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Private Antitrust Enforcement and Tentative Steps Toward Collective Redress in Europe and the United Kingdom

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NOTE

PRIVATE ANTITRUST ENFORCEMENT AND TENTATIVE STEPS TOWARD COLLECTIVE REDRESS IN EUROPE AND THE UNITED KINGDOM

*Maria Teresa Vanikiotis**

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INTRODUCTION

In an effort to strengthen private antitrust enforcement, the United Kingdom's recent legislative proposal stands to provide a viable collective redress mechanism, whereas the European Commission's policy recommendation remains mired in constraints that will undermine its very objective.¹ The opportune role for collective redress is a hotly contested issue in the global debate over the appropriate function of private action in antitrust enforcement.² While collective action has been an underdeveloped area of the law in the United Kingdom and European Union jurisdictions, its recognized value as an effective means of compensating antitrust infringement victims has galvanized interest in developing avenues for collective redress.³ The US answer to collective redress is the class action

1. *See* Consumer Rights Bill, Private Actions in Competition Law, 2014, H.C. Bill [161] sch. 8, 103–117 (U.K.); *see* Commission Recommendation on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted Under Union Law, Jul. 26, 2013, 2013 O.J. (L 201) 60 [hereinafter Commission Recommendation] (providing proposed collective redress mechanisms in private antitrust enforcement).

2. *See* Commission White Paper on Damages Actions for Breach of EC antitrust Rules, COM (2008) 165 final (April 2008) [hereinafter Commission White Paper 2008]; *See* GERAIN HOWELLS, *EVALUATION OF THE EFFECTIVENESS AND EFFICIENCY OF COLLECTIVE REDRESS MECHANISMS IN THE EUROPEAN UNION—COUNTRY REPORT UNITED KINGDOM* (Frank Alleweldt et al. eds., 2008); *See also* DEP'T FOR BUS. INNOVATION & SKILLS, *PRIVATE ACTIONS IN COMPETITION LAW: A CONSULTATION ON OPTIONS FOR REFORM* (2012) [hereinafter DEP'T FOR BUS. INNOVATION & SKILLS—2012 CONSULTATION] (discussing the appropriate role of private action in antitrust enforcement and the potential benefits and disadvantages to different collective redress mechanisms).

3. *See* Commission Green Paper on Damages Actions for Breach of Antitrust Rules, at 4, COM (2005) 673 final (Dec. 2005) [hereinafter Commission Green Paper 2005] (describing the enforcement of antitrust rules in the Member States as an area of “total underdevelopment”); JOHN SORABJI ET AL., *IMPROVING ACCESS TO JUSTICE THROUGH COLLECTIVE ACTIONS* 77 (Michael Napier et al. eds., 2008) (recognizing that

suit, which is filed by plaintiffs on behalf of a larger group of people seeking a legal remedy for some perceived wrong.⁴ The US-style class action, however, has been widely criticized as encouraging frivolous lawsuits and giving rise to an undesirable culture of litigation, contributing to the so-called “toxic cocktail.”⁵ To escape the perceived flaws in the US model, the United Kingdom and the European Commission have developed new regimes, which are embodied in the recently proposed UK Consumer Rights Act and the European Commission’s Recommendation on common principles for collective redress mechanisms in the Member States.⁶

These collective action regimes proposed by the United Kingdom and the European Commission are the subject of this comparative analysis.⁷ Part I delivers a comprehensive review of antitrust enforcement in the United States, the United Kingdom, and the European Union. This Part also surveys the academic literature outlining the perceived advantages and shortcomings of the US class action model. Part II illustrates the legal conflict

“individual citizens have almost no chance of bringing action against powerful companies” and “international consensus has developed that a collective action procedure is the most efficient and effective means of providing genuine access to justice”).

4. See DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 1 (2000); Bruce Hay & David Rosenberg, “Sweetheart” and “Blackmail” Settlements in Class Actions: Reality and Remedy, 75 NOTRE DAME L. REV. 1377, 1377 (2000) (adding that class actions often represent thousands or even millions of claims).

5. Christopher Hodges, *Collective Redress in Europe: The New Model*, 29 CIV. JUST. Q. 370, 372–73 (2010) (illustrating the resistance of the European Commission toward US-style class actions because in Europe, “political consensus formed that the U.S. class action model gave rise to highly undesirable adverse effects” and that the legal culture “did not contain some of the ‘toxic elements’ that make up the ‘American toxic cocktail’”); Samuel Issacharoff & Geoffrey P. Miller, *Will Aggregate Litigation Come to Europe*, 62 VAND. L. REV. 179, 179 (2009) (“Once decried as the perversity of rapacious Americans, class actions are now the focus of significant reform efforts in many European countries and even at the level of the European Union.”).

6. See Consumer Rights Bill, Private Actions in Competition Law, 2014, H.C. Bill [161] sch. 8, 103–117 (U.K.) (introducing a variety of consumer rights related policies, including reformed mechanisms for collective redress); see also Commission Recommendation, *supra* note 1 (introducing recommendations on collective redress mechanisms for implementation in the European Member States).

7. See Consumer Rights Bill, Private Actions in Competition Law, 2014, H.C. Bill [161] sch. 8, 103–117 (U.K.); Commission Recommendation, *supra* note 1 (indicating the legislative proposals in the United Kingdom and the European Union relevant to the subsequent analysis).

at hand by detailing the regulatory solutions to the collective redress question proposed by the UK government and the European Commission. The critical analysis of the respective approaches comprises Part III. In this Part, the proposed collective action schemes are assessed with respect to how well each stands to fulfill the stated objectives. This analysis will demonstrate that the UK Consumer Rights Act and the European Commission Recommendation on collective redress each represent notable steps forward in enhancing private actions in antitrust enforcement. Part III argues, however, that certain safeguards implemented in both jurisdictions may prove highly counterproductive toward achieving the intended ends.

I. *ANTITRUST REGIMES AND EXISTING COLLECTIVE ACTION SCHEMES IN THE UNITED STATES, UNITED KINGDOM, AND EUROPEAN UNION*

To properly evaluate the efficacy of current and proposed collective action mechanisms, Part I establishes the context of existing antitrust law, enforcement and redress in the relevant jurisdictions. Part I.A sets the stage by detailing the broad advantages and goals of a well-developed legal infrastructure for bringing aggregated claims in antitrust cases. Part I.B then illustrates the US class action model, which is a highly developed regime. Part I.C explores class action critiques to identify the model's perceived flaws. Finally, Part I.D and I.E sketch the existing regimes in the United Kingdom and European Union, respectively, as well as the motivations for reforming collective action measures in these jurisdictions.

A. *Why Provide Collective Redress At All?*

Despite United Kingdom and European resistance toward US-style class actions, there has been a great amount of dialogue on the question of how to implement mechanisms for collective redress in private competition litigation.⁸ The persistence of this

8. See Marc A. Sittenreich, Note, *The Rocky Path for Private Directors General: Procedure, Politics, and the Uncertain Future of EU Antitrust Damages Actions*, 78 *FORDHAM L. REV.* 2701, 2712 (2010) (noting that EU Competition Commissioner Neelie Kroes acknowledged the Commission was “looking for ways to boost private enforcement and strengthen competition”); SORABJI ET AL., *supra* note 3, at 62 n.100 (describing the

discussion suggests that the current state of private enforcement in the United Kingdom and Europe is lacking in some material way.⁹ The literature suggests that the following policy objectives and gaps in the existing system—access to justice, market rectification, judicial economy, deterrence, and more robust private enforcement—indicate that some form of collective redress is desirable.¹⁰

1. Access to Justice

First, in UK and EU jurisdictions where claimants traditionally must finance their own causes of action, universal access to justice is a substantial challenge to strengthening private enforcement.¹¹ The lack of competition litigation and redress can be attributed to the fact that many claims are for individually small amounts, which are not cost-effective actions to bring.¹² The ability to aggregate claims and bring a suit

antipathy in Europe toward US style class action litigation culture and quoting Commissioner Neelie Kroes in a speech to the Commission as saying “[t]o those who have come all the way from Lisbon to hear the words ‘class action’, let me be clear from the start: there will not be any. Not in Europe, not under my watch”).

9. See Commission Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules, at 8, SEC (2008) 404 final (Apr. 2008) [hereinafter Commission Staff Working Paper 2008] (“The ECJ acknowledged, and recently confirmed, that the right to damages is necessary to guarantee the useful effect of the EC competition rules.”); DEP’T FOR BUS. INNOVATION & SKILLS, PRIVATE ACTIONS IN COMPETITION LAW: A CONSULTATION ON OPTIONS FOR REFORM—GOVERNMENT RESPONSE 3 (2013) [hereinafter OPTIONS REFORM—GOVERNMENT RESPONSE] (noting that responses to the UK consultation on private actions confirmed that the existing regime is “not working”).

10. “Research has demonstrably evidenced an ‘unmet need’ for reform for collective redress mechanisms in English civil procedure. Whether this is to be achieved by the introduction of a new collective redress mechanism or by the supplementation of an existing procedure, ‘something more’ is required to facilitate the litigation and testing of widespread grievances, in circumstances where, presently, these grievances are not being addressed nor compensated.” SORABJI ET AL., *supra* note 3, at 97 (citing R. MULHERON, REFORM OF COLLECTIVE REDRESS IN ENGLAND AND WALES: A PERSPECTIVE OF NEED 157–61 (2008)).

11. Janet Walker, *Our Courts and the World: Transnational Litigation and Civil Procedure—Complex Transnational Litigation: Who is Afraid of U.S. Style Class Actions?*, 18 SW. J. INT’L L. 509, 518, 522 (2012) (noting that access to justice is one of the objectives of group litigation and that, in Lord Woolf’s 1996 Report for the United Kingdom, access to justice was one of the “key underpinnings of any new regime of collective redress”); see Hodges, *supra* note 5, at 373.

12. See Hodges, *supra* note 5, at 371; see also Tiffany Chieu, *Class Actions in the European Union? Importing Lessons Learned from the United States’ Experience into European Community Competition Law*, 18 CARDOZO J. INT’L & COMP. L. 123, 143 (2010) (“While

collectively allows claimants to share costs and ultimately engage in more litigation.¹³

2. Market Rectification

Second, the disincentive to bringing small individual claims is subsequently an unjust gain for the violator of antitrust law.¹⁴ In typical scenarios where multiple consumers or small businesses suffered an individually small amount of loss, that amount in the aggregate can be quite significant.¹⁵ The “large illicit windfall” gained by the perpetrator would distort competition and disrupt the balance of a fair free market.¹⁶ In light of the broader market implications of non-aggregated claims, some form of collective redress is necessary even if the individual claims themselves are not overly burdensome to each claimant.¹⁷

the class action device has its critics, it has been particularly useful in the United States among individuals with small claims who, without class action mechanisms, have no economic incentive to bring lawsuits on their own.”); Commission White Paper 2008, *supra* note 2, at 4 (“Individual consumers, but also small businesses, especially those who have suffered scattered and relatively low-value damage, are often deterred from bringing an individual action for damages by the costs, delays, uncertainties, risks and burdens involved. As a result, many of these victims currently remain uncompensated.”).

13. Commission Staff Working Paper 2008, *supra* note 9, at 14 (reporting that respondents to the Commission’s 2005 Green Paper recognized “the need to allow consumer claims to be aggregated in some way, particularly to reduce the difference between the costs of action and the often small value of the damage individually suffered.”); *see* Chieu, *supra* note 12, at 137.

14. *See* Hodges, *supra* note 5, at 371 (linking the gap in judicial remedies for antitrust violations with broader implications for the European internal market); Tiana Leia Russell, *Exporting Class Actions to the European Union*, 28 B.U. INT’L L.J. 141, 156 (2010) (noting the importance of disgorgement as a public policy matter, i.e., equity principles provide that wrongdoers should not profit from their wrongdoing and “[s]ociety benefits . . . when courts devise remedies that force defendants to relinquish ill-gotten gains”).

15. *See* Hodges, *supra* note 5, at 371; *see also* Edward D. Cavanagh, *The Private Antitrust Remedy: Lessons from the American Experience*, 41 LOY. U. CHI. L.J. 629, 635 (2010) (discussing the disgorgement of ill-gotten gains by antitrust violators via treble damages in US antitrust cases).

16. Hodges, *supra* note 5, at 371 (providing that such an illicit windfall would produce an imbalance in the market, which “would not conform to the ideals of fair competition within the European internal market”).

17. *See id.* at 371 (describing broader market implications, including barriers for consumers to wield maximum economic power and barriers for small businesses to maximize innovative and regenerative potential).

3. Judicial Economy

Third, a procedure allowing aggregated claims would provide for swifter, more effective resolution of cases that, due to the number of claimants and nature of the claims, are not conducive to individual treatment.¹⁸ The corollary objectives of proportionality and predictability also support the adoption of collective action reform; for instance, in a justice system that aims to allocate resources proportionately, the aggregation of similar claims under collective action is more efficient than a series of individual claims.¹⁹ Also, a class action regime would streamline the outcomes of related claims and increase predictability, whereas a succession of individual claims might lead to a wide range of outcomes depending on the strategies of each court.²⁰ Furthermore, allowing for aggregated claims under a single suit improves efficiency for defendants; collective action mechanisms promote finality in that defendants can avoid duplicative litigation of the same claim.²¹

4. Deterrence

Fourth, collective redress bolsters the overarching aim of all antitrust enforcement: deterrence.²² The UK Office of Fair

18. Sir Harry Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*, ch. 17 para. 2 (1996), available at <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/civil/final/sec4c.htm>; see also Chieu, *supra* note 12, at 150 (“The failure to include all identifiable victims also undermines one of the benefits of collective action: judicial economy.”).

