

# Harmonising Private Enforcement of Competition Law in Central and Eastern Europe: The Effectiveness of Legal Transplants Through Consumer Collective Actions

by

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## *Abstract*

The aim of this paper is to critically analyze the manner of harmonizing private enforcement in the EU. The paper examines the legal rules and, more importantly, the actual enforcement practice of collective consumer actions in EU Member States situated in Central and Eastern Europe (CEE). Collective actions are the key method of getting compensation for consumers who have suffered harm as a result of an anti-competitive practice. Consumer compensation has always been the core justification for the European Commission's policy of encouraging private enforcement of competition law. In those cases where collective redress is not available to consumers, or consumers cannot apply existing rules or are unwilling to do so, then both their right to an effective remedy

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and the public policy goal of private enforcement remain futile. Analyzing collective compensatory actions in CEE countries (CEECs) places the harmonization process in a broader governance framework, created during their EU accession, characterized by top-down law-making and strong EU conditionality. Analyzing collective consumer actions through this ‘Europeanization’ process, and the phenomenon of vertical legal transplants, raises major questions about the effectiveness of legal transplants *vis-à-vis* homegrown domestic law-making processes. It also poses the question how such legal rules may depend and interact with market, constitutional and institutional reforms.

### *Résumé*

Le but de cet article est d’analyser de façon critique la manière d’harmonisation d’un mécanisme d’application privée du droit de la concurrence dans l’UE. Le document examine non seulement les dispositions juridiques, mais surtout la pratique actuelle des actions collectives dans les États membres de l’UE et dans les pays d’Europe centrale et orientale (PECO). Les actions collectives représentent une méthode clé pour les consommateurs, qui permet d’obtenir une indemnisation d’un préjudice subi du fait d’une pratique anticoncurrentielle. L’indemnisation des consommateurs a été toujours la justification principale de la politique de la Commission européenne visée à encourager l’application privée du droit de la concurrence. Si les actions collectives ne sont pas disponibles pour les consommateurs, ou si les consommateurs ne peuvent pas appliquer les règles existantes ou sont réticents à le faire, le droit à un recours efficace finit par son abandon, et l’objectif d’application privée du droit de la concurrence n’est pas réalisé. L’analyse des actions collectives dans les PECO place le processus d’harmonisation dans un large cadre de gouvernance, mise en place pendant l’adhésion des PECO à l’UE. Ce cadre est caractérisé par l’adoption des lois de la façon «descendante» («top-down») et une forte dépendance du processus législatif national de l’UE. L’analyse des actions collectives à travers le processus «d’eupéanisation» et le phénomène des «transplantations juridiques» verticales, provoque des questions importantes concernant l’efficacité des «transplantations juridiques» en comparaison avec le processus législatif national. Cette analyse provoque aussi une autre question, concernant la relation entre les règles juridiques et le marché, les réformes constitutionnelles et institutionnelles.

**Key words:** private enforcement of competition law; collective actions; consumer; EU law; Europeanization.

**JEL:** K23; K42.

## I. Introduction

Ever since the European Commission (hereafter, EC or Commission) has initiated its 1<sup>st</sup> proposal on private enforcement of EU competition rules, it was the success of US private antitrust enforcement that has served as the comparison

standard for the EU and its Member States. Private enforcement has proved to be a powerful enforcement tool in the US antitrust system. It could thus be argued that the EU and its Member States have been implementing legal rules to enable and foster private enforcement of EU competition law in order to establish a similarly effective system as that of the US.

Member States have gradually begun transplanting the EC's initiatives regarding damages claims, and have enacted various legal rules to facilitate private enforcement in their own legal systems. With the adoption of Directive 2014/104/EU<sup>1</sup> in November 2014, damages claims for competition law violations were formalized as a legal obligation for Member States. The Directive must be implemented by the end of 2016. Despite the fact that the final version of the Directive does not cover collective actions, and the latter are only the subject of a Recommendation on common principles concerning collective actions<sup>2</sup>, collective actions have been a core aspect of the EC's private enforcement initiative from its conception. They have been considered a powerful enforcement tool to compensate consumers who suffered harm as a result of anti-competitive practices.

The aim of this paper is to critically analyze the way in which harmonization of private enforcement is taking place in the EU by examining the legal rules and, more importantly, the actual enforcement of consumer collective actions in Member States situated in Central and Eastern Europe (hereafter, CEE). Collective actions provide a fundamental and, perhaps, even the only means for consumers, who have suffered harm as a result of an anti-competitive practice, to get compensation. Consumer compensation has always been the core justification of the EC's policy to encourage private enforcement of competition law. If collective redress is not available to consumers, or they cannot apply existing rules or are not willing to do so, then a fundamental right – the right to an effective remedy – remains futile. This would, in turn, result in the failure to realize the public policy goal of private enforcement. Analyzing collective compensatory actions in CEE countries (hereafter, CEECs) places the harmonization process in a broader governance framework, created during their EU accession, which was characterized by top-down law-making and strong EU conditionality. Analyzing collective consumer actions through this 'Europeanization' process, and the phenomenon of vertical legal transplants, raises essential questions about

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<sup>1</sup> Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ L 349, 05.12.2014, p. 1).

<sup>2</sup> Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (OJ L 201, 26.07.2013, p. 60).

the effectiveness of legal transplants *vis-à-vis* homegrown domestic law-making processes. It also raises the question how such legal rules may depend and interact with market, constitutional and institutional reforms.

Accordingly, the paper starts with a brief overview of the development of private enforcement of competition law in the EU and the role played by consumers in this enforcement method. The paper goes on to analyze the relevance of collective actions as a way for consumers to enforce competition rules before national courts. The paper continues with the analysis of both legal rules and actual enforcement of specific collective redress schemes in CEECs. The paper closes with conclusions.

## II. The development of private enforcement of EU competition law

In the last twenty years, the EU competition law enforcement model has been subject to a fundamental reform in order to increase the deterrent effect of EU competition rules. These reforms endorsed major procedural as well as institutional changes<sup>3</sup>. At the same time, they reinforced the participation of private actors in the enforcement of EU competition law, by way of strengthening private enforcement and introducing leniency programmes. Since the *Automec II*<sup>4</sup> judgment of the Court of Justice of the EU (hereafter, CJ), the EC tried to encourage (potential) complainants to secure adequate protection of their own rights before national courts, instead of filing a complaint with the Commission<sup>5</sup>. Backed up by the EU judiciary, the EC argued that reasons pertaining to procedural economy and the sound administration of justice speak in favour of a case being considered by national courts<sup>6</sup>,

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<sup>3</sup> The so-called modernization package was launched by the 1999 White Paper, which among other issues stressed the importance of complaints in the new decentralized enforcement system. The White Paper on modernization of the Rules implementing Articles 81 and 82 of the EC Treaty, Commission programme No 99/027, OJ C 132, 12.05.1999, p. 1.

<sup>4</sup> Case T-24/90 *Automec Srl v Commission of the European Communities (Automec Srl)*, ECR [1992] II-2223.

<sup>5</sup> For more details on the interplay of private actions and complaints see: K.J. Cseres, J. Mendes, 'Consumers' access to EU competition law procedures: outer and inner limits' (2014) 51(2) *Common Market Law Review* 1–40.

<sup>6</sup> This refers to private enforcement of competition law – individually initiated litigation, either as stand-alone or follow-on actions, before a court to remedy a violation of competition law. Such an action may lead to civil law sanctions such as damages, restitution, injunction, nullity or interim relief. Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, OJ C 101, 27.04.2004, p. 65, points 12–18; European Commission, *Report on Competition Policy*, 2005, at: [http://ec.europa.eu/competition/publications/annual\\_report/2005/en.pdf](http://ec.europa.eu/competition/publications/annual_report/2005/en.pdf) (access 21.07.2013), p. 26.

rather than by the EC, when the same matter has been, or can be referred to national courts<sup>7</sup>.

