

COLLECTIVE CONSUMER REDRESS IN COMPETITION LAW
—
**THE EU GREEN AND WHITE PAPERS ON PRIVATE DAMAGES ACTIONS FOR
BREACH OF THE EC ANTITRUST RULES AND SOUTH AFRICAN
DEVELOPMENT[∞]**

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I. INTRODUCTION

This article focuses on one specific question within private enforcement of competition law, namely what sort of collective redress mechanism, if any, would enable the consumer(s)-(claimant(s)) and the businesses-(defendant(s)), to resolve their differences in a just, fair, and efficient manner, either within or outside the judicial system. In the EU, this debate has been raging for more than a decade, and will continue in the foreseeable future. In South Africa, private enforcement in antitrust cases is a rarity. The Competition Act allows for parties to seek reparation for damages in the civil courts only after the competition authorities (that being the Competition Commission, Competition Tribunal and if there is an appeal, the Competition Appeal Court) have investigated and made a final determination as to whether anti-competitive conduct has taken place.¹ Thus parties seeking damages in antitrust cases have to wait for the outcome of that decision before pursuing redress. Many additional factors work against the private plaintiff. Claiming damages can be an expensive exercise due to the time and costs required. The anti-competitive conduct may have caused the aggrieved party to suffer significant economic loss, thereby limiting the resources available to a claimant to underwrite litigation. Injured parties can seek legal assistance on a contingency basis (although there may not be too many willing litigators).

[∞] Draft paper. Do not quote without authors permission.

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¹ Section 65 of the Competition Act 89 of 1998 (as amended). Hereafter referred to as the “Competition Act”.

Since the inception of the Competition Act in 1999, there has in fact been just one damages case. In this case, which occurred in 2008, Nationwide Airlines (a company that is currently being liquidated) sued South African Airways (SAA), after the Tribunal had made a finding that SAA had abused its dominant position.² Nationwide Airlines subsequently settled for an undisclosed amount.³ Since this case, there has not been much development in the area of private enforcement in antitrust cases in South Africa. Instead there have simply been rumors and rumblings about possible damages claims which have not yet come to light.

The purpose of this article is to present an important episode of the European debate (part II) on collective consumer redress, namely the Green Paper⁴ (part III) and White Paper⁵ (part IV) on private damages actions for breach of the EC antitrust rules. The comments to the 2005GP and the 2008WP are numerous (more than three hundred in eleven languages) and their content is both lively and controversial. This episode might be of service to South Africans wishing to further their reflections on how to achieve a satisfactory level of private enforcement especially with regard to class action suits (part

² Case no: 83/CR/Oct04 available at www.comtrib.co.za. See also Tamara Dini 'Nationwide settles damages claim for SAA's abuse of dominance' February 19 2008 at <http://www.bowman.co.za/Law/Articles/Law-Articles.asp?id=2132417250>.

³ <http://www.bowman.co.za/LawArticles/Law-Article.asp?id=2132417250/>

⁴ See the official discussions relating to the damages actions for breach of the EC antitrust rules, available at <http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>, accessed on 9 August 2010.

The Green Paper – Damages actions for breach of the EC antitrust rules, presented by the European Commission, Brussels, 19 December 2005 COM(2005) 672 final {SEC(2005) 1732} is abbreviated '2005GP'. The Commission Staff Working Paper annex to the Green Paper – Damages Actions for Breach of the EC Antitrust Rules, Brussels, 19 December 2005 SEC(2005) 1732 is cited as '2005CSWP'. Regarding the specific comments to the 2005GP mentioned in this article, I chose to maintain the way they were cited in the following Webpage, so as to ensure a clear reference system:

http://ec.europa.eu/competition/antitrust/actionsdamages/green_paper_comments.html, accessed on 9 August 2010.

⁵ See the official discussions relating to the damages actions for breach of the EC antitrust rules, available at <http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>, accessed on 9 August 2010.

The White Paper on Damages actions for breach of the EC antitrust rules, Brussels, 2 April 2008 COM(2008) 165 final {SEC(2008) 404}{SEC(2008) 405}{SEC(2008) 406} is abbreviated '2008WP'. The Commission Staff Working Paper Accompanying the White paper on Damages actions for breach of the EC antitrust rules, Brussels, 2 April 2008 {COM(2008) 165 final} {SEC(2008) 405} {SEC(2008) 406} is abbreviated '2008CSWP'. Equally accompanying the 2008WP is the Commission Staff Working Document Accompanying Document to the White Paper on Damages Actions for Breach of the EC Antitrust Rules – Impact Assessment (Impact Assessment Report), Brussels, 2 April 2008 {COM(2008) 165 final} {SEC(2008) 404} {SEC(2008) 406} (hereinafter: '2008IAR') and an External Impact Study 'Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios' done in Brussels, Rome and Rotterdam, 21 December 2007.

Regarding the specific comments to the 2008WP mentioned in this article, I chose to maintain the way they were cited in the following WebPages, so as to ensure a clear reference system: http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments.html, accessed on 9 August 2010.

V). Our conclusions will present possible ways forward for resolving this fundamental debate (part VI).

II. OVERVIEW OF THE VARIOUS DEBATES ON COLLECTIVE CONSUMER REDRESS AT THE EU LEVEL

The European Commission has always been keen to distance its own legal proposals from the perceived excesses arising from US-style litigation. However, as we will see in the following analysis of the 2005GP/2008WP, the DG Comp, and with it, the European Commission, came quite close to proposing an American class action mechanism in all but name.⁶ In the end, the project as presented in the 2008WP has been deferred due to the backlash it created: a coalition of Member States, the European Parliament, businesses and other interest groups forced the European Commission to shelve its draft directive.⁷ While these events were unfolding, DG SANCO (Health and Consumer Protection) launched a European-wide debate on consumer protection in November 2007. Its purpose is to analyse cases of consumer settlement procedures, focusing more on the solutions rather than on particular mechanisms, such as the class action. The latter approach, less controversial, seems to enjoy the support of the various stakeholders and will likely lead to some kind of Directive or Regulation within a few years.⁸

The following analysis is nevertheless important for three main reasons. First, there might still be some elements in the prospective debate launched by DG SANCO in the second half of 2010/beginning of 2011 which may take into account elements discussed

⁶ For a brief introduction to private enforcement of European competition law, see Kasturi Moodaliyar, James F. Reardon, Sarah Theuerkauf 'The relationship between public and private enforcement in competition law – A comparative analysis of South African, European Union and Swiss law' (2010) 127 *SALJ* 141ff at 150ff. A general notice on Articles cited in this research: With the coming into force of the Treaty of Lisbon on 1 December 2009, the EU and EC Treaties were amended, without being replaced. The latter is renamed 'Treaty on the Functioning of the European Union'. As a consequence of the coming into force of the Treaty of Lisbon, Articles of the TEC changed numbers. For example, Article 81 TEC on cartels becomes Article 101 TFEU while Article 82 TEC on abuse of dominant position is transformed into Article 102 TFEU. We will quote and use the numbering according to TFEU. For further explanations, see http://europa.eu/lisbon_treaty/index_en.htm, last accessed 10 August 2010. See generally OJ 2008/C 115/01.

⁷ See esp. Committee on Economic and Monetary Affairs, rapporteur K.-H. Lehne, *Report on the White Paper on damages actions for breach of the EC antitrust rules* (European Parliament, 9 March 2009), A6-0123/2009 (hereinafter: CEMA, 2008WP Report). Available at <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A6-2009-0123&language=EN>, accessed 10 August 2010.

