that the national courts are empowered, in accordance with national procedures, to estimate the amount of harm if it is established that a claimant suffered harm but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available."* The above solution shall be positively assessed, and regarded as the another factor allowing for greater role of the judge in collective proceedings.

Finally, the court shall have a possibility to render a judgment on responsibility of the accused undertaking, in cases when the individual assessment of injuries suffered by each individual would not be possible.

4.5. Costs of the collective action and a role of a judge

The final stage of judicial intervention in collective proceedings refers to the costs of collective actions. As it was already mentioned, the issue of costs of collective proceedings construes one of the main limitations in bringing actions for damages. While the parties may mitigate this problem by concluding contingency fees agreements, providing third party funding or buying insurance policy[66], the court could play an active role in increasing access to justice by limiting the costs of judicial action.

[66] See in details Part II Chapter 3 Point II(5).

The first way in which the role of the court could be increased at this stage of proceedings concerns granting to the court a possibility of issuing a "cost protection order". As it was mentioned before, the goal of such mechanism is to enable a court, dealing with the collective action, to exempt a party from paying the costs of legal action[67]. It may take a form of *ex post* "cost protection order", issued by a court once a party failed to win the case on the merits. In such a case, a "cost protection order" would be a discretionary power of the court, used once the private claim was unsuccessful. The second possible solution would refer to the *ex-ante* "cost protection order" which could be granted by the court at the outset of action. The goal of *ex ante* "cost protection order" would be to protect economically weaker parties, e.g. consumers, from the cost exposure. Both of the aforementioned solutions were already evoked by the Commission in the Green Paper on damages actions, however they were further abandoned in a debate on private enforcement of antitrust law. The reconsideration of these mechanisms would be highly desirable in the new legislative proposal, and could construe interesting solution to the problem of high costs of collective actions.

The second solution able to increase the role of a judge once the costs of collective actions are concerned, refers to the possibility of limitation of "loser-pays" principle. While the Commission recognised that this principle may limit the efficiency of private actions[68], it did not try to mitigate its negative influence on collective redress. Neither Communication, nor Recommendation on collective redress, do not stipulate that the court deciding on collective action shall have a right to derogate from "loser-pays" principle, e.g. when the costs incurred by a collective plaintiff are unreasonable. Although the Recommendation states that: *"The Member States should ensure that the party that loses a collective redress action reimburses necessary legal costs borne by the winning party ('loser pays principle'), subject to the conditions provided for in the relevant national law"*, however, it does not guarantee that the procedural rules existing in different MS will empower national courts with the same right to derogate from the aforementioned rule. It is even less certain once we refer to the Communication on collective redress, where the Commission notices: *"The principle that the losing party should bear the costs of the court proceedings is well embedded in the European legal tradition, although it is not present in every jurisdiction of the European Union and the way in which it is applied differs between jurisdictions."*[69]

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67 See in details Part I Chapter 2 Point IV(3.2).

68 See in details Part II Chapter 1 Point II(2).

69 Communication from the Commission to the European Parliament, the Council, the European Economic And Social Committee and the Committee of the Regions "Towards

Therefore, in order to ensure greater certainty in EU law, equal level of protection of EU citizens against competition law infringements, and greater efficiency of collective redress, the new solutions on "loser-pays" principle shall be adopted. The main goal shall be to grant greater flexibility to the court dealing with the costs of collective actions, and to avoid situations in which the strict application of "loser-pays" principle, would lead to detrimental effects for the efficiency of collective redress.

As the first possible solution we can evoke a rule, according to which the costs would only be ordered against a claimant who acted manifestly unreasonable by bringing an action.

Other solution could concern granting to the court a discretionary power to determine, in each single case, if the application of loser-pays principle may be exempted. As the grounds for such exemption the court could consider position of parties to the proceedings, economic situation of the claimant and defendant, and the rules of social justice. Through such solution, a better balance between "incentives" and "safeguards" would be achieved, leading in consequence to greater efficiency of group litigation mechanism. Moreover, by remaining under a strict control of the court, the possibility of partial limitation of "loser-pays" principle would not lead to abuse, and would be applied by a court only in the well justified cases.

As the above analysis shows, the judge is present at each stage of collective proceedings. It does not only provide a scheme for group litigation, but through its intervention, it often determines the efficiency and a final outcome of collective redress. Therefore, the role of a judge is crucial and shall be fully recognised in the legislative proposal on collective redress. Obviously, the goal should not be to create an inquisitorial process in which a judge would be a sole master of collective proceedings. However, in order to ensure the efficiency of collective redress, and in the same time, in order to prevent against the abuse, the role of a judge shall be increased and precisely determined. It would ensure greater transparency of group litigation and prevent the possible conflicts between the parties to the proceedings. In order to achieve this objective, new solutions, allowing to adapt the role of the court to the specificity of collective actions, and granting greater flexibility to the judge, shall be introduced. Only in this way it may be ensured, that the mechanism of collective redress will construe additional and effective instrument in the enforcement of competition law provisions.

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a European Horizontal Framework for Collective Redress", COM(2013) 401 final, pt. 3.9.3.

5. Contingency fees and the new methods of financing – essential element of collective redress

The next element of a modern regime of collective redress should concern the rules on costs and financing of group litigation. As it was already mentioned before, the costs of collective redress are often decisive factor in the individuals' decision making process on undertaking a court action. As C. Hodges underlines, the decision on claiming for compensation is affected by multiple factors, such as costs of funding a case (court fees, expenses for lawyers and experts), chances of success, the amount of money that might be recovered and the rationality of the investment risk (relationship between the costs of legal action and a possible return)[70]. While in many antitrust cases big enterprises, wishing to undertake a collective action, may effectively deal with a question of financial resources required to undertake a case, the same issue may be more problematic for injured individuals or small and medium enterprises. Therefore, as the BEUC European Consumer Organisation states: *"Without appropriate funding, no collective redress mechanism will work in practice."*[71] Having this in mind, the goal of EU legislator shall be to limit the costs of collective proceedings, and in the same time, provide the effective means of financing. Only in this way, the efficiency of private antitrust enforcement may be increased and the functioning of collective redress may be effectively strengthened.

5.1. Reduction of costs of collective proceedings

As far as the issue of costs of legal action is concerned, the inspiration could be drawn from Polish system of collective redress. As it was described in details in Part I Chapter 2 Point II, the Polish Law on collective redress foresees the limitation of court fees once a claim has collective character. According to the general provisions on costs of civil proceedings applicable in Poland, the claimant bringing a case to the court shall incur a fee of 5% of the value of subject matter of dispute. However, once a claim has collective character, the value of court's fee is reduced to 2% of the value of subject matter. Moreover, it can never exceed the fixed amount 100,000 PLN.