19. Walker, *supra* note 11, at 521–23; SORABJI ET AL., *supra* note 3, at 51 (providing that “proportionality & efficiency” are a valid benchmark to be applied when evaluating approaches to collective action).

20. Walker, *supra* note 11, at 522 (noting that in the absence of a mechanism to aggregate claims, a multitude of courses will produce a range of outcomes and decrease predictability).

21. See Walker, *supra* note 11, at 523; SORABJI ET AL., *supra* note 3, at 167 (contending that aggregating damages is essential to the success of a collective action mechanism because it “ensures that the defendant has certainty and finality in terms of their liability to all claimants”); see also Woolf, *supra* note 18, ch. 17 para. 2 (discussing the importance of achieving fairness in the balance between the claimants’ and defendants’ rights and the interests of both parties in litigating the action “as a whole and in an effective manner”); *Multi-party Actions*, DEP’T FOR CONSTITUTIONAL AFFAIRS, <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/civil/final/sec4c.htm> (last visited June 10, 2014).

22. See Cavanagh, *supra* note 15, at 633; see also Walker, *supra* note 11, at 523. *But see* Commission Communication, *Toward a European Horizontal Framework for*

Trading (the “OFT”) and the Commission have agreed that private actions are an essential complement to public enforcement in that expand the pool of claims to investigate and strengthen deterrence.”²³ Collective action further enhances deterrence because the threat of a suit representing thousands of similarly situated claimants is a daunting incentive for defendants to discontinue any anti-competitive behavior.²⁴

5. More Robust Private Enforcement

Finally, “no antitrust regulation system has any realistic chance of success without [private antitrust litigation].”²⁵ Collective redress mechanisms stand to contribute substantially to a broader effort in Europe and the United Kingdom to increase private antitrust enforcement.²⁶ In the United Kingdom, the Civil Justice Council of England and Wales (“CJC”) reports that individual citizens have “almost no chance of bringing

Collective Redress, at 7, COM (2013) 401/2, 7 [hereinafter Commission Communication 2013] (evidencing traditional European jurisprudence that public enforcement serves to prevent, detect and deter, whereas private enforcement should solely aim to secure compensation for victims, and acknowledging that where public enforcement is weak, private actions can also serve a deterrence function).

23. Walker, *supra* note 11, at 523 (identifying deterrence as an “important ancillary consequence” of private enforcement, but simply a by-product of achieving compensation for class members); *see also* Commission White Paper 2008, *supra* note 2, at 3 (“Effective remedies for private parties also increase the likelihood that a greater number of illegal restrictions of competition will be detected and that the infringers will be held liable. Improving compensatory justice would therefore inherently also produce beneficial effects in terms of deterrence of future infringements and greater compliance with EC antitrust rules.”).

24. Cavanagh, *supra* note 15, at 635 (“It is one thing for a defendant to be sued by a single plaintiff for a single overcharge. It is quite another for a defendant to be sued by a plaintiff on behalf of tens of thousands of similarly situated victims of antitrust violations.”); Sittenreich, *supra* note 8, at 2707.

25. CLIFFORD A. JONES, PRIVATE ENFORCEMENT OF ANTITRUST LAW IN THE EU, UK AND USA, at xii (1999); *see* SORABJI ET AL., *supra* note 3, at 79 (noting that both the Office of Fair Trading (the “OFT”) and the European Commission have publicly acknowledged that private actions are a “necessary complement” to public enforcement efforts).

26. DEP’T FOR BUS. INNOVATION & SKILLS, GOVERNMENT RESPONSE TO CONSULTATIONS ON CONSUMER RIGHTS 52 (2013) (U.K.) [hereinafter GOVERNMENT RESPONSE TO CONSULTATIONS ON CONSUMER RIGHTS 2013] (noting that the reforms to the UK collective action regime were intended to “enhance opportunities for businesses and consumers to obtain compensation for losses, and to tackle anti-competitive behavior”); Commission Communication 2013, *supra* note 22, at 13 (identifying one goal of the Commission’s proposed reforms as “facilitating effective private collective redress”).

actions against powerful companies” and recommends that the government actively pursue a procedural shift that favors individual claimants, either as consumers or small businesses.²⁷ Furthermore, the UK Department for Business Innovation & Skills expressed that the existing private action regime in competition law is “not working” and that most consumers and small businesses lack access to justice.²⁸ Similarly in the European context, the 2005 Green Paper identified the area of damages claims for infringements of antitrust rules as one of total underdevelopment, and the subsequent 2008 White Paper underscored the present state of ineffectiveness in private antitrust litigation.²⁹ As noted by Judge Ginsburg of the US Court of Appeals for the D.C. Circuit, “The prevailing view in Europe seems to be that competition policy would benefit from an increased level of private enforcement.”³⁰

B. Antitrust and Enforcement Mechanisms in the United States

The legislation upon which all US antitrust enforcement is based is the Sherman Antitrust Act of 1890 (“Sherman Act”) and the amending Clayton Act of 1914 (“Clayton Act”).³¹ Together these federal statutes prohibit activities that restrain competition in the free market and provide remedies for antitrust violations.³² Section 1 of the Sherman Act bars any

27. SORABJI ET AL., *supra* note 3, at 77; see DEP’T FOR BUS. INNOVATION & SKILLS—2012 CONSULTATION, *supra* note 2, at 27 (noting that consumers and small businesses face financing difficulties in bringing competition actions, as well as liability concerns that far outweigh the individual value of the claim in the event that the individual cases lose).

28. OPTIONS REFORM—GOVERNMENT RESPONSE 2013, *supra* note 9, at 3; GOVERNMENT RESPONSE TO CONSUMER RIGHTS 2013, *supra* note 26, at 4–5 (describing existing consumer law as unsatisfactory and the aim of reforms as enabling consumers and businesses easier access to justice).

29. Commission Green Paper 2005, *supra* note 3, at 4; Commission White Paper 2008, *supra* note 2, at 2.

30. Douglas H. Ginsburg, *Comparing Antitrust Enforcement in the United States and Europe*, 1 J. OF COMP. L. & ECON. 427, 435 (2005); see Sittenreich, *supra* note 8, at 2707–08 (noting that private litigation can provide compensation to consumers and businesses for economic injuries and that “the Commission intends to make damages actions the primary means of compensation for EU antitrust victims”).

31. Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (1890) (providing the basis of federal antitrust and anti-monopoly law in the United States); Clayton Act, 15 U.S.C. §§ 12–27 (1914) (amending and supplementing the Sherman Antitrust Act).

32. Sherman Antitrust Act, 15 U.S.C. §§ 1–7; Clayton Act, 15 U.S.C. §§ 12–27.

agreement that, as its aim or effect, restricts interstate trade, while Section 2 proscribes monopolization and conspiracy to monopolize.³³ The Clayton Act further expands the meaning of anti-competitive practices beyond the traditional concept of monopoly to include, among others practices, price discrimination, exclusive dealings, and anti-competitive mergers.³⁴

The United States' approach toward antitrust enforcement is twofold: public and private.³⁵ On the public side, the Federal Trade Commission ("FTC") and the Department of Justice Antitrust Division ("DOJ") are charged with leading investigations and adjudications against violators of antitrust laws on behalf of the federal government.³⁶ On the private side, private litigation brought forward by the victims of antitrust infringements constitutes a substantial component of antitrust enforcement in the United States.³⁷ In the event that an antitrust violation occurs, the Clayton Act provides standing for injured persons to bring actions for treble damages against the perpetrators of the wrongful anti-competitive conduct.³⁸ Consequently, at least ninety percent of all federal antitrust cases up until the 1980s were private actions.³⁹ Even more

33. 15 U.S.C. §§ 1, 2 (declaring illegal any collusive behavior in restraint of trade or commerce, as well as any monopolistic behavior in trade or commerce).

34. 15 U.S.C. §§ 13, 14, 18 (providing that persons engaged in commerce shall not discriminate in price, take part in exclusive dealing arrangements, or acquire monopolistic power in any line of commerce).

35. Chieu, *supra* note 12, at 130; *see also* Sittenreich, *supra* note 8, at 2710 (identifying public enforcement by the DOJ and FTC and private enforcement through damages actions as primary enforcement mechanisms).

36. Chieu, *supra* note 12, at 129–30; Sittenreich, *supra* note 8, at 2710 (outlining the respective antitrust enforcement responsibilities of the US Federal Trade Commission ("FTC") and Department of Justice ("DOJ")). Individual state governments also enforce antitrust statutes at the state level. *See, e.g.*, N.Y. St. Office of the Att'y General, *Antitrust Enforcement*, <http://www.ag.ny.gov/antitrust/antitrust-enforcement> (last visited Apr. 4, 2014).

37. Chieu, *supra* note 12, at 130; Spencer Weber Waller, *The Incoherence of Punishment in Antitrust*, 78 CHI-KENT L. REV. 207, 210 (2003) ("The vast majority of antitrust enforcement comes through private damages suits.").

38. 15 U.S.C. § 15(a) (providing that any person injured by conduct forbidden by US antitrust laws may sue in federal court and "shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee").

39. Chieu, *supra* note 12, at 130; *see also* George Berrisch et al., *E.U. Competition and Private Actions for Damages: The Symposium on European Competition Law*, 24 NW. J. INT'L L. & BUS. 585, 591 (2004) (noting that in 2002 over ninety percent of antitrust

recently, US Federal Judicial Caseload Statistics indicate that, in 2013, ninety-eight percent of antitrust cases in federal courts were private actions.⁴⁰

The significance of the link between public and private enforcement cannot be overstated. Government investigation and prosecution of parties accused of anti-competitive conduct can be a valuable source of evidence for aggrieved individuals pursuing private litigation.⁴¹ In this capacity, lawsuits brought by the DOJ may act as roadmaps for subsequent private litigation (i.e., follow-on actions); in cases where defendants are found guilty of antitrust violations or where defendants choose to settle, the outcomes can have preclusive effect on related litigation to follow.⁴²

An element that has, in the past, distinguished US private antitrust enforcement from those of other countries is the capacity to bring a collective suit on behalf of a class.⁴³ Class action suits, which may be brought under Rule 23 of the Federal Rules of Civil Procedure or under the Class Action Fairness Act of 2005, are a powerful tool useful in compensating victims of antitrust violations and broadly deterring anti-competitive behavior.⁴⁴ Proponents of class actions typically herald the cost-

proceedings were initiated by private individuals, many of whom were seeking damages).

40. *Federal Judicial Caseload Statistics, Table C-2: U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During 12-month Period Ending March 31, 2012 and 2013*, <http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/caseload-statistics-2013.aspx> (last visited Jan. 17, 2014) (reporting that 762 of 776 antitrust cases in federal courts were private actions); see Berrisch et al., *supra* note 39, at 591 (reporting that in 2002, over ninety percent of antitrust claims were initiated by private individuals).

41. Weber Waller, *supra* note 37, at 210 (noting that plaintiffs may bring follow-on actions by “making any verdict in a government antitrust case prima facie evidence in subsequent private litigation”); Berrisch et al., *supra* note 39, at 598 (noting that private plaintiffs are “not required to re-litigate issues that have already been decided in civil or criminal judgments in favor of the government, including plea bargains”).

42. Berrisch et al., *supra* note 39, at 598 (describing how the Clayton Act, for example, allows private plaintiffs to “piggyback” on government enforcement actions by citing final judgments as evidence against defendants as a matter of estoppel between the parties in follow-on private litigation).

43. See generally Russell, *supra* note 14; Hodges, *supra* note 5 (outlining the policy objectives discussed in developing a model of collective redress for Europe).

44. Chieu, *supra* note 12, at 137; FED. R. CIV. P. 23(a).

saving benefits for clients and courts, as well as the ability to address problems involving prospective litigant apathy.⁴⁵

Furthermore, scholars argue that US-style class actions enhance broader antitrust goals of deterrence and compensation.⁴⁶ Research suggests that class actions are a strong disincentive for wrongdoing.⁴⁷ A 2008 study analyzing this deterrent effect found that the criminal antitrust fines imposed by the DOJ during the period of the study totaled US\$4.323 billion, whereas the recoveries from private antitrust class actions amounted to between US\$18.006 billion and US\$19.639 billion.⁴⁸ Additionally, cases discovered and initiated by private attorneys represented at least forty-three to forty-seven percent of the total amount recovered from private antitrust class actions.⁴⁹ The active role private attorneys play in driving antitrust enforcement is significant because it counters the argument that private actions are commonly follow-on cases offering limited additional deterrence.⁵⁰

45. Russell, *supra* note 14, at 145; see John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 422 (2000) (discussing low opt-out rates, Coffee explains that rational apathy exists for “[s]mall claimants who have only modest claims and no real alternative because their claims are typically too small to litigate on an individual basis [and these claimants] will simply not bother to opt-out”).