In its 2004 Notice on the handling of complaints<sup>8</sup>, the Commission clearly conveyed its view that private law actions before national courts are an alternative or even a more efficient avenue for potential complainants to secure law enforcement. The EC stressed the considerable advantages for individuals and companies of EU competition law enforcement by national courts, as opposed to public enforcement by the Commission. The EC's discretion on setting enforcement priorities and deciding whether to pursue certain complaints is, therefore, partially grounded on the argument that private enforcement serves as an alternative mechanism of consumer redress<sup>9</sup>.

Since *Automec II*, private enforcement of competition law has been a top priority of the EC's competition policy and the Commission itself. Following the CJ's judgment in *Courage*<sup>10</sup>, which formulated the right to damages resulting from EU competition law violations, the EC has put forward several proposals to harmonize both national civil procedural rules that enable private enforcement of EU and national competition laws. The effectiveness of US antitrust practice (where the majority of cases are brought by private parties) has served as an example in the process of EU harmonization of private enforcement matters<sup>11</sup>. EU Member States followed the policy of the Commission and also began to pursue an active private enforcement policy. The former manner of legal borrowing has been identified as a horizontal legal transplant, while the latter as a vertical legal transplant. Horizontal legal transplants imply an interaction among different legal systems, which can take place in relation to particular rules or institutions, or even entire branches of law, and can be determined by different reasons<sup>12</sup>. Accordingly, a horizontal legal transplant occurs when one co-equal legal system borrows from another, such as the EU borrowing from the US, or one EU Member State from another. A vertical legal transplant occurs, in turn, when a member

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<sup>7</sup> *Automec Srl*, cited *supra* note 2, para 87. Notice on handling complaints cited *supra* note 4; *Report on Competition Policy*, 2005 cited *supra* note 4, p. 26.

<sup>8</sup> *Supra* note 4.

<sup>9</sup> K.J. Cseres, J. Mendes, 'Consumers' access'.

<sup>10</sup> Case C-453/99, *Courage Ltd v Bernard Crehan (Courage)*, [2001] ECR I-6297, para. 26.

<sup>11</sup> D.J. Gerber, 'Private Enforcement of Competition Law: A Comparative Perspective', at: [http://scholarship.kentlaw.iit.edu/fac\\_schol/244](http://scholarship.kentlaw.iit.edu/fac_schol/244) (access 05.10.2015).

<sup>12</sup> See A. Watson, *Legal Transplants: An Approach to Comparative Law*, Athens 1993; A. Watson, 'From Legal Transplants to Legal Formants' (1995) 43 *American Journal of Comparative Law*, 469–476. Turkey and Armenia are examples of extreme borrowing from codes of other countries; see A. Watson, 'Legal Transplants and European Private Law', at: [http://www.alanwatson.org/legal\\_transplants.pdf](http://www.alanwatson.org/legal_transplants.pdf) (access 13.06.2009). See also B. Kviattek, *Explaining legal transplants. Transplantation of EU law into Central Eastern Europe*, Oisterwijk 2015.

of a supra-national regime borrows from its own supra-governmental system, such as EU Member States borrowing from EU institutions<sup>13</sup>.

Even despite the EU's lack of competences in private law matters<sup>14</sup>, the EC has taken a number of concrete steps in order to facilitate damages actions for breaches of EU competition rules. The Commission published a study in 2004 that found an 'astonishing diversity and total underdevelopment' of private damages actions in the EU<sup>15</sup>. In order to stimulate private enforcement, the Commission published, in December 2005, a Green Paper on how to facilitate actions for damages caused by EU competition law infringements<sup>16</sup>. The Green Paper set out the reasons for the low levels of private enforcement in Europe. It found that its failure was largely due to various legal and procedural hurdles existing at that time in Member States' rules governing actions for competition law damages before national courts. In 2008, the Commission followed up with the publication of a White Paper<sup>17</sup> that made detailed and specific proposals to address identified obstacles to effective damages actions.

All these initiatives included proposals for collective actions<sup>18</sup>. In fact, one of the most important issues in the debate on private enforcement of EU

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<sup>13</sup> While Wiener has developed a framework of legal borrowing adding the vertical dimension, he elaborates only on borrowing between States and federal and international bodies, rather than States borrowing from supra-national institutions. J.B. Wiener, 'Something Borrowed for Something Blue: Legal Transplants in the Evolution of Global Environmental Law' (2001) 27 *Ecology Law Quarterly* 1295.

<sup>14</sup> Private enforcement of competition law is, in fact, a question of national private law rules, contract, tort and corresponding civil procedural rules. The private law consequences of competition law infringements fall within the competences of Member States in accordance with the so-called 'national procedural autonomy'. The CJ has consistently held that '[I]n the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)'. Joined cases C-295/04 to C-298/04 *Manfredi v Lloyd Adriatico Assicurazioni SpA and Others*, [2006] ECR I-06619, para. 62; Case 33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland (Rewe I)*, [1976] ECR 1989, para. 5; Case C-261/95 *Palmisani* [1997] ECR I-4025, para. 27; Case C-453/99 *Courage*, [2001] ECR I-6297, para. 29.

<sup>15</sup> Ashurst (2004), *Study on the conditions of claims for damages in case of infringement of EC competition rules*.

<sup>16</sup> Green Paper – Damages actions for breach of the EC anti-trust rules, COM (2005) 672 final.

<sup>17</sup> White Paper on Damages Actions for Breach of the EC antitrust rules, COM(2008) 165, 02.04.2008; Commission Staff Working paper accompanying the White Paper on damages, COM(2008) 165 final, SEC(2008) 404, 02.04.2008.

<sup>18</sup> Collective actions are by far more common in the EU Member States than actions brought by individual consumers. This is part of the 'European approach' that is 'rooted in

competition law was whether group actions should be based on an 'opt-out' or an 'opt-in' principle<sup>19</sup>. At the same time, one of the most important concerns was to avoid a 'US style litigation culture'<sup>20</sup>.

Accordingly, many EU Member States have revised their legislation in recent years and have given legal standing to consumers to sue for damages by way of collective actions including, for instance, collective opt-in actions and representative actions brought by consumer associations<sup>21</sup>.

In November 2014, the EU finally adopted Directive 2014/104/EU<sup>22</sup> on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (hereafter, Damages Directive). EU Member States will have to implement the Directive and change, accordingly, their own legal system by the end of 2016<sup>23</sup>.

### III. Consumers' role in private enforcement of competition law

It is argued that the normative justification for the role of consumers in EU competition law enforcement lies in the fact that EU competition law is not only concerned with the competitive process, but also guarantees that consumers get a fair share of the economic benefits resulting from the effective working

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European legal culture and traditions'. Commission White Paper on damages actions for breach of EC antitrust rules, cited *supra* note 15, p. 3.

<sup>19</sup> The Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms now follows the opt-in approach. See also Z. Juska, 'Obstacles in European competition law enforcement: a potential solution for collective redress' (2014) 7(1) *European Journal of Legal Studies* 126–152.

<sup>20</sup> B. Wardhaugh, 'Bogeymen, lunatics and fanatics: collective actions and the private enforcement of European competition law' (2014) 34(1) *Legal Studies* 1–23; M.T. Vanikiotis, 'Private Antitrust Enforcement and Tentative Steps Toward Collective Redress in Europe and the United Kingdom' (2014) 37 *Fordham International Law Journal* 1639; V. Trstenjak, P. Weingerl, 'Collective Actions in the European Union – American or European Model?' (2014) 5 *Beijing Law Review* 155–162.

<sup>21</sup> For an overview of national legislation on types of standing for consumers see the so-called 'Lear study', Buccirossi et al., *Collective redress in antitrust, European Union*, Brussels, June 2012, at: <http://www.europarl.europa.eu/committees/fr/studiesdownload.html?languageDocument=EN&file=74351> (access 05.10.2015), p. 22, table 1.

<sup>22</sup> Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 05.12.2014, p. 1 (hereafter, Damages Directive).

