CHAPTER 8
Fast, Effective and Low Cost Redress: How Do Public and Private Enforcement and ADR Compare?

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§8.01 THE NEED TO REASSESS POLICY

The findings of the research reported in this book show that there is considerably more private enforcement of competition law than had previously been imagined, that enforcement is far wider than just actions for damages, and that the context in which competition law is most invoked is business to business (B2B) relations. This is in stark contrast to the finding of the Ashurst Study, which famously found that nearly all Member States have civil litigation systems under which damages claims may be brought but that the system was one of ‘total underdevelopment’, finding only 60 cases in Member States in which judgment had been delivered.1

Other evidence has accumulated since the Ashurst study that much more litigation exists than was previously thought. In Germany, 900 private law antitrust cases were registered between 2002 and 2006; 68 of 240 decisions between 2002 and 2004 had been asserted offensively, of which 38 had involved damages claims.2 Peyer’s study found 368 private antitrust cases dealt with before German courts from 2005 to

* Grateful thanks to Barry Rodger and Morten Hviid for comments on the draft: the usual disclaimers.

2007 (only 2.2% of which were follow-on cases), and suggested that the actual figure was significantly higher.\(^3\)

In the United Kingdom, Rodger’s survey of legal practitioners identified 43 out-of-court settlements in between 2000–2005 related to anti-competitive practices (about seven per year), against only one in the Ashurst Report.\(^4\) The outcomes led to payment of damages in 23.2% of those settlements, agreement as to future conduct in 27.9%, a combination of both those outcomes in a further 20.9%, withdrawal of the claim in 11.6%, and some other outcome in 16.3%. There was some difference between the levels of damages claimed and paid at under GBP 20 million levels. Rodger’s later study\(^5\) found that there were a total of 41 (interim or other) judgments in competition litigation cases in the UK between 2005 and 2008, thus averaging about 10 judgments per year, in 29 of which the claimants raised a competition law issue. Of the judgments, 25 were first instance, nine in the Competition Appeal Tribunal (CAT), and seven appeals. Litigants relying on competition law were unsuccessful in 48.8% of cases, successful in 43.9%, partially successful in 7.3%. Seven cases (12 judgments) were follow-on actions; 29 were not follow-on. The number of cases brought by claimants who raised a breach of competition law, whether stand-alone or follow-on, and their success rates, is unclear from the data. The UK Government stated in 2012 that the research showed that only around 30% of cases were follow-on, a total of three per year.\(^6\)

The UK competition pro bono scheme receives around 100 enquiries a year, of which around 30% are rejected and the remainder referred on to lawyers on the panel for further advice.\(^7\) Ultimate outcomes are unknown. The overwhelming majority of complaints relate to vertical arrangements between suppliers and distributors.

Anecdotal evidence suggests that major companies obtain restoration of losses caused by cartels through private negotiations: they note if any of their suppliers are listed in cartels sanctioned by public authorities and then negotiate bilaterally, often without resorting to litigation, for example a reduction on the price when a further contract is renegotiated.\(^8\) Such situations remain largely confidential.

Taken together, these consistent findings reveal that competition law is invoked – and applied – on a consistent basis in many Member States. The findings highlight two major differences between jurisdictions that give rise to variations in litigation.

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7. The Competition Pro Bono Scheme: 500th Query Review (Greenberg Traurig Maher 2011); supplemented by information kindly provided by Stephen C. Tupper.
8. Oral communications with the author in 2012; these matters are widely known in the competition community, but remain unresearched.
First, different trends exist in the subject matter, or sectors, which are subject to enforcement or litigation in different national contexts (such as the fashion for multiple petrol retailer actions in Spain). Second, the major technical issue seems to relate to differing national impediments in civil procedure: it is easier to sue and to bring mass claims in some countries than others. This is the picture in relation to B2B issues. There remains a question over whether indirect purchasers, especially consumers, may remain uncompensated, since almost no damages claims or settlements relate to them. But before progressing that idea further, it would be important to know how serious any gap is: how often do consumers lose out and what losses are involved? What is the direct cost pass-through? How would compensation, which is a lump sum amount and hence should have no direct effect on price setting, feed through to lower costs via R&D investments? Are these issues something we should be worrying about, or are they illusory problems? There is no data on those issues.

The European Commission has based its policy on reform of private enforcement of competition law solely on the Ashurst study and an external 2007 study.\(^9\) The policy was developed in the 2005 Green Paper\(^10\) and 2008 White Paper (which proposed two mechanisms for aggregating damages claims for competition claims:\(^11\) a collective private damages claims brought by two or more individuals (‘a group action’), and a ‘representative action’ brought by a qualified entity on behalf of injured parties), and the 2013 Recommendation on collective redress (which called for every Member State to introduce a generic collective action within four years, including specified features)\(^12\) and proposal for a Directive on competition damages.\(^13\) The Commission’s Impact Assessment that accompanied the White Paper claimed that:

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\text{the total annual cost for hardcore cartels in the EU can be estimated to range from approximately } €25 \text{ billion (on the most conservative assumptions) to approximately } €69 \text{ billion (on the least conservative). Expressed as a proportion of the EU’s gross domestic product, the negative consumer welfare impact of all these hardcore cartels is estimated as ranging from 0.23} \% \text{ to 0.62} \% \text{ of the EU’s GDP in}
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\(^{10}\) COM(2005) 672, 19 Feb. 2005. Proposals relate to access to evidence, burden of proof, calculation of damages, limitation rules, whether claims should be aggregated, whether an opt in or opt out model should be applied, and whether punitive damages should be available.