46. Russell, *supra* note 14, at 145–48; see Edward Brunet, *Improving Class Action Efficiency by Expanded Use of Parens Patriae Suits and Intervention*, 74 TUL. L. REV. 1919, 1926–27 (2000) (discussing a shift in thinking on class actions from Professor Kenneth W. Dam’s efficiency, compensation and deterrence analysis to Professor John Coffee’s critique highlighting problems with the class action model).

47. Robert H. Lande & Joshua P. Davis, *Benefits From Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. REV. 879, 880 (2008) (indicating that the results of the study show “private litigation probably does more to deter antitrust violations than all the fines and incarceration imposed as a result of criminal enforcement by the DOJ”); see also Sittenreich, *supra* note 8, at 2707 (“The threat of a costly lawsuit or a large adverse judgment can deter businesses from engaging in anticompetitive conduct.”).

48. Lande & Davis, *supra* note 47, at 893 (demonstrating that the damages recovered by private litigants in antitrust class actions were significantly greater than the aggregate of criminal antitrust fines imposed).

49. Lande & Davis, *supra* note 47, at 897 (illustrating that US\$7.631 to US\$8.981 billion came from the fifteen cases that did not follow any government enforcement actions).

50. See *supra* note 39 and accompanying text; John C. Coffee, Jr., *Understanding the Plaintiff’s Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 681 n.36 (1986) (“Although the conventional wisdom has long been that class actions tend to ‘tag along’ on the heels of governmentally initiated suits, a recent study of antitrust litigation by

Class actions are also often a source of compensation for legitimate victims of antitrust violations.⁵¹ The availability of class action suits allows plaintiffs whose individual claims are too small to justify the high costs of litigating to aggregate potential claims in an economically efficient way.⁵² Therefore, without the threat of class action suits, defendant corporations that violate antitrust regulations could be safe from litigation as long as the harm inflicted on individual claimants is small.⁵³ Moreover, class action suits are an efficient means of victim compensation.⁵⁴ A study of 1120 class actions filed between 1990 and 2003 found that for every dollar recovered, 18.4 cents were allocated to attorneys' fees and expenses while 81.6 cents went directly to class members.⁵⁵

C. Critiques of the US Class Action Scheme

While the US system of private antitrust enforcement is indisputably the world's most developed regime, "[t]he concept of US-style class actions can send chills down the spines of many EU attorneys, conjuring images of greedy rushes to the courthouse."⁵⁶ US class actions have been met with substantial

Professors Kauper and Snyder has placed this figure at '[l]ess than 20% of private antitrust actions filed between 1976 and 1983.'")

51. Sittenreich, *supra* note 8, at 2711; Russell, *supra* note 14, at 144 (noting that a consensus exists in the class action literature that such suits provide compensation to victims of antitrust violations).

52. Brunet, *supra* note 46, at 1926–27; Sittenreich, *supra* note 8 (“Class action rights enable plaintiffs to aggregate claims where it would not be practical to sue individually.”)

53. Russell, *supra* note 14, at 148 (arguing that class actions provide an implicit check on corporate anticompetitive conduct).

54. Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, U. PA. L. REV. 103, 131 (2006) (citing *Attorney Fee Awards in Common Fund Class Actions*, 24 CLASS ACTION REPS. 167 (2003)); Brunet, *supra* note 46, at 1926 (noting that the aggregation of claims in a class action suit create the possibility that “valid legal and factual claims could be compensated”).

55. Gilles & Friedman, *supra* note 54, at 131. *But see* Issacharoff & Miller, *supra* note 5, at 186 (clarifying that the class action attorney inevitably recovers more than any single class member). Counsel typically recovers between ten to thirty percent of the total recovery. Therefore, the only way an individual class member could recover as much as counsel would be if that class member experienced between ten to thirty percent of the harm. *Id.*

56. Gregory P. Olsen, *Enhancing Private Antitrust Litigation in the EU*, 20 ANTI-TRUST 73, 73, 75 (2005); Sittenreich, *supra* note 8, at 2710 (“The United States has the most advanced system of private antitrust litigation in the world.”).

skepticism in European jurisdictions and certain aspects of the US model are viewed as “contrary to the legal tradition of the E.U. Member States.”⁵⁷ The Commission drafted its 2008 White Paper with specific intent to avoid the more undesirable aspects of US class action suits and former Competition Commissioner Neelie Kroes underscored this aim in a 2005 speech where she explained that the Commission intends to “foster a *competition* culture, not a *litigation* culture.”⁵⁸ Class action criticism can be aligned according to two fundamental threads: (1) the principal-agent relationship; and (2) the threat of frivolous litigation and over-deterrence.⁵⁹

The principal-agent critique suggests that many of the problems in representative actions stem from a “misalignment of interests” between attorneys and the represented clients, as class attorneys are concerned primarily with contingent fees.⁶⁰ Further asymmetry is evident between class attorneys and defendants, who are burdened not only by legal fees but also the potential for liability.⁶¹ These asymmetries become especially significant within the context of settlement negotiations where

57. Berrisch et al., *supra* note 39, at 598 (arguing that contingency fees are likely unenforceable by the European Court of Justice because they are “contrary to the legal traditions of the E.U. Member States, and . . . are also seen in Europe as encouraging frivolous or meritless litigation”); Chieu, *supra* note 12, at 125–26 (describing European aversion to the US class action model, which is perceived to yield a culture of litigation).

58. Sittenreich, *supra* note 8, at 2713 (noting the aims and objectives set forth in the Commission’s White Paper); Neelie Kroes, Comm’r for Competition, European Commission Dinner Speech at the Harvard Club: Enhancing Actions for Damages for Breach of Competition Rules in Europe (Sept. 22, 2005), *available at* http://europa.eu/rapid/press-release_SPEECH-05-533_en.htm.

59. Russell, *supra* note 14, at 148; *see also* Gilles & Friedman, *supra* note 54, at 155–59 (discussing the over-deterrence critique); Issacharoff & Miller, *supra* note 5, at 184 (discussing the scope of agency power of class counsel).

60. Russell, *supra* note 14, at 148 (recounting Professor John Coffee’s assessment of the principal-agent problem in which “common pool problems cause class action plaintiffs’ lawyers to underinvest in their work”); *see* Gilles & Friedman, *supra* note 54, at 113 n.35 (2006).

61. John C. Coffee, Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 *IND. L.J.* 625, 635–36 (1987) (adding that the defendant can be expected to exploit the cost differential between themselves and the plaintiff; by expending more resources, pursuing more collateral issues, and investing more readily in the action, the defendant raises the stakes); John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 *U. CHI. L. REV.* 877, 889–90 (1987) (using empirical evidence to suggest that the asymmetric stakes between class action attorneys and clients, and how this asymmetry can affect recovery outcomes).

“sweetheart deal settlements” enable class action attorneys to profit even if the class members do not.⁶² For class attorneys, financial incentives lie in fees disproportionate to the effort invested in the case, while for defendants’ counsel, the rewards lie in the ability to return to business as usual, despite the merits of the case.⁶³

For society, however, there are substantial costs: lost opportunities for deterrence (if class counsel settled too quickly and too cheaply), wasted resources (if defendants settled simply to get rid of the lawsuit at an attractive price, rather than because the case was meritorious), and—over the long run—increasing amounts of frivolous litigation as the attraction of such lawsuits becomes apparent to an ever-increasing number of plaintiff lawyers.⁶⁴

Unfair settlements are even more likely in the class action system because the represented class members are unlikely to actively monitor the attorney’s behavior.⁶⁵ As class attorneys “are not subject to monitoring by their putative clients, they operate largely according to their own self-interest, subject only to whatever constraints might be imposed by bar discipline, judicial oversight, and their own sense of ethics and fiduciary responsibilities.”⁶⁶ Class attorneys are in effect free to make

62. Russell, *supra* note 14, at 148–49 (demonstrating the class attorney’s contingent fee “is not congruent with that of his client”); *see also* Brunet, *supra* note 46, at 1929 n.44 (referencing commentary and cases evidencing class settlements that were overturned on the basis of inequity, including *In re Ford Motor Co. Bronco II Prods. Liab. Litig.*, 177 F.R.D. 360, 364 (E.D. La. 1997), where the presiding judge rejected a class action settlement because it suggested collusion by overcompensating class attorneys while granting class members “only a safety video and an inspection”).

63. HENSLER ET AL., *supra* note 4, at 10 (“The powerful financial incentives that drive plaintiff attorneys to assume the risk of litigation intersect with powerful interests on the defense side in settling litigation as early and as cheaply as possible, with the least publicity . . .”).

64. *Id.*

65. Brunet, *supra* note 46, at 1929 (“Potentially unfair settlements caused by asymmetry cannot be effectively monitored.”); *see* HENSLER ET AL., *supra* note 4, at 9–10 (expressing that “there are few if any consumer class members who actively monitor the class attorney’s behavior”).

66. Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiff’s Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 7–8 (1991); Issacharoff & Miller, *supra* note 5, at 188 (noting that “surely, there is *some* connection between the American use of the private attorney general and the capacity for . . . criminal misconduct and the breach of some of the most solemn obligations shared by all lawyers”).

decisions on behalf of the clients based on self-interest rather than the interests of the class.⁶⁷

The principal-agent problem is further exacerbated by the inherent tension between “principles of finality in settlement and the scope of the agency power of class counsel.”⁶⁸ US courts rely on procedural and intuitive controls to address the concern of unselected, unsupervised attorneys settling on behalf of absent class members.⁶⁹ Practitioners and scholars alike are skeptical that such controls can effectively mitigate the dominance of class action settlements struck by counsel without adequate representation.⁷⁰

Opponents of the class action model also contend that the system leads to frivolous claims and over deterrence.⁷¹ In principle, US class action lawyers are entrepreneurial.⁷² As legal fees typically are calculated as a percentage of the total damages

67. Gilles & Friedman, *supra* note 54, at 104 (highlighting the “significant possibility that litigation decisions will be made in accordance with the lawyer’s economic interests rather than those of the class”); Russell, *supra* note 14, at 149 (positing that class action attorneys can be “rent-seeking entrepreneurs who operate with total freedom and who make decisions based on their own self-interest rather than the interests of the class”).

68. Issacharoff & Miller, *supra* note 5, at 184; Gilles & Friedman, *supra* note 54, at 113 (providing that because small claim class members have little at stake individually and lack both expertise and information, they consequently lack the incentive and capacity to monitor their agent attorneys).

69. Issacharoff & Miller, *supra* note 5 (arguing procedural protections often are reduced down to *process minima*, first established in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 803 (1985), which requires individual notice, an opportunity to opt-out, and a guarantee of non-conflict of interests in representation. Judicial intuition lies in the notion that class members need not allege identical harms, but must have basically fungible claims); Hay & Rosenberg, *supra* note 4, at 1379 (concluding that courts provide appropriate safeguards in class action lawsuits to address the concerns of abusive settlements struck by representative attorneys).

70. Issacharoff & Miller, *supra* note 5, at 184–85 (noting that class action settlements seem to be dominated by class attorneys who offer to settle claims of those they do not represent).

71. Russell, *supra* note 14, at 148. *But see* Gilles & Friedman, *supra* note 54, at 156 (positing that over-deterrence is not a major concern because where class actions survive a defendant’s dispositive motions, the parties settle and generally do so for significantly less than the full value of the social loss created by the defendant’s conduct).

72. Macey & Miller, *supra* note 66, at 7 (arguing that “the single most salient characteristic of class and derivative litigation is the existence of ‘entrepreneurial’ plaintiffs’ attorneys”); *see* Issacharoff & Miller, *supra* note 5, at 191 (identifying the role of private entrepreneurial lawyers as the aspect of America class action practice that Europeans find most troubling).

paid by defendants in successful claims (i.e., contingent fees), large class action suits with many class members stand to pay out very high sums.⁷³ The opportunity for great financial gain motivates attorneys to solicit clients to further aggregate claims; the fear is that, in doing so, class action attorneys may aggressively pursue frivolous, non-meritorious suits.⁷⁴ Furthermore, attorneys can leverage class actions suits and the asymmetric stakes to extort settlements from defendants on non-meritorious claims.⁷⁵ The ultimate over-deterrent effect of defendant payouts on illegitimate claims is that consumers pay for the litigation costs via increased prices for products.⁷⁶

Critics identify the sources of US class actions excesses as rooted in several specific features, including the opt-out mechanism, broad pre-trial discovery rights, contingent fee agreements, jury trials, absence of a loser pays rule, and treble damages.⁷⁷ Both the UK Draft Consumer Rights Act and the

73. HENSLER ET AL., *supra* note 4, at 9 (noting that class action specialists have developed monitoring strategies to detect situations that stand to offer attractive litigation). *But see* Sittenreich, *supra* note 8, at 2736 (referencing research by Professors Eric Helland and Alexander Tabarrok suggesting that, first, attorneys who work on contingent fees turn down more cases and provide a comparatively better quality of legal counsel, and second, contingent fees encourage settlements while hourly wages are more likely to lead to delays).