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70 C. Hodges, *Fast, Effective and Low Cost Redress: How do Public and Private Enforcement and ADR Compare?*, in: B. Rodger (ed.), *Competition Law Comparative Private Enforcement and Collective Redress across the EU*, Kluwer Law International 2014, p. 278.

71 BEUC (*Bureau Européen des Unions de Consommateurs*), *Litigation funding in relation to the establishment of a European mechanism of collective redress*, BEUC, 2012, available at: http://www.beuc.eu/publications/2012-00074-01-e.pdf [access: 5.12.2015].

In the opinion of many scholars, the solution provided in Poland is able to increase the popularity of collective actions, and mitigate one of the main obstacles in bringing collective claims, i.e. high costs of a lawsuit[72]. While it is hard to imagine that the European legislator could interfere into the states' procedural autonomy by setting the amount of court fees in case of collective actions, the goal shall be however to encourage MS, to limit the costs of group litigation in comparison to individual claims. It could take a form of the directive's provision on limitation of costs of collective proceedings, or of the complex statement provided in the directive's preamble, stipulating that in order to increase the efficiency of collective redress, the national regime shall foresee the limitation costs of civil action once the claim has collective character.

5.2. Innovative methods of financing

The second issue requiring further development concerns the rules on financing of collective claims. While setting the specific court fees in EU legislative act seems to be outside the scope of EU action, the establishment of a general and uniform scheme for financing of group litigation may be already regarded as covered by the EU's prerogative. That is because, the goal of rules on financing would be to ensure effective access to justice, eliminate obstacles to civil proceedings within the EU and, by removing uneven level playing field at the internal market, to ensure equal protection of EU citizens against law infringements (see the Art. 81 and Art. 114 TFEU).

Referring to the specific solutions on financing of collective actions, two mechanisms stemming from the national legal practice and current discussion on group litigation in the EU shall be considered by the European legislator. First mechanism concerns contingency fees. Second solution refers to other methods of third party funding.

5.2.1. Contingency fees agreements

The contingency fees were widely discussed in Europe during the recent debate on collective redress. While many scholars and legal practitioners were pointing out on the benefits which could be offered to injured individuals due to the introduction of contingency fees agreements, the Commission constantly underlined that such solution is foreign to European legal practice, and if provided as a method of collective redress financing, would inevitably

[72] M. Sieradzka, *Dochodzenie roszczeń w postępowaniu grupowym…*, p. 370.

lead to abuse. Therefore, as the Commission stated in the Recommendation: *"The Member States should ensure that the lawyers' remuneration and the method by which it is calculated do not create any incentive to litigation that is unnecessary from the point of view of the interest of any of the parties. The Member States should not permit contingency fees which risk creating such an incentive."*[73] Nevertheless, while the Commission argued against contingency fees agreements, it also added that: *"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."*[74] Therefore, once again the Commission has left a margin of appreciation to MS, and did not exclude further discussion on this method of financing in the EU. For these reasons it will be argued, that the issue of contingency fees shall be undertaken by the European legislator, and specific provisions shall be proposed in the directive in order to introduce this method of collective redress financing in the EU. Because, as the national experience shows, the contingency fees are not necessarily a foreign legal concept leading to the abuse once applied in the European legal environment.

Referring to the national legal practice we may state, that the Commission's fears of the abusive use of contingency fees agreements do not find a practical confirmation. According to the analysis conducted by P. Buccirossi and M. Carpagnano, contingency fees are currently used in some way in 12 out of 28 MS[75]. Moreover, in none of the systems, the introduction of contingency fees mechanism led to abusive litigation. On the contrary, it may be held that despite the availability of such solution in the national regimes, parties and their lawyers are still reluctant to refer to this method of financing. Taking the example of Poland, where the possibility of contingency fees was provided in the Law on collective redress, we may claim that the number of cases in which plaintiffs set the remuneration of lawyers at the contingent basis is limited. The main reasons for such an outcome are the lawyers reluctance to this method of financing, and the procedural constraints in formulating damages actions. Therefore, the contingency fees, once coupled with the procedural limitations of collective actions, strong safeguards against the abusive litigation and a lack of so-called "litigation

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73 Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU), OJ L 201, 26.7.2013, p. 60–65, pt. 30.

74 *Ibidem*, pt. 29–30.

75 P. Buccirossi, M. Carpagnano, *Is it Time for the European Union to Legislate in the Field of Collective Redress…*, p. 6.

culture", turn out to be a solution of limited practical significance, unable to change the traditional, EU-like approach to collective redress.

In view of the above it may be stated, that the Commission's fear of contingency fees is exaggerated and does not find justification in the European practice of collective redress. Moreover, the almost outright rejection of contingency fees in the Recommendation is not consistent with the position adopted in many national jurisdictions which recently opted for this method of financing (e.g. Poland and UK)[76]. Therefore, instead of constantly arguing against contingency fees, the Commission shall rather focus on how to ensure its coherence with the EU legal environment. It shall also try to guarantee that if introduced in practice, the contingency fees will construe an effective response to the limitations of collective redress. In order to achieve this objective, several elements shall be taken into consideration by the Commission.

Firstly, the contingency fees shall be proposed as an alternative method of financing. The parties shall always have a possibility of setting the lawyer's remuneration as a specific, pre-determined amount of money, or if they wish to do so, as a contingent remuneration dependent on the outcome of case. It is important to underline at this point, that despite which method of financing will be chosen, the overall costs of litigating a case will remain the same. Nevertheless, the availability of contingency fees would ensure that the problem of lack of financial resources for initial disbursements would be effectively solved, and that the individuals would be more keen to undertake a collective lawsuit, once having a possibility to refer to such method of lawyer's remuneration[77].

Secondly, the maximum amount of contingency fees shall be specified. It will be still required to decide at which level such limit shall be set, however, in order to avoid the risk of entrepreneurial litigation, and a flow of mass and unfounded claims motivated by a desire of profit, the maximum level of contingency fees shall be provided. Here, the Polish example, setting the maximum level of contingency fees as 20% of awarded damages, can be regarded as a possible solution.

Thirdly, the contingency fees agreements shall remain under a strict control of the court. It will not only allow to confirm the principal role of a judge in the collective proceedings, but will also permit to limit the risk of abuse. Such control shall be conducted once a claim is brought to the court. The positive assessment of contingency fees agreement shall be

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76 A. Adreangeli, *Private Enforcement of Antitrust…*, pp. 385–386.