2007 …. To illustrate the harm created by cartels and thus the potential benefits of enhanced private enforcement differently: if more effective compensation mechanisms were to lead to a reduction of hardcore cartels by, for example, 5%, the negative consumer welfare impact would be reduced by €1.25 to €3.45 billion.¹⁴

Based on the evidence that there is far more claiming and payment of competition damages than was assumed to be the case, even if the position is mixed across Europe, those assertions turns out to be an over-estimate to a clearly significant extent.

Three serious questions are raised by this situation. First, is current policy, and in particular the 2013 proposal, still reliably well-founded?¹⁵ Second, should policy be re-assessed, especially on the basis of issuing a revised impact assessment, so that we know whether and how significant the residual problem is? Third, the method of making major policy decisions based on reliance on a single study can be seriously questioned: should the whole methodology be reviewed? In my view, the answer to these questions is: no, yes, and yes.¹⁶ Will DG COMP and the Commission as a whole have the humility to carry out such a reassessment? Will the European Parliament and the Council hold the Commission to account here?

Pending such reassessment, further analysis of the differing methodologies by which redress may be claimed and delivered is somewhat premature. It may even not be needed, if the demand is too low. Nevertheless, this chapter proceeds on the theoretical basis that there is a demand for redress, and that various mechanisms should be compared and evaluated. It is, however, relevant to review what the nature of that demand might be.

The findings of the study reported in this book suggest above all that private enforcement of competition law is mostly used by businesses in commercial contract (B2B) disputes, often as one of a number of arguments that are primarily about contract law rather than competition law, and which sometimes raise competition arguments as defences. Accordingly, the question that arises is whether competition law could be better integrated within other commercial or consumer trading law and systems, so as to be more effective. Second, speed of response to competition infringements is of paramount importance, so injunction remedies are far more important than damages. Third, since there have been almost no small value mass consumer claims based on competition law in any Member State, the question arises whether the real focus should be on providing redress for ultimate consumer purchasers. This is not a new question, but, as noted above, whether it is a real question in practice, or a solution in search of a question, depends now more than before on empirical research that is not available.

¹⁵. We should be conscious that situations change over time. Was the policy wrong from the start, or does it simply need to be re-assessed now?
¹⁶. The Ashurst study showed what DG COMP expected it to show, but which turns out to be incorrect. Policy-making should be based on research that is planned independently from the policy-maker, not just carried out independently, and without the constraints of focus, budget and time that are imposed.
Of these three questions, the rest of this chapter will bear in mind the third question in particular, on consumer redress. The findings of the current study suggest that there are multiple inter-connected reasons why ultimate purchaser claims remain unresolved. The reasons for this include the inherent complexity of competition law and of establishing issues such as dominance or that a cartel exists, problems of proving quantum of damage, high cost of both litigation and distribution of funds, grossly disproportionate and unattractive cost-benefit rations for funders of litigation. At the 2012 conference at which the preliminary study findings were reported, it was questioned whether litigation could ever be an effective answer to such problems in the European context. This chapter will proceed by focusing primarily on developments at EU and UK levels.

§8.02 THE MAIN OPTIONS FOR DELIVERING REDRESS

Assuming there exists reasonable evidence that an infringement has occurred, the following are the principal options for achieving payment of compensation for loss:

1. The infringers would voluntarily agree to pay compensation to those who have suffered loss. This result might be facilitated by independent parties, such as through some form of alternative dispute resolution (ADR) assistance.

2. A public authority would influence the infringers to pay compensation, or would order them to do so, or would ask a court to order this.

3. The defendants would decline to pay compensation, maybe also the public authority would decline to be involved in compensation issues, and private parties would be able to bring private actions for damages. This might be facilitated by intermediaries, notably litigation funders and lawyers.

It is noteworthy that the 2005 Commission Green Paper on competition enforcement omitted to identify alternative policy options to that of enhancing the litigation option. Subsequent statements have increasingly mentioned ADR, but no mention has been made at EU level of the regulatory redress option, neither have any impact assessments focused on any method other than private litigation. This is shameful. The Commission itself requires that legislative proposals require formal impact assessments that analyse the likely economic and social impacts, consider all alternative policy options, and compare the impacts of different options. The Commission’s Impact Guidelines recommend that even Green Papers should ‘where possible, provide an indication of the possible pros and cons of the different options presented for consultation’.