<sup>23</sup> Damages Directive, Article 21: '1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 27 December 2016. They shall forthwith communicate to the Commission the text thereof.'

of markets<sup>24</sup>. Accordingly, the enforcement of competition law affects the economic interests of consumers. On this basis, consumers are to be involved in the enforcement of competition rules<sup>25</sup>. In EU law, consumers can bring complaints before the Commission and National Competition Authorities (hereafter, NCAs) and participate in the resulting public law procedures. Alternatively, consumers may also bring damages claims before national courts<sup>26</sup>, where they enforce competition rules in private litigation, availing themselves of compensation for the harm suffered. In these roles, consumers also contribute to the achievement of public policy goals of competition law enforcement – deterring undertakings from legal infringements and making them comply with the law<sup>27</sup>.

Moreover, consumers' access to justice through compensatory claims is based on the right to an effective remedy (before a national court or tribunal) against a violation of rights and freedoms guaranteed by the law of the EU. The right to an effective remedy is one of the fundamental rights enshrined in Article 47 of the Charter of Fundamental Rights of the EU.

The Commission has been actively pursuing these normative justifications in its enforcement policy since 2004. It was at that point in time that the EC has laid down a more pronounced role for consumers whereby consumers should actively take part in the public and in the private enforcement of competition rules<sup>28</sup>. This policy prompted a discussion on how to facilitate the role of consumers, and their benefits, in private enforcement of competition

<sup>24</sup> This is explicitly addressed in Article 101(3), which says that consumers must receive a fair share of the efficiency gains generated by the otherwise restrictive agreement. See Case C-26/76 *Metro/Saba I*, [1977] ECR-1875, para. 47; Case C-45/85 *Verband der Sachversicherer e.V. v Commission*, [1987] ECR-0405, para. 15; Cases T-528/93, T-542/93, T-543/93 and T-546/93 *Métropole Télévision and Others v Commission*, [1996] ECR II-00649, para. 118; Case C-309/99, *J.C.J. Wouters et al. v. Algemene Raad van de Nederlandse Orde van Advocaten*, [2002] ECR I-1577; Case C-519/04 P, *Meca-Medina*, [2006] ECR I-6991. See K.J. Cseres, 'Towards a European Model of Economic Justice: the Role of Competition Law' [in:] H-W. Micklitz (ed.), *The Many Concepts of Social Justice in European Private Law*, Cheltenham 2011, p. 405–450; C. Townley, 'Is Anything more Important than Consumer Welfare (in Article 81 EC)?: Reflections of a Community lawyer' (2007–2008) 10 *Cambridge Yearbook of European Legal Studies* 345-3. With regard to Article 102 TFEU see Case C-53/03 *Syfait and Others v GlaxoSmithKline*, [2005] ECR I-04609, opinion of AG Jacobs delivered on 28 October 2004; P. Akman, 'Consumer Welfare and Article 82 EC: Practice and Rhetoric' (2009) 32 *World Competition* 71–90.

<sup>25</sup> K.J. Cseres, J. Mendes, 'Consumers' access'.

<sup>26</sup> Case C-453/99 *Courage*, [2001] ECR I-6297, para. 26. Joined cases C-295/04 to C-298/04 *Manfredi v Lloyd Adriatico Assicurazioni SpA and Others*, [2006] ECR I-6619; Case C-199/11 *Otis NV and others*, judgment of 6 November 2012, not yet reported.

<sup>27</sup> See also M. Ioannidou, 'Enhancing Consumers' Role in EU Private Competition Law Enforcement: a Normative and Practical Approach' (2012) 8 *Competition Law Review* 59.

<sup>28</sup> White Paper on modernization of the Rules implementing Articles 81 and 82 of the EC Treaty, cited *supra* note 1.



law through damages actions. Consumers can, indeed, play an essential role in private enforcement of competition law. In general, their knowledge of the day-to-day functioning of markets, in particular those in mass-market consumer goods, make consumers and consumer organisations important information providers by way of initiating damages actions before national courts. It has been argued that consumers may, in principle, have optimal access to information on vertical restraints and unilateral conduct, a fact that would facilitate private litigation<sup>29</sup>.

Final consumers act as ‘private attorney generals’<sup>30</sup> when they bring private law suits before their national courts with a view to enforcing competition law. It has been argued in legal and economics literature that private enforcers have greater incentives, better information and sufficient resources to enforce competition rules<sup>31</sup>. Private enforcement can provide compensation for harm suffered as a result of anti-competitive conduct and thus achieve corrective justice goals<sup>32</sup>. In addition, it has a deterrent effect, similar to public law enforcement mechanisms; insofar as it functions as an added burden that potential infringers might need to carry. As such, the fear of private enforcement might deter potential infringers from future violations<sup>33</sup>.

However, consumers’ readiness to bring damages actions before courts is hindered by their general unawareness of competition rules, consumers’ weak party autonomy and their common lack of recognition of the possibility of involving private actors in law-making and law enforcement. Besides the

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<sup>29</sup> K.J. Cseres, J. Mendes, ‘Consumers’ access’.

<sup>30</sup> The term ‘private attorney general’ refers to the use of private litigation in the US as a means of bringing potential antitrust infringements before courts. In the US, public enforcement has long since been assumed to be inadequate to achieve effective enforcement. Hence, private litigation has been used as a means of public enforcement. Private litigants play a public role by assisting public authorities in their enforcement role. D.J. Gerber, ‘Private Enforcement of Competition Law: A Comparative Perspective’ [in:] A. Möllers, A. Heinemann (eds.), *The Enforcement of Competition Law in Europe*, Cambridge 2007, p. 416–417.

<sup>31</sup> G. Becker, G. Stigler, ‘Law Enforcement, Malfeasance, and Compensation of Enforcers’ (1974) 3 *Journal of Legal Studies* 1–18. M. Polinsky, ‘Private Versus Public Enforcement of Fines’ (1980) 9 *Journal of Legal Studies* 105–127; W. Schwartz, ‘An Overview of the Economics of Antitrust Enforcement’ (1980) 68 *Georgetown Law Journal* 1075–1102. W.P.J. Wils, ‘The Relationship between Public Antitrust Enforcement and Private Actions for Damages’ (2009) 32(1) *World Competition* 3–26.

<sup>32</sup> Case C-453/99 *Courage*, [2001] ECR I-6297, para 26. Joined cases C-295/04 to C-298/04 *Manfredi v Lloyd Adriatico Assicurazioni SpA and Others*, [2006] ECR I-6619; Case C-199/11 *Otis NV and others*, judgment of 6 November 2012, not yet reported.

<sup>33</sup> See G. Becker, G. Stigler, ‘Law Enforcement’. Private law actions impose additional sanctions on undertakings which infringed competition rules and thus make them comply with the law. The aim of private law sanctions, often in the form of damages, is to prevent the offenders, as well as other potential infringers, from breaking the law.

lack of confidence in the judiciary, consumers are greatly challenged by the significant length, costs and complexity of competition law litigations.

Final consumers are often indirect purchasers of competition law infringers. Being further away from these firms, they are often unaware of the legal breach before the actual harm has already occurred. In cases of hard-core cartels, most consumers do not even realize that they have been harmed. Still, availability of information concerning infringements, and the identity and location of the wrongdoers, are crucial for consumers in order to initiate private law actions.

Moreover, private enforcement entails additional costs for final consumers<sup>34</sup> and so they may face incentive problems due to ‘rational apathy’ and ‘free-riding’. Arguably, private consumers are much more influenced by costs and benefits than public enforcers. The costs of accessing information in order to discover an infringement, coupled with litigation costs (including lawyers’ fees and perhaps expert witnesses), are often identified as the main reasons why consumers refrain from going to the courts<sup>35</sup>. Consumers will balance the costs of searching for the necessary information with the benefits of a possible legal action. If their private incentives are insufficient to detect and litigate a case (that is, their expected private gains are lower than the costs of enforcement), then they will not act. It would be irrational for consumers to bear the high costs of legal proceedings if they cannot expect off-setting benefits. This is often the reason for the inaction of consumers<sup>36</sup>. In cases where damages are widespread and individual losses low, ‘rational apathy’ prevails among the injured individuals and thus they will not sue<sup>37</sup>.