74. HENSLER ET AL., *supra* note 4, at 9 (suggesting that “private attorneys general may be too willing to bring non-meritorious suits if these suits produce generous financial rewards”); Russell, *supra* note 14, at 150–51 (positing that class action suits are often “vehicles for enriching plaintiff class action attorneys, not mechanisms for ensuring that important legal rules are enforced or for compensating consumers”).

75. Russell, *supra* note 14, at 150; Brunet, *supra* note 46, at 1930 (referencing Professor Coffee’s theory that differences in stakes, expertise and risks can induce defendants to settle for amounts with little regard for the merits of the claim; where “conditions for a ‘strike suit’ are present, settlements could result that are inaccurate and inefficient.”).

76. Russell, *supra* note 14, at 150–51 (positing that trivial lawsuits “in reality, are often vehicles for enriching plaintiff class action attorneys, not mechanisms for ensuring that important legal rules are enforced or for compensating consumers . . . [who] pay for this litigation through increased product costs”).

77. Commission Staff Working Paper 2008, *supra* note 9, at 14, 21, 30 (discussing class action excesses in a variety of contexts, such as abusive settlements, claimant’s loss of control as agents pursue self-interest, and overly burdensome disclosure obligations for defendants); Sittenreich, *supra* note 8, at 2727–28; Olsen, *supra* note 56, at 75. *But see* Commission Staff Working Paper 2008, *supra* note 9, at 17 n.24 (remarking that while the Commission must consider the dangers of US class action litigation, the Commission should also note that the European legal regimes are inherently different. In fact, many of the features contributing to American excesses—including jury trial, one-way cost shifting, treble damages, wide pre-trial discovery, contingent fees, and an

European Recommendation on collective redress mechanisms have taken explicit steps to address these allegedly undesirable features in order to mitigate the threat of adopting US-style class actions, which critics call the result of a “toxic cocktail.”⁷⁸

More broadly, the US Supreme Court recently has demonstrated a heightened level of skepticism toward the scope of private action’s role in antitrust cases.⁷⁹ In *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko* and *Bell Atlantic Corp. v. Twombly*, the Supreme Court articulated this shift in attitude and four themes emerged: a fear of false positives; a confidence deficit in the capacity of judges and juries to achieve correct results; an inability among judges to cost-effectively manage antitrust litigation; and a broad predisposition for regulation over judicial intervention.⁸⁰ Later in *Wal-Mart Stores, Inc. v. Dukes*, the Supreme Court held that a “rigorous analysis” must apply in evaluating the Rule 23 prerequisites, which are (a) numerosity, showing that aggregating the claims is more practical than individual litigation, (b) commonality among claims, with respect to factual

opt-out model—are absent in European jurisdictions. Therefore, the introduction of a collective redress mechanism within the European legal context may not produce the effects seen in the US model).

78. Cavanagh, *supra* note 15, at 640 (noting that “it is readily apparent that the American model for private antitrust enforcement is viewed with considerable skepticism abroad” and that the US system has been dubbed a “toxic cocktail”); *see e.g.*, Press Release, European Commission, Green Paper on Consumer Collective Redress – Questions and Answers (Nov. 27, 2008) (identifying the elements of the “toxic cocktail” as contingency fees, punitive damages, pre-trial discovery, and opt-out systems; recommending that the European Commission should not adopt these features of the US model).

79. Cavanagh, *supra* note 15, at 636 (arguing that despite historical support for the broad remedial effects of the private action in antitrust cases, “the Supreme Court . . . now clearly views the private action with skepticism”); Lee Goldman, *Trouble for Private Enforcement of the Act: Twombly, Pleading Standards, and Oligopoly Problem*, 2008 *BYU L. REV.* 1057, 1069 (2008) (referencing *Twombly* and *Trinko* to demonstrate how the US Supreme Court has acknowledged the effect of false positives to “chill the very conduct [active competition] the antitrust laws are designed to protect”).

80. Cavanaugh *supra* note 15, at 636; *see Verizon Comms. v. Trinko*, 540 U.S. 398, 399 (2004) (holding that regulation significantly reduces the likelihood of major antitrust harm, whereas the costs of judicial intervention must be assessed in light of its “slight benefits”); *see Bell Atlantic v. Twombly*, 550 U.S. 544, 573 (2007) (providing that one practical concern explaining the Court’s “dramatic departure from settled procedural law” is that juries might “mistakenly conclude that evidence of parallel conduct has proved that the parties acted pursuant to an agreement when they in fact merely made similar independent decisions”).

or legal issues, (c) adequacy of the representative parties to protect the interests of the class, and (d) typicality, in that the class claim must be typical of the plaintiffs' individual claims generally.⁸¹ Finally, the Supreme Court reiterated in *Comcast Corp. v. Behrend* that district courts facing a class certification must undertake a rigorous analysis, and provided that the named plaintiff must show that damages can be determined for the entire class and not merely on an individual basis.⁸² The Court's recent decisions demonstrate an effort to reign in private antitrust actions in favor of regulation and increase the standard for bringing such aggregated claims.⁸³ This conservatism reflects a tipping of the scale more toward the more limited approach to collective actions adopted by the UK and the European Commission.

D. UK Competition Law and Representative Actions

The Competition Act of 1998 ("CA98") is the UK legislative equivalent to the United States' Sherman Act and Clayton Act.⁸⁴ Chapter 1 Section 2 of the CA98 prohibits "[a]greements . . . preventing, restricting or distorting competition [within the United Kingdom]," whereas Chapter 2 Section 18 prohibits "any conduct on the part of one or more undertakings which amounts to an abuse of a dominant position in the market . . .

81. *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541, 2551 (2011); *see also* *General Telephone Co. of the Southwest v. Falcon*, 456 U.S. 147 (1982) (holding that a rigorous analysis should apply in class certification procedures); FED. R. CIV. P. 23(a).

82. *Comcast v. Behrend*, 133 S. Ct. 1426, 1432, 1434 (2013) (referencing the appellate court holding that, at the class certification stage, plaintiffs must assure the courts that damages are "capable of measurement and will not require labyrinthine individual calculations"); *see* Sergio Campos, *Opinion Analysis: No Common Ground*, SCOTUSBLOG (Mar. 29, 2013), <http://www.scotusblog.com/2013/03/opinion-analysis-no-common-ground> (explaining that the majority in *Comcast v. Behrend* suggests that evidence of antitrust impact must also prove that "the case is susceptible to awarding damages on a class-wide basis").

83. *See* Cavanagh, *supra* note 15, at 644 (acknowledging the US Supreme Court's advocacy of regulation over private enforcement in antitrust); Goldman, *supra* note 79, at 1058 (noting that in *Twombly* the US Supreme Court held that "simple allegations of parallel conduct with conclusory assertions of agreement could not survive a motion to dismiss").

84. Competition Act, 1998, c.41 (U.K.) (representing UK national competition law).

[that] may affect trade with the United Kingdom.”⁸⁵ Enforcement of UK competition law falls chiefly to the OFT, which possesses the capacity to investigate companies suspected of CA98 violations.⁸⁶ The OFT handles all public enforcement mechanisms of competition law and has the power to impose corporate and individual fines, as well as imprison guilty parties.⁸⁷ Challenged OFT decisions are reviewed by the Competition Appeals Tribunal (“CAT”).⁸⁸

Private enforcement through the courts is also a viable remedy in the United Kingdom.⁸⁹ The government’s purported reforms aim to make the existing regime more robust.⁹⁰ The government acknowledges that public policy aims support the reduction of barriers facing consumers and businesses in

85. Competition Act, 1998, c.41, §§ 2, 18 (U.K.) (identifying collusive and monopolistic anticompetitive behavior as illegal under UK competition law).

86. *Competition Act and Cartels*, OFFICE OF FAIR TRADING—COMPETITION ACT AND CARTELS, <http://www.oft.gov.uk/OFTwork/competition-act-and-cartels/#.UrIOd6W6ods> (last visited Dec. 18, 2013). *But see* Clive Maxwell, *United Kingdom: Office of Fair Trading*, EUR. ANTITRUST REV. (2013), available at <http://globalcompetitionreview.com/reviews/53/sections/179/chapters/2127/> (declaring that in April 2014 the competition and consumer protection duties of the OFT will be transferred to a new agency, the Competition Markets Authority).

87. *Competition Act and Cartels*, *supra* note 86, Rule 20.5; *see also* Russell, *supra* note 14, at 176 n.179 (noting that the OFT is responsible for establishing an antitrust infringement has taken place).

88. *Home*, COMPETITION APPEALS TRIBUNAL, Rule 20.5, <http://www.catribunal.org.uk> (last visited Dec. 18, 2013); *see also* Russell, *supra* note 15, at 176 n.179 (noting that representative actions can be brought in the CAT).

89. OPTIONS REFORM—GOVERNMENT RESPONSE, *supra* note 9, at 12 (noting that OFT research confirms that private actions are viewed as the least effective component of the competition regime); DEP’T FOR BUS. INNOVATION & SKILLS—2012 CONSULTATION, *supra* note 2, at 10 (referencing only forty-one competition cases between 2005 and 2008 in which judgments were delivered).

90. In a public consultation preceding the release of 2013–14 Consumer Rights Bill, the UK Secretary of State recognized that, “[w]hile the public competition authorities are at the heart of the regime, they have finite resources and cannot do everything. What is needed from Government is to create the legal framework that will empower individual consumers and businesses to represent their own interests.” OPTIONS REFORM—GOVERNMENT RESPONSE, *supra* note 9, at 3; DEP’T FOR BUS. INNOVATION & SKILLS—2012 CONSULTATION, *supra* note 2, at 10 (noting that reforms to private actions are needed to complement public enforcement by “[e]mpowering and enabling businesses and consumers to take direct action against anticompetitive behavior”).

pursuing private actions, as the uncurbed costs of anticompetitive behavior take a toll on society collectively.⁹¹

The UK collective redress scheme for competition cases allows for follow-on procedures in which a “specified body” can bring an action on behalf of consumers who have suffered losses.⁹² The entity must fulfill a set of criteria to demonstrate that the body is capable and eligible to bring a legitimate representative action.⁹³ Furthermore, any consumers represented in the action must have given the entity explicit consent to act on the consumers’ behalf.⁹⁴ The permission requirement places the existing UK collective redress scheme within the “opt-in” model, which is diametrically opposed to the “opt-out” US-style class action.⁹⁵ The opt-in model requires that individual claimants actively choose to join the collective action by giving permission for the representative body to litigate on their behalf, whereas the opt-out model automatically litigates on behalf of all eligible claimants and allows individuals to withdraw from the suit.⁹⁶ The impact of the opt-in approach has been controversial and has produced mixed results, which account for the United Kingdom currently undergoing a shift in policy.⁹⁷

91. OPTIONS REFORM—GOVERNMENT RESPONSE, *supra* note 9, at 14; GOVERNMENT RESPONSE TO CONSULTATIONS ON CONSUMER RIGHTS 2013, *supra* note 26, at 52 (U.K.) (“Anti-competitive behavior can result in lower output, higher prices, and reduced choice and innovation.”).

92. Howells, *supra* note 2, 4–5 (outlining the relevant features of the UK Competition Act of 1998).

93. Howells, *supra* note 2, at 5 (a representative action can be brought by a body that (1) “is so constituted, managed and controlled as to be expected to act independently, impartially and with complete integrity;” (2) “is able to demonstrate that it represents and/or protects the interests of consumers;” (3) “has the capability to take forward a claim on behalf of consumers;” and (4) “the trading arm [of the body] does not control the body, and any profits of the trading body are only used to further the stated objectives of the body”).

94. Howells, *supra* note 2, at 5; *see* DEP’T FOR BUS. INNOVATION & SKILLS—2012 CONSULTATION, *supra* note 2, at 32 (critiquing the opt-in model as it requires potential plaintiffs “to link themselves to a case before they know what the damages are, or even if it is successful”).

95. DEP’T FOR BUS. INNOVATION & SKILLS—2012 CONSULTATION, *supra* note 2, at 27 (referencing the existing limited opt-in regime for collective action cases).

96. *See generally* Howells, *supra* note 2, at 4–5.

97. GOVERNMENT RESPONSE TO CONSULTATIONS ON CONSUMER RIGHTS 2013, *supra* note 26, at 52–55. *See generally* DEP’T FOR BUS. INNOVATION & SKILLS—2012 CONSULTATION, *supra* note 2, at 30–35 (expressing the opt-in model’s general failure to

In 2008, the CJC published a report making a number of recommendations for how the UK government might improve the effectiveness and efficiency of collective action procedures.⁹⁸ One of the CJC's suggested reforms represented a particularly dramatic regime shift, recommending that collective actions be brought on an opt-in *or* opt-out basis.⁹⁹ The Consumer Rights Act 2014, which was first published in June 2013 and formally introduced in the House of Commons in January 2014, adopted some of the key recommendations suggested in the CJC report, including the establishment of a limited opt-out mechanism.¹⁰⁰

E. Competition Regimes and Collective Redress in the European Union

Antitrust enforcement operates within a two-tiered system in the European Union, both at the Member State level and at the community level.¹⁰¹ Member States (e.g., the United Kingdom) abide by their national competition regimes, each with a unique set of laws and mechanisms for public and private enforcement.¹⁰² While the majority of EU Member States have not embraced US-style class actions generally, some have implemented other mechanisms for collective action in

provide a viable mechanism for bringing collective competition claims and noting the shift toward offering an opt-out alternative).