⁸ Christopher Hodges 'Collective Redress in Europe: The New Model' (2010) 29 *Civil Justice Quarterly* 370 esp. at 394. See also Jochen Clausnitzer 'Europäisches Parlament bremst Europäische Kommission – Sammelklagen im Kartellrecht' (8/2010) 20 *Europäische Zeitschrift für Wirtschaftsrecht* 233. See generally http://ec.europa.eu/consumers/redress_cons/collective_redress_en.print.htm, accessed 10 August 2010.

by DG Comp. Secondly, the debate on consumer collective redress mechanism is not over. Hence, class actions might still become a European reality. Thirdly, competition law has its own specificities and needs. Hence, one should take into account what DG Comp, the European Commission and the various commentators put forth in the 2005GP/2008WP debate in order to have all the specific competition issues at hand.

III. 2005GP

(a) Presentation of the European Commission's Proposals

It is interesting to note that the European Commission lays down Option 25 as follows, a 'cause of action for consumer associations without depriving individual consumers of bringing an action. Consideration should be given to issues such as standing (a possible registration or authorisation system)...'⁹ The European Commission acknowledges that the existing civil procedures have too many obstacles (e.g. delays and costs) for a consumer – having suffered a relatively minor damage – to pursue his claim. However, consumers should be encouraged to do just that, because such action enhances competition culture, compensation, and deterrence. In addition to the European Small Claims Procedure,¹⁰ the main objective would be to implement collective redress mechanisms in favour of consumers. Three main mechanisms are proposed, namely a representative action,¹¹ a collective action,¹² and public interest litigation.¹³ Interestingly, the 2005CSWP states that the benefits of such actions could either go to the victims of the competition infringement, or 'could be made to the natural or legal person who brought the action'.¹⁴ The cardinal notion of compensation is clearly not at the heart of the latter. Hence, the European Commission seems to forget one of its basic goals in promoting consumer protection, namely to secure compensation for victims of antitrust infringements.¹⁵

⁹ 2005GP op cit note [...] p 9. There is also an Option 26 providing for a special provision for collective action by groups of purchasers other than final consumers, but this option has been barely discussed by the commentators. See also 2005CSWP op cit note [...] § 200 p 55 where it is rightly stated that the enforcement 'of consumer rights in competition cases must be appropriately set in the wider context of consumer redress mechanisms'.

¹⁰ Commission's proposal for a Regulation of the European Parliament and of the Council establishing a European Small Claims Procedure, COM(2005)87 of 15 March 2005. The proposal led to Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July establishing a European small claims procedure.

¹¹ 2005CSWP op cit note [...] § 192 p 53: An 'action brought by a representative natural or legal person, such as a consumer organisation, on behalf of a group of identified individuals, usually its members, and aimed at protecting the individual rights of those represented'.

¹² 2005CSWP op cit note [...] § 192 p 53: A collective action 'is brought on behalf of a group of identified or identifiable individuals and aimed at protecting interests of those represented'.

¹³ 2005CSWP op cit note [...] § 192 p 53: public interest litigation 'is not done on behalf of any identified individuals but for the benefit of the public at large'.

¹⁴ 2005CSWP op cit note [...] § 192 p 53.

¹⁵ 2005GP op cit note [...] p 4 (footnotes omitted): 'Damages actions for infringement of antitrust law serve several purposes, namely to compensate those who have suffered a loss as a consequence of anti-competitive behaviour and to ensure the full effectiveness of the antitrust rules of the [FTEU] by

(b) Answers from Respondents

The 'great divide' rests with economic incentive. Indeed, consumer associations and some legal practitioners 'are generally in favour of far-reaching measures to facilitate and create incentives for private damages actions'.¹⁶ Conversely, businesses and their associations fight vigorously against any implementation of collective mechanisms, or promote a limited version thereof. Academics' and Member States' opinions vary, but some Member States worry about Community encroachment in civil procedure, an area where Member States are generally competent.¹⁷ Lastly, the European Parliament and the European Economic and Social Committee have given differing comments on the 2005GP.

(i) *Supportive Answers to the European Commission's Proposals*

(1) *Necessary to Introduce Collective/Representative and Class Actions*

About half of the respondents welcome the introduction of class actions and/or a representative action that will benefit consumers and produce greater deterrence.¹⁸ One contributor recognises that 'it is politically important for the [European] Commission to empower consumers to bring claims'.¹⁹ While other commentators do not exactly indicate whether they approve or oppose the European Commission's proposals. They mention only which kind of mechanism the European Commission should implement and/or how such mechanism should function, if a collective redress mechanism existed.²⁰

(2) *Role of Member States*

Some respondents believe that if any amendments are to be brought in private enforcement of competition law, then such amendments should be made at the national level. In the case of an association bringing a suit for aggrieved consumers, the

discouraging anti-competitive behaviour, thus contributing significantly to the maintenance of effective competition in the Community (deterrence)'.¹⁶

¹⁶ 2008IAR op cit note [...] § 9 p 6.

¹⁷ 2008IAR op cit note [...] § 9 p 6. See also 2008CSWP op cit note [...] § 30 p 14.

¹⁸ See e.g. CECRA, European Council for Motor Trades and Repairs, BE p 3; Syndicat National des Producteurs Indépendants d'Electricité Thermique, FR p 8; Richards Butler, UK p 3; Malta EU Secretariat p 3; Lithuania's Competition Council, LT p 3; Institut National de la Consommation, FR p 5-6; CLCV, Consommation Logement et Cadre de Vie, FR p 3; Allen & Overy LLP, Italian Office p 4; AEDC, Asociación Española para la Defensa de la Competencia, ES p 9; BEUC, p 6; Ernst & Young LLP, UK p 4; Bundesministerium für Soziale Sicherheit Generationen und Konsumentenschutz, AT p 14.

¹⁹ Lovells, UK p 11.

²⁰ Some law firms are amongst those commentators who tactfully do not indicate any preference as accepting or rejecting the European Commission's proposals for setting-up a collective redress mechanism for consumers: Norton Rose, UK p 8; Linklaters, UK p 6; Lovells, UK p 11-12.

Romanian Competition Council, RO states that ‘the standing to sue is necessary for this association and must be expressly laid down in the national legislation’.²¹

(3) American Model for Damages Class Actions

Some commentators believe that Europe needs to import US-style litigation.²² Indeed, the experiences conducted in Europe do not yet yield the expected results. Hence, ‘[serious] consideration should be given to developing special procedures for collective actions and protecting consumer interests based on the procedure in the US system, which is supported by tested procedural rules and a settled body of case law’.²³ Such mechanism provides maximum deterrence against competition infringements.²⁴ Any class action disadvantages ‘are greatly outweighed by the use of class actions to facilitate compensation for victims of antitrust violations, and there are several practices that can be employed to minimize abuses’.²⁵ Lastly, other sweeping reforms (such as modifying cost awards or proximate causation, consolidation of cases at EU level, lifting the prohibition of contingency fees) are requested, as without such additional reforms the financial risks of bringing such claims would simply remain too high.²⁶

(4) Quebecoise Model for Damages Class Actions

One respondent believes the Quebecoise model offers some opportunity for justice.²⁷ Moreover, this model is considered to be effective not only in cases of competition infringements, but also in other fields of law, such as health or environmental litigations. The main reason to follow the Quebecoise class action is that it avoided the many abuses the US class actions have experienced.²⁸

(5) Sceptical of Consumer Association Actions But Underlying Principle Welcomed

Some contributors fret about the effectiveness with respect to the implementation of a consumers’ association action.²⁹ Indeed, CLF, Competition Law Forum, UK doubts

²¹ Romanian Competition Council, RO p 14. See also Norton Rose, UK p 8 and Herbert Smith, Gleiss Lutz Stibbe, BE p 8.