77 P. Buccirossi, M. Carpagnano, *Is it Time for the European Union to Legislate n the Field of Collective Redress…*, p. 11.

regarded as one of the pre-conditions for hearing a case. Nevertheless, in order to provide greater flexibility to the claimant, and in order to ensure effective access to justice, the negative assessment of contingency fees agreement by the court shall not automatically lead to the rejection of claim. It shall only oblige the plaintiff to reformulate the agreement in accordance with the court's requirement, or to provide other method of remuneration acceptable by the court, in order to proceed with the action. The advantage of such solution would be the establishment of a filter against abusive litigation, applicable already at the initial stage of court proceedings. Moreover, as A. Andreangeli claims: *"provided that they are subjected to appropriate judicial checks, contingency fee agreement can be reconciled with principles of fairness and of sound administration of justice."*[78]

Finally, in order to ensure greater legal transparency, and avoid eventual disputes at the initial stage of the proceedings, the law on collective redress shall precise the criterions for the assessment of contingency fees agreement by the court. As such we can evoke, *inter alia*, the value of legal services to be rendered by a lawyer, the character and the complexity of a case, the value of subject matter of claim, or the number of claimants. All these elements shall aim to justify that the contingency fees are the "most appropriate" method of financing, and shall allow the court to approve such solution.

The introduction of contingency fees agreements in the form described above would ensure that without running counter to the European legal tradition, and creating a risk of abusive litigation, the contingency fees mechanism would increase the efficiency of collective redress in the EU. Moreover, it would ensure the equal level of protection of EU citizens against law infringements, and limit a risk of forum-shopping, often motivated by a search for more preferential regime of funding.

5.2.2. Other methods of third party funding

The last element of a desired approach to the question of costs and financing should concern other methods of third party funding. That is because, while the contingency fees agreements may limit the costs of legal representation, the plaintiff will be still obliged, under the loser-pays principles, to face the risk of paying defendant's legal costs in case of losing a case[79]. Therefore, in order to encourage injured individuals to initiate

[78] A. Adreangeli, *Private Enforcement of Antitrust…*, p. 386.

[79] P. Buccirossi, M. Carpagnano, *Is it Time for the European Union to Legislate n the Field of Collective Redress…*, p. 12.

collective actions, and to ensure the establishment of an effective system of financing, additional mechanisms shall be proposed.

First of the possible solutions concerns introduction of a legal costs insurance which could be purchased by a person wishing to undertake a collective action. According to such insurance policy, the insurer would pay the opponent's legal costs and expenses if the policyholder would lose the case. While this mechanism, described in details in Part I Chapter 3 Point 4.3.2.2, does not limit the costs of judicial action, it allows to reduce the financial risk of a negative outcome of claim. Therefore, the legal cost insurance could construe interesting alternative to the claimant, which especially in case of mass-claims, covering numerous victims and reaching very high value of subject matter, could be discouraged from bringing a claim due to the risk of failure.

While the above solution could construe an interesting alternative to the system of collective redress, it shall be underlined however, that due to the relatively high costs of insurance and its complex character, it would be rather business-relevant mechanism. In consequence, it would hardly provide an interesting alternative for individuals or consumers deciding to initiate collective action, since already at the initial stage of proceedings their financial resources would be limited. Therefore, the legal costs insurance should be only a part of collective redress financing scheme, and shall be additionally supported by the collective redress fund described underneath.

Second solution, which could accompany the previously analysed mechanisms, and together with the legal costs insurance and contingency fees construe a complex approach to financing of collective claims in the EU, concerns establishment of a collective redress fund.

The first possible approach to the issue of collective redress fund would concern a public funding of collective claims. As it was already described in Part I Chapter 3 Point III(3.2), it could take a form of financial aid provided to the claimant, or the establishment of a public fund, responsible for providing financial support to the parties enforcing their rights in court. The possibility of such solution was discussed in Europe for the long time, and both the EU institutions and participants of a debate on collective redress argued in favour of the establishment of a collective redress fund. As the European Social and Economic Committee held in December 2008, while referring to the question of financing of group litigation: *"one of the ways of funding this system would be by establishing a 'support fund for collective action', provisioned by the sum of the 'unlawful profits' made by enterprises which have been convicted; these profits, as defined by the judge in the course of the procedure, could be so used insofar as they are not claimed*

by identified persons who have suffered direct injury."[80] The aforementioned approach of the European Social and Economic Committee seemed to be continued in further European debate on group litigation. Three years later, in the public consultation on collective redress, the Commission still wondered if public funding may construe an alternative to financing of collective actions in the EU[81]. And as the participants of public consultation on collective redress have stated in the great majority, the public fund should be established in order to support potential plaintiffs in financing of collective actions[82].

While the issue of public funding was a subject of debate for many years, and showed wide support of scholars, legal practitioners and EU citizens towards this method of financing, the Recommendation on collective redress did not decide to take more decisive step on this matter. It only argued that: *"funding for collective redress litigation should be arranged in such a way that it cannot lead to an abuse of the system or a conflict of interest"*[83], and refrained from formulating any constructive proposals. Such approach of the Commission may be regarded as disappointing, since as the European debate on group litigation has shown, the question of funding construes one of the main obstacles to development of effective mechanism of group litigation in the EU.

Therefore, the question of public funding shall be raised once again. However, in order to avoid the abuse and ensure effective functioning of such mechanism, several crucial issues shall be resolved. It should concern in particular following questions:

- how the applications to the fund would be assessed;
- who would supervise the functioning of a fund;
- what would be the possible influence of a fund on a plaintiff and a trial strategy, and finally;
- how the fund should be financed.

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80 Opinion of the European Economic and Social Committee on Defining the collective actions system and its role in the context of Community consumer law (Own-initiative opinion), 2008/C 162/01, OJ C 162, 25.6.2008, p. 1–19, pt. 7.6.3.

81 Commission Staff Working Document, Public Consultation: Towards a Coherent European Approach to Collective Redress, SEC(2011)173 final, question 25.

82 B. Hess and others, *Evaluation of contributions to the public consultation and hearing…*, p. 12.

83 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, OJ L 201, 26/07/2013, p. 60–65, pt. 19 of the Preamble.

In order to answer these questions, certain inspiration could be drawn from the French discussion on collective redress, which already in *"Loi Chatel"* argued in favour of the establishment of a fund of aid for access to justice[84].

According to the French proposal, the fund shall have a legal personality and shall be able to cover the costs of collective actions. In order to obtain financing, the case should present "serious chances of success", what would be assessed by the fund. Once the financing would be granted, the plaintiff would be able to cover the costs of proceedings, publicity and legal aid with the allocated money. Moreover, the burden of recovering money and claiming for reimbursement from undertaking losing a case would be transferred to the fund. Finally, as far as the financing of the fund is concerned, the French proposal argued in favour of funding from the state's budget, combined with the financing from the financial penalties imposed on undertakings committing violations of antitrust and consumer law.

The French proposal could be a good example of bottom-up initiative in the discussion on public funding of collective redress. Despite the fact that the French solution has never entered into practice, it could be evoked as an interesting alternative in the future European discussion on public funding of collective redress.