Although the Commission has only focused on the litigation technique, with some reference to ADR in the background, all three options have recently been the

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18. Ibid., s. II, n. 6.
subject of consultation and wide debate in the UK,\textsuperscript{19} so the following discussion is able
to draw on that rich seam of thought. Indeed, the UK government announced in 2013
that it intends to adopt all three options,\textsuperscript{20} as discussed below.

In evaluating these three (or any other) techniques, the criteria that should be
applied are the effectiveness of the technique(s) in delivering due compensation, the
speed of the procedure, its cost and hence efficiency.\textsuperscript{21} Techniques are usually
evaluated only against a policy of maximizing access to justice, or ability to assert
rights. But it is suggested that where there is a choice between several techniques, the
important questions relate to evaluating the outcomes of maximizing the achievement
of due compensation, speed, cost and efficiency, on a comparative basis. Theoretical
comparisons of public and private enforcement have hitherto only compared calculations
on the supposed costs of those two methods of enforcement – but omit the key
criteria of duration and the practical realities of costs and affordability to claimants and
their funders.\textsuperscript{22} Other criteria might arise, such as fairness, justice, which are not
discussed here, since they should apply equally to every option.

As noted, an important criterion in evaluating a legal mechanism is the extent to
which it achieves desired outputs. There is a constant tension in liability law and
redress mechanisms between the output of achieving the redress that is legally claimed
and that of achieving wider behavioural effects: in particular, compensation and future
compliant behaviour (deterrence). These two possible outputs are in constant tension
in the enforcement of tort law and competition law. However, analysis of the extent to
which damages claims in competition might have a deterrent effect is a large and
complex issue and will not be examined further here. The analysis below focuses,
therefore, essentially on the two criteria of cost and duration – aspects that are
principally about the performance of each mechanism that is being compared.

\textsuperscript{19} Private Actions in Competition Law: A Consultation on Options for Reform (Department for
Business Innovation & Skills, 2012), (‘Consultation’) at http://bis.gov.uk/assets/biscore/
consumer-issues/docs/p/12-742-private-actions-in-competition-law-consultation.pdf (accessed
on 1 Oct. 2013).

\textsuperscript{20} Private Actions in Competition Law: a Consultation on Options for Reform - Government Response
(Department for Business, Innovation and Skills, Jan. 2013).

\textsuperscript{21} This approach is wider than that implicit in the UK’s 2012 Consultation, which effectively
considered only the ability to assert rights, under the policy of maximizing access to justice, but
not the question of measuring the outcomes of maximizing the achievement of due compensa-
tion, speed or cost on a comparative basis. However, the Response to Consultation by Which?
(the UK consumers association) stated ‘we agree that the focus now should be on reforming the
system such that the consumers and businesses affected are able to obtain redress in a manner
that is fair, quick, low cost and efficient’ and that by the CBI said ‘Collective redress for
consumers in competition cases should be delivered speedily and at minimum cost’.

\textsuperscript{22} The UK Consultation cites R.P. McAfee, H.M. Mialon and S.H. Mialon, ‘Private v Public Antitrust
consideration of duration, and the calculations that it models are based on the US cost system
that excludes the loser pays rule. Further, the starting assumptions of the paper are unsupported
and highly questionable: it asserts that ‘private enforcers have a greater incentive to take
antitrust action than public enforcers’ and private enforcers’ costs of detecting possible
violations and gathering initial evidence are lower [than public enforcers’]. Accordingly, that
analysis is of little relevance to the UK or EU context, and the UK Government erred in relying
on it.
This chapter proceeds by examining the three tracks just identified (ADR, public regulatory redress, and private litigation), and then draws conclusions. It will be suggested that the private class action technique may offer some solution in follow-on cases, but the same result can be achieved by ADR and regulatory techniques, if they are appropriately designed to achieve this. Questions, therefore, arise about duplication, cost and delay. For stand-alone claims, it is suggested that the theoretical benefits of a class action are unlikely to be realized in practice, in which case the availability of one or more of the other techniques will be essential. In short, the analysis suggests that current EU policy needs to be revised if compensation is to be achieved in practice when it is due.

§8.03 OPTION 1: VOLUNTARY SETTLEMENT PLUS ADR

It is intuitively clear that the institution by a firm of appropriate voluntary arrangements to pay compensation is likely to be the quickest way of achieving that outcome. An appropriate voluntary solution is also likely to save costs for all (the claimants, the payers, and the state authorities that may be involved, such as regulator or court). By contrast, if public or private legal procedures have to be followed, especially if such mechanisms have to observe ‘due process’ requirements and involve adversarial procedures and a series of formal stages, they are likely to take longer and cost more overall. In other words, ‘doing the right thing spontaneously’ is better than fighting throughout a lengthy formal procedure and then being compelled to do it.

Further, the earlier a voluntary solution can be implemented, the more will be saved in costs. However, involvement in the litigation process might result in a settlement in which a substantial discount is negotiated: whether this is worthwhile in comparison to the costs incurred will be different in every case. It may be necessary for public and/or private mechanisms to play some organizational role, but as far as achieving payment of compensation is concerned, it is often the objective to enable the infringing firm(s) to agree an arrangement as quickly as possible under which it/they will implement payment.