²² Caton Matthew, UK p 21-22; CMHT, Cohen, Milstein, Hausfeld & Toll, p.I.I.c. US p 12-13 and 19; Irwin Mitchell Solicitors, UK p 3-4 and 6. With some amendments to the implementation of US class actions, see Rachael Mulheron, Queen Mary University of London, UK.

²³ Caton Matthew, UK p 21 (footnotes omitted).

²⁴ CMHT, Cohen, Milstein, Hausfeld & Toll, p.I.I.c. US p 2.

²⁵ CMHT, Cohen, Milstein, Hausfeld & Toll, p.I.I.c. US p 13.

²⁶ Caton Matthew, UK p 22; CMHT, Cohen, Milstein, Hausfeld & Toll, p.I.I.c. US p 21; Europe Institute, NL p 9.

²⁷ UFC-Que Choisir, FR p 12-14.

²⁸ UFC-Que Choisir, FR p 13. See also Bundesministerium für Soziale Sicherheit Generationen und Konsumentenschutz, AT p 2-3 and 14-15.

²⁹ CLF, Competition Law Forum, UK p 16; CMS, Competition Practice Group, BE p 4 and 13.

‘whether this would be an effective means of providing genuine redress to affected customers’.³⁰

(ii) *Negative Answers to the European Commission’s Proposals*

(1) *General Opposition*

The negative opinions range from negative ‘feelings’ to heartfelt outcry for proposing such measures. ‘The Commission needs to study the alternatives to [legalisation] of social relations’.³¹ Moreover, ‘these procedures ... are hijacked by law firms or various interest groups who are not using the procedure to obtain compensation for injured consumers but to punish companies’.³² Companies, either individually³³ or via their associations,³⁴ lead the charge against the 2005GP’s proposals on collective consumer litigation, either in the form of the American class actions or separate actions by consumer associations. Moreover, many contributors consider that the American litigation experience entails measureless risks for companies. They do not want to see such procedures in Europe.³⁵ Furthermore, some respondents believe that ‘collective actions are ill-suited to competition matters’.³⁶ Lastly, a collective lawsuit filed by a ‘representative’ pretending to act on behalf of a group of unknown plaintiffs should not be accepted. Indeed, such mechanism would not only relieve consumers from their duty to act diligently and hence remain in charge of their own choices, but also lead them to become means to an aim foreign to their own interests.³⁷

³⁰ CLF, Competition Law Forum, UK p 16.

³¹ AFEP, Association Française des Entreprises Privées, FR p 2.

³² UNICE, Union of Industrial and Employer’s Confederation of Europe, BE p 6.

³³ Fastweb S.p.A., IT p 14-15; Kesko Corporation, FI p 2 and 6-7; France Telecom, FR p 4.

³⁴ AFEP, Association Française des Entreprises Privées, FR p 11; BDI, Bundesverband der Deutschen Industrie e. V., DE p 13; CEFIC, European Chemical Industry Council, BE p 10; EFPIA, European Federation of Pharmaceutical Industries and Associations p 13-15; European Association of Co-operative Banks, BE p 10-11; GDV, Gesamtverband der Deutschen Versicherung e.V., DE p 14-15; Gesamtverband Textil + Mode, DE p 5; HDE, Hauptverband des Deutschen Einzelhandels, DE p 4; IV, Industriellen Vereinigung, AT p 11-12; MEDEF, Mouvement des Entreprises de France, FR p 7; VCI, Verband der Chemischen Industrie e.V., DE p 13-14; VDMA, Verband Deutscher Maschinen- und Anlagenbau e.V., DE p 4; Zentrale zur Bekämpfung unlauteren Wettbewerbs E.V. p 8-10; Vereinigung Schweizerischer Unternehmen in Deutschland, CH p 4; UNICE, Union of Industrial and Employer’s Confederation of Europe, BE p 1 and 6; FFF, Fédération française de la franchise, FR p 3; EAPB, European Association of Public Banks, IRL p 5; Confederation of Finnish Industries EK, FI p 4; Central Chamber of Commerce, FI p 4; CEA, Comité Européen des Assurances, BE p 3-4; CCIP, Chambre de commerce et d’industrie de Paris, FR p 17-19; ANIA, Italian Association between Insurance Companies, IT p 4; CBI, UK p 8; NHO, Confederation of Norwegian Enterprise, NO p 11. See also ICC, International Chamber of Commerce, FR p 2.

Some Ministries from Member States equally question the European Commission’s approach. See e.g. Bundesministerium für Justiz, AT p 4 and 11.

³⁵ DIHK, Deutscher Industrie- und Handelskammertag, DE p 5; Zentrale Kreditausschuss (German Central Loans Committee), DE p 11; BDI, Bundesverband der Deutschen Industrie e. V., DE p 19; CEFIC, European Chemical Industry Council, BE p 10; CCIP, Chambre de commerce et d’industrie de Paris, FR p 18.

³⁶ Central Chamber of Commerce, FI p 4. See also Confederation of Finnish Industries EK, FI p 4.

³⁷ CCIP, Chambre de commerce et d’industrie de Paris, FR p 18-19.

(2) Already Existing Mechanisms

Some respondents are reluctant to create new mechanisms as already existing mechanisms are in place and should be used. Moreover, one should integrate new mechanisms only after careful thought and consideration in order to respect the fundamental principles appertaining to every sovereign State.³⁸ For instance, in Norway opt-in as well as opt-out – under specific circumstances – mechanisms already exist. Hence, ‘no reform would ... be needed’.³⁹

(3) Such Mechanisms Go Against European Procedural Traditions

One of the most consistent challenges to the European Commission’s proposals relates to the fact that collective redress mechanisms go against – or are alien to – the procedural principles existing within Member States.⁴⁰ As one respondent indicates: ‘The application of a legally valid judgment to all members of the respectively defined group, by contradicting the maxim of party disposition and the claim to a legal hearing, represents a break with the current system of civil procedure law’.⁴¹ Other contributors want a strict separation between defending a private interest and defending the public interest.⁴²

(4) Difficulty to Implement and Apply

Some respondents are convinced that a class – or collective – action’s mechanism would be too difficult to implement or apply in the Member States.⁴³ For instance, with respect to enhancing consumer compensation, one commentator concludes that consumers would receive trifling compensation.⁴⁴ As such, the procedures originating from these proposals would ‘simply be costly and protracted procedures that result in little, if any, benefit to anyone’.⁴⁵ Moreover, several commentators view the whole

³⁸ AFEC, Association Française d’Etude de la Concurrence, FR p 16; France Telecom, FR p 4; MEDEF, Mouvement des Entreprises de France, FR p 7; AFEP, Association Française des Entreprises Privées, FR p 2.

³⁹ NHO, Confederation of Norwegian Enterprise, NO p 11. See also DTI, Department of Trade and Industry, UK p 20-22, esp. p 22 for an appraisal of the English legal landscape.

⁴⁰ ANIA, Italian Association between Insurance Companies, IT p 4; CCIP, Chambre de commerce et d’industrie de Paris, FR p 18; EAPB, European Association of Public Banks, IRL p 5; EFPIA, European Federation of Pharmaceutical Industries and Associations p 14-15; European Association of Co-operative Banks, BE p 11; Fastweb S.p.A., IT p 14; GDV, Gesamtverband der Deutschen Versicherung e.V., DE p 14; Vereinigung Schweizerischer Unternehmen in Deutschland, CH p 4; IV, Industriellen Vereinigung, AT p 11-12.