98. SORABJI ET AL., *supra* note 3, at 21–23.

99. SORABJI ET AL., *supra* note 3, at 22, 145–50; *Collective Redress Across the Pond—Interview with Matthew Shankland & Lianne Craig*, METRO. CORP. COUNS. 18 (Oct. 2008), <http://www.metrocorp.counsel.com/pdf/2008/October/18.pdf> (stating that the adoption of the CJC recommendations by the UK competition enforcement regime “would represent a significant shift in the current position in England and also take [the United Kingdom] a step beyond where the European Commission and other European Member States seem to be going with collective redress”).

100. Consumer Rights Bill, Private Actions in Competition Law, 2014, H.C. Bill [161] sch. 8, 103–117 (U.K.); *Consumer Rights Bill 2013-14: Progress of the Bill*, U.K. PARLIAMENT, <http://services.parliament.uk/bills/2013-14/consumerrights.html> (last visited Feb. 3, 2014) (indicating that the Consumer Rights Bill is currently in the committee stage of the parliamentary review process).

101. Chieu, *supra* note 12, at 131; Sittenreich, *supra* note 8, at 2716 (providing that the European Commission’s Directorate General for Competition works in partnership with national competition authorities and courts in a policy-making capacity to “strengthen private enforcement in the member state courts”).

102. Chieu, *supra* note 12, at 131; *see* Russell, *supra* note 14, at 167 (adding that national competition authorities are also empowered to enforce community law under Articles 81 and 82, which are now Articles 101 and 102 respectively).

competition cases in recent years.¹⁰³ Member State legislation providing collective redress options—in France, Germany, Italy, and Sweden, for example—has taken many different forms.¹⁰⁴ For instance, Germany now allows for some collective actions that are limited to injunctive relief, and the Swedish Parliament passed the 2002 Group Proceeding Act, which allows for collective action procedures in all areas of civil law.¹⁰⁵ In 2004, the Netherlands adopted the Collective Settlement of Mass Damages Act, which provides broad class action rules, as well as a US-style opt-out provision.¹⁰⁶

At the community level, the European Commission's Directorate General for Competition ("DG Competition") is charged with the responsibility of monitoring and eliminating anti-competitive practices perpetrated by undertakings within the internal market.¹⁰⁷ The Commission has the authority to investigate alleged violations of competition law and, if an infringement is found, the Commission may impose fines.¹⁰⁸ The

103. Chieu, *supra* note 12, at 141 (noting that many EU Member States are "still skeptical of the idea that private mechanisms, through the use of class actions and public enforcement . . . can together improve the legal system in Europe"); *see, e.g.*, Russell, *supra* note 14, at 168.

104. Cavanagh, *supra* note 15, at 647 n.120; Russell, *supra* note 14, at 168 ("Several European jurisdictions have either implemented legislation that makes it easier for claimants to bring group or class actions, or are currently considering implementing legislation, especially in the consumer protection context.").

105. *See* Group Proceedings Act (Svensk författningssamling [SFS] 2002:599) (Swed.) (providing that "group action means an action that a plaintiff brings as the representative of several persons with legal effects for them, although they are not parties to the case"); Russell, *supra* note 14, at 168.

106. Russell, *supra* note 14, at 168; Hélène van Lith, *The Dutch Collective Settlements Act and Private International Law—Aspecten van Internationaal Privaatrecht in de WCAM*, Research and Documentation Centre, Ministry of Justice—WODC, Ministerie van Veiligheid en Justitie (2010), 16 (Neth.) (reporting on the Dutch Act on the Collective Settlement of Mass Damage Claims, which provides for collective redress).

107. Chieu, *supra* note 12, at 131; EUROPEAN COMMISSION, COMPETITION POLICY IN THE EUROPEAN UNION (2011), available at http://ec.europa.eu/dgs/competition/factsheet_general_en.pdf. The internal market is "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provision of the Treaties [of the European Union]." Consolidated Version of the Treaty on the Functioning of the European Union art. 26(2), 2012 O.J. C 326/47, at 59 [hereinafter TFEU].

108. Commission Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2)(a) of Regulation No 1/2003, 2006 O.J. C 210/2, at 2 ("(1) . . . the Commission may, by decision, impose fines on undertakings or associations of undertakings where, whether intentionally or negligently, they infringe Article 81 or 82 of the Treaty."); European Comm'n Competition-Antitrust, *Overview* (Jan. 17, 2014),

cornerstone legislation of the European Union competition regime lies in Article 101 and Article 102 of the Treaty on the Functioning of the European Union (“TFEU”).¹⁰⁹ Similar to the US approach, Article 101 prohibits all agreements between undertakings that may affect trade among the Member States in such a way as to prevent, restrict or distort competition within the internal market.¹¹⁰ Article 102 forbids the abuse of a dominant position within the internal market, so far as the abuse may affect trade among the Member States.¹¹¹

There is no existing judicial forum at the community level where private claims under European competition law may be brought.¹¹² The lack of private enforcement mechanisms to complement the EU public enforcement scheme, led by DG Competition, has prompted exploration of ways in which the European Union may implement a private right to damages.¹¹³ In recent years, the Commission has published a series of documents exploring different policy options to create a space for private litigation.¹¹⁴ The culmination of the work conducted in this area has been the Commission’s Proposal for a Directive

http://ec.europa.eu/competition/antitrust/overview_en.html; Sittenreich, *supra* note 8, at 2716 (noting that the Commission can investigate potential antitrust violations “on application by a Member State or on its own initiative” and can impose “tremendous fines”).

109. Formerly Article 81 and Article 82, respectively, of the EC Treaty (“Treaty of Rome”). EUROPA—APPLICATION OF ARTICLES 101 AND 102 TFEU, http://europa.eu/legislation_summaries/competition/firms/126092_en.htm (last visited Feb. 14, 2014).

110. TFEU, *supra* note 107, art. 101(1), 2012 O.J. 326 at 88–89 (prohibiting agreements, decisions and concerted practices between undertakings that have as their object or effect the prevention, restriction or distortion of competition in the internal market).

111. *Id.* art. 102, at 89 (prohibiting abuse of a dominant position within the internal market by one or more undertakings).

112. Chieu, *supra* note 12, at 133. Green Paper 2005, *supra* note 3, at 4 (noting that Community courts have no original jurisdiction in damages claims for infringements of antitrust laws).

113. Commission Green Paper on Consumer Collective Redress, COM (2008) 794 final (Nov. 2008), 7 [hereinafter Commission Green Paper 2008] (providing a number of options to address the unsatisfactory status of consumer redress in the European Union); Commission Green Paper 2005, *supra* note 3, at 8–9 (posing the question of whether special procedures should be made available for bringing collective actions).

114. Chieu, *supra* note 12, at 134–36; *see* Commission Green Paper 2005, *supra* note 3; Commission White Paper 2008, *supra* note 2; Commission Green Paper 2008, *supra* note 113.

on Antitrust Damages Claims, and a Recommendation for collective redress mechanisms in Europe.¹¹⁵

As noted by Dr. S.I. Strong, “the patchwork nature of regional legislation and the inconsistent availability and nature of national forms of collective relief have raised questions as to whether the current state of affairs is hindering the proper operation of the internal market.”¹¹⁶ At the community level, the Commission Recommendations on collective redress mechanisms in the Member States provide a specific set of guidelines—assessed subsequently in Part II and Part III—to encourage and help streamline standards, processes, and procedures across the region.¹¹⁷

A range of desired objectives support the introduction of collective action into UK and EU justice systems, including broader access to justice, market rectification, judicial economy, deterrence, and increased private enforcement. The reviewed literature, however, also details the critiques of the US class action model, particularly relating to the principal-agent problem and the threat of unmeritorious litigation. In their respective policy positions, the UK government and the European Commission articulate a need for enhanced private enforcement mechanisms to complement public enforcement efforts. In the same breath, both bodies express a parallel goal of protecting domestic legal traditions from the perceived abuses associated with US-style class actions. Therefore,

115. Proposal for a Directive on Certain Rules Governing Actions for Damages Under National Law Infringements of the Competition Law Provisions of the Member States and the European Union, COM (2013) 404 final (June 2013); Commission Recommendation, *supra* note 1.

116. S.I. Strong, *Cross-Border Collective Redress in the European Union: Constitutional Rights in the Face of the Brussels I Regulation*, 45 ARIZ. ST. L.J. 223, 236 (2013); Commission Green Paper 2008, *supra* note 113, at 4 (noting that the thirteen Member States with judicial collective redress mechanisms take very different approaches and have diverse results).

117. Commission Recommendation, *supra* note 1, at 62 (providing that “Member States should have collective redress mechanisms at national level . . . which respect the basic principles set out in this Recommendation . . . [and these] principles should be common across the Union”); Commission Communication 2013, *supra* note 22, at 5 (noting that the Commission “deems it necessary to increase policy coherence and to take a horizontal approach on collective redress”); Russell, *supra* note 14, at 169 (“The inconsistent and piecemeal attempts by Member States to introduce collective actions highlight the need for a community-wide response from the EU.”).

mechanisms established by the advocated reforms in the UK and EU also must be evaluated with respect to these aims.

II. *CRITICISMS AND PROPOSED ALTERNATIVES TO THE COLLECTIVE ACTION QUESTION*

Despite affirmations in the United Kingdom and the European Union that collective action mechanisms are a necessity in antitrust enforcement, both jurisdictions have expressed a clear intention to avoid the approach fostered in the United States.¹¹⁸ The US-style class action model has undergone severe criticism by policymakers, scholars, and practitioners across borders.¹¹⁹ In this Part, the legal solutions proffered by the UK government and European Commission are described in Part II.A and Part II.B, respectively.

A. *The UK Legislative Response to Collective Action in Antitrust: The Consumer Rights Act of 2014*

Of the private competition enforcement reforms proposed in the Consumer Rights Act 2014, two key elements stand out.¹²⁰ The first is the expansion of eligible representative bodies to bring collective action suits before the CAT.¹²¹ Under the

118. See Commission Communication 2013, *supra* note 22, at 3 (contending that the US class action model attracts abusive litigation and that any European approach to collective redress must “give proper thought to preventing these negative effects and devising adequate safeguards against them”); GOVERNMENT RESPONSE TO CONSULTATIONS ON CONSUMER RIGHTS 2013, *supra* note 26, at 54 (providing that while the UK Government proposes reforms to collective redress more accessible, a range of safeguards would be implemented in order to prevent US-style class actions from taking root).

119. See, e.g., Sittenreich, *supra* note 8, at 2712 n.81 (providing examples of the resistance and hostility toward suggestions that the European Union adopt the U.S.-style litigation culture in antitrust private enforcement); Hodges, *supra* note 5, at 372 (referencing a political consensus in Europe that the US-style class action gives rise to “highly undesirable adverse effects”).

120. See Consumer Rights Bill, Private Actions in Competition Law, 2014, H.C. Bill [161] (U.K.).

121. GOVERNMENT RESPONSE TO CONSULTATIONS ON CONSUMER RIGHTS 2013, *supra* note 26, at 53–54 (juxtaposing the current regime allowing for only Which? to bring a claim on behalf of a limited group of potential plaintiffs with the proposed regime where any representative group could bring an action and eligible plaintiffs would automatically be included in proposals); Consumer Rights Bill, Private Actions in Competition Law, 2014, H.C. Bill [161] (U.K.); 47B Collective Proceedings before the Tribunal, sch. 8, at 105 (U.K.) (providing that the Tribunal may authorize a party to act

existing regime, only the largest consumer rights body in the UK—called “Which?”—has the ability to bring forward a competition collective action suit.¹²² Under the proposed reforms, *any* representative group or trade association may have standing to bring an action.¹²³ While the legislation’s aim is to broaden the pool of representatives, the government also set parameters; the OFT notes that to ensure collective actions are managed in the best interests of claimants alone—and not in the interest of a third party agent—law firms, third party funders, and special purpose vehicles are precluded from acting as representative bodies.¹²⁴

The second key reform set forth by the UK government is the introduction of a limited opt-out collective action regime.¹²⁵ Of all the suggested reforms, the adoption of the opt-out model was subject to the highest degree of debate; opposition to the opt-out model voiced apprehension about the rise of frivolous litigation and a litigation culture.¹²⁶ Under the current opt-in

as the representative “only if the Tribunal considers that it is just and reasonable for that person to act as a representative”).

122. GOVERNMENT RESPONSE TO CONSULTATIONS ON CONSUMER RIGHTS 2013, *supra* note 26, at 53 (“Under the current regime, only Which? can take forward a group, or ‘collective’ action . . . and on an ‘opt-in’ basis.”); see *Competition Litigation: Major New Proposals from the EU and the UK*, NORTON ROSE FULBRIGHT (June 13, 2013) [hereinafter NORTON ROSE FULBRIGHT], <http://www.nortonrosefulbright.com/knowledge/publications/99667/competition-litigation-major-new-proposals-from-the-eu-and-the-uk> (last visited Dec. 19, 2013) (noting that the current limited jurisdiction of the Cat allows only the consumer association Which? to bring claims).