If payment of compensation is to be made, assuming liability is accepted, answers to the following questions need to be clear:

1. To which payees should payment be made (identification)?
2. Does each claimant have a valid claim (verification)?
3. How much should be paid to each payee (quantum)?
4. How to achieve distribution of payment (distribution)?

These four issues may present little problem in some cases, but may present major challenges in others. For example, some firms may hold the necessary information to resolve the identification issue. It may be the direct customers of the firm: an infringing firm(s) to agree an arrangement as quickly as possible under which it/they will implement payment.

23. That may be a major assumption in some stand-alone cases. In follow-on cases, the scope of the primary infringement decision may also limit the subsequent damages inquiry.
firm should normally know who its direct customers are. Where the number of customers is limited, such as in a vertical restraint of trade, the identification issue should present little problem. Some firms will also have electronic records of mass consumer customers, thus solving the identification issue. In some situations, the quantum will be easily identifiable, such as where a small number of payees is involved, or where every payee is due the same amount. However, in other situations, it may be a challenge to satisfy the identification, verification and quantum issues.

If a legal procedure is followed, it will involve a sequential process towards identification, verification, quantum and distribution, applying logic and law at each stage. In a mass private claim, for example, the main choices for approaching the identification issue lie between requesting individual payees to register (an opt-in approach) and considering that everyone who satisfies criteria are automatically registered but must de-register if they disapprove of a generic settlement reached on their behalf (an opt-out approach towards the class, followed by an opt-out stage before approval of settlement). Distribution of payment may be made either spontaneously by the payer or on the basis of application by individual payees. In some circumstances all this may be thought to be impossible to achieve, or too cumbersome, and some approximated equivalent solution may be applied. An example of an approximated solution was giving every telephone subscriber free calls for a weekend, thereby avoiding the impossible or grossly disproportionate approach of identifying everyone who might be due a small amount, which will have differed in every case.24 The great advantage of that solution was that it was implementable voluntarily and quickly. A court would not normally have power to order such a flexible solution, at least not in the absence of it being proposed by the parties as part of a settlement.

What are the options for a system that aims to induce voluntary payment of compensation? What incentives and/or compulsive forces (carrot and/or stick) would assist in achieving that outcome? The major incentives would be:

(a) To comply with an internal policy on ‘doing the right thing’ and obeying the law, perhaps in accordance with requirements in an internal statement of ethics and compliance programme.

(b) To avoid or reduce commercial damage for the firm resulting from damage to its reputation, and even to seek to enhance its reputation by announcing a swift voluntary restoration of a problem that it might claim to have discovered. The impact of this factor will be greater for firms that have high reputations in competitive markets. Firms that are small, or local, or have low reputations, or reputations for cost-cutting, should be less affected. Thus, this incentive may have force in relation to large retailers, or firms with large consumer brands, but less for lower profile intermediaries like wholesalers.

(c) To achieve a reduction in sanction(s) that will be imposed by the authorities, such as a reduction in a fine, especially if the fine would otherwise be large

and the amount of the reduction might be significant. This is similar to the very significant incentives that are currently operated under the leniency policy to induce reporting of a cartel by a whistle-blowing firm, which would receive total immunity from a fine. The (fairness and restorative) justice in such a result may be questionable, but such considerations might be discounted on the basis that infringements would not otherwise be identified and sanctioned.

(d) To avoid or reduce the costs of private litigation, especially if they are high. The impact of this factor will be greater for smaller firms than larger firms that have extensive resources or litigation insurance. It will be lessened if the size of damages payments is comparatively high.

The major compulsions would be:

(e) An order from a court at the conclusion of a private action for damages to make a payment. This compulsion arises in the form of an enforcement order after a civil court judgment.

(f) An order from a regulator to make a payment or put in place a restorative scheme.

The object of the various incentives and compulsions, whether individually or together, is to induce an infringing firm to avoid or cut short a formal process (such as one that would result in compulsions e or f above) and make a satisfactory voluntary offer of compensation, or engage in settlement negotiations to do so.

[A] ADR Assistance

How can parties who wish to pay compensation quickly be helped to do this? A range of independent expertise and systems can facilitate all of the key barriers of identification, quantum and distribution issues that were noted above. ADR techniques are now familiar options. ADR has spread widely and quickly in European legal systems, and is continuing to do so. To many people, ADR means a process of mediation that can be invoked before or during private litigation, in an attempt to reach a negotiated solution between existing identified parties. It can encompass a range of types, such as early neutral evaluation, facilitative conciliation between parties, mediation involving putting forward solutions, or even binding arbitration.

Systems are spreading quickly across European Member States for consumer ADR (CDR), based on an architecture of ombudsmen or other special bodies rather than courts, since it is a swift, cheap and effective means of resolving consumer-to-business (C2B) disputes. Recent EU legislation requires that CDR will be available for

every type of C2B dispute. CDR systems work for contract claims and could be extended for competition claims. They process claims individually but can inherently process mass similar claims. This system might offer opportunities for certain types of C2B competition claims, such as over-pricing, or new architectures might be inspired.