The second possible approach to the issue of collective redress fund concerns establishment of a private fund. It refers to the situation when the money is provided to the claimant by a private entity, aiming to obtain financial reward in exchange for such help. The above solution gives important financial benefits to individuals claiming for compensation, and creates a possibility to pursue claims which due to the high risk of financial investment could be excluded from public financing[85]. Nevertheless, while the private funding allows to mitigate one of the main obstacles in access to justice, i.e. limited financial resources of injured individuals, it is also considered that private third party funding may lead to "commercialisation" of justice. Therefore, as it was evoked during the European debate on collective redress, opening a door for private third party funding may lead to abuse, and create a risk that the funder's economic interests will take priority over the interests of claimants[86].

Undoubtedly, the private third party funding is not an issue without controversies. Nevertheless, refraining from giving response to this question by EU legislator, may lead to detrimental consequences to the internal market

84 See in details Part II Chapter 2 Point I(1.3).

85 B. Hess and others, *Evaluation of contributions to the public consultation and hearing…*, p. 12.

86 *Ibidem*, p. 12.

and EU citizens and. That is because, while the private third party funding is still discussed by the EU institutions, it already seems to be a part of legal reality in Europe. It concerns in particular situations when a right to claim for damages, considered as a receivable, is assigned to third party in exchange for financial remuneration. Such cases, described in more details in Part I Chapter 3 Point I(4.3), have recently occurred in Belgium, Germany, Netherlands and Ireland, showing that evolving group litigation in Europe, may often provoke questions that need to be addressed by the European Commission.

Referring to the possible approach of the Commission to the question of private third party funding, we may claim that its goal shall be to respond in a positive manner to the developing practice in Europe, and to provide clear legal scheme for such method of financing. Undoubtedly, one may say that private funds, acting within the competitive business environment, will be already controlled by its competitors. However, as P. Buccirossi and M. Carpagnano rightly observe: *"Public regulation may still be needed to make the functioning of the fund completely transparent, with the aim of avoiding any conflict of interest."*[87]

As the required areas of EU regulation we shall consider:

- removing a prohibition of the injured party to transfer its right to compensation to a third party (such as the fund);
- amending national procedural rules that might prohibit a third party from exercising control over the litigation strategy;
- providing for individuals' freedom to choose between different, alternative methods of financing of claim;
- introducing maximum amount of a fund's share in the awarded damages;
- providing for a strict judicial control over the agreements concluded between the fund and the claimant.

The goal of such regulation would be to ensure that while the additional mechanism of collective redress financing will be developed, the abuse will be avoided. Moreover, the EU regulation in this area of legal practice would allow to prevent development of a so-called "grey-zone" in group litigation in the EU, which if left without control, could lead to negative consequences to the internal market and its participants. Therefore, the EU shall follow current changes in the area of group litigation, and undertake the issue of private third party funding in future debate on collective redress.

In view of the above we may state, that the issue of costs and financing of group litigation requires complex and detailed approach of the EU legislator.

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87 P. Buccirossi, M. Carpagnano, *Is it Time for the European Union to Legislate n the Field of Collective Redress…*, p. 12.

While the balance shall be stroke between the EU intervention and the national procedural autonomy, the goal of the directive shall be to provide coherent and effective scheme for financing of collective redress in the EU. The introduction of solutions analysed above, would ensure greater flexibility to the claimants, limit the costs of judicial actions, and provide methods of financing that correspond to the current legal practice. In the same time, it would not undermine the interests of a defendant, because no matter which solution would be chosen, the strong judicial control over the methods of financing and the "loser-pays" principle would be upheld. Therefore, the construction of a coherent regime on financing would ensure equilibrium between the parties to the proceedings, and guarantee that due to the existence of numerous filters and safeguards, the risk of abusive litigation would be avoided.

6. Collective redress and ADR – increased importance of alternative methods of dispute resolution

The last element of the proposed approach to collective redress shall refer to the use of alternative methods of dispute resolution. It includes mechanisms, such as neutral evaluation, facilitative conciliation, mediation, or even binding arbitration, which are aimed at resolving conflicts without the direct intervention of a court[88]. The importance of ADR is crucial in the modern systems of law enforcement, and as the analysis of recent European discussion on group litigation confirms, without establishment of the effective mechanisms of ADR, the complex and coherent regime of collective redress may not be fully achieved. As I. Benöhr even states: *"in order to provide affordable means of redress and prevent excessive court litigation, ADR remains a primary first step in the process of dispute resolution."*[89]

As certain scholars rightly observe, while referring to the European system of competition law enforcement, its construction is based on three main pillars[90]. The first pillar, being in the centre of European competition law enforcement regimes, refers to the enforcement of antitrust law by public authorities (public enforcement). The second pillar, covers private antitrust litigation, performed by or on behalf of injured individuals (private

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88 See Study on the use of ADR in the EU, Civic Consulting on 16 October 2009, (ADR Study, 2009), p. 11; see also on the issue of different forms of ADR Ł. Błaszczak, *Mediacja a inne alternatywne formy rozwiązywania sporów (wybrane zagadnienia)*, ADR. Arbitraż i Mediacja 2012, No. 2, p. 19 and following.

89 I. Benöhr, *Consumer Dispute Resolution after The Lisbon Treaty…*, p. 108.

90 C. Hodges, *Current discussions on consumer redress…*, p. 19.

enforcement). Finally, the last pillar, concerns a direct negotiation and resolution of antitrust disputes by the mean of ADR. And while the public enforcement and private antitrust litigation are evoked as the principle mechanisms of competition law enforcement, the significance of ADR is constantly increasing.

Therefore, the following point will argue in favour of development of more effective ADR techniques, in order to ensure that their joint application with public enforcement and collective redress, will lead to better achievement of corrective justice principle and more effective enforcement of antitrust law.

6.1. Advantages of ADR

As it was mentioned above, the ADR construes additional path for the enforcement of competition law provisions. Its important advantage, in comparison to public enforcement and private antitrust litigation, is time and money devoted for resolving a case. It is commonly agreed that the voluntary arrangements to pay the compensation, are likely to be the quickest and cheapest way of achieving corrective justice[91]. Moreover, the application of ADR allows to save the costs not only for the injured individuals and accused undertakings, but also for the courts and public enforcers. In consequence, thanks to the use of this method of disputes settlement, greater economy of justice may be achieved[92].