‘Free-riding’ is an additional problem here – potential private enforcers may tend to leave the enforcement to other victims, hoping to ‘free-ride’ on

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<sup>34</sup> It may lead to strategic litigation and to an abuse of the private action mechanism. W.P.J. Wils, ‘Should Private Enforcement Be Encouraged in Europe?’ (2003) 26 *World Competition* 472–488. W. Shughart II, ‘Private Antitrust Enforcement – Compensation, Deterrence, or Extortion’ (1988) 12 *Regulation Magazine*; P. McAfee, H. Mialon, S. Mialon, ‘Private v. Public Antitrust Enforcement: A Strategic Analysis’ (2008) 92 *Journal of Public Economics* 1863–1875.

<sup>35</sup> These are costs that public entities only face if they ultimately also need to litigate. However, unlike consumers, public entities enforce competition law as part of the functions they are expected to perform. R. Van den Bergh, L. Visscher, ‘The Preventive Function of Collective Actions for Damages in Consumer Law’ (2008) 1(2) *Erasmus Law Review*.

<sup>36</sup> R. Van den Bergh, ‘Private Enforcement of European Competition Law and the Persisting Collective Action Problem’ (2013) 20 *Maastricht Journal of European and Comparative Law* 17. The losses suffered by individual consumers are smaller than society’s losses. Consumers’ financial reward is small compared to the costs of enforcement and they may benefit only marginally from the deterrent effect of enforcing competition rules against wrongdoers. S. Shavell, ‘The Optimal Structure of Law Enforcement’ (1993) 36 *Journal of Law and Economics* 255–287; M. Polinsky, ‘Private Versus Public’, p. 105–127.

<sup>37</sup> R. Van den Bergh ‘Private enforcement’.

their efforts<sup>38</sup>. Consumers who are victims of a competition law infringement have an interest to leave the enforcement efforts to others, so that profits can be obtained without having to use their own resources. The ‘free-riding’ problem reduces the number of private actions below a socially optimal level of enforcement<sup>39</sup>.

Collective and representative actions have often been considered to be the way forward to remedy these incentive problems<sup>40</sup>. Although in most EU Member States consumer organizations have standing to bring actions for injunctive relief, they do not always have the power to sue for damages<sup>41</sup>. The next section will further set out the rationale of collective actions and analyze the specific role they play in consumer compensatory claims for competition law violations.

#### **IV. The relevance of collective actions in private enforcement of competition law**

As mentioned, the recently adopted Damages Directive does not contain provisions on collective actions, despite the fact that earlier proposals of 2005 and 2008 addressed collective actions as one of the key issue in the EC’s overall private enforcement policy. Instead, the EU took a more horizontal approach culminating in 2013 in a Communication<sup>42</sup> and a Recommendation on collective consumer redress<sup>43</sup>. This Recommendation is an act of non-

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<sup>38</sup> *Ibidem*, p. 20, 24

<sup>39</sup> R. Van den Bergh, L. Visscher, ‘The Preventive Function’, p. 14.

<sup>40</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Towards a European Horizontal Framework for Collective Redress, COM(2013) 401 final; not published in the Official Journal. Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, C(2013) 3539 final; not published in the Official Journal.

<sup>41</sup> For example, the recent decision of the German Federal Court of Justice on indirect purchaser standing, passing-on defense, and new type of claim aggregation. Federal Court of Justice BGH of 28 June 2011, KZR 75/10 ORWI; BGH of 7 April 2009, KZR 42/08 CDC.

<sup>42</sup> In 2011, the EC published a public consultation working document entitled ‘Towards a Coherent European Approach to Collective Redress’ indicating a change from a sectorial to a horizontal approach towards collective redress. This was followed in 2013 by the Communication: Towards a European horizontal framework for collective redress, COM(2013) 401 final.

<sup>43</sup> The most important issue in the debate on private enforcement of EU competition law was whether group actions should be based on an ‘opt-out’ or an ‘opt-in’ principle. The Recommendation on common principles for injunctive and compensatory collective redress mechanisms now follows the opt-in approach. Commission Recommendation of 11 June 2013

binding soft law and thus Member States are not obliged to implement its solutions.

The majority of EU Member States has given legal standing to consumers, and adopted some form of a collective redress model, yet most of these schemes remain under-enforced<sup>44</sup>. Most Member States implemented collective ‘opt-in’ actions and representative actions brought by consumer association. However, some countries, such as the UK, Portugal, Denmark and the Netherlands, adopted the ‘opt-out’ model<sup>45</sup>.

Irrespective of the specific model of collective redress adopted, collective actions are considered to solve both the incentive problem of individual consumers as well as the public policy concern associated with damages claims. It has been argued in literature that collective actions can increase consumers’ access to justice, can serve public policy goals (such as: market rectification, judicial economy and deterrence), as well as increase the overall effectiveness of private enforcement<sup>46</sup>. Collective actions can consolidate dispersed small-scale claims, and thus solve the incentive problem of many individual consumers in cases where the harm caused by an infringement is widespread, but the harm caused to individuals is so fragmented that they refrain from litigating. Consolidating these claims in collective actions is, therefore, critical for consumers who have suffered harm.

Collective actions are cost-spreading solutions; they can reduce litigation costs, enlarge litigation possibilities and provide optimal representation for consumers in court proceedings. Moreover, surveys show that citizens would be more willing to defend their rights before a court if they could join other consumers who complain about the same thing<sup>47</sup>. Furthermore, collective

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on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, OJ L 201, 26.07.2013, p. 60.

<sup>44</sup> For an overview of national legislation on types of standing for consumers see the so-called ‘Lear study’, Buccirosi et al., *Collective redress in antitrust, European Union*, Brussels, June 2012, at: <http://www.europarl.europa.eu/committees/fr/studiesdownload.html?languageDocument=EN&file=74351> (access 21.07.2013), p. 22, table 1. See also Z. Juska, ‘Obstacles in European’.

<sup>45</sup> In the ‘opt-in’ model, the individual claimants have to express their wish to join the collective action in order to be recognized as a group member and be bound by the judgment resulting from the collective action. In the ‘opt-out’ model, individuals are automatically members of the group, unless they explicitly opt-out. Ch. Leskinen, ‘Collective Actions: Rethinking Funding and National Cost Rules’ (2011) 8(1) *Competition Law Review* 87–121.

<sup>46</sup> M.T. Vanikiotis, ‘Private Antitrust’, p. 1643–1647.

<sup>47</sup> Eurobarometer, *European Union citizens and access to justice*, October 2004, p. 36; 2<sup>nd</sup> Edition of the Consumer Markets Scoreboard COM (2009) 25 Part 2, page 10 and Eurobarometer n. 299, at: [http://ec.europa.eu/consumers/redress\\_cons/docs/cons\\_redress\\_EU\\_qual\\_study\\_report\\_en.pdf](http://ec.europa.eu/consumers/redress_cons/docs/cons_redress_EU_qual_study_report_en.pdf) (access 05.10.2015).

actions form litigation avenues that are less disruptive for the market than multiple individual litigations.

Despite all these arguments in favour of collective actions, consumers, who are often not in a direct contractual relationship with the wrongdoer (indirect purchasers), do not turn to their national courts to obtain redress. Although in theory consumers and small and medium sized enterprises (hereafter, SMEs) are affected by anti-competitive behaviours, and as such they should bring actions as potential claimants, empirical evidence shows that the new rules on collective actions have not yet resulted in a notable increase in consumer litigations<sup>48</sup>. The next sections will focus specifically on CEECs and analyze their legislation on collective actions as well as the actual enforcement practice of existing collective redress schemes.

## V. Collective consumer actions in CEECs

### 1. Europeanization of competition and consumer law in CEECs

In order to evaluate the way in which collective consumer actions for EU competition law enforcement have developed in CEECs, it is necessary to briefly comment on two topics: ‘Europeanization’, of more than just competition law, and on the role of consumers. First, while competition and a functioning market economy did not yet, in fact, exist in CEECs, a clear and comprehensive set of competition and consumer rules developed in the shadow of their EU accession. The introduction of both competition as well as consumer law was initially part of the legal obligations of CEECs during their accession process to the EU<sup>49</sup>. Interestingly, competition acts were enacted already at the beginning of the 1990s, but it was not until its 2<sup>nd</sup> half that CEECs enacted consumer protection acts<sup>50</sup>. In reality, consumer

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<sup>48</sup> For example, in Sweden, France and the UK, consumer associations have standing to bring representative actions for damages and yet the number of such cases is low and participation rates vary greatly. R. Van den Bergh, ‘Private enforcement’, p. 23; Z. Juska, ‘Obstacles in European’, p. 141.