In response to the 2012 UK BIS consultation, support for ADR in competition cases was expressed by the Government, consumer representatives, business representatives, lawyers, and some academics. In its Consultation document, the Government noted that:

> cases being resolved through alternative means, avoiding court involvement, can be a more satisfactory outcome for all parties as well as reducing burdens on the state…. It therefore is minded to ensure that courts and the OFT can use ADR wherever suitable, and to encourage private and third sector bodies to provide further forms of ADR.

Thus, it intended to ‘strongly encourage’ ADR, via a ‘nudge’ approach that would make ADR the default first option.

Business Europe has put forward a model of ADR for competition claims, which would involve a Panel of independent experts chosen from a list held by a private sector ADR provider. It has the following main features:

1. it would apply to follow-on claims only;
2. it would be purely voluntary for all, hence all ‘parties’ must agree to use this ADR procedure, and must agree whether outcomes are going to be binding or not;

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30. The Response to Consultation by Which? was to ‘strongly encourage’ ADR use wherever possible.
31. Responses to Consultation by the Confederation of British Industry (‘ADR offers a quicker, cheaper form of redress with better outcomes.’), Bundesverband der Deutschen Industrie e.V., and Institute for Legal Reform of the US Chamber of Commerce.
32. Responses to Consultation by City of London Law Society (para. 1.16), CMS Cameron McKenna.
33. Response to Consultation by Hodges. But the competition experts at the University of East Anglia (UEA) objected to ADR, considering that it contradicts the aim of speeding up proceedings, the additional benefits of ADR in competition litigation are doubtful, and could adversely affect general deterrence.
34. Consultation, Ch. 6 introductory summary.
35. Consultation, para. 6.8.
the Panel would set the procedure in each case, but must issue notices to attract potential claimants;

(4) only publicly available information would be submitted to the Panel.

Without debating the pros and cons of such a scheme, it is clear that other competition-ADR schemes could be envisaged. A possible simpler version would be for a company to submit all its evidence (maybe internal documents assembled by independent investigators, or documents held by authorities that may even remain otherwise confidential) to an independent standing Panel for a determination, or indication, of all or some specific issues, such as liability, size of the class of victims, or total losses or profits. The results could be taken into account in subsequent discussions with either public authorities or representatives of private claimants. Alternately, the court or a regulator could refer some of the four questions posed at the start of this section (especially quantum and distribution) to an expert panel.

Business has asserted that ADR can provide effective redress on its own, without any ‘big stick’ compulsion, and should be the principal means by which consumers can achieve collective redress.³⁷ Mulheron and Smith suggest that:

infringers ought to be given the opportunity to offer redress schemes voluntarily before they are imposed: many companies will, we believe, wish to be seen to make good the harm caused to restore their reputations and will wish to avoid an order if at all possible. This will particularly be true where an undertaking applies for immunity or seeks to settle a public enforcement proceeding.³⁸

Adverse publicity can be a powerful incentive on firms that value their reputation. An example can be seen in RBS Group’s establishment of voluntary compensation arrangements to customers within a few days of its computer systems fault in daily processing in June 2012.³⁹ The British and German business organizations CBI and BDI noted that ADR can be incentivized by integration with the enforcement policies of a competition enforcement authority. In particular:

- a reduction in fines (a standard fixed amount, to avoid the authority having to make a detailed assessment);
- allocating some portion of a fine to redress;
- limiting further liability, changing the rules on joint and several liability;
- approval by the court of a collective action scheme.

In addition to assistance with identification, verification, quantum and distribution issues, external or ADR techniques may be needed to facilitate determinations of liability (or the percentage risk that the claim will or will not succeed) and with making

³⁷. Response to Consultation by CBI.
³⁸. Response to Consultation by Mulheron and Smith.
any outline agreement binding on as many class members as possible. For the former, neutral evaluation or similar techniques can assist. For the latter, the courts or a regulator can assist.

The UK 2013 decision supported ADR in general terms, but without developing any specific ideas for mechanisms specific to the competition sector, other than adopting the striking and successful mechanism that has been used in the Netherlands since 2005.40

The Netherlands invented a mechanism for making a settlement scheme binding on inactive class members, under the Class Action Settlement Law (WCAM).41 Representatives on the claimant side (usually a consumer association, shareholders’ foundation or specially created foundation) negotiate a settlement of multiple claims with the defendants, and a special procedure is then started in the Amsterdam Court of Appeal for its approval. The Court approves a public notice, which outlines the proposed terms and states a hearing date, at which parties have the opportunity to be heard. If so minded, the Court approves the settlement, and notices are published of a period within which class members may opt-out of the arrangement and open to litigate separately. Distribution of the settlement funds will usually be by the representative claimant foundation. Since 2005, six major class cases have been settled under this model.42

The involvement of the court in approving the settlement is intended to provide representation of individual class members and of the general public in ensuring that settlements agreed to by claimants’ representatives and defendants are fair. This has been a criticism of the US class action system, for example with allegations that claimants are under-paid, or not given value (such as coupons most will not use) or lawyers or funders are over-paid. Independent scrutiny, whether by a regulator as discussed below, or by a court, perhaps with independent advice, seems advisable, even if challenges may arise in some circumstances.