The above described advantages of ADR seem also to be recognised by the European institutions. The EU Parliament in its Resolution on collective redress *"encourages the setting-up of ADR schemes at European level so as to allow fast and cheap settlement of disputes as a more attractive option than court proceedings."*[93] Also the European Commission in the Recommendation on collective redress recognises that: *"alternative dispute resolution procedures can be an efficient way of obtaining redress in mass harm situations"*[94], and claims that: *"the Member States should ensure that*

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91 See C. Hodges, *Fast, Effective and Low Cost Redress…*, p. 261; I. Benöhr, *Consumer Dispute Resolution after The Lisbon Treaty…*, p. 99.

92 J. Żołądź, *Bariery rozwoju mediacji w sferze administracji publicznej w Polsce. Refleksje teoretyczno-praktyczne,* ADR. Arbitraż i Mediacja 2012, No. 2, pp. 65 and following.

93 European Parliament resolution of 2 February 2012 on 'Towards a Coherent European Approach to Collective Redress', 2011/2089(INI), pt. 25.

94 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, OJ L 201, 26/07/2013, p. 60–65, pt. 16 of the Preamble.

judicial collective redress mechanisms are accompanied by appropriate means of collective alternative dispute resolution available to the parties before and throughout the litigation."[95]

Apart from a positive influence of ADRs on costs and duration of the proceedings, they offer also other benefits to parties to dispute. As such we can evoke confidentiality of dispute settlement process, greater informality of proceedings and the consensual character of dispute settlement. And while the previously evoked advantages of ADR, i.e. cost and time efficiency, may be crucial for parties suffering and injury and claiming for compensation, the latter group of benefits offered by ADR may have important meaning once analysed from the perspective of enterprises. That is because, the consensual dispute settlement creates chances that the good reputation of enterprise will remain untouched. Moreover, it allows to restore peaceful relationships between the injured individuals and accused undertaking. Finally, it increases chances that the market position of certain business undertaking will not be negatively influenced by the dispute settlement process.

6.2. Limitations of ADR in the area of antitrust law

Despite the numerous advantages offered by ADRs, the analysed methods of disputes settlement still struggle to gain importance in the mass-injuries scenarios, especially in the area of antitrust law. As the current national practice shows, while the ADR starts to gain importance in the area of consumer law, mainly thanks to the recent legislative changes at the European level[96], the significance of this technique is still limited in case of mass antitrust injuries. The reasons for such outcome are multiple.

First, the application of ADR is much more difficult in a mass harm context, than in a simple injured individual versus accused undertaking scenario. It results from a fact, that apart from determining the existence of injury and reaching agreement on the value of settlement, in case of collective ADR, it is necessary to determine if each claimant forming a group has a valid claim, to which claimants the payment should be made, how much should be paid to each individual, and in which manner the distribution of

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95 *Ibidem*, pt. 26.

96 See Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, OJ L 165, 18.6.2013, p. 63–79; and the Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, OJ L 165, 18.6.2013, p. 1–12.

payment shall be achieved. While addressing these issues may be easier in case of judicial proceedings, where the mechanisms such as notification, court hearings, disclosure of proofs, or assessment of damages are available to the court, it may be more difficult to deal with these questions for an independent mediator, ADR panel or the arbitration tribunal. Therefore, in complex antitrust cases involving multiple claimants, parties may be more keen to refer a case to the court than to the ADR.

Secondly, the ADR once used in the area of competition law, has to face similar problems as private antitrust litigation. It concerns in particular limited access to proofs of violation, asymmetry in the position of injured individuals and accused undertakings, and the problem with the assessment of harm. Therefore, due to the lack of required information it may be difficult for the impartial third party to determine if the violation occurred, which parties were injured by certain infringement, and what is the actual size of suffered injury. While the court proceedings offer certain solutions to mitigate these problems, e.g. disclosure of evidence, estimation of harm by a court or a presumption of harm caused by a cartel, the consensual techniques of disputes settlement do not propose such mechanisms.

Finally, the ADR remains strongly dependent on the efficiency of private antitrust litigation. While in a case of effective system of private antitrust enforcement, e.g. in the United States, the undertakings may be motivated to settle a dispute and avoid in this manner a risk of paying high damages, in case of inefficient private antitrust litigation, the undertakings' motivation to settle a case may be much lower. As the European practice confirms, due to the low efficiency of private antitrust enforcement, and the multiple procedural constraints imposed on claimants, especially in case of group litigation, the undertakings faced with a risk of compensation are often more keen to refer a case to the court, prolong the proceedings and defend its rights in judicial process, than to settle a case.

The aforementioned analysis shows that the ADR, despite offering multiple benefits to injured individuals and accused undertakings, will not construe an alternative to antitrust collective redress, if not better adapted to the specificities of multiple-injury cases, and reinforced by the effective private enforcement regime. The simple encouragement of MS to develop ADR techniques in their national jurisdictions, as argued by the Commission in the Recommendation[97], is not sufficient to establish

[97] See 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, OJ L 201, 26/07/2013, p. 60–65, pt. 25–28.

coherent and effective system of consensual collective disputes settlement. Therefore, the following analysis will aim to propose solutions able to mitigate the aforementioned difficulties, and promote establishment of the ADR scheme in the area European antitrust law.

6.3. Required response in the area of ADR

6.3.1. Creating incentives to settle

The first objective shall be to create incentives to settle. As different authors underline, it can be achieved by the integration of ADR within the enforcement policies of competition authority[98]. It can concern in particular reduction of fines imposed on undertakings deciding to settle a case and limitation of liability of such entities. Both of the aforementioned solutions find confirmation in changes recently introduced by Damages Directive.

As far as the reduction of fines is concerned, the Damages Directive states in the Art. 18(3) that: *"A competition authority may consider compensation paid as a result of a consensual settlement and prior to its decision imposing a fine to be a mitigating factor."* The Commission's attempt to promote ADR by the reduction of fines imposed by the competition authority shall be positively assessed. Nevertheless, what may be criticised, is the ambiguity of Commission's proposal. While it opens a possibility for NCAs to consider compensation paid as a result of settlement agreement as a mitigating factor, it neither obliges NCAs to do so, nor determines what shall be the amount of eventual reduction.

It shall be argued, that in order to ensure full efficiency of such mechanism and provide the real incentive to settle, the reduction of fine by NCAs in case of settlement shall be obligatory. Moreover, the amount of possible reduction of fine shall be clearly specified (probably by specifying minimum and maximum amount of reduction). It would allow not only to ensure greater legal transparency, but would also permit for greater efficiency of discussed solution once applied in practice.

Concerning the limitation of liability of settling undertaking, the Damages Directive states in the Art. 19(1) that: *"Member States shall ensure that, following a consensual settlement, the claim of the settling injured party is reduced by the settling co-infringer's share of the harm that the infringement of competition law inflicted upon the injured party".* Moreover, it adds in the Art. 19(2) that: *"Any remaining claim of the settling injured party shall be exercised only against non-settling co-infringers. Non-settling co-infringers*

[98] See for example C. Hodges, *Fast, Effective and Low Cost Redress…*, p. 265.

shall not be permitted to recover contribution for the remaining claim from the settling co-infringer." Such solution, which practically liberates settling infringer from further compensation liability, may effectively encourage undertakings to settle a case and avoid any further claims for damages. Therefore, once analysed from the perspective of an incentive to settle, it shall be positively assessed.