123. GOVERNMENT RESPONSE TO CONSULTATIONS ON CONSUMER RIGHTS 2013, *supra* note 26, at 54; NORTON ROSE FULBRIGHT, *supra* note 122 (“The collective actions could be brought by any appropriate consumer representative body or trade association – much wider than the existing procedure.”).

124. *UK Government Publishes Draft Consumer Rights Bill Including Proposed Reforms to Private Actions in Competition Law*, HOGAN LOVELLS (Nov. 2013), <http://ehoganlovells.com/cv/200eb9dd8e3a96ecc1a38dd5600e18c45c71e025/p=4859753> [hereinafter HOGAN LOVELLS]; SORABJI ET AL., *supra* note 3, at 143 (recommending that “law firms, especially alternative business structures, would not be suitable bodies for authorization or ad hoc certification” so as to avoid a lawyer-led culture of litigation).

125. See Consumer Rights Bill, Private Actions in Competition Law, 2014, H.C. Bill [161] (U.K.), at 105 (allowing for opt-out collective proceedings under section 10).

126. See OPTIONS REFORM—GOVERNMENT RESPONSE, *supra* note 9, at 30 (noting the heated debate surrounding an opt-out collective action regime); see also DEP’T FOR BUS. INNOVATION & SKILLS—2012 CONSULTATION, *supra* note 2, at 34 (noting concerns that an opt-out model would lead to a US-style class action procedure that “allegedly led to instances of large businesses settling for significant sums simply to avoid the cost of further litigation”).

regime, eligible consumers have to actively join the action in order to benefit from damages.¹²⁷ The government ultimately decided not to abandon the existing opt-in system, but instead to incorporate an alternative opt-out approach.¹²⁸ Under the new opt-out regime, qualified consumers who are domiciled in the United Kingdom are automatically eligible for an award of damages, unless they opt-out of the suit.¹²⁹ To assuage fears associated with the implementation of an opt-out model, the legislation provides for safeguards designed to avoid an US-style class action, which include a certification mechanism, a proscription of treble damages and a ban against contingency fees.¹³⁰

The government requires the CAT to certify collective action suits.¹³¹ In a 2012 Consultation on Options for Reform,

127. See GOVERNMENT RESPONSE TO CONSULTATIONS ON CONSUMER RIGHTS 2013, *supra* note 26, at 53–54 (noting also that under the current regime consumers are required to provide evidence of their eligibility, i.e. proof of purchase of a product they potentially bought several years before); see also Howells, *supra* note 2, at 5 (“Affected consumers must have given the specified body permission to act on their behalf.”).

128. See Consumer Rights Bill, Private Actions in Competition Law, 2014, H.C. Bill [161] (U.K.), at 105 (“(10) ‘Opt-in collective proceedings’ are collective proceedings which are brought on behalf of each class member who opts in by notifying the representative, in a manner and by a time specified, that the claim should be included in the collective proceedings. (11) ‘Opt-out collective proceedings’ are collective proceedings which are brought on behalf of each class member except – (a) any class member who opts out by notifying the representative, in a manner and by a time specified, that the claim should not be included in the collective proceedings . . .”); see also OPTIONS REFORM—GOVERNMENT RESPONSE, *supra* note 9, at 30 (defending the government’s decision to employ an opt-out regime by demonstrating that the existing system was ineffective, reforming the opt-in model likely would not increase access to justice, some cases could practically be brought only on an opt-out basis, and consumer groups had agreed not to take another case under the opt-in system).

129. See Consumer Rights Bill, Private Actions in Competition Law, 2014, H.C. Bill [161] (U.K.), at 105.

130. See GOVERNMENT RESPONSE TO CONSULTATIONS ON CONSUMER RIGHTS 2013, *supra* note 26, at 54; see also DEP’T FOR BUS. INNOVATION & SKILLS—2012 CONSULTATION, *supra* note 2, at 55–58 (outlining in detail measures including certification, damages, costs and fees).

131. See DEP’T FOR BUS. INNOVATION & SKILLS—2012 CONSULTATION, *supra* note 2, at 55 (outlining the design details of a proposed opt-out collective action regime, including a preliminary certification process); OPTIONS REFORM—GOVERNMENT RESPONSE, *supra* note 9, at 6 (identifying “strict judicial certification of cases” to ensure that only cases with merit would go forward); see also NORTON ROSE FULBRIGHT, *supra* note 122 (providing that the CAT would issue a collective proceeding order in which it defines the class of persons included in the suit and specifies whether the case should proceed on an opt-in or opt-out basis).

the government suggested a series of design details for the proposed opt-out regime, including a preliminary merits test that would assess the reasonability that material issues of fact and law will be resolved at trial in favor of the class.¹³² As part of the certification evaluation, the CAT must review the adequacy of the representative body, and whether collective action is the best means of bringing the particular case.¹³³ Toward this assessment, the CAT may require minimum standards, such as:

Numerosity—A threshold number of claimants is met;

Commonality—A sufficient commonality of issues among claimants is present;

Representation—The individual or body bringing the suit adequately represents the claimants collectively and poses no conflict of interests;¹³⁴

Funds—The representative body has sufficient funds to cover the defendant's costs, should the case be unsuccessful;

Suitable Means—Collective action is the most suitable way to resolve issues common among the claimants.¹³⁵

The damages awarded in collective action suits will be limited to an amount that compensates the claimants for their

132. See DEP'T FOR BUS. INNOVATION & SKILLS—2012 CONSULTATION, *supra* note 2, at 55 (citing Ontario Law Reform Commission Report (1982)). *But see Response to the Department for Business Innovation & Skills' Consultation on the Draft Consumer Rights Bill*, BERWIN LEIGHTON PAISNER (Sept. 12, 2013) <http://www.blplaw.com/expert-legal-insights/articles/blps-response-to-bis-consultation-on-the-draft-consumer-rights-bill/> (noting that the specific factors to determine certification have not yet been released and will be set out in revised CAT rules).

133. See OPTIONS REFORM—GOVERNMENT RESPONSE, *supra* note 9, at 40 (“The Government has . . . decided that there should be a strong process of judicial certification, including a preliminary merits test, an assessment of the adequacy of the representative and a requirement that a collective action must be the best way of bringing the case.”); see also DEP'T FOR BUS. INNOVATION & SKILLS—2012 CONSULTATION, *supra* note 2, at 55 (noting that a certification process is the most suitable way of preventing unsuitable cases from clogging the courts' dockets).

134. See DEP'T FOR BUS. INNOVATION & SKILLS—2012 CONSULTATION, *supra* note 2, at 55 (if the representative is an individual, his/her claim must be typical of the group's claims. Other representative bodies or entities must suitably represent the claimants' interests).

135. See *id.* (proffering a preliminary process of certification to bring forth collective actions in competition cases); see also HOGAN LOVELLS, *supra* note 124 (clarifying that the review of case suitability for collective redress will consider whether the claims raise the “same, similar or related issues of fact or law”).

losses and does not reflect additional ‘exemplary’ damages.¹³⁶ In the 2012 public consultation leading up to the Consumer Rights Bill drafting, the government expressed that treble damages, or punitive damages, provide an incentive for claimants to bring cases under competition law that would be classed more accurately as contract law cases, in order to benefit from the inflated compensation.¹³⁷ Another voiced critique of treble damages relates to the effect on settlements; the government’s response to the Consultation submissions cites Cleary Gottlieb Steen and Hamilton LLP’s position on this issue: “[W]e agree that it is unfair for a company to be pushed into settling for fear of treble [or punitive] damages where, as is normally the case in litigation, it is not certain of being able to successfully defend the claim.”¹³⁸

Contingency fees or “damages-based agreements” (“DBAs”)—payable only where the result is a favorable one—are also prohibited in opt-out collective action cases brought before the CAT.¹³⁹ It is the government’s view that DBAs encourage

136. See NORTON ROSE FULBRIGHT, *supra* note 122 (noting that damages in collective actions should be limited to compensating claimants for experienced losses and prohibiting a punitive approach will prevent excessive damages awards); Consumer Rights Bill, Private Actions in Competition Law, 2014, H.C. Bill [161] (U.K.), at 106 (“47C. Collective proceedings: damages and costs. (1) The Tribunal may not award exemplary damages in collective proceedings.”).

137. See DEP’T FOR BUS. INNOVATION & SKILLS—2012 CONSULTATION, *supra* note 2, at 56 (noting also that, while treble or punitive damages provides an incentive for claimants to bring cases and thereby enforce the competition regime, such justifications “carry less weight in the [United Kingdom] where the bulk of enforcement activity, including fining, is undertaken by the public competition authorities”). *But see* Cavanagh, *supra* note 15, at 642 (outlining the utility of multiple damages in antitrust actions, including the covertness of antitrust violations and the subsequent difficulty in detecting and prosecuting them, the challenge in re-creating a ‘but-for’ market to use as a yardstick in calculating damages, the needed incentive for claimants to bring claims in view of the complexity and cost of antitrust litigation, the higher degree of deterrence of multiple damages, and the validity of punitive damages in cases of antitrust violations that serve no purpose other than to destroy competition).

138. See OPTIONS REFORM—GOVERNMENT RESPONSE, *supra* note 9, at 36 (“The great majority of respondents agreed that treble damages should not be allowed in collective actions.”); *see also* DEP’T FOR BUS. INNOVATION & SKILLS—2012 CONSULTATION, *supra* note 2, at 56 (opining that a treble damages system “distorts the relative incentives between fighting a case and settling, unfairly penalizing defendants who may not have committed any fault”).

139. See Consumer Rights Bill, Private Actions in Competition Law, 2014, H.C. Bill [161] (U.K.), at 106 (“(7) A damages-based agreement is unenforceable if it relates to opt-out collective proceedings.”); *see also* GOVERNMENT RESPONSE TO CONSULTATIONS

speculative litigation, where defendants face unjustified costs and claimants attorneys are tempted to focus only on large cases.¹⁴⁰ Furthermore, the “loser-pays” rule shall continue to apply, as the government views the rule as a safeguard against frivolous cases and views the “loser-pays” principle as a matter of fairness.¹⁴¹ In the interests of enhancing access to justice, however, the government aims to preserve some discretion to cost-cap to ensure that a small claimant is not held liable for an extraordinary sum of legal fees accrued by a much better funded defendant.¹⁴²

Opt-out settlements must be judicially approved.¹⁴³ In an effort to ensure fairness toward the action’s claimants, approval of opt-out settlements includes consideration of the reasonableness of attorneys fees paid to the claimants’ representatives.¹⁴⁴ Furthermore, claimants are offered the

ON CONSUMER RIGHTS 2013, *supra* note 26, at 54 (asserting that a ban on contingency fees, based on the success of the outcome, will help prevent US-style class actions).

140. See OPTIONS REFORM—GOVERNMENT RESPONSE, *supra* note 9, at 41 (noting that the Government and many respondents viewed a ban on contingency fees as a key safeguard in avoiding the rise of a “litigation culture”); see also DEP’T FOR BUS. INNOVATION & SKILLS—2012 CONSULTATION, *supra* note 2, at 57–58 (arguing that contingency fees could “unduly distort the incentives” to litigate, i.e. artificially inflating the number of claimants, encouraging spurious litigation, and encouraging attorneys to focus only on large cases).

141. See OPTIONS REFORM—GOVERNMENT RESPONSE, *supra* note 9, at 41 (noting the unfairness where “a defendant which wins a case had to pay its own legal costs”, and justness where “a claimant which wins should be able to reclaim its costs”); see also DEP’T FOR BUS. INNOVATION & SKILLS—2012 CONSULTATION, *supra* note 2, at 35 (“The preservation of the loser-pays rule in collective actions is also critical in ensuring fairness for defendants and a check on unmeritorious claims.”).

142. See DEP’T FOR BUS. INNOVATION & SKILLS—2012 CONSULTATION, *supra* note 2, at 57 (adding that “Cost capping can reduce the incentives to run up costs and provide certainty for claimants, meaning that meritorious cases that might not otherwise be brought would be more likely to occur”); see also OPTIONS REFORM—GOVERNMENT RESPONSE, *supra* note 9, at 41 (noting that while the loser-pays rule should apply in the vast majority of cases, there are special circumstance where cost-capping should occur in order to preserve access to justice).

143. See Consumer Rights Bill, Private Actions in Competition Law, 2014, H.C. Bill [161] (U.K.) (“49A Collective settlements: where a collective proceeding order has been made. “(2) An application for approval of a proposed collective settlement must be made to the Tribunal by the representative and the defendant in the collective proceedings.”); see also OPTIONS REFORM—GOVERNMENT RESPONSE, *supra* note 9, at 43 (providing the Government’s decision that any opt-out settlement must be judicially approved).