An innovative ‘nudge’ for firms to make voluntary reparation was suggested by the European Parliament in 2013.43 After the statement of objections (and thus before

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43. Draft Report of the Committee on Economic and Monetary Affairs on the proposal for a directive of the European parliament and of the Council on certain rules governing actions for damages
a decision regarding the fine for infringement), an authority could define a time-frame within which the infringers could voluntarily seek a settlement with their victims. If the authority considered the compensation paid to be accurate and lawful, it should subsequently take it into account when setting its fine. The Rapporteur noted that this solution ‘seems to provide the fastest and most cost-efficient way’ to compensate victims.

[B] Conclusion on ADR

Voluntary arrangements will almost always be fastest way of in achieving payment of compensation, but sometimes external assistance is required with the core issues of liability, verification of claims, identification of all class members, quantification of individual or total entitlements, or distribution of a fund. Independent assistance (loosely called ADR) can clearly assist, and the existence of standing arrangements for complex competition cases may be beneficial. External incentives or compulsions, from regulators or litigation, may also assist. But the achievement of voluntary or agreed solutions will depend on what incentives or compulsions may be necessary.

§8.04 OPTION 2: PUBLIC AUTHORITY FACILITATION OF COMPETITION

The involvement of a public enforcement authority in the payment of compensation is a relatively new technique, but one that has already proved that, if it is properly designed, it can be extremely successful and score highly against comparative criteria of speed and cost.

This technique exists in a number of different forms, and so far has been applied primarily in consumer redress. In 2013, the European Commission has itself adopted a notably new approach in proposing to accept commitments from a trader that include introduction of a new pricing system and paying some customers compensation.44

The UK government announced in 2013 that the new competition enforcement authority, the Competition and Markets Authority (CMA), is to be empowered to use this technique:45

the Government recognises that there are some situations where it may be appropriate for the public enforcement body to consider mechanisms for redress, as part of its administrative settlement of cases. For example, in its case against


44. Press release: Antitrust: Commission market tests commitments proposed by Deutsche Bahn concerning pricing system for traction current in Germany (European Commission, 15 Aug. 2013), IP/13/780. The company proposed to pay railway companies that it does not own a one-time retroactive refund of 4% of their latest annual traction current invoice, and to provide the Commission with the necessary data to assess if the price levels charged under the new pricing system would lead to a margin squeeze.

45. Response, para. 6.27.
certain independent schools, the OFT decided to impose a fine on the schools found to be price-fixing but also agreed that they would establish a series of trust funds to benefit the pupils who attended the schools during the academic years in which the infringement took place.\(^{46}\)

The 2012 UK Consultation drew widespread support for a regulatory redress power. The Consultation noted\(^ {47}\) that a number of stakeholders, including the CBI,\(^ {48}\) had publicly advocated an approach along these lines. Responses in support came from consumer representatives,\(^ {49}\) business representatives,\(^ {50}\) lawyers,\(^ {51}\) some academics\(^ {52}\) and the competition enforcement authority (then OFT, from 2014 the CMA).\(^ {53}\)

How can compensation be facilitated or achieved by the actions of a public authority? A range of possible options exists, such as the following powers:

1. to remove illicit profits;\(^ {54}\)
2. to order redress to be paid, identifying exactly how much is to be paid to every possible claimant.\(^ {55}\)

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\(^ {46}\) See OFT press release 166/06, 23 Nov. 2006. It should be noted that this was a settlement in lieu of a higher fine being imposed; it was not a settlement that would have protected the school against subsequent private actions.

\(^ {47}\) Consultation, para. 6.28.

\(^ {48}\) Consultation, para. 6.28.

\(^ {49}\) Responses to Consultation by Which? and Citizens Advice.

\(^ {50}\) Responses to Consultation by CBI, BDI, ILR.

\(^ {51}\) Responses to Consultation by CLLS and CMS Cameron McKenna.

\(^ {52}\) Responses to Consultation by Mulheron and Smith, Hodges, and a group from the ESRC Centre for Competition Policy. See earlier C Hodges *The Reform of Class and Representative Actions in European Legal Systems: A New Framework for Collective Redress in Europe* (Hart Publishing 2008). UEA said: ‘It may be worth empowering NCAs to include agreements on damages in any settlement procedure. This would be a better, more cost effective, alternative to running the case again as a follow-on litigation. … Pure follow-on cases would add nothing positive to deterrence but mean duplication of enforcement efforts.’

\(^ {53}\) Response to Consultation by the Office of Fair Trading, especially paras 1.14, 1.1.5, 4.3 to 4.7.