⁴¹ Zentrale Kreditausschuss (German Central Loans Committee), DE p 11.

⁴² DIHK, Deutscher Industrie- und Handelskammertag, DE p 5; MEDEF, Mouvement des Entreprises de France, FR p 8.

⁴³ FFF, Fédération française de la franchise, FR p 3; BDI, Bundesverband der Deutschen Industrie e. V., DE p 20.

⁴⁴ Dechert LLP, BE p 27-32, esp. p 30-31.

⁴⁵ Dechert LLP, BE p 31. See also CEA, Comité Européen des Assurances, BE p 3.

discussion as beside the point, as the demand for such compensatory mechanisms is limited and will remain limited for the foreseeable future.⁴⁶

(5) *Such Procedures Go Against the Separation of Power between the European Union and Member States*

Some opponents to intervention at the European Union level in this area of law mention the separation of powers between the European Union and its Member States. Austria's Bundeswettbewerbsbehörde is one of the most vocal opponents to such encroachment on Member State's sovereignty.⁴⁷ It indicates that neither Article 101 TFEU nor Article 102 TFEU grant the European Commission the right to create civil venues. Equally, with *Courage v. Crehan*,⁴⁸ the ECJ did not invite the European Commission to intervene, but declared that national courts were responsible for hearing cases based on Articles 101 and 102 TFEU. Hence, the 2005GP's Commission lacks the necessary competence to formulate such proposals.⁴⁹

(iii) *European Institutional Responses*

The European Parliament⁵⁰ calls on the European Commission to 'prepare a White Paper with detailed proposals to facilitate the bringing of "stand alone" and "follow on" private actions claiming damages for behaviour in breach of the Community competition rules ...'⁵¹ The European Economic and Social Committee considers group actions to achieve the aim of ensuring 'effective protection of everyone involved in the European internal market',⁵² and further adds that 'from the point of view of those breaching the rules, the possibility of concentrating their defence would have marked cost and efficiency gains'.⁵³

IV. 2008WP

(a) Presentation of the European Commission's Proposals

Following the comments pertaining to the 2005GP and having further studied collective mechanisms, the European Commission remains convinced of the need to introduce

⁴⁶ Clifford Chance, UK p 4-5; Cuatrecasas, ES p 7; France Telecom, FR p 4; EFPIA, European Federation of Pharmaceutical Industries and Associations p 15. Regarding the response rate, see Dechert LLP, BE p 30.

⁴⁷ Bundeswettbewerbsbehörde (Federal Competition Authority), AT p 4-5 and 10.

⁴⁸ ECJ case C-453/99: *Courage and Crehan* [2001] ECR I-6297. See also Moodaliyar, Reardon, *Theuerkauf* op cit note [...] at 151f.

⁴⁹ Bundeswettbewerbsbehörde (Federal Competition Authority), AT p 4-5 and 10. See also JWP, Joint Working Party of the Bars and Law Societies of the UK, UK p 3.

⁵⁰ European Parliament resolution on the Green Paper on Damages actions for breach of the EC antitrust rules, dated 25 April 2007 (hereinafter: EP 2007 Resolution).

⁵¹ EP 2007 Resolution op cit note [one above] p 1.

⁵² European Economic and Social Committee (EESC), Opinion of the European Economic and Social Committee on the Green Paper – Damages actions for breach of the EC antitrust rules, COM(2005) 672 final (2006/C 324/01) (hereinafter: 'EESC (2006/C 324/01)') p 1, 5-6.

⁵³ EESC (2006/C 324/01) op cit note [one above] p 6.

collective redress mechanisms in order to allow ‘aggregation of the individual claims of victims of antitrust infringements’.⁵⁴ It suggests two complementary mechanisms, namely a representative action (i) and an opt-in collective action (ii).⁵⁵ The European Commission relies on familiar arguments to enhance its proposition for implementing both collective redress mechanisms. Indeed, it indicates that prospective claimants with low-value claims do not wish to undertake a risky procedure against deep-pocketed antitrust infringers. The victims may not even know about the infringement and their resulting damage. This leads to ‘the unsatisfactory situation that the victims concerned receive no compensation and the illegal gain often remains in the hands of the tortfeasors’.⁵⁶

(i) *Representative Action*

The European Commission defines a representative action for damages as ‘an action brought by a natural or legal person on behalf of two or more individuals or businesses who are not themselves party to the action, and aimed at obtaining damages for the individual harm caused to the interests of all those represented (and not to the representative entity)’.⁵⁷ The European Commission mentions as examples of legal entities empowered to act as a representative body, consumer protection associations on behalf of aggrieved consumers, trade associations in the name of their members, or State bodies. The primary purpose for giving such bodies the possibility to file a lawsuit is that they might be less reluctant than the individual consumer or business to do so. A proposed explanation resides in the fact that the infringement relates to the core activity – i.e. the protection of specific interests – of the representative entity.⁵⁸

Public control over such entities, while not overly restrictive, is one major point the European Commission wishes to promote. Indeed, it indicates that two main kinds of representatives should be allowed. The first group would ‘include entities representing legitimate and defined interests, officially designated in advance by their Member State to bring representative actions for damages on behalf of identified or, in rather restricted cases, identifiable victims (not necessarily their members). In order to be designated, these qualified entities would need to meet specific criteria set in the law, which give sufficient assurance that abusive litigation is avoided’.⁵⁹ The second subdivision would ‘be *entities* that would be *certified*, in order to be able to bring a representative action in relation to a particular infringement, on an *ad hoc* basis according to the procedures laid down in the national law of their Member state. Eligibility should be limited to entities

⁵⁴ 2008WP op cit note [...] p 4.

⁵⁵ 2008WP op cit note [...] p 4.

⁵⁶ 2008CSWP op cit note [...] § 39 p 16.

⁵⁷ 2008CSWP op cit note [...] § 49 p 18 (footnotes omitted).

⁵⁸ 2008CSWP op cit note [...] §§ 49-50 p 18-19.

⁵⁹ 2008CSWP op cit note [...] § 52 p 19 (footnotes omitted).

whose primary task is to protect the defined interests of their members, other than by pursuing damages claims (e.g. a trade association in a given industry) and which give sufficient assurance that abusive litigation is avoided'.⁶⁰

With respect to the distribution of damages, the European Commission quite strikingly sets forth the idea that the damages should be distributed to the representative party. The European Commission acknowledges that '[where] possible, it is preferable that the damages be used by the [representative] entity to directly compensate the harm suffered by all those represented in the action'.⁶¹ Such a general rule once again contradicts the main reason for discussing private actions for damages. Indeed, as the 2008WP clearly states that 'all victims of infringements of EC competition law have access to effective redress mechanisms so that they can be fully compensated for the harm they suffered'.⁶²

(ii) *Opt-in Collective Action*

The main distinction between a representative action and a class action resides in the person of the claimant. In the representative action, the claimant – as we have seen above – has not suffered any harm in the hands of the alleged cartelists. Conversely in the opt-in collective action, the claimant suffered from the antitrust infringement and seeks his own compensation as well as compensation for all those similarly situated.⁶³

The European Commission explains that a collective action system 'improves the situation of the claimants by rendering cost/benefit analysis of the litigation more attractive, since it allows them to share the evidence obtained as well as the costs, but also more indirectly by reinforcing their position in the litigation and providing moral support'.⁶⁴ Moreover, an opt-in procedure should prevent (perceived) excesses relating to opt-out class actions known in other jurisdictions (namely the US) and opt-in class actions (or collective actions) are similar to traditional European litigation.⁶⁵ Lastly, it should be quite straightforward to allocate compensation funds to victims of antitrust infringements in case of opt-in collective actions as every plaintiff is known.⁶⁶

(b) Answers from the Respondents

⁶⁰ 2008CSWP op cit note [...] § 53 p 19 (footnotes omitted).