144. See OPTIONS REFORM—GOVERNMENT RESPONSE, *supra* note 9, at 43 (adding that underlying claimants must be given an opportunity to opt-out of the settlement).

opportunity to opt-out of the settlement and preserve individual claimant autonomy.¹⁴⁵

B. The EU Response to Collective Action in Antitrust: Recommendation for the Member States

The European Union has offered its own answer to the collective redress question.¹⁴⁶ In June 2013, the Commission issued a Recommendation setting out a series of principles for collective redress mechanisms to be adopted voluntarily by the Member States.¹⁴⁷ The aim is to improve access to justice through collective redress mechanisms while relying on the Member States' procedural safeguards to prevent abusive litigation.¹⁴⁸

Similar to the UK approach, the European Commission aims to set conditions that the representative body must satisfy in order to achieve certification and recommends that the representative possess "sufficient capacity in terms of financial resources, human resources, and legal expertise" to effectively represent the aggregated claims of the group.¹⁴⁹ Also

145. See Consumer Rights Bill, Private Actions in Competition Law, 2014, H.C. Bill [161] (U.K.), at 110 ("(10) But a collective settlement is not binding on a person who – (a) opts out . . ."); see also OPTIONS REFORM—GOVERNMENT RESPONSE, *supra* note 9, at 43 (adding that "underlying claimants" must also be given an opportunity to opt-out of the settlement).

146. See Commission Recommendation, *supra* note 1. But see NORTON ROSE FULBRIGHT, *supra* note 122 (noting that a Recommendation, unlike a Directive, is not legally binding on the Member States).

147. See Commission Recommendation, *supra* note 1; see also Press Release, European Commission, Commission Recommends Member States to Have Collective Redress Mechanisms in Place to Ensure Effective Access to Justice (June 11, 2013) [hereinafter European Commission Press Release 2013], available at http://europa.eu/rapid/press-release_IP-13-524_en.htm (providing that the Commission's Recommendation promotes a coherent approach across the Member States without requiring the harmonization of national systems).

148. See European Commission Press Release 2013, *supra* note 147 (noting also that the Recommendation was meant to complement a proposed Directive on antitrust damages intended to help citizens and businesses overcome obstacles in obtaining compensation for competition infringements); see also NORTON ROSE FULBRIGHT, *supra* note 122 (stating that Recommendation is a "clear sign of the European Commission's determination to encourage the victims of competition law infringements to recover their losses" and the proposals are meant to set the direction and limits on collective action regimes in the European Union).

149. See Commission Recommendation, *supra* note 1, at 62–63 (outlining the standing upon which a body may bring a representative action); see also Commission

comparable to the UK approach, the Commission sets boundaries for the scope of entities eligible to represent claimants, emphasizing that the representative body, in order to have legal standing, must act genuinely in the best interest of the group, and not for the representative's own profit.¹⁵⁰ Toward that end, the Commission specifies that only bodies of non-profit character are suitable to bring collective actions, as they are "guided by the interests of those affected in situations of mass damages."¹⁵¹

One of the most significant distinctions between the European approach to collective redress and that of the United Kingdom and the United States is the recommendation of an opt-in model.¹⁵² The Commission's endorsement of the opt-in model recommends that Member States require claimants to actively choose to become a part of the represented group, at which point the resulting judgment is binding; but those who do not opt-in to the collective proceedings maintain the right to pursue a damages claim individually.¹⁵³ The prevailing

Communication 2013, *supra* note 22, at 9 (clarifying that legal standing should be granted to the representative body upon its qualification in advance, and that the conditions for legal standing are stipulated in the Commission's Recommendation).

150. See Commission Communication 2013, *supra* note 22, at 10 (providing that as the representative entity alone acts on behalf of claimants, then the entity must be trusted to act in the best interest of the represented group, and not for own profit); see also Commission Recommendation, *supra* note 1, at 63 (stating that "there should be a direct relationship between the main objectives of the entity and the rights granted under Union law that are claimed to have been violated in respect of which the action is brought").

151. See Commission Recommendation, *supra* note 1, at 62 (providing that in order to have standing to bring a representative action, "the entity should have a non-profit making character"); European Commission Press Release 2013, *supra* note 147 (noting that by permitting only entities of a non-profit character to represent claimants, the Commission aims to discourage abuse in the collective redress regime).

152. See Commission Recommendation, *supra* note 1, at 64 (providing as a specific principle relating to compensatory collective redress that "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)"); see also Commission Communication 2013, *supra* note 22, at 12 (stating that the Commission takes the view that the opt-in method should form the basis of the European horizontal framework on collective redress).

153. See Commission Communication 2013, *supra* note 22, at 12 (noting that the opt-in model "guarantees that the judgment will not bind other potential qualified claimants who did not join"); see also European Commission Press Release 2013, *supra* note 147 (providing that under the opt-in method, claimant parties must directly express consent for the representative party to bring the collective action on their behalf).

understanding of the Commission is that the opt-in model preserves the parties' autonomy and "respects the right of a person to decide whether to participate or not."¹⁵⁴ The Commission further lauds the perceived advantages of the opt-in system, e.g., the value of the collective dispute can be more easily determined, the court is in a better position to determine both the merits of the case and the admissibility of the collective action, and the apparent certainty that the judgment will not bind other qualified claimants who did not opt into the claim.¹⁵⁵

Additional safeguards proffered by the Commission to mitigate the incentives for abuse associated with class action suits largely reflect those safeguards adopted in the UK.¹⁵⁶ For instance, the Commission recommends a prohibition of contingency fees as well as treble, or punitive, damages.¹⁵⁷ The bar against contingency fees, both in the European Union and the United Kingdom, is a source of skepticism among practitioners who weigh the risks and rewards in bringing

154. See Commission Communication 2013, *supra* note 22, at 12 (contrasting the opt-out model as a remedy that prevents potential claimants from making an informed decision on whether to pursue the claim); see also European Commission Press Release 2013, *supra* note 147 (adding that "the Recommendation "stresses the need to provide information to potential claimants who may wish to join the collective action").

155. Commission Communication 2013, *supra* note 22, at 12 (juxtaposing the proposed benefits of the opt-in model with the disadvantages of the opt-out model, including the perception that the opt-out system is inconsistent with the compensatory aim of collective redress, as some claimants who are unidentified cannot receive the awarded damages); Commission Staff Working Paper 2008, *supra* note 9, at 21 (arguing that the opt-in model is preferable because it is more similar to traditional litigation and more easily implemented at the national level, and because opt-out regimes in other jurisdictions are perceived to lead to excesses, increased risk that claimants lose control of the proceedings, and increased risk that the attorney pursues his or her own interests before those of the claimants).

156. See European Commission Press Release 2013, *supra* note 147 (noting that the Commission recommended "important procedural safeguards to make sure there are no incentives to abuse collective redress systems"); Commission Communication 2013, *supra* note 22, at 6 (stating that the proposed collective redress system should include safeguards against abusive litigation and mitigate the economic incentives to bringing meritless claims).

157. Commission Recommendation, *supra* note 1, at 64–65 ("The Member States should not permit contingency fees" and "punitive damages, leading to overcompensation in favour of the claimant party . . . should be prohibited"); European Commission Press Release 2013, *supra* note 147 (reiterating the Commission's recommendation that contingency fees and punitive damages should be prohibited).

collective antitrust actions.¹⁵⁸ Finally, the Commission and all the stakeholders who participated in the public consultation agreed that the loser-pays principle—which is deeply embedded in the legal traditions across Europe—must also apply in cases of collective action.¹⁵⁹

While the UK Consumer Rights Act and the EU Recommendation share some similarities—such as a prohibition of contingency fees and treble damages, and a reiteration of the loser pays rule regarding attorney’s fees and other litigation costs—the two bodies take different directions on other points.¹⁶⁰ For example, the United Kingdom adopted a limited opt-out approach toward collective action, whereas the European Union recommends a strictly opt-in model.¹⁶¹ Also, where the United Kingdom recognizes the legal standing of any representative group or trade association to bring a collective action, the European Union recommends that the representative entity be of a non-profit character.¹⁶² Nonetheless, both require that the body bringing the action be certified to represent the aggregated claims and both consider a variety of factors toward this making the certification determination.¹⁶³

158. Melissa Lipman, *Plaintiffs Attys Say EU Antitrust Litigation Plan Falls Short*, LAW360, June 12, 2013, <http://www.law360.com/articles/449387/plaintiffs-attys-say-eu-antitrust-litigation-plan-falls-short> (noting that the risks outweigh the incentives for attorneys bringing collective antitrust claims when contingency fees are off the table) (quoting Daniel Small, Cohen Milstein Sellers & Toll PLLC).

159. Commission Recommendation, *supra* note 1, at 63 (“(13) 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’)”); Commission Communication 2013, *supra* note 22, at 9, 16 (identifying the loser-pays rule as a central safeguards against abusive litigation and noting the total agreement among stakeholders and the Commission on its inclusion in the proposed collective redress regime).

160. Consumer Rights Bill, Private Actions in Competition Law, 2014, H.C. Bill [161] (U.K.); OPTIONS REFORM—GOVERNMENT RESPONSE, *see supra* note 141 and accompanying text; Commission Recommendation, *see supra* note 157, note 159 and accompanying text.

161. Consumer Rights Bill, Private Actions in Competition Law, 2014, H.C. Bill [161] (U.K.); *see supra* notes 125, 152 and accompanying text.

162. *See supra* notes 123, 151 and accompanying text.

163. *See supra* notes 135, 149 and accompanying text.

III. ANALYZING THE IMPACT OF PROPOSED COLLECTIVE
REDRESS REFORMS IN THE UNITED KINGDOM AND
EUROPEAN UNION

To competently evaluate the efficacy of the UK Draft Consumer Rights Bill and the EU Recommendations for collective redress mechanisms, the fit between the desired ends and the selected means must be assessed. The specific question pondered in this analysis is: Will the legal framework and tools adopted in these legislative proposals effectively achieve the intended goals of creating avenues for collective redress in the competition arena? Part III assesses the capacity of the mechanisms and safeguards proposed to implement collective redress schemes that will meet the goals expressed by the UK government and the European Commission. Three key critiques are offered to identify and assess the weaknesses of the proposed reforms. Part III.A questions sources of litigation funding, Part III.B appraises the certification process, and Part III.C evaluates the opt-in/opt-out debate. The resulting analysis is cautiously optimistic toward the prospective success of the UK approach, but skeptical as to the capacity of the EU proposal to achieve a robust and responsible collective action system in private antitrust enforcement.

A. *Funding Disincentives*

Funding collective redress claims remains a persistent problem and stands to critically undermine the legislative efforts in both the United Kingdom and the European Union to strengthen collective redress in antitrust claims.¹⁶⁴ The United Kingdom and European Union approaches bar contingency fees.¹⁶⁵ This prohibition reflects the legal traditions of both jurisdictions, as well as an effort to actively mitigate the threat of abusive litigation.¹⁶⁶ The underlying principle is that contingency fees encourage entrepreneurial lawyers to pursue a

164. See Lipman, *supra* note 158.

165. Consumer Rights Bill, Private Actions in Competition Law, 2014, H.C. Bill [161] (U.K.); Commission Recommendation, *supra* note 157; *supra* note 139 and accompanying text.

166. Berrisch et al., *supra* note 57; OPTIONS REFORM—GOVERNMENT RESPONSE, *supra* note 140; *supra* note 157 and accompanying text.

high volume of claims, regardless of whether the claims have merit.¹⁶⁷ The aggregation of a large number of claims may pressure defendants to settle, even if the claims are frivolous, which would promote the litigious culture both jurisdictions seek to avoid.¹⁶⁸ If contingency fees are prohibited, however, what are the practical alternatives for funding collective litigation?

The European Commission recognizes that private third parties may act as both an opportunity for funding as well as a source of abuse, and acknowledges the need for proper regulation.¹⁶⁹ The practicality of the Commission's proposed solution is questionable because, after all, what is the likelihood that third-party funders with limited budgets will be eager to finance collective actions where there are no contingency fees? Plaintiffs' attorneys would take on great risk and cost to bring collective actions with no incentive of a damages-based reward.¹⁷⁰ Furthermore, the opt-in collective redress model promoted by the Commission shrinks the size of the represented claimant group.¹⁷¹ Consequently, third party funders face the added challenge of aggregating enough claims to cover the litigation costs.

The gravity of the funding hurdle is compounded by the pledge to uphold the loser pays rule in both jurisdictions.¹⁷² Claimants must consider not only how they will fund their own

167. See *supra* note 73–75 and accompanying text.

168. See *supra* note 65, 75 and accompanying text.

169. Commission Communication 2013, *supra* note 149, at 15 (referencing the Commission Communication encouraging Member States to make third-party financing subject to conditions via a transparent approval system that ensures the best interests of claimants are served); see *supra* note 149 and accompanying text (setting parameters regarding third party financiers).

170. See Lipman, *supra* note 158 (noting that attorneys likely will be skeptical of bringing collective antitrust claims without the financial incentive of contingency fees, or damages-based arrangements).

171. SORABJI ET AL., *supra* note 3, at 90 (identifying the third party funding problem as a disadvantage to the opt-in approach because there must be “enough claimants to cover the high cost of bringing the action”); Commission Staff Working Paper 2008, *supra* note 9, at 20 (affirming that the opt-in collective action system usually results in a smaller claimant pool than in the opt-out model).