\(^ {54}\) This is widely used in US, where the SEC ordered recoveries of USD 2.8 billion per year in 2010 and 2011: See *SEC’s Financial Statements for Fiscal Years 2011 and 2010*, Government Accountability Office (GAO), GAO-12-219, at 57 (15 Nov. 2011). The ‘skimming off’ approach was introduced in Germany in 2005: German Act Against Restraints on Competition (GWB), Article 34. See W. Wurmnest, ‘A New Area for Private Antitrust Litigation in Germany? A Critical Appraisal of the Modernized Law against Restraints of Competition’ 6 German L. J. 1173 (2005); T. Lübig and M. Le Bell, ‘Die Reform des Zivilprozesses in Kartellsachen’ (2006) Wettbewerb in Recht und Praxis 1209. see also S. Peyer, ‘Myths and Untold Stories – Private Antitrust Enforcement in Germany’, University of East Anglia, Centre for Public Policy, Working Paper 10-12, July 2010, at http://ssrn.com/abstract=1672695 (accessed on 1 Oct. 2013). Various general powers are available to UK criminal prosecutors, notably a Confiscation Order or Recovery Order under the Proceeds of Crime Act 2002 ss 6–13 and 240–243. The Financial Services Authority (FSA) has a specific ‘skimming off’ power to seek a compensation order from the court, for such sum as appears just, where profits have accrued to a person as part of a contravention of the requirements and a person has suffered loss as a result, and seize infringers’ assets: Financial Services and Markets Act 2000 (FSMA), ss 382, 383.

\(^ {55}\) An example of this power is the UK Independent Schools case, where the OFT agreed that the 50 infringing schools should not pay a fine but instead make ex gratia payments totalling GBP 3 million to create an educational trust. *Exchange of Information on Future Fees by Certain
(3) to bring a collective action on behalf of claimants;\textsuperscript{56}
(4) to bring public enforcement proceedings, on which private claimants could
’piggy-back’ as civil parties to claim compensation;\textsuperscript{57}
(5) to refer assessment of loss to the court;
(6) to order an infringer to create a restoration scheme, without specifying the
detail of which individuals are to be paid how much, and without further
scrutiny;
(7) to order the infringer to propose a compensation scheme that would be
approved by the authority and/or by the court, or by some independent
(e.g., ADR) body;\textsuperscript{58}
(8) to approve a compensation scheme that would be proposed either volun-
tarily by the infringer(s) or by infringer(s) and some or all claimants;\textsuperscript{59}
(9) to refer a proposed compensation scheme to a court for approval;
(10) to order an infringer to negotiate with claimant(s) and/or to refer a dispute
to independent ADR, such as an ombudsman.\textsuperscript{60}

\textsuperscript{56} The Danish Consumer Ombudsman, who is the principal enforcement authority for consumer
law, is authorized to institute a compensation class action on behalf of consumers since 1 Jan.
2008, and in relation to competition law since 1 Oct. 2010: Act No 181 of 28 Feb. 2007 (the Class
Actions Act) and Act on Competition, s. 26. See C. Hodges, \textit{The Reform of Class and
Representative Actions in European Legal Systems: A New Framework for Collective Redress in

\textsuperscript{57} The right of private parties to join criminal proceedings (compensation piggy-back) exists under
the criminal law of virtually every European state, and is widely used by private claimants in
civil law jurisdictions across Europe. See S. Voet, \textit{Public Enforcement & A(O)DR as Mechanisms
for Resolving Mass Problems: A Belgian Perspective} in \textit{Resolving Mass Disputes: ADR and

\textsuperscript{58} Many UK regulatory authorities have revised enforcement policies to require them to achieve
redress: see Regulatory Enforcement and Sanctions Act 2007, Part 3. The UK financial services
regulator has power to order a consumer redress scheme or its equivalent on several or an
individual provider: FSMA, s. 404 and 404 F(7). The Response to Consultation by Mulheron and
Smith favoured a power to require firms to offer a redress scheme in any event, but not for the
authority to require or even permit the OFT to certify voluntary redress schemes. They also
suggested that if the authority does approve a scheme, individuals could object to a court
without involving the authority.

\textsuperscript{59} The OFT favoured this option, as it operates on a ‘high level basis’ and avoided involvement in
any aspect of quantifying individual loss, and in overseeing the satisfactory implementation of
any payment scheme, and that the authority should only approve proposals put forward
voluntarily by firms in general terms: Response to Consultation by the OFT, para. 4.4.

\textsuperscript{60} In Italy Decision no. 173/07/CONS of the Public Authority for Telecommunication required that
there must be a mandatory attempt at settlement before local administrative bodies, or before
the Chambers of Commerce, or through a conciliation body on which representatives of
telecommunication companies and the consumers associations sit. If a settlement is not reached,
any party can refer the case to be decided by the Public Authority for Telecommunication, which
operates on an arbitration basis. Separate procedures for settlement of telecom disputes exist for
mobile phones, which can be activated also through the internet, and for normal phones. See
(11) to take into account, in settling sanctions, payment of compensation made by a firm: this power might apply to public authorities or courts;\textsuperscript{61}
(12) to have an enforcement policy that includes the goal of achieving restoration, as well as deterrence or other goals.\textsuperscript{62}

It will be seen that there are in fact many options for a regulatory power. Further, none of these options need stand-alone. Indeed, the effectiveness of the technique is enhanced where several of the powers listed above are combined – whether with each other or with other options such as ADR techniques.