⁶¹ 2008CSWP op cit note [...] § 56 p 20 (footnotes omitted). It should be noted that the European Commission further indicates that reflections on cy-près should be continued.

⁶² 2008WP op cit note [...] p 2-3.

⁶³ 2008CSWP op cit note [...] § 57 p 20.

⁶⁴ 2008CSWP op cit note [...] § 57 p 20. Conversely, according to the European Commission, joint actions do not permit claimants to benefit from the cost/benefit analysis.

⁶⁵ 2008CSWP op cit note [...] § 58 p 20-21.

⁶⁶ 2008CSWP op cit note [...] § 59 p 21.

The actors are more or less the same as the ones who responded to the 2005GP: consumer associations and some legal practitioners are in favour of far-reaching reforms that would enhance their position, while businesses and their associations still resist collective redress mechanisms, at the very least in their most enhanced forms.

One should note that, given the European Commission's purported vagueness in terms and proposals, the majority of the answers – either in favour⁶⁷ or opposing⁶⁸ the European Commission's viewpoints – follows the same unsatisfactory pattern and rightly criticises the European Commission's lack of engagement.⁶⁹

(i) *Supportive Answers to the European Commission's Proposals*

(1) *Agreement in Principle*

Slightly less than half of the respondents agree with the European Commission's proposals. They include academics, consumer associations, competition and consumer protection authorities, as well as some business associations.⁷⁰ For example, Ernst & Young states that, when the right safeguards are implemented, 'the proposals [of the European Commission] will strike a good balance between saving costs by allowing multiple claims to be heard together'.⁷¹

(2) *Representative Actions*

Several respondents welcome the European Commission's proposal of creating a representative action not only for consumers, but for all victims of antitrust infringements.⁷²

⁶⁷ Baker & McKenzie LLP p 1; Herbert Smith LLP p 2; Nederlandse Raad voor de rechtspraak, NL p 5-6.

⁶⁸ Confederation of Swedish Enterprise, SE p 4; White & Case LLP p 4; ZGV, Zentralverband Gewerblicher Verbundgruppen, DE p 3.

⁶⁹ Indeed, the European Commission on the one hand expresses its purpose to 'adopt a White Paper in order to foster and further focus the ongoing discussions by setting out concrete measures aimed at creating an effective private enforcement system' (2008CSWP op cit note [...] § 4 p 8), while on the other hand – and specifically for key issues regarding consumer collective redress mechanisms – the European Commission declares that 'the purpose of this section is to stress the importance of these issues rather than to already set out concrete solutions' (2008CSWP op cit note [...] § 44 p 17).

⁷⁰ Belgian Competition Authority (Directorate General), BE p 1; Romanian National Authority for Consumer Protection, RO p 1; Allen & Overy LLP p 3; BRC, British Retail Consortium, UK p 3; Bundeswettbewerbsbehörde, AT p 5; BVMW, Bundesverband mittelständische Wirtschaft, DE p 1; CEA-PME, Confédération Européenne des Associations de Petites et Moyennes Entreprises p 1; Naganawa, Prof. Tomoaki (Osaka University of Economics) p 1; NautaDutilh, NL p 3-5; Norton Rose LLP p 2; Norwegian Ministry of Government Administration and Reform, NO p 3; ÖBB-Infrastruktur Bau Aktiengesellschaft, AT p 12; Office for the Protection of Competition of the Czech Republic, CZ p 2; Österreichischer Rechtsanwaltskammertag, AT p 2; Reed Smith LLP p 1; RIAD, International Association of Legal Expenses Insurance p 2; Vilà Costa, Blanca; Oró Martínez, Cristian (Universitat Autònoma de Barcelona), ES p 4.

⁷¹ Ernst & Young p 2.

⁷² See e.g. Allen & Overy LLP p 4; Företagarna, Federation of Private Enterprises, SE p 2.

One of the main issues will be the Community-wide mutual recognition of qualified entities. 'This is likely to be achieved through a Directive, which will probably be setting certain criteria for mutual recognition of designated or certified entities'.⁷³

(3) *Opt-In Collective Actions*

Given the negative meaning of the term 'class action', the European Commission considers it wise not to talk about 'class action' but of 'collective action'.⁷⁴ They are, however, one and the same.⁷⁵

Many respondents favour the European Commission's proposals of setting up an opt-in collective action – or class action – mechanism.⁷⁶ One respondent clearly indicates that the 'real question at stake concerns the opportunity to introduce at EU level, rules that would allow the possibility for a group of victims to aggregate their claims within the framework of one single action'.⁷⁷ Another commentator considers 'the creation of opt-in collective actions ... as positive steps towards the objective of strengthening private litigation'.⁷⁸

(4) *Specific Proposals*

Given the vagueness of the European Commission's proposals, some respondents submitted ideas as to how best implement a prospective opt-in collective action.⁷⁹ Other answerers consider the proposals of the European Commission either for representative actions⁸⁰ or for opt-in collective actions⁸¹ as insufficient, and suggest it take into account the experiences of the US and Canada, among others, to improve the prospects of

⁷³ Annex to IMEDIPA, Institute for Studies in Competition Law and Policy, GR p 88. See also Vilà Costa, Blanca; Oró Martínez, Cristian (Universitat Autònoma de Barcelona), ES p 4. See also Reed Smith LLP p 1.

⁷⁴ See e.g. Annex to IMEDIPA, Institute for Studies in Competition Law and Policy, GR p 87.

⁷⁵ See e.g. Gaudet, Robert Jr. p 2.

⁷⁶ Conseil de la Concurrence, Inspection de la Concurrence, LU p 3; AECLJ, Association of European Competition Law Judges p 3-4; EuroCommerce p 4; CEA-PME, Confédération Européenne des Associations de Petites et Moyennes Entreprises p 1; CFI, Claims Funding International, IE p 2; DBF, Délégation des Barreaux de France, FR p 6; Företagarna, Federation of Private Enterprises, SE p 2; IMEDIPA, Institute for Studies in Competition Law and Policy, GR p 1; Naganawa, Prof. Tomoaki (Osaka University of Economics) p 1; Norwegian Ministry of Government Administration and Reform, NO p 3; Reed Smith LLP p 2; RIAD, International Association of Legal Expenses Insurance p 2; Valli & Associati Studio Legale, IT p 3; AFEC, Association Française d'Etude de la Concurrence, FR p 5.

⁷⁷ EuroCommerce p 4.

⁷⁸ Vilà Costa, Blanca; Oró Martínez, Cristian (Universitat Autònoma de Barcelona), ES p 4.

⁷⁹ AFEP, Association Française des Entreprises Privées, FR p 10; Pavia e Ansaldo Studio Legale, IT p 4; Addleshaw Goddard LLP p 2. Baker & McKenzie LLP (p 2) considers the European Commission's stance on whether opt-out mechanisms are unacceptable to be unclear.

⁸⁰ See e.g. OFT, Office of Fair Trading, UK p 5. See generally Which?, UK p 4-6, for its own experience regarding the JJB Sports case.