<sup>49</sup> The legal basis for aligning domestic competition laws with that of the EU were laid down in various bilateral agreements between the EU and individual candidates from CEE (in the so-called ‘Europe Agreements’). In the course of the EU eastward enlargement process, *acquis communautaire* became a legally binding reference framework for the candidate countries – the approximation of their laws was formulated as a strict obligation of the candidate countries in the texts of their individual agreements.

<sup>50</sup> Czech Republic 1992, Poland 1990 amended in 2000, Hungary 1997, Bulgaria 1999, Estonia 1994, Latvia 1992 amended in 1999, Lithuania 1994 amended in 2000.

protection, as both law and policy, was slowly advancing and was put on the legislative and political agenda of CEECs due to considerable EU pressure<sup>51</sup>. This slow trend has continued also after their EU accession, partly due to the weakness of their consumer associations and often weak and fragmented civil societies.

It was the EU enlargement process that induced the adoption of an identifiable body of competition as well as consumer law in the candidate countries of CEE. It was the very same process that has led to the continuous alignment of domestic laws with legislative and policy developments in the EU<sup>52</sup>. Accordingly, the enactment of domestic competition as well as consumer laws was subject to top-down rule transfers and the law-making process was governed by strong EU conditionality<sup>53</sup>. The ‘Europeanization’ process<sup>54</sup> continued also after CEEC’s EU accession, and often involved vertical legal transplants in both of these legal branches. For example, CEECs implemented similar procedural rules and enforcement tools (such as leniency programmes) as those used by the Commission in its enforcement system<sup>55</sup>. The underlying reason for this approach was the belief that once these rules and enforcement methods have proven effective in the EU and for the Commission, they will prove successful in Member States as well. However, the effectiveness of the transplanted rules in the specific organizational and institutional framework

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<sup>51</sup> K.J. Cseres, *Consumer protection and competition law*, The Hague 2005.

<sup>52</sup> F. Cafaggi, O. Cherednychenko, M. Cremona, K.J. Cseres, L. Gorywoda, R. Karova, H.W. Micklitz, K. Podstawa, ‘Europeanization of Private Law in Central and Eastern Europe Countries (CEECs). Preliminary Findings and Research Agenda’ (2010) 15 *European University Institute Working Papers LAW* 15; K.J. Cseres, ‘Accession to the EU’s competition law regime: a law and governance approach’ (2014) 7(9) *YARS* 31–66.

<sup>53</sup> Schimmelfennig defines conditionality as a direct mechanism of Europeanization. The EU disseminates its legal rules and governance by setting them as conditions that external actors have to meet in order to obtain candidate/accession status or other rewards and avoid sanctions. F. Schimmelfennig, U. Sedelmeier, ‘Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe’ (2004) *Journal of European Public Policy* 670; F. Schimmelfennig, ‘EU External Governance and Europeanization Beyond the EU’, [in:] D. Levi-Faur (ed.), *The Oxford Handbook of Governance*, Oxford 2012. It was only with regard to CEECs that pre-accession conditionality became a regular feature of EU enlargement policy for all candidates.

<sup>54</sup> Europeanization is understood as ‘the reorientation or reshaping of politics in the domestic arena in ways that reflect policies, practices or preferences advanced through the EU system of governance’; I. Bache, A. Jordan, ‘Europeanization and Domestic Change’, [in:] I. Bache, A. Jordan (eds.), *The Europeanization of British Politics*, Basingstoke 2006, p. 30.

<sup>55</sup> See K.J. Cseres, ‘The impact of Regulation 1/2003 in the New Member States’ (2010) 6(2) *Competition Law Review* 145–182; G. Pridham, ‘The EU’s Political Conditionality and Post-Accession Tendencies: Comparisons from Slovakia and Latvia’ (2008) 46 *Journal of Common Market Studies* 365–388.

of CEECs was not as high as it was at its origin when they were enforced by the Commission<sup>56</sup>.

## 2. Europeanization of private enforcement of competition law

Even before the Damages Directive was adopted, certain CEECs began to adopt specific provisions on private enforcement, or harmonized some of its elements, in their civil or commercial laws. Bulgaria, Hungary, Lithuania, Romania and Slovenia implemented a specific provision in their respective Competition Acts. All other CEECs rely on the rules of their civil procedure or on the rules of their commercial codes.

However, while national legislation has indeed been aligned with the intentions of EU institutions to encourage and enable private enforcement of competition law, this fact is in sharp contrast with the number of cases where private parties have actually enforced national or EU competition rules in CEECs. These numbers are limited to a few cases per country. Indeed, in a study covering all 27 EU Member State, Rodger reveals less than 10 cases in the period of 1999–2009 in all CEE Member States except Hungary, which had 16 cases<sup>57</sup>.

Not all of the reasons behind low numbers of private enforcement cases are the same between different CEECs. There are, however, a few that form a pattern among them. It has been argued in most CEECs that private actors are not at all aware of the possibility of private enforcement. Many potential claimants remain inactive due to the overall complexity of damages cases, especially with regard to the calculation of damages, general distrust in the court system (as a result of the judiciary's lack of expertise and experience), as well as substantial litigation costs and long litigation periods<sup>58</sup>. The reported

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<sup>56</sup> This is, for example, the case with regard to the power to investigate private premises or leniency programmes. K.J. Cseres, 'Accession', p. 55; see also The Global Diffusion of Competition Law and Policy – An Exploratory Workshop, at: [https://www.ucl.ac.uk/cles/research\\_initiatives/gcl-economic/competition-law-and-policy-workshop](https://www.ucl.ac.uk/cles/research_initiatives/gcl-economic/competition-law-and-policy-workshop) (access 05.10.2015).

<sup>57</sup> See reports from Bulgaria, Czech Republic, Hungary, Latvia, Lithuania Estonia, Poland, Slovenia, Slovakia, Romania in: B. Rodger, *AHRC project Comparative Private Enforcement of Competition Law and Consumer Redress in the EU, 1999–2012*, at <http://www.clcpecreu.co.uk/> (access 05.10.2015). Rodger's project considers all cases in the courts of all EU Member States throughout a ten year period (1999–2009). His project gives a quantitative analysis of the extent to which private enforcement is taking place across Member States. See B. Rodger, *AHRC project Comparative Private Enforcement of Competition Law and Consumer Redress in the EU, 1999–2012*, Research methodology, research objectives, at: <http://www.clcpecreu.co.uk/> (access 05.10.2015).

<sup>58</sup> M.D. Kukainis, 'Latvia' [in:] B. Rodger, *AHRC project*, at: <http://www.clcpecreu.co.uk/pdf/final/Latvia-Executive%20Summary.pdf> (access 05.10.2015); P. Szilágyi, 'Private Enforcement of Competition Law and Stand-Alone Actions in Hungary' (2013) 3(6) *Global*

Hungarian cases were unfounded and frivolous<sup>59</sup>. Similarly in Slovakia, judges have dealt with rudimentary questions of law only, rather than on substantive issues on the merits. In Poland, all of the reported cases concerned the nullity of contracts, none dealt with damages claims<sup>60</sup>. It has also been argued that the fact that public enforcement is not effective, and fails in its decisional stage, hinders the development of the private enforcement system<sup>61</sup>.

Bulgaria specifically mentioned that the time needed for the adoption of a new law (as a result of external pressure) is significantly shorter than the time needed 'for its familiarization and application'. This situation was further aggravated by the abovementioned general unawareness of relevant rules, as well as reluctance to enforce them<sup>62</sup>.