172. OPTIONS REFORM—GOVERNMENT RESPONSE, *supra* note 141; Commission Recommendation, *supra* note 159 (noting that the loser-pays rule is a legal tradition in UK and EU jurisdictions that, for the foreseeable future, will carry into the proposed collective action regimes in antitrust enforcement).

action, but also how they will fund the defendant's legal costs in the event that the damages suit is unsuccessful.¹⁷³ The pairing of the loser pays rule with the prohibition of contingency fees act together as a weighty disincentive for claimants to bring competition damages actions before the courts. Therefore, in an effort to curtail abusive litigation, the European Union and United Kingdom undercut the primary mutual objective of encouraging competition-related private actions by opening up avenues for collective redress.

B. *Certification of the Representative Entity*

It is unclear whether the certification process heralded by both the UK and EU proposals will provide any added protection against the pitfalls of the US class action model, as they share many of the same fundamental criteria.¹⁷⁴ As a safeguard against abusive collective litigation, both the United Kingdom and the European Union seek to implement a rigorous certification process required for the representative body to bring the aggregated claims.¹⁷⁵ The UK's certification analysis may include a number of possible factors, which were proffered in the 2012 public consultation on the matter; these factors included numerosity, commonality, representation adequacy, funding, and suitability.¹⁷⁶ Similarly, the European Commission recommends that the representative body have sufficient funding, be a suitable entity to bring a collective claim, and be free from conflict of interests.¹⁷⁷

173. OPTIONS REFORM—GOVERNMENT RESPONSE, *supra* note 141 ; Commission Recommendation, *supra* note 159 and accompanying text (illustrating what the loser-pays rule entails and identifies it as a safeguard against the threat of frivolous lawsuits).

174. FED. R. CIV. P. 23(A); DEP'T FOR BUS. INNOVATION & SKILLS—2012 CONSULTATION, *supra* note 135; Commission Recommendation, notes 150–51 and accompanying text (outlining the existing or proposed representation criteria in each jurisdiction).

175. DEP'T FOR BUS. INNOVATION & SKILLS—2012 CONSULTATION, *supra* note 131; *see supra* notes 149–150 and accompanying text (noting the certification processes proffered by the UK government and the European Commission for representative claims and bodies).

176. DEP'T FOR BUS. INNOVATION & SKILLS—2012 CONSULTATION, *supra* note 135 (offering factors likely to be considered as part of the UK representative action certification process).

177. *See supra* notes 150–51 and accompanying text (detailing the representative action certification criteria proposed by the European Commission).

Notably, the United Kingdom and European Union aim to implement these certification processes in order to avoid a litigious culture allegedly brought about by US-style class actions.¹⁷⁸ Rule 23 of the US Federal Rules of Civil Procedure, however, also requires class certification and the class must be able to demonstrate certain prerequisites, including: (a) numerosity, (b) commonality among claims, (c) adequacy of the representative parties, and (d) typicality.¹⁷⁹ The procedure developed to certify US class action suits contains the same substantive elements proposed under the UK and EU regimes.¹⁸⁰ Therefore, without having cases to review regarding the level of stringency with which the UK and EU certification requirements apply, the efficacy of their respective efforts to avoid American-style class actions is questionable.

C. *Opt-in Inertia*

The opt-in model endorsed by the European Commission faces the inertia obstacle, which ultimately will cripple the proposed collective action regime for antitrust claimants.¹⁸¹ The fears associated with the opt-out approach weighed heavily against its adoption; the Commission explained that the opt-out system raised fundamental questions as to potential claimants' autonomy to decide whether they wish to litigate.¹⁸² Whereas inactivity in an opt-out system results in a large class of uninvolved claimants, inactivity in an opt-in system results in an

178. See *supra* note 118 and accompanying text; note 149–150 and accompanying text (identifying the proposed certification process as a key defense against the emergence of the alleged litigious culture associated with US-style class actions).

179. FED. R. CIV. P. 23(A); see *supra* note 81 and accompanying text (outlining the class certification requirements in the US justice system).

180. See *supra* note 81 and accompanying text; note 135 and accompanying text; note 149–150 and accompanying text; FED. R. CIV. P. 23(A) (comparing the certification criteria under the existing US model and the proposed regimes in the United Kingdom and the European Union).

181. See *supra* notes 152–155 and accompanying text (discussing the European Commission's commitment to the opt-in model for collective redress).

182. See *supra* note 154 and accompanying text. *But see* SORABJI ET AL., *supra* note 3, at 149 (arguing that, as part of the certification process, where potential claimants are given proper and effective notice to enable them to opt-out of the collective action, this notice provides each individual the opportunity to exercise their right of party autonomy).

active but small class of claimants.¹⁸³ Plaintiffs' attorneys project that "through inertia alone" very few potential claimants will choose to pursue a collective claim.¹⁸⁴ By requiring claimants to opt-in, the European Commission drastically reduces the initial pool of claims.¹⁸⁵ The EU Recommendation that heralds the opt-in approach fails to overcome the inertia hurdle and does not advance—and indeed will subvert—the goal of enhancing private actions in this area of the law.

In the United Kingdom, the low level of claimant participation in the opt-in system was "the single biggest hurdle" to the effectiveness of the existing collective action scheme.¹⁸⁶ Participation rates were a key factor in the decision to shift toward a limited opt-out system.¹⁸⁷ The UK's adoption of a limited opt-out model stands to provide compensation to a greater number of victims of competition infringements.¹⁸⁸ In this capacity, the Consumer Rights Act 2014 fulfills the aims of increasing access to justice for claimants and strengthening the deterrence effect that collective litigation can have on future breaches of competition law.¹⁸⁹ Furthermore, the opt-out model

183. Howells, *supra* note 2, at 9 (asserting that "the numbers are 'crunched' to demonstrate that opt-out regimes attract higher degrees of participation than opt-in regimes").

184. See Lipman, *supra* note 158 (quoting practitioner Daniel Small, at Cohen Milstein Sellers & Toll PLLC, expressing "You're just going to get, through inertia alone, very few potential class members opting in").

185. SORABJI ET AL., *supra* note 3, at 101 (noting that opt-in regimes in the European Union and the United States typically produce considerably lower rates of participation as compared to opt-out regimes, while opt-in rates in the United Kingdom's group litigation scheme vary from as little as less than one percent to almost all group members).

186. DEP'T FOR BUS. INNOVATION & SKILLS—2012 CONSULTATION, *supra* note 2, at 31; SORABJI ET AL., *supra* note 3, at 78 (affirming that the opt-in model creates significant barriers to entry in collective follow-on competition actions).

187. See DEP'T FOR BUS. INNOVATION & SKILLS—2012 CONSULTATION, *supra* note 2, at 31 (noting that Civil Justice Council's research demonstrates that the great majority of opt-in rates are 50% or lower, whereas the average participation rates in opt-out cases in non-UK legal systems have ranged between 87% to 99%); see OPTIONS REFORM—GOVERNMENT RESPONSE, *supra* note 9, at 30 (identifying the opt-in model as the primary point of concern regarding the existing regime's inability to provide access to justice for victims of antitrust infringements).

188. Howells, *supra* note 2, at 9; SORABJI ET AL., *supra* note 3, at 100–01 (asserting that numerical data substantiates anecdotal evidence that opt out "catches more litigants in the fishing net").

189. SORABJI ET AL., *supra* note 3, at 101; OPTIONS REFORM—GOVERNMENT RESPONSE, *supra* note 10, at 30 (linking the opt-in model with poor access to justice in

enhances judicial efficiency for defendants; the totality of potential exposure related to a particular competition infringement can be better assessed, which may encourage defendants to settle claims earlier.¹⁹⁰ The decision to employ a limited opt-out mechanism is crucial to the success of creating a robust collective action regime in private antitrust enforcement.

CONCLUSION

Professors Issacharoff and Miller made an accurate prediction when they opined, “an apparent cultural revulsion at accepting the reality of legal enforcement as entrepreneurial activity may leave the reforms without the necessary agents of implementation.”¹⁹¹ The instant analysis assessed whether the UK government and the European Commission, in an attempt to avoid the US class action model, pursued legal frameworks that can accomplish the intended aims of creating limited and appropriate avenues for collective redress. The three determinative factors subject to review were the representative certification requirements, the sources of funding, and the selected collective action model for aggregating claims.

The UK Consumer Rights Act and the European Commission’s Recommendations for collective redress express a need for pre-trial certification of collective actions.¹⁹² The proposed certification requirements are meant to act as safeguards against the creation of a culture of litigation where claims are brought and settled without adequate scrutiny as to

the antitrust realm and suggesting the opt-out model as a solution to the access to justice deficit).

190. *Response to the Department for Business Innovation & Skills’ Consultation on the Draft Consumer Rights Bill*, BERWIN LEIGHTON PAISNER, *supra* note 132 and accompanying text; *see also* DEP’T FOR BUS. INNOVATION & SKILLS—2012 CONSULTATION, *supra* note 2, at 33–34 (adding that the opt-out model improves efficiency by making a judgment binding on all those who do not opt-out, thereby increasing certainty for defendants that future parallel proceedings will not occur).

191. Issacharoff & Miller, *supra* note 5, at 181 (opining whether the constraints imposed on new collective action reforms in Europe will cause the reforms to be ineffective).

192. *See supra* note 135 and accompanying text; note 149–150 and accompanying text (referencing the certification processes in the UK and EU proposals for collective redress mechanisms).

merit.¹⁹³ The certification process is also a part of the American-style class action model, and there are parallels among the factors reviewed in making the certification determination.¹⁹⁴ Recent trends in the US justice system show movement toward a more stringent review, or “rigorous analysis,” of the claimants’ ability to meet the class prerequisites, and a heightened level of skepticism toward the scope of private action’s role in antitrust cases more broadly.¹⁹⁵ The implications of this shift indicate that the US and the EU/UK attitudes and approaches toward collective redress may be converging.

One issue upon which the UK government and the European Commission saw eye-to-eye, but that clashes with US legal custom, was the funding of collective actions.¹⁹⁶ Both saw fit to prohibit contingency fees and uphold the loser pays rule, which are long-held legal traditions in both jurisdictions.¹⁹⁷ While the underlying intent was to discourage entrepreneurial lawyers from pursuing frivolous or meritless claims, the effect of these policies will be to hobble efforts to enhance collective action in competition cases by dampening the ability and the will of plaintiffs to bring claims.¹⁹⁸

The most drastic, and perhaps most seminal, difference between the approaches adopted by the UK government and the European Commission lies in the decision to adopt

193. *See supra* note 118 and accompanying text; Commission Communication 2013, *supra* note 156, at 6, 10–11 (identifying the certification process as an important safeguard against the US class action model pitfalls).

194. *See supra* note 81 and accompanying text; note 135 and accompanying text; note 149–150 and accompanying text (illustrating the similarities between the certification factors proposed by the UK government and the European Commission, and the Rule 23 requirements under the US class action model).

195. *See supra* note 79 accompanying text (noting that in recent years the US Supreme Court has shown skepticism toward the scope of private actions generally in antitrust enforcement); *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541, 2551 (2011); *Comcast v. Behrend*, 133 S. Ct. 1426, 1432, 1434 (2013) (holding that a rigorous analysis must take place at the class certification stage).

196. *See supra* notes 139, 157 and accompanying text (expressing the employment of the loser-pays rule and the ban on contingency fees to distinguish the UK and EU collective redress proposals from the US class action alternative).

197. *See supra* notes 139–141, 157–159 and accompanying text (describing the respective reliance on the loser-pays rule and ban on contingency fees in the UK and EU proposals).

198. *See supra* notes 170, 172–173 and accompanying text (illustrating the difficulty and risk in bringing collective actions in light of the funding constraints imposed by the contingency fee ban and the loser-pays rule).

contrasting models for aggregating claims.¹⁹⁹ While the UK Consumer Rights Act proposed a limited opt-out model for collective action claims, the European Commission recommended an opt-in approach.²⁰⁰ The opt-out model stands to greatly increase the level of private enforcement of competition law in the UK, which also positively impacts deterrence objectives and judicial economy.²⁰¹ The European Commission's opt-in recommendation, however, seriously undercuts the same broader objectives by dramatically reducing the pool of aggregated claims in representative actions.²⁰²

While the UK's approach retains some safeguards and limitations to the collective action scheme proposed, the government has taken important steps toward opening up avenues for more people to access justice. The European Commission has also taken steps through its Recommendation to encourage private enforcement of competition law through claims aggregation, but has constrained the mechanisms for collective redress to such an extent so as to make substantial changes to the status quo unlikely.

199. *See supra* note 152 and accompanying text (identifying the opt-in versus opt-out issue as a key point of deviation between the EU and UK proposals).

200. *See supra* note 152 and accompanying text (noting the divergent approaches taken by the European Commission, which recommends the opt-on collective redress model exclusively, and the United Kingdom, which has aligned with the US model in offering an opt-out alternative).

201. SORABJI ET AL., *see supra* note 3 and accompanying text; OPTIONS REFORM—GOVERNMENT RESPONSE, *see supra* note 126 (referencing the low participation rates in opt-in model collective action regimes generally and the ineffectiveness of the existing opt-in system in the United Kingdom as impediments to maximum private antitrust enforcement).

202. Howells, *supra* note 2, at 9; SORABJI ET AL., *supra* note 3 (supporting the contention that opt-in regimes typically produce substantially lower participation rates in collective actions).