⁸¹ See e.g. UFC Que Choisir, FR p 4, which speaks about a 'closed action' (action fermée); Office for the Protection of Competition of the Czech Republic, CZ p 3; Taylor Wessing LLP, UK p 2.

consumer success.⁸² A vociferous critic of the European Commission's appraisal of US class actions is Gaudet, Robert Jr.: 'Fundamental facts about class actions in ... the U.S. are not being heard. Or they are not understood. [The European Commission] presented ... a bundle of misconceptions, emotional feelings, and stereotypes about the opt-out mechanism'.⁸³

(ii) *Negative Answers to the European Commission's Proposals*

(1) *General Opposition*

Somewhat more than half of the respondents oppose the introduction of class action mechanisms in Europe, as the resulting losses to society may greatly outweigh purported gains. Even though the European Commission does not use the expression 'class actions', many opponents to the European Commission's measures believe that, if left unchecked, US-style class actions might become a European reality.⁸⁴

One major concern of some respondents relates to the general unpredictability – or legal uncertainty – that the European Commission's proposals bring forth.⁸⁵ Several commentators express their uneasiness about having two concurrent competing discussions about collective redress, one touching competition law with the other pertaining to the wider consumer protection debate taking place under DG SANCO's aegis. Indeed, they fear having a general consumer Directive or Regulation and a specific Directive or Regulation concerning solely competition matters.⁸⁶

⁸² See e.g. UK Competition Law Association, UK p 4; TILP Rechtsanwälte, DE p 3; Cohen Milstein Hausfeld & Toll LLP p 3-4, suggests (p 4) 'that perception does not reflect current reality given recent legislative and case law (jurisprudence) changes in the US, and never reflected reality in those other countries or territories where opt-out class actions are allowed. And [Cohen Milstein Hausfeld & Toll LLP believes] that evidence shows that it is only in those countries where opt-out class actions (in some form or other) have been allowed that redress for competition breaches, particularly for consumers, is a reality'. See also the whole discussion developed by ABA, American Bar Association, Sections of Antitrust Law, US p 23-30 which is fairly critical of the European Commission's proposals.

⁸³ Gaudet, Robert Jr. p 66-67.

⁸⁴ European Justice Forum p 5-6; Economie Suisse, CH p 1-2; UEAPME, Union Européenne de l'Artisanat et des Petites et Moyennes Entreprises p 2; AMCHAM EU, American Chamber of Commerce to the European Union p 2; Assonime, Associazione fra le società italiane per azioni, IT p 13; BDEW, Bundesverband der Energie-und Wasserwirtschaft, DE p 4; BusinessEurope, Confederation of European Business p 4; Confederation of Swedish Enterprise, SE p 4; EBF, European Banking Federation p 3; FDP Bundestagsfraktion, DE p 2-3; GDV, Gesamtverband der Deutschen Versicherungswirtschaft, DE p 9; Groupe France Télécom, FR p 1; HDE, Hauptverband des Deutschen Einzelhandels und Handelsverband BAG, DE p 2; ICC, International Chamber of Commerce p 2; Kesko Corporation, FI p 2; ORGALIME, European Engineering Industries Association p 2; UGAL Union des Groupements de Détaillants indépendants de l'Europe p 2; VDMA, Verband Deutscher Maschinen und Anlagenbau, DE p 3; Wind Telecomunicazioni S.p.a., IT p 4; ZDH, Zentralverband des Deutschen Handwerks, DE p 3; ZGV, Zentralverband Gewerblicher Verbundgruppen, DE p 3; ZKA, Zentraler Kreditausschuss, DE p 3.

⁸⁵ See e.g. Belgian Competition Authority (Directorate General), BE p 1; Swiss Reinsurance Company, CH p 2.

⁸⁶ CEA, European insurance and reinsurance federation p 2; BusinessEurope, Confederation of European Business p 4; Assonime, Associazione fra le società italiane per azioni, IT p 13; DIHK, Deutscher Industrie-und Handelskammertag, DE p 1; Swiss Reinsurance Company, CH p 2; Työ- Ja

(2) Fear of US-Style Litigation

Respondents from a diversity of backgrounds fear that the proposed actions by the European Commission might open the Pandora Box of US-style litigation. Public institutions,⁸⁷ law firms,⁸⁸ and business organizations – either American⁸⁹ or European⁹⁰ – all indicate the risk of creating new collective redress mechanisms in Europe. Indeed, ‘despite the [European] Commission’s clear intention to create a balanced proposal which discourages frivolous litigation, the [2008WP’s] proposed framework lacks sufficiently concrete measures to protect against the long-term threat of litigation abuse’,⁹¹ such as excess incentives to bring suit,⁹² vulnerability to changing legal landscape,⁹³ or ‘shifting the balance too far in favour of claimants and creating the risk of unintended consequences that could allow less desirable aspects of the US class action system to develop and thrive in the EU’.⁹⁴ Indeed, many contributors believe that an opt-out mechanism is present in the 2008WP, either wilfully or due to the overall lack of clarity of the European Commission’s proposals. In the case of a representative action, the main cause for concern resides with the notion of identifiable victims rather than only identified victims.⁹⁵ Hence, ‘[a] representative action for damages which does not exclude the possibility of an opt-out model is to be rejected’.⁹⁶

(3) Basic Premises Are Misleading or Ineffective

Some commentators question the basic premises of the 2008WP.⁹⁷ Other contributors indicate that the collective redress mechanisms proposed by the European Commission

Elinkeinoministeriö, Arbets- och näringsministeriet, Ministry of Employment and the Economy, FI p 2; Wind Telecomunicazioni S.p.a., IT p 4; UGAL Union des Groupements de Détaillants indépendants de l’Europe p 6.

⁸⁷ See e.g. Bundesrat, DE p 2.

⁸⁸ See e.g. Chiomenti Studio Legale, IT p 2; Clifford Chance LLP p 1; Howrey LLP p 5-8.

⁸⁹ ILR, US Chamber Institute for Legal Reform, US p 4-5; AMCHAM EU, American Chamber of Commerce to the European Union p 2.

⁹⁰ BusinessEurope, Confederation of European Business p 3-4; EBF, European Banking Federation p 4; FEB, Fédération des Entreprises de Belgique, BE p 3; VCI, Verband der Chemischen Industrie, DE p 6; ZKA, Zentraler Kreditausschuss, DE p 3-4.

⁹¹ ILR, US Chamber Institute for Legal Reform, US p 2.

⁹² ILR, US Chamber Institute for Legal Reform, US p 7, according to which, ‘under the [2008WP’s] proposed framework, a plaintiff potentially could be able to recover a damages award greater than what is available in the United States on lesser showing’.

⁹³ ILR, US Chamber Institute for Legal Reform, US p 8.

⁹⁴ AMCHAM EU, American Chamber of Commerce to the European Union p 1.

⁹⁵ 2008CSWP op cit note [...] § 52 p 19.

⁹⁶ Bundesministerium für Wirtschaft und Technologie, Bundesministerium der Justiz, Bundesministerium für Ernährung, Landwirtschaft und Verbraucherschutz, Bundeskartellamt, DE p 5. See also Bundesrat, DE p 4; CBI, Confederation of British Industry, UK p 3; CCBE, Council of Bars and Law Societies of Europe p 3; CCIP, Chambre de commerce et d’industrie de Paris, FR p 2; Chiomenti Studio Legale, IT p 2; Clifford Chance LLP p 1; Confederation of Swedish Enterprise, SE p 4; Wirtschaftskammer Österreich, AT p 8-10.