Another way of creating incentives to settle concerns increasing efficiency of group litigation mechanism. As it was stated before, the ADR is strongly dependent on the efficiency of private antitrust litigation, and if the later increases, the probability of out-of-court settlements is also higher. Once faced with a risk of paying high damages ordered by a court, accused undertakings will be more keen to settle a case and avoid a risk of paying high compensation. Therefore, while the ADR may increase access to justice, it may be achieved only if it construes a part to the effective system of private antitrust enforcement.

Finally, the incentive to settle may be provided by setting appropriate relationship between collective redress and ADR. First, it shall concern the courts ability to refer the parties to ADR at any stage of proceedings. Secondly, it shall refer to the rules on limitation period, which should not discourage the parties from undertaking an attempt to settle.

Both of the aforementioned issues are recognised by the Commission in the Recommendation on collective redress. Concerning the courts ability to refer the parties to ADR, the Commission claims that: *"The Member States should ensure that the parties to a dispute in a mass harm situation are encouraged to settle the dispute about compensation consensually or out-of-court, both at the pre-trial stage and during civil trial."*[99] As far as the issue of limitation period is concerned, the Commission states in the Recommendation that: *"Any limitation period applicable to the claims should be suspended during the period from the moment the parties agree to attempt to resolve the dispute by means of an alternative dispute resolution procedure until at least the moment at which one or both parties expressly withdraw from that alternative dispute resolution procedure."*[100] Such standpoint of the Commission must be positively assessed, and shall form a part of further proposals on collective redress in the European Union.

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[99] 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, OJ L 201, 26/07/2013, p. 60–65, pt. 25.

[100] *Ibidem*, pt. 27.

6.3.2. Establishment a mechanism of collective ADR

The second goal of legislative proposals on ADR in the area of antitrust law shall be to establish clear and comprehensive mechanism of consensual dispute settlement, adapted to the needs of antitrust cases.

As C. Hodges rightly observes, in case of consumer versus business claims ("C2B"), the provisions of recent EU legislation on ADR for consumer disputes could be effectively used[101]. As the author claims: *"Consumer ADR systems work for contract claims and could be extended for competition claims. They process claims individually but can inherently process mass similar claims."*[102] We can imagine that such mechanism could be effectively applied in case of price-fixing agreements, or other infringements of antitrust law causing injuries to multiple consumers.

As far as the business versus business claims are concerned ("B2B"), further changes shall be made. Among key elements of such changes we shall evoke:

- voluntary character of ADR;
- confidentiality of settlement proceedings;
- protection of information disclosed within the ADR process;
- assessment of case by the independent panel of experts specialising in the area of antitrust law;
- binding character of case settlement;
- assessment of the settlement agreement by the court;
- exclusion of further liability of settling undertaking.

The goal of proposed solutions shall be to ensure full efficiency of ADR, and in the same time, to provide appropriate protection of interests and rights of all parties involved.

6.3.3. Ensuring coherence between public enforcement, collective redress and ADR

The final objective of the provisions on ADR shall be to ensure coherence between 3 pillars of competition law enforcement, i.e. public enforcement, private enforcement and ADR. In order to achieve this goal following solutions shall be adopted.

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[101] See Directive 2013/11/EU of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, OJ L 165, 18.6.2013, p. 63–79; and the Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, OJ L 165, 18.6.2013, p. 1–12.

[102] C. Hodges, *Fast, Effective and Low Cost Redress…*, pp. 263–264.

First, the court shall be granted control over the ADR scheme and the settlement agreement. The control over the ADR scheme shall cover:
- approval by the court of the parties' attempt to refer a case to ADR;
- approval of a subject of ADR;
- approval of a person(s) selected as competent to settle the dispute.

The control over the settlement agreement, shall refer to the court's approval of the agreement and granting a binding nature to the settlement. Thanks to such solution, the abuse could be avoided, the interests of both parties could fully protected, and the efficiency of out-of-court settlement would be increased.

The second way of ensuring coherence between 3 pillars of competition law enforcement would concern the issue of access to proofs. Since this element of antitrust disputes concerned particular problems in the recent discussion on private enforcement, specific provisions, similar to these stipulated in Damages Directive (Art. 5–8 of the Damages Directive), shall be provided in order to ensure full protection of information disclosed within ADR proceedings.

Finally, the mutual relationship between ADR and public enforcement shall be ensured. Here, the particular attention shall be given to the sanctioning policy of NCA and an obligation of competition authority to consider out-of-court settlement as a mitigating factor in its fining policy.

In order to sum up, it shall be stated that further discussion on collective redress in the EU shall give much more attention to the issue of ADR. Its aim should not be only to encourage parties to refer to ADR, but to provide real solutions able to incentivise undertakings and individuals to refer to such method of disputes settlement. Moreover, the goal shall be to increase importance of ADR, within the previously described 3 pillars construction of competition law enforcement, and by providing a balance and required links between public enforcement, collective redress and ADR, increase individuals' access to justice. Because, as C. Hodges states: *"The issue arises of how the three pillars can be optimally combined in practice within a single holistic model. It appears that new thinking can at last solve many issue of redress: the key has been to think about outcomes and possible mechanisms, rather than stick to assumptions that only an existing mechanism provides the answer."*[103]

[103] *Ibidem*, p. 289.

Conclusion Chapter 3

The reasoning conducted in Chapter 3 shows that specific steps shall be undertaken by the European legislator in order to ensure establishment of a modern and effective mechanism of collective redress in Europe. As Chapter 3 shows, if properly shaped and adopted at the EU level, the group litigation mechanism can become a final puzzle in the European model of private enforcement of competition law.

The conducted analysis confirms that more decisive steps need to be undertaken in order to ensure that the objectives pursued by the Damages Directive are achieved and the individuals injured by competition law infringements are empowered with the effective mechanisms of enforcement. In the opinion of the authors, following steps shall be undertaken in order to establish common European approach to collective redress:

- adoption of a minimum harmonisation directive (limited only to competition law or having the horizontal nature) covering the issue of group litigation;
- proposal of a group litigation mechanism composed of the specific elements, i.e.:
  - a broad scope of legal standing;
  - the flexible rules on the conduct of collective proceedings;
  - an opt-out or hybrid model of group's formation;
  - a principle role of a judge within the group litigation process;
  - the limited costs of group proceeding and innovative methods of financing;
  - an increased role of ADRs;
- ensuring a balance between public enforcement, collective redress and ADR.