The UK Government anticipated that the majority of cases in which a regulatory power in relation to competition damages could appropriately be used would primarily benefit consumers.\textsuperscript{63} The power would be discretionary for the authority to use, rather than mandatory, ‘based on factors such as the suitability of the case and the resources that would be required from the OFT, bearing in mind the need to prioritize its resources effectively across all areas of activity’.\textsuperscript{64} The Consultation said:

Four key aspects of the FSA’s power that the Government considers might be worth including in a new power for the OFT are:

- Use of the power would be entirely independent of any fines or other sanctions that may be imposed.
- The OFT would not attempt itself to quantify individual loss. Rather it would set out the types of redress that could be awarded and direction as to how redress should be calculated, but would leave it for the firm to apply these rules to calculate loss on an individual case basis.
- A redress scheme could either be imposed by the OFT or entered into on a voluntary basis by the undertaking and certified by the OFT. No consultation would be necessary.
- Although any consumers who make use of the redress scheme give up their right to sue (it is essentially a form of settlement), there is no curtailment of the rights of consumers to take action through the courts if they do not believe the scheme to be satisfactory. This would be an important check as it ensures that the scheme must provide genuine restitution for the wrong done.\textsuperscript{65}

The OFT was not unduly keen on the idea, since it believed that there were many difficulties involved, not least being that it had little resource to take on any further activity, and issues about compensation were essentially private matters that should be handled by private parties. It argued that to adopt ‘a compulsory power may take up considerable time and resources in ensuring that potentially unwilling businesses implement a redress scheme in an appropriate manner’ and ‘take significant resources’.

\begin{footnotesize}
\begin{enumerate}
\item For examples of where the Commission and some authorities have either reduced or even waived fines after firms have paid compensation, see A. Ezrachi and M. Ioannidou, ‘Public Compensation as a Complementary Mechanism to Damages Actions: from Policy Justifications to Formal Implementation’, 3 J. European Competition L. Prac. 536–544 (2012).
\item Restoration as a goal of enforcement policy has been adopted by almost all UK regulatory authorities – apart from those responsible for competition law.
\item Consultation, para. 6.34.
\item \textit{Ibid.}, para. 6.35.
\item \textit{Ibid.}, para. 6.39.
\end{enumerate}
\end{footnotesize}
away from the [authority’s] core enforcement work and that ‘If BIS were to maintain the proposal for the OFT to require undertakings to set up redress schemes, the OFT would require substantial additional resources to perform this role.’ The Consultation also anticipated this position:

6.29 … the Government also considers it important that any new role does not detract from the OFT’s existing role of detecting, examining and sanctioning anticompetitive activity. …

6.31 … the Government would not wish the OFT to become so involved in the business of quantifying the degree of loss suffered by consumers or business that this led to an impairment in carrying out its other functions. To divert resources away from or delay enforcement activities in order to help facilitate compensation could cause a reduction in deterrence and therefore an increase in anticompetitive behaviour.

It should be noted that the OFT was sensitive to criticism that its general enforcement record was poor when compared with authorities in other Member States, as noted by the Government itself in Table 7.1 (paragraph 21) of its Consultation:

Table 7.1 Aggregate Figures on Antitrust Cases for Selected Member States 1 May 2004 – 1 September 2010

<table>
<thead>
<tr>
<th>Member State</th>
<th>New Case Investigations</th>
<th>Decisions Notified to the European Commission</th>
</tr>
</thead>
<tbody>
<tr>
<td>France</td>
<td>189</td>
<td>70</td>
</tr>
<tr>
<td>Germany</td>
<td>128</td>
<td>58</td>
</tr>
<tr>
<td>Italy</td>
<td>81</td>
<td>58</td>
</tr>
<tr>
<td>Netherlands</td>
<td>76</td>
<td>32</td>
</tr>
<tr>
<td>Denmark</td>
<td>62</td>
<td>32</td>
</tr>
<tr>
<td>Spain</td>
<td>75</td>
<td>30</td>
</tr>
<tr>
<td>Greece</td>
<td>31</td>
<td>22</td>
</tr>
<tr>
<td>Hungary</td>
<td>79</td>
<td>20</td>
</tr>
<tr>
<td>Sweden</td>
<td>36</td>
<td>16</td>
</tr>
<tr>
<td>Slovenia</td>
<td>24</td>
<td>12</td>
</tr>
<tr>
<td>UK</td>
<td>52</td>
<td>11</td>
</tr>
<tr>
<td>European Commission</td>
<td>195</td>
<td>N/A</td>
</tr>
</tbody>
</table>

However, it may be that the way in which compensation oversight powers can work (and do work for other authorities) has not been fully understood. They enable some authorities to achieve more swift overall negotiated solutions to both public and private enforcement aspects, shortening total enforcement duration of some cases, and thereby facilitating larger throughput of