⁹⁷ See e.g. Department of Enterprise, Trade and Employment on behalf of Ireland, IE p 10.

are ineffective, due to various causes, namely lack of legal infrastructure, opt-in collective actions are too risky, lack of awareness, and different judicial systems between Member States.⁹⁸ Another respondent identified an inherent contradiction within the proposed system as a claim could be brought via a representative action and by an opt-in collective action. An unlucky defendant would thus be ordered to pay twice for his infringement.⁹⁹

(4) *Specifically Against Representative Actions*

The right to redress should be limited to the claimants and not a third party such as an association. This is due to the fact that claimants have a financial interest in the claim and are hence best suited to protect the claims of other parties in the same situation.¹⁰⁰ A respondent thinks that associations could become professional ‘paralegal’ entities not bound to their clients by a deontological code akin to the relationship between attorneys and their clients.¹⁰¹ Others see in the European Commission’s proposals an obvious risk for abuse, given the uncertainty engendered by the European Commission’s lack of clarity.¹⁰² Another respondent declares that it is not the role of specific private entities to take up the role of public authorities.¹⁰³ Lastly, some contributors believe that state bodies should be excluded to act as representative entities because it is not the state’s mission to claim compensation on behalf of its citizens or because these state bodies may have access to information held by the competition authorities.¹⁰⁴ With respect to ad hoc associations, one commentator considers such associations subject to abuse by forcing some sort of allocation between victims,¹⁰⁵ while others think such associations ‘may create legal uncertainty and raise potential conflicts of interest’.¹⁰⁶

⁹⁸ CDC, Cartel Damages Claims, BE p 5-6; HCLRC Hungarian Competition Law Research Centre, HU p 3; Bird & Bird LLP p 3.

⁹⁹ NOAB Nederlandse Orde van advocaten bij de balie te Brussel, BE p 3. See also ABA, American Bar Association, Sections of Antitrust Law, US p 28-29, according to which another ‘concern flowing from the [European] Commission’s recommendations is the potential for undue procedural complexity engendered by overlapping actions. [Including individual claims, there are three different overlapping actions,] creating a complex and expensive procedural maze’.

¹⁰⁰ ESBG, European Savings Banks Group p 3; VCI, Verband der Chemischen Industrie, DE p 5.

¹⁰¹ NOAB Nederlandse Orde van advocaten bij de balie te Brussel, BE p 3-4. These associations are compared to contingency fee lawyers by Sullivan & Cromwell LLP p 2.

¹⁰² O’Melveny & Myers LLP p 4-5; SEV Hellenic Federation of Enterprises, EL p 3.

¹⁰³ Wirtschaftskammer Österreich, AT p 7.

¹⁰⁴ ZKA, Zentraler Kreditausschuss, DE p 5; EBF, European Banking Federation p 3.

¹⁰⁵ BGA, Bundesverband des Deutschen Groß- und Außenhandels, DE p 2.

¹⁰⁶ Bonelli Erede Pappalardo, Bredin Prat, Hengeler Mueller, Slaughter and May, Uría Menéndez p 11; FEB, Fédération des Entreprises de Belgique, BE p 2; ORGALIME, European Engineering Industries Association p 2; DBF, Délégation des Barreaux de France, FR p 6; FEB, Fédération des Entreprises de Belgique, BE p 2; Bonelli Erede Pappalardo, Bredin Prat, Hengeler Mueller, Slaughter and May, Uría Menéndez p 11.

(5) Member States' Jurisdiction

Several respondents consider that 'matters which relate to civil procedure in individual Member States generally should not be amended by way of general European legislation or guidance, just because they happen to raise issues when applied in the competition law context. The civil procedure codes of the different Member States are the product of long term development based on culture and experience. Whilst there is always room for improvement in such codes and that special treatment for certain types of cases may sometimes be necessarily appropriate, European legislation making unilateral changes to particular elements of those codes ... could fail properly to take into account the balance struck in a particular national system'.¹⁰⁷

(iii) European Institutional Responses

EESC agrees with the European Commission on the main issues.¹⁰⁸ However, EESC states that follow-up measures 'should be in line with other proposals on collective redress, namely those currently under way at DG SANCO, and need to be dealt with in a coordinated and coherent manner so as to avoid pointless duplication of judicial instruments, creating huge transposition and application difficulties in Member States'.¹⁰⁹ Conversely, the European Parliament welcomed in a lukewarm way the proposals set forth in the 2008WP.¹¹⁰ In its introductory remarks, EP underlines several times its perceived necessity to limit the expansionist views residing in the European Commission's proposals.¹¹¹ In his explanatory statement,¹¹² the rapporteur expresses his skepticism. Indeed, he 'doubts that private-law law enforcement mechanisms are underdeveloped in the Member States, since many Member States have strengthened private enforcement further to the relevant Court of Justice case-law'.¹¹³ Moreover, 'the

¹⁰⁷ LIDC, Ligue Internationale du Droit de la Concurrence p 1-2. See Bundesministerium für Wirtschaft und Technologie, Bundesministerium der Justiz, Bundesministerium für Ernährung, Landwirtschaft und Verbraucherschutz, Bundeskartellamt, DE p 2, where it reminds the European Commission about the subsidiary principle enshrined in Article 5 § 3 TFEU. See generally CEP, Centrum für Europäische Politik, DE p 1; IV, Industriellenvereinigung, AT p 2; VCI, Verband der Chemischen Industrie, DE p 2; ZKA, Zentraler Kreditausschuss, DE p 2; BusinessEurope, Confederation of European Business p 2.

¹⁰⁸ EESC, Opinion of the European Economic and Social Committee on the White Paper on damages actions for breach of the EC antitrust rules, COM(2008) 165 final (2009/C 228/06) (hereinafter: 'EESC (2009/C 228/06)') p 40.

¹⁰⁹ EESC (2009/C 228/06) op cit note [...] p 44.

¹¹⁰ European Parliament Resolution of 26 March 2009 on the White Paper on damages actions for breach of the EC antitrust rules (2008/2154(INI)) (hereinafter: 'EPR, 2008WP').

Available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2009-0187+0+DOC+XML+V0//EN> accessed on 10 August 2010.

Regarding collective redress mechanisms for consumers, EP followed in almost its entirety CEMA, 2008WP Report op cit note [...].

¹¹¹ EPR, 2008WP p 1-2 letters C., E., I., and J, which are – only for a few minor details – materially identical to the ones mentioned in CEMA, 2008WP Report op cit note [...] p 4.

¹¹² CEMA, 2008WP Report op cit note [...] p 9-12, esp. p 9-10.

¹¹³ CEMA, 2008WP Report note op cit note [...] p 9.

rapporteur also has doubts as to the Commission's competence for its proposals,¹¹⁴ both vertically, according to the principle of subsidiarity, and horizontally. The rapporteur thus invites the European Commission to wait 'for the communication from DG [SANCO] on the subject of collective enforcement mechanisms before entering into a discussion on a horizontal instrument for collective enforcement instruments.'¹¹⁵ Regarding qualified entities empowered to file a representative action, the rapporteur 'calls for only a clearly identified group of people to be able to take part in a representative action; identifiability [sic] is not enough.'¹¹⁶

V. SOUTH AFRICAN DEVELOPMENTS-CLASS ACTION

In the *Ngxuza* case¹¹⁷, Supreme Court Justice Cameron described South African class actions generally:

"In the type of class action at issue in this case, one or more claimants litigate against a defendant not only on their own behalf but on behalf of all other similar claimants. The most important feature of the class action is that other members of the class, although not formally and individually joined, benefit from, and are bound by, the outcome of the litigation unless they invoke prescribed procedures to opt out of it."¹¹⁸

Class action suits may be brought against companies or individuals in South Africa. They are usually initiated when joinder is impractical, but where the parties nonetheless seek to avoid spending unnecessary time and money on individual claims. Class actions are thus intended to enhance "(1) judicial economy and efficiency; (2) protection of defendants from inconsistent obligations; (3) protection of the interests of absentees; (4) access to judicial relief for small claimants; and (5) ... [enforcement of the] laws and [deterrence of] wrongdoing."¹¹⁹

i. Defining the class

¹¹⁴ CEMA, 2008WP Report op cit note [...] p 9.