If the above is fulfilled, the chances for the establishment of a coherent and effective approach to collective redress within the EU would be significantly increased. In consequence, *de lege ferenda* proposals included in the last Chapter of thesis may be used as a guideline towards the way to increase efficiency of competition law enforcement in the EU.

Conclusion

The analysis conducted within the thesis leads us to the conclusion that a modern system of competition law enforcement requires complex approach, composed of legal, social and cultural changes, in order to ensure full efficiency of antitrust law provisions. Its goal shall not be only to set a balance between public and private enforcement, provide new tools for the detection and prosecution of anticompetitive practices, but the ultimate objective shall be to establish a regime in which each actor of modern society, i.e. consumers, enterprises and public authorities, will play a role in the enforcement process.

In order to achieve this objective, the legislative changes introduced at the European level may not be a patchwork of legal solutions, differently interpreted and applied in various jurisdictions, but shall form a part of complex and coherent approach to the issue of competition law enforcement. Moreover, in order to ensure that new and innovative proposals in the area of antitrust enforcement will reach its addresses, greater competition advocacy is required.

Therefore, while the thesis welcomes the steps recently undertaken by the EU legislator in the area of public and private enforcement (launching a consultation *"Empowering the national competition authorities to be more effective enforcers"* and adoption of "private enforcement package"), it argues that still a lot has to be done, before we can claim that a coherent and fully effective regime of antitrust law enforcement, ensuring appropriate protection of individuals against competition law infringements, was established in Europe.

First, it has to be recognised that a system of competition law enforcement currently existing in the EU, based on a dominant role of public authorities in the enforcement of competition law provisions, leads to restrained protection of individuals against antitrust law violations. This initial scientific

hypothesis is confirmed by the analysis of empirical data conducted within the research. As it shows, despite the existence of innovative enforcement mechanisms, such as leniency programmes or private methods of competition law enforcement, great majority of private parties injured by anticompetitive behaviours is still left without protection. As the Commission estimates, annually between 13 and 37 billion euros of direct costs caused by illegal cartels are suffered by EU consumers and other victims of competition law infringements[1]. Moreover, as the Commission adds, such assessment: *"takes no account of more indirect macro-economic effects, such as the absence of greater allocative, productive and dynamic efficiency, which contribute to growth and employment, but are extremely difficult to estimate."*[2] Also the national experience with the enforcement of antitrust law confirms, that individuals are still reluctant to undertake private actions once injured by competition law infringements. The outcome of such scenario is simple to foresee, the great number of injured parties are left without due compensation, and important part of illegal gains resulting from the anticompetitive practices stays on the side of law perpetrators. In view of the above, the author strongly argues in favour of strengthening the role of private method, and granting to individuals greater role in the execution of competition law provisions.

The second observation following from the conducted research concerns the role of private method in the whole system of competition law enforcement. As the thesis confirms, only through establishment of a hybrid system of law enforcement, composed both of public and private method, the objectives of competition law enforcement may be fully achieved. Therefore, the second scientific hypothesis, claiming that in order to increase the efficiency of competition law, private method shall be developed and constitute a complement to the hybrid system, receives its particular meaning. Nevertheless, while such conclusion does not seem to create a novelty in the current European discussion on the enforcement of antitrust law, what seems to differ, is the role that thesis grants to the private enforcement and its specific mechanisms.

At this point it shall be argued, that while the EU legislator seems to swung the "pendulum of competition law enforcement" on the side of public

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1 See EC's Impact Assessment Report, Damages actions for breach of the EU antitrust rules, Accompanying the proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, SWD(2013) 203 final, pt. 64.

2 *Ibidem*, pt. 64.

mechanism, the thesis strongly opposes to such solution. In the opinion of author, such approach runs a risk that a *status quo* in the enforcement of antitrust law will be preserved, and despite introduction of the Damages Directive, individuals will still be deprived of the effective measures of protection against competition law infringements.

It may result from a character of changes proposed in the Damages Directive, exclusion of certain issues from the scope of regulation, and possible problems with the implementation of the Damages Directive into the national legal orders. Finally, what is particularly striking in current debate on private enforcement, and may squander efficiency of private method in the EU, is the limitation of a role of group litigation in the newly proposed regime. By refraining from the adoption of a binding and coherent approach to collective redress, and leaving to MS a freedom to introduce, modify, or even remove a mechanism of group litigation from their national legal order, the EU legislator calls into question the future of private enforcement in the EU.

Therefore, it may be claimed that without reassessment of current approach to private enforcement and introduction of more innovative mechanisms in this area of law, the full protection of EU citizens and enterprises against anticompetitive practices will not be achieved. Such conclusion confirms the third scientific hypothesis, which held that:

"With a view of guaranteeing higher efficiency of antitrust law and proper protection of individuals against competition law violations, it is required to develop more flexible and innovative private methods of competition law enforcement, especially a group litigation mechanism."

The above conclusion also opens a door for further debate on private enforcement in the EU, which in the author's opinion, shall inevitably lead to introduction of a single European model of group litigation. Because as the current experience shows, a lack of such mechanism at the EU level, and conservative character of Commission's proposals in the area of collective redress, result in the unequal protection of EU citizens against competition law infringements and limited development of private enforcement in the EU.

The results of the above reasoning confirm fourth and fifth scientific hypothesis, stating that:

"The current approach of European Commission to the issue of collective redress does not ensure establishment of an effective mechanism of group litigation in Europe and further steps are required in order to change this scenario",

and that:

"National solutions on group litigation does not ensure effective protection of individuals against competition law infringements, and if not empowered with a coherent and binding approach to collective redress at the EU level, may lead to limited and unequal protection of EU citizens against competition law infringements."

In view of the above assessment, showing several limitations of current regime of competition law enforcement, and underlining a need of its further changes, we may finally undertake an attempt to provide an answer to the question asked at the beginning of thesis:

"How to establish a system of antitrust law enforcement able to mitigate the problems of injured individuals claiming for compensation?"

First of all, in order to achieve this objective, the role of private method in the enforcement of competition law provisions shall be increased, and the current relationship between public and private enforcement shall be reassessed. While the author does not contest the fundamental meaning of public method for the execution of competition law provisions, it argues in favour of greater significance of private method in a hybrid regime of law enforcement. The reassessment shall be considered once the rules on access to evidence are concerned, the costs and financing of private actions are involved, and finally once the mechanisms of private enforcement are analysed. The goal shall be to empower individuals with more effective and cost-efficient mechanisms of legal protection, that without diminishing the role of public method, will strengthen the role of individuals in the detection and prosecution of anticompetitive practices.