It could be argued that most of the challenges are equally valid for 'old' Member States. However, CEECs do face some problems which are specific to them. The fact that private actors are unaware that private enforcement is a way to enforce competition rules and to get compensation, seems to be one of these specific challenges. The complexity of competition law cases, especially proving the causal link between the infringement and the damage, as well as the calculation of the damage itself, form a significant barrier for both private parties and national courts in all Member States. The institutional anxiety of both private parties and courts to launch private damages claims seems stronger in CEECs<sup>63</sup>. The fact that the 'Europeanization' of competition law has been

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*Competition Litigation Review* 13–142, available at SSRN: <http://ssrn.com/abstract=2396802> (access 16.02.2014); A. Braun, I. Hartmann, *Czech Republic: Overviews, The European Antitrust Review 2015*, at: <http://globalcompetitionreview.com/reviews/62/sections/210/chapters/2472/croatia-overview/> (access 05.10.2015). In Lithuania, as well as the non-litigious nature of the Lithuanian society; J. Malinauskaite, 'Lithuania', [in:] B. Rodger, *AHRC project*, at: <http://www.clcpecreu.co.uk/pdf/final/Lithuania-%20Executive%20Summary.pdf> (access 05.10.2015); V. Mircea, 'Romania', [in:] B. Rodger, *AHRC project*, at: <http://www.clcpecreu.co.uk/pdf/final/Romania-Executive%20Summary.pdf> (access 05.10.2015); K. Sein, 'Private enforcement of competition law – the case of Estonia' (2013) 6(8) *YARS* 129–139.

<sup>59</sup> P. Szilágyi, 'Private Enforcement'.

<sup>60</sup> A. Jurkowska-Gomułka, 'Private Enforcement of Competition Law in Polish Courts: The Story of an (Almost) Lost Hope for Development' (2013) 6(8) *YARS* 110–112.

<sup>61</sup> S. Sramelova, 'Slovakia', [in:] B. Rodger, *AHRC project*, at: <http://www.clcpecreu.co.uk/pdf/final/Slovakia%20report.pdf> (access 05.10.2015).

<sup>62</sup> D. Dragiev, 'Bulgaria', [in:] B. Rodger, *AHRC project*, at: <http://www.clcpecreu.co.uk/pdf/final/Bulgaria-%20Executive%20Summary.pdf> (access 05.10.2015).

<sup>63</sup> Both private individuals and national authorities face the problems of assessing complex legal and economic issues of competition law. While most of the NCAs have built up sufficient legal and economic expertise with regard to competition law issues the same cannot be said about the national courts. National courts face a double barrier: on the one hand, they lack a basic knowledge of European law and on the other, they are unfamiliar with competition law issues. The new system of European competition law substantially raised the level of economic analysis in competition cases, which will most probably create problems. The main difficulties



taking place parallel with market, constitutional and institutional reforms explains the shortcoming of the institutional framework of private enforcement.

The adoption of the necessary legal framework for private actions is certainly essential to activate actual enforcement. The above analysis shows, however, that it is also necessary to create a broader institutional framework and, more notably, to strengthen relevant institutions (also at the civil level of society). In CEECs, there is generally a strong reliance on public enforcement and prevalent view that public enforcement has to facilitate private enforcement. This might be a legitimate expectation in cases such as an *amicus curiae* intervention by a NCA in court proceedings<sup>64</sup>. However, private enforcement requires the stand-alone reliance of private actors on market-based solutions such as tort, contract and property rights.

This clearly demonstrates that there is a significant gap between transplanting the policy and the necessary rules of private enforcement and their actual application. The next section will analyze the legal framework and enforcement of collective actions in CEECs.

### 3. Legislation and enforcement of collective actions in CEECS

Table 1 below provides an overview of existing laws on collective redress schemes in CEECs. The overview shows that there hardly any specific rules for collective actions exist in this region, with the exception of Poland and Bulgaria.

Poland has introduced a class action procedure in 2009. The procedure covers consumer law, product liability law, and applies to tort claims across all sectors. It is an ‘opt-in’ collective redress scheme. However, all cases regarding collective claims brought so far were related to consumer protection claims, rather than competition law breaches<sup>65</sup>.

Bulgaria has three categories of collective actions. Two separate types of representative actions can be brought before the courts by consumer organizations for cases related to consumer protection issues. The first concerns

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to be expected are among others how NCAs will deal with cases that spill over much beyond their narrow competition mandate. National judges receive trainings and assistance in order to be able to manage expert witnesses and economic evidence that will be inherent and frequent parts of competition cases.

<sup>64</sup> See the possible information exchange cooperation mechanisms laid down in Article 15 of Regulation 1/2003.

<sup>65</sup> For a detailed discussion see A. Piszcz, “‘Class actions’ in the Court culture of Eastern Europe” [in:] L. Ervo, A. Nylund (ed.), *The Future of Civil Litigation – Access to Courts and Court Connected mediation in the Nordic Countries*, Cham 2014, p. 357–379; A. Jurkowska-Gomułka, ‘Private Enforcement’, p. 110–112; M Tulibacka, *Poland, Report*, at: <http://www.collectiveredress.org/reports/poland> (access 05.10.2015).

Table 1. Collective redress models

	Collective redress
<b>Bulgaria</b>	Civil Procedural Code 'Proceedings under collective claims', Arts. 379–388
<b>Croatia</b>	Collective action is explicitly allowed only in consumer protection cases (Article 131 Consumer Protection Act)
<b>Czech Republic</b>	no effective instrument for collective redress; an action to seek an injunction in order to protect consumer interests can be submitted by a registered consumer organization (Sec. 25 of the Act No. 634/1992 Coll., on the Protection of Consumers)
<b>Hungary</b>	no special rules for collective redress, general rules for claim aggregation apply (Article 51 of the Code of Civil Procedure) the Competition Authority (GVH) can enforce civil law claims for consumers on the basis of Article 92 of the Hungarian Competition Act
<b>Estonia</b>	there are no collective claims, no class actions, nor actions by representative bodies or other forms of public interest litigation (no collective redress) <sup>1</sup>
<b>Latvia</b>	no mechanism for compensatory collective redress action may be brought by several plaintiffs against one defendant, however, each co-plaintiff acts independently in relation to the other party and other co-plaintiffs associations for the protection of consumer rights and the Latvian Consumer Rights Protection Centre have the right to submit claims and to represent the interests of consumers in court <sup>2</sup>
<b>Lithuania</b>	Article 49(6) of the Code of Civil Procedure provides that a group action may be submitted to protect public interest in accordance to the law, representative actions are allowed to protect the public interest of consumers. Article 30 of the Law on Consumer Protection <sup>3</sup>
<b>Poland</b>	Act of 17 December 2009 on Collective Redress, opt-in model <sup>4</sup>
<b>Romania</b>	Opt-in representative action: since 2011, the Competition Act gives rights to specified bodies <sup>5</sup> to bring representative damages actions on behalf of consumers
<b>Slovenia</b>	no specific provisions, two options available: (1) courts may join cases with the same subject matter, (2) system of 'co-litigation', a form of aggregation of individual claims <sup>6</sup>

**Slovakia**

no legal basis for collective redress, some elements of a collective redress mechanism present in Act no. 99/1963 Coll. Civil Procedure Code whereby claimants may bring a joint action, consumer associations cannot bring representative actions for damages but they may, on behalf of a group of consumers, bring an action *restitutio in integrum* or *actio negatoria*<sup>7</sup>

<sup>1</sup> K. Sein, 'Private enforcement', p. 130.

<sup>2</sup> M.D. Kukainis, 'Latvia'.

<sup>3</sup> V. Mizaras, *Report, Lithuania*, at <http://www.collectiveredress.org/reports/lithuania> (access 05.10.2015).

<sup>4</sup> A. Piszcz, "Class actions"; M Tullbacka, *Poland, Report*, <http://www.collectiveredress.org/reports/poland> (access 05.10.2015).

<sup>5</sup> They include: registered consumer protection associations and professional or employers' associations having these powers within their statutes or being mandated in this respect by their members. The only rule that existed before 2011 originated in a general provision in the Consumers' Law that allow consumer associations to file legal actions to defend consumer rights and their legitimate interests against undertakings. This legal provision, however, does not clarify whether such actions are limited to protecting the general rights recognized under the Consumers' Law or whether it also permits collective damages actions based on anti-competitive practices or other illicit deeds. Moreover, the Consumers' Law is also silent on whether such claims could be brought as representative actions at large or on behalf of named consumers.