¹¹⁵ CEMA, 2008WP Report op cit note [...] p 9.

¹¹⁶ CEMA, 2008WP Report op cit note [...] p 9.

¹¹⁷ *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza* 2001 (4) 1184 (SCA). This was not a competition law-related case, but instead illustrates the issues in class action cases.

¹¹⁸ *Ibid* at 1192-1194.

¹¹⁹ Ian Simmons and Alexander Okuliar "Private Enforcement of the U.S. Antitrust Laws through Class Actions" in ICLG Competition Litigation 2009. <http://www.iclg.co.uk> and see Alba Conte and Herbert B. Newberg, 1 Newberg on Class Actions sec 1.1 (4th edition) 2002.

It is imperative that the parties bringing the action first define the class of people included in the action. In *Beukes v Krugersdorp Transitional Local Council and another, not an antitrust case*, ratepayers challenged the unequal tariffs imposed on them by the local Council. The respondents argued that the class had not been properly defined for a class action and they had not given individual affidavits supporting the application. Justice Cameron held that dismissing this case would be contrary to the spirit of Section 38 and thereby allowed the applicants to submit their affidavits.¹²⁰ Although there are no antitrust class actions to refer to, it is generally necessary for the class to be defined first and for the Court to certify that such class has standing before the case can proceed on the merits. Exactly what is required is unclear.

In the paper produced by the South African Law Reform Commission, the Commission recommended that a class action be defined as "an action instituted by a representative on behalf of a class of persons in respect of whom the relief claimed and the issues involved are substantially similar in respect of all members of the class and certified as a class action".¹²¹ This definition has not been formally entrenched in our law, which is why this remains an unresolved debate.

ii. How to bring a class action suit.

To date, there has been no class action suit for damages under Competition Law in South Africa. Even though there have been class action cases decided at the Constitutional Court, there are no formalized procedures or guidelines on how to bring a class action for a competition related case.

The South African Law Reform Commission¹²² recommended in its 1998 report to the Department of Justice, titled *The Recognition of Class Actions and Public Interest Actions in South African Law*¹²³, that a class action may be brought when:

¹²⁰ *Beukes v Krugersdorp Transitional Local Council and another* 1996 (3) SA 467 (W) at 474G-I)

¹²¹ South African Law Commission *Report on the recognition of class actions and public interest actions in South African law*. Project 88, August 1998.

¹²² A statutory body enacted under the South African Law Reform Commission Act 19 of 1973. This Commission has established various working committees, projects and writes discussion and research papers as well as made recommendations for legislation to the Minister of Justice. See www.doj.gov/za/salrc/docs_gen/function.htm.

there is an identifiable class of person;

- a cause of action is disclosed;
- there are issues of fact or law which are common to the class;
- a suitable representation is available;
- the interests of justice so requires; and
- the class action is the appropriate method of proceeding with the action.”¹²⁴

In this Report, the Law Commission advocated for legislation to be drafted to serve as a guide in defining the roles and procedure for class action and public interest suits, especially in non-constitutional cases.¹²⁵ The South African Constitution is the supreme law of the land and all law must be consistent with the provisions of the Constitution. If it is not, it will be rendered invalid by the Constitutional Court. The Constitutional Court only hears matters of a constitutional nature (i.e. that fall within the Constitution Act) and all other matters can be ultimately appealed to the Supreme Court of Appeals, the final court of appeal in non-constitutional matters. Unfortunately, at this stage, there has been no legislation enacted to iron out these issues.

iii. Giving notice to members of a class action

As it has been defined above, judgment in a class action affects everyone in the class who has not opted out. It is therefore imperative that members of the class be aware of the impending damages claim. The outcome of the claim could be rewarding to that member, or it could be detrimental if the member is not able to take further action and would be liable for the costs of the action. Court costs are not automatically required from the losing party. It is usually up to the Court to decide if costs should be awarded but the fact that the claimant may be required to cover their opponent’s legal fees if he or she loses may also be a deterrent to bringing damages suits.

Currently there is no prescribed form for giving notices of class actions. Plaintiffs can individually contact members of the class, publish the notice in the Government

¹²³ South African Law Commission *Report on the recognition of class actions and public interest actions in South African law*. Project 88, August 1998
http://www.doj.gov.za/salrc/reports/r_prj88_classact_1998aug.pdf

¹²⁴ Ibid at xv.

¹²⁵ South African Law Commission *Report on the recognition of class actions and public interest actions in South African law*. Project 88, August 1998
http://www.doj.gov.za/salrc/reports/r_prj88_classact_1998aug.pdf para 3.1.1.

Gazette, or advertise using different media such as newspapers or the internet¹²⁶. Considering the lack of formal guidance available for how to notify class members of the action, it has been submitted that the Courts should make notice compulsory, and all reasonable forms of advertisement to prospective class members be utilized.

iv. Option to opt out

As in many other jurisdictions, South African courts give parties the option to opt out of a class action.¹²⁷ Individuals may opt out of a class action suit for various reasons. For example, they may not have the financial resources or time to see the action through, they may not have a large financial stake in the suit, they may believe that they are not part of the “class” or that the legal representative is not acting in their best interest, or they may believe they have a better chance of success if they sue for damages independently.¹²⁸ In such cases, the individual may give written notice to the plaintiffs’ attorneys or the court indicating their desire to opt out of the action. The cut-off date to opt out is unclear.

VI. GENERAL OUTLOOK

As the Competition authorities gain momentum with investigations and reach successful outcomes, the interest in pursuing civil claims for damages will also heighten. This will in turn promote a symbiotic relationship between the private and public enforcers who will rely on each other for evidence gathering and information. Whether that exchange of information would include submissions from leniency applicants is still to be determined, as these are untested waters. However, what remains clear is that confidential information given to competition authorities cannot automatically be handed over to parties in a damages suit. Only when confidentiality is waived can the information enter the public domain. One of the major obstacles that potential claimants face is the lack of clear procedural direction, which will in time be ironed out by much needed guidelines. It is submitted that South Africa will perhaps soon be seeing a greater number of private claims coming to the fore.

¹²⁶ See for example, a notice to join a class action suit advertised on the internet: <http://www.southafrica.to/transport/Airlines/SAA-flights/anti-SAA/SAA-strike/SAA-strike.php5> and <http://www.flyafrika.info/forums/showthread.php?s=18f51163a3dbe0feefb87c5e47b0b950&t=13124>

¹²⁷ *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza* 2002 (2) SA 609 (E) at 630 C-J).

¹²⁸ See http://www.lawsuitsearch.com/class_action_opt_out.aspx.

A number of lawyers stand ready to represent claimants. In South Africa, even though there is a relatively small niche of lawyers who practice antitrust law, many of them come from the largest law firms in the country where these law firms have specialized antitrust law departments. There are also less-specialized advocates who have worked on many cases in which they have developed a fair amount of antitrust expertise. It is submitted that the driving force behind damage claims will be the mid-sized companies (perhaps those below the market power threshold of 45 per cent) who have been affected by anti-competitive conduct or consumer groups that are able to mobilize and take on these antitrust damage claims as class action litigants. For a consumer organization to have a right to bring a representative action, however, amendments would have to be made to the Competition Act. The cost and risks of litigation are always a major factor. Although parties have been encouraged to sue for damages, there has been no active role played by government authorities in the form of, for example, guidelines on private damages. What is needed is a strengthened relationship between public and private enforcement, which will benefit competition in South African markets.