Secondly, in order to mitigate the problems of individuals injured by antitrust law infringements and claiming for compensation, greater importance shall be given to innovative mechanisms of private enforcement. As such the author considers group litigation mechanism, and alternative methods of dispute resolution, which shall always accompany judicial methods of disputes settlement. In the author's opinion, only through introduction of a coherent approach to group litigation in the EU, individuals may be empowered with the effective instrument of private enforcement, able to increase access to justice and reduce the asymmetry between the victims of law infringements and law perpetrators. Moreover, such a solution has a potential to ensure greater economy and predictability of the enforcement process, and strengthen the hybrid regime in the detection, prosecution and deterrence of anticompetitive behaviours.

What is also important to underline at this point, is that the new approach to collective redress should not only aim to ensure coherence between solutions adopted in all MS, but first and foremost, shall try to propose

innovative and efficient instruments in this area of legal practice. The main improvements shall cover the scope of legal standing, organisation of collective proceedings, rules on group formation, position of a judge, financing and costs of collective claims, and finally relationship between group litigation, public enforcement and ADRs.

While proposing such improvements, a reference to the national systems of group litigation may be particularly important. The comparative approach may permit that the universal solution, based on the mechanisms working effectively in practice in different jurisdictions, will be proposed to all MS. Moreover, in the author's opinion, such an approach is an ideal way of progress, in a new and still undiscovered area of law. Because as R. Sacco rightly observed: *"Without variation we would not have progress, for progress is itself variation […] Variation does not stop at each goal it reaches. Progress does not aim to a static, final equilibrium. On the contrary, each point of arrival creates new disequilibrium, i. e. a situation congenial to further innovation."*[3]

Having the aforementioned guideline in mind, the thesis wishes to open a discussion on future of group litigation in the EU. The aim of *de lege ferenda* proposals included in the last Chapter of thesis, is to provide a general framework for a model solution in the area of collective redress. In the author's opinion, the proposals based on the experiences of different national jurisdictions, may construe a step towards the innovation, and lead to further improvement in the area of private enforcement of antitrust law. In the same time, thanks to the method of minimum harmonisation proposed by the author, a way for further changes and bottom-up initiatives may be opened. It can ensure that a new regime of private enforcement and group litigation will not be a static construction, but a solution able to adapt to future changes and the needs of market participants.

Finally, the last element required to establish a system of antitrust law enforcement able to mitigate the problems of individuals claiming for compensation, has neither legal, nor economical, but rather cultural dimension. That is because, it shall be always kept in mind that in any legal scenario, even the most effective tools of enforcement, may remain a dead letter if they do not reach its addresses.

In view of the above that it shall be claimed, that introduction of new mechanisms of private enforcement, shall be accompanied by a change in the cultural approach to competition law enforcement in Europe. For that reason, all legal reforms proposed by the European and national legislator

[3] R. Sacco, *Diversity and Uniformity in the Law*, The American Journal of Comparative Law, Vol. 49, No. 2 (Spring 2001), pp. 174–175.

require greater advocacy, in order to reach persons and entities involved in the enforcement process. Probably, this is a task most complex and difficult to achieve, what does not mean however, that it shall be abandoned.

In order to fulfil the aforementioned objective, several mechanisms may be proposed. It concerns in particular:

- publication of guidelines and public communications on private enforcement and group litigation;
- organisation of conferences and seminars on the aforementioned issue;
- organisations of workshops and training for judges involved in the enforcement process, and finally;
- launching public campaigns aiming to reach the addresses of introduced mechanisms, i.e. consumers and enterprises.

The main goal of all undertaken efforts, i.e. political, legal and cultural changes, shall be to find a new, European approach to the enforcement of competition law provisions. It could be defined neither as a "public enforcement culture", nor as a "litigation culture", but rather as an "effective enforcement culture". As such we shall understood such an approach to the enforcement of antitrust law, which while respecting mutual coherence and complementary role of public and private method, will aim to ensure the full attainment of three objectives of competition law enforcement, i.e. punishment, deterrence and compensation, without giving priority to none of them. In such a culture, the greater involvement of involvement of individuals in the enforcement process, mainly by the use of group litigation mechanism, shall obtain particular importance and complement currently existing system of competition law enforcement in the EU.

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Dr. Maciej Gac
Dr. Maciej Gac specialises in Polish and EU competition and consumer law. He works as a lawyer in the Competition Law practice at the Hogan Lovells Warsaw Office. He is also active in research and didactic work, both in Poland and abroad. He is an academic teacher and the author of many scientific publications in the fields of EU law and competition law. Dr. Maciej Gac is a graduate of the Faculty of Law and Administration of the Jagiellonian University, and of the Faculty of Law of the University of Toulouse. In September 2016, he defended his doctoral thesis (with honours) being the subject of this book. The thesis was prepared within the framework of international cooperation between the Jagiellonian University and the University of Toulouse.

From the book reviews:

As to the substance, Mr. Gac proves a thesis that is not entirely new. It is based on a double assumption - shared by numerous authors, that on the one hand, the more effective application of competition law depends on the development of private enforcement, and on the other, that in the present state of statutory law, a group litigation mechanism introduced by a mean of directive, is a missing element of the chain. As he states in the French abstract of the thesis "the objective is to encourage the national and European legislator to undertake more decisive steps in the area of competition law enforcement, and to introduce solutions able to mitigate the problems of individuals injured by antitrust law infringements." The author supports his assumptions in a systematic way. He raises questions, presents various stages of his analysis and concludes each point before proceeding to further considerations. Therefore, all the formal rules that the doctoral thesis shall fulfil are well respected.

Prof. Laurence Idot
Professor at the University Paris II – *Panthéon Assas*
Member of the College of the French Competition Authority
(*Autorité de la concurrence*)

The reviewed doctoral thesis prepared by Mr. Maciej Gac entitled "Group litigation as an instrument of competition law enforcement - analysis based on European, French and Polish experience" received a lot of attention before it was even read. Not only because it was written in English, in the *co-tutelle*, under the supervision of two renowned specialists in the area of competition law from Poland (Prof. dr. hab. Sławomir Dudzik) and France (Prof. Sylvaine Poillot-Peruzzetto), but also due to the fact, that it was prepared by a Ph.D. candidate whom I have known before as an author of scientific publications, conducting his research within the grant attributed by the National Science Centre in Poland. It could have been expected though, a unique research, conducted reliably by a very ambitious person. The reading confirmed my expectations. The doctoral thesis of Mr. Maciej Gac shows his ability to correctly recognise and resolve current research problems, and confirms his deep knowledge and researching autonomy. He is able to present the problem from different angles and refers to the opinions expressed by various authors, presenting at the same time his own standpoint. Therefore a doctoral thesis of high cognitive values, characterised by a thorough and innovative nature, was prepared.

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