<sup>6</sup> S. Stoica, M. Ion, 'Romania' [in:] I. Knable Gotts (ed.), *The private competition enforcement Review*, at: [http://www.pnpartners.ro/publications/articles/PCER\\_2012\\_Romania.pdf](http://www.pnpartners.ro/publications/articles/PCER_2012_Romania.pdf) (access 05.10.2015), p. 328.

<sup>7</sup> In a case concerning a concerted increase in the price of electricity, which was an example of potential follow-on litigation in the field of private enforcement of competition law, the Slovenian Consumer Association issued a public notice in different media calling upon the infringers to pay what they owed to consumers in order to avoid the costs associated with court proceedings and lengthy litigation. M. Brkan, T. Bratina, 'Slovenia', at: <http://www.clcpectreu.co.uk/pdf/final/Slovenia%20report.pdf> (access 05.10.2015).

<sup>8</sup> S. Sramelova, 'Slovakia', p. 4.

claims for damages for collective consumer interests, the second covers claims for compensation brought on behalf of consumers<sup>66</sup>. The third type refers to a general group action procedure, which can be applied for claims based on any legal branch. This procedure was adopted in 2008 and allows consumer organizations to represent unspecified persons who suffered damages from any legal infringements. Only a few of such cases have been brought forth so far (five between 2004 and 2008). It has been argued that Bulgarian consumers are often unaware of this redress mechanism and that they lack incentives to use it<sup>67</sup>.

In certain other CEECs, such as Hungary and Croatia, legislation on some form of collective actions is clearly limited to, or has so far only been applied to, consumer law cases. Representative actions can also be commenced by public authorities, including the Hungarian Competition Authority (GVH) or certain specified bodies in Romania. However, even this model is under-enforced. In Hungary, this provision has never been used in relation to a competition case, albeit it was applied in consumer deception cases<sup>68</sup>.

Publicly available studies on collective redress schemes in all EU Member States support the above picture present in CEECs. Studies demonstrate a very low proportion of consumer claims in all EU Member States<sup>69</sup>. The so-called 'Lear Study' reported six countries where collective redress cases occurred for antitrust infringements, albeit the trial stage has actually been reached only in four Member States<sup>70</sup>. Rodger's empirical study of collective consumer actions in all 27 Member States found that contractual disputes between businesses are the most common type of cases, with only very few consumer cases in existence (less than 4%)<sup>71</sup>. Even in those Member States where

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<sup>66</sup> The 1<sup>st</sup> collective scheme can be used irrespective of the fact whether the number of affected consumers is definite or definable, and regardless of whether collective consumer interests were damaged or exposed to threat. The 2<sup>nd</sup> mechanism is, however, conditional upon: two or more identifiable consumers having suffered damages of the same origin; the damages must have been caused by the same trader; and that the association has been authorized in writing by at least two consumers to take court action. BEUC, *Country survey of collective redress mechanisms, Bulgaria*, <http://www.beuc.eu/publications/2011-10006-01-e.pdf> (access 05.10.2015).

<sup>67</sup> BEUC, *Country survey*; D. Dragiev 'Bulgaria'.

<sup>68</sup> P. Szilágyi, 'Report for the 'Comparative Private Enforcement and Collective Redress Project'' [in:] B. Rodger, *AHRC project*, at <http://www.clcpecreu.co.uk/pdf/final/Hungary%20report.pdf> (access 05.10.2015), p. 7.

<sup>69</sup> Between 2006–2012, the majority of private damages claims that followed an EC decision were brought by large companies or public entities and not by SMEs or by consumers. Z. Juska, 'Obstacles in European', p. 132–33.

<sup>70</sup> Buccicrossi et al., *Collective redress*.

<sup>71</sup> B. Rodger, *Competition litigation and collective redress: a comparative EU analysis with focus on Portugal and recent developments in the UK*, 3 June 2013, University of Lisbon Law School, at: [http://www.ideff.pt/xms/files/Iniciativas/varios\\_2013/Rodger\\_2013\\_Private\\_enforcement\\_Lisbon\\_presentation.pdf](http://www.ideff.pt/xms/files/Iniciativas/varios_2013/Rodger_2013_Private_enforcement_Lisbon_presentation.pdf) (access 21.07.2013). See also B. Rodger, 'Private enforcement and

consumer organizations can sue for damages, they have remained passive as enforcers.<sup>72</sup>

This leaves a remaining problem unsolved: consumers who suffered harm as a consequence of competition law violations do not receive compensation and so their fundamental right to a remedy is ineffective. At the same time, both the unjustified enrichment on the side of the infringer, as well as the public policy goals of competition law enforcement (deterrence and compensation), remain unaddressed. The next section will discuss a number of issues that could be implemented when shaping future legal frameworks for collective actions in CEECs.

## VI. Are there solutions? In the law and beyond

Barriers to consumers' access to justice are well-known and have been thoroughly analyzed.<sup>73</sup> Litigation before courts takes excessive time and money when compared to the small value of the dispute at stake. Moreover, civil procedures are often not geared to the institution of mass (collective) procedures and courts end up adjudicating cases rather than mediating or reconciling them. A part from that, there are also barriers of a psychological nature: unfamiliarity with the legal language, lack of information about the actual harm and the infringement<sup>74</sup>, combined with a lack of investigatory tools to detect them. Consumers discover harm when it has already taken place and are thus not interested in avoiding it in the future. When individual consumers face substantial costs, disproportionate to the amount of their complaint, they

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collective redress: the benefits of empirical research and comparative approaches' (2012) 8(1) *Competition Law Review* 1–6; S. Peyer, 'Private Antitrust Litigation in Germany from 2005 to 2007: Empirical Evidence' (2012) 8(2) *Journal of Competition Law and Economics* 331–359.

<sup>72</sup> The 2012 'Lear study' argued that 'the number of actions related to antitrust infringements is still very limited. This may be in part due to the fact that most of the national collective redress systems in Europe have been introduced only recently, but it might also suggest that existing legislation is scarcely effective in promoting consumer and SME access to collective redress instruments'. Buccirosi et al., *Collective redress*, p. 13, 42–43.

<sup>73</sup> W.H. Van Boom, M. Loos (eds.), *Collective Consumer Interests and How They are Served Best in Europe; Legal aspects and policy issues on the border between private law and public policy*, Groningen 2007; K.J. Cseres, 'Collective consumer actions: a competition law perspective' [in:] W.H. van Boom, M. Loos (eds.), *Collective Consumer*; R. Van den Bergh, L. Visscher, 'The Preventive Function'.

<sup>74</sup> Information concerning law infringements and the identity and location of the wrongdoer are key to consumers in order to initiate proceedings. Consumers are often unaware of the infringements before the actual harm has occurred.

will decline to seek redress and resolve disputes<sup>75</sup>. All these arguments make a strong case for collective actions. In fact, collective actions are the only means through which consumers are likely to seek redress and get compensated.

However, as the above analysis shows, even in countries with an existing, statutory collective redress model, there are hardly any, or even no cases at all of damages claims based on competition law violations. Several in-depth studies have been conducted analysing the optimal model of collective redress for consumers in competition law cases as well as in other legal branches<sup>76</sup>. These studies covered legal rules that optimize the effectiveness of collective redress schemes and, most notably, traditional rules on legal funding, which do not easily accommodate the realities of representative litigation. Yet these issues alone may not solve the entire problem of the overwhelming under-enforcement of collective schemes.

Specific problems of CEECs could lay behind the low number of such cases. These problems include the weak position of consumers, consumer organizations and associations, which reflects a general feature of CEECs, where civil society is often fragmented. The specific problems of CEECs call for solutions beyond a mere transplantation of legal rules which have proven effective elsewhere. The case of CEECs calls for home-grown solutions that strengthen private autonomy as such. Accordingly, caution is recommended with respect to some of the suggestions popular in these countries such as, for example, to rely even more heavily on public enforcement in order to facilitate private enforcement. In the public-private divide of law enforcement, public enforcement is already more dominant in CEECs than in older Member States. Certain advantages can indeed be earned by relying on effective public enforcement in order to stimulate private enforcement. These include, for example, making use of the expertise of the EC<sup>77</sup> or of NCAs who can assist national courts as an *amicus*

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<sup>75</sup> Consumers have insufficient incentives to enforce the law because their personal financial reward is small compared to the enforcement costs and they will only marginally benefit from the deterrent effect of enforcing the rules against wrongdoers. They have insufficient retributive motives. These factors might even result in under-enforcement. Hence private enforcement of consumer law is inefficient to achieve deterrence because of the lack of information and the risk of under-enforcement. R. Van den Bergh, 'Private enforcement', R. Van den Bergh, L. Visscher, 'The Preventive Function'.

<sup>76</sup> Z. Juska, 'Obstacles in European'; M. Ioannidou, 'Enhancing Consumers'; Ch. Leskinen, 'Collective Actions'; D. Hensler, 'The Globalization of Class Actions: An Overview' (2009) 622(1) *The Annals of the American Academy of Political and Social Science* 7–29; Ch. Hodges, *The Reform of Class and Representative Actions in European Legal Systems*, Oxford-Portland 2008.

<sup>77</sup> According to Article 15(1) of Regulation 1/2003, national courts may ask the EC to transmit to them information in its possession or to give its opinion on questions concerning the application of EU competition rules. A national court may ask the EC for its opinion on economic, factual and legal matters concerning the application of EU competition rules. On

*curiae* in adjudicating damages claims in competition cases<sup>78</sup>. However, they will not manage to cure the incentive problems plaguing consumers when faced with the possibility to bring damages actions.

There have also been examples of other methods meant to facilitate private actions. In Hungary, a legal presumption of a 10% overcharge was introduced when calculating damages for hard-core cartels with the intention to simplify and encourage damages claims<sup>79</sup>. Similarly, in Bulgaria, a more flexible procedural rule has been implemented for damages claims for competition law violations. The Bulgarian Competition Act provides that all legal and natural persons, harmed by an anti-competitive practice, are entitled to compensation even if the infringement was not directly aimed against them. This special rule allows the compensation of damages suffered by persons or entities (such as final customers and consumers) that have not been a direct counterparty of the infringer/s, but who suffered harm because the results of the infringement were passed on to them by intermediate commercial operators<sup>80</sup>. Even though these procedural shortcuts have not yet resulted in an increase in the number of consumer cases, they substantially reduce the complexity and thereby the costs of litigation.

Another way to stimulate an increase in the number of consumers bringing claims before national courts might lay in alternative dispute resolution (hereafter, ADR), which could be a combination of collective consumer actions and normal ADR mechanisms – so-called collective ADR. The well-known Italian motor car insurance cartel case<sup>81</sup> demonstrated that if the objective is

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the basis of Article 15(3) of Regulation 1/2003, the EC, acting on its own initiative, may submit written observations (*amicus curiae*) to national courts, where a coherent application of Article 101 or 102 TFEU so requires.

<sup>78</sup> In Hungary, for example, on the basis of Article 88/B of the Competition Act, a court shall immediately notify the NCA if the application of competition rules on cartels or abuse of dominance arises in a civil action before that court. The NCA may submit observations or set forth its standpoint orally before the closing of the hearings. Upon a request of the court, the NCA shall inform the court about its legal standpoint concerning the application of competition rules in the given case. Thus, the NCA acts as an *amicus curiae* to the courts. Furthermore, if the NCA decides to initiate proceedings in a matter that is pending before the court, then the court shall stay its own proceeding until the NCA issues its final, legally binding decision. The court is bound by the final and legally binding decision of the NCA concerning the finding of an antitrust breach or the lack thereof. See also Article 9 of the Damages Directive. A final decision of a NCA (or national appellate court) will constitute irrefutable evidence in litigation in that Member State that an infringement has occurred.

<sup>79</sup> In case of a horizontal hardcore cartel, except horizontal hardcore purchase cartels, it is presumed that the competition law violation caused a 10% increase in the market price. The presumption is rebuttable.

<sup>80</sup> P. Petrov, 'Bulgaria' [in:] *International Comparative Legal Guide, Enforcement of competition laws*, London 2009, p. 44.

<sup>81</sup> Joined cases C-295/04 to C-298/04 *Manfredi v Lloyd Adriatico Assicurazioni SpA and Others*, [2006] ECR I-6619.

to provide compensation for final consumers, and to encourage them to take action to enforce competition rules, then consumers will choose this redress avenue which provides optimal conditions to have their claims adjudicated in a swift, flexible and effective way. *Manfredi*<sup>82</sup> shows that if claims are small and there is no possibility to consolidate and aggregate them, then consumers prefer to turn to small claims courts, where procedures are less formal and less demanding in terms of evidence and the burden of proof.

The Commission has, in fact, acknowledged these points earlier. In its Staff Working Paper accompanying the 2008 White Paper, collective ADR was put forward as a means of an early resolution of disputes and encouraging settlements<sup>83</sup>. Similarly, the EC's 2009 Discussion Paper on consumer collective redress recommends collective ADR, in combination with judicial collective redress for consumer disputes, as presently available in Sweden and Finland<sup>84</sup>.

## VII. Conclusions

Private enforcement of competition law has been among the European Commission's priorities for over a decade now. As a horizontal legal transplant from the US antitrust system, the EC has intended to apply this enforcement tool in order to raise the effectiveness of competition law enforcement, similarly to the success of the US private enforcement system. EU Member States have followed the 'prioritization' of the Commission and have also actively engaged in both law- and policy-making concerning damages claims. Yet the Damages Directive, which can be considered the result of the numerous efforts and proposals of the EC in this field does not contain rules on collective redress at all. The EC issued merely a Recommendation that includes soft law instruments meant to stimulate Member States to create collective redress schemes. Nevertheless, the Commission was encouraging Member States to implement legislation to enable damages claims and also collective actions. This paper has critically analyzed this policy and the 'transfer of rules' in the broader governance framework of 'Europeanization', which has been a dominant governance mode since CEECs' EU accession. Private enforcement of competition law has thus been a vertical policy transplant in CEECs. However, examining its actual enforcement practice, and especially that of collective actions, questions its viability.

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<sup>82</sup> *Ibidem*.

<sup>83</sup> Commission Staff Working Paper, SEC(2008) 404, 2.04.2008, points 41, 247, 248.

<sup>84</sup> [http://ec.europa.eu/consumers/redress\\_cons/docs/consultation\\_paper2009.pdf](http://ec.europa.eu/consumers/redress_cons/docs/consultation_paper2009.pdf) (access 05.10.2015), p. 16–19.



First, while rules exist for private damages claims in all CEECs that are EU Member States, most countries in this region have only experienced a handful of such cases in practice. Moreover, many of the few existing cases concerned issues other than damages claims. It is thus possible to speak of hardly any practice of successful damages actions in CEECs. The possible reason for the low number of such cases can be summed up as a weak institutional framework (composed of private actors, consumer organizations, lawyers and national courts) which is not yet sufficiently developed to actively use existing legislation. Second, the legal framework for collective actions is under-developed. Only two out of the thirteen CEECs have an effective collective redress scheme for consumers' compensatory claims. But even the two existing systems are under-enforced. Numerous studies have been conducted already that try to crystallize what would be the optimal model of collective redress, including effective funding rules. Nevertheless, a further institutional issue might exist that has to be addressed in CEECs. Institution-building initiatives have to target their fragmented and weak civil societies so as to make consumers assert their rights as well as strengthen the judicial system in order to cope with the complexity of such cases. This paper has also suggested to look into rules that simplify the procedure in collective consumer claims such as the Hungarian legal presumption of 10% overcharge as well as argued in favour of a more in-depth study of the collective ADR model.

The objective of collective actions in private enforcement of competition law is to compensate those consumers who suffered harm as a result of an anti-competitive practice. That objective can indeed be transplanted into the national legal regimes of EU Member States originating in CEE. However, the resulting domestic rules need to be further adapted to reflect the legal and social position of consumers in CEECs. Otherwise, those rules will remain law in books without being effectively used in practice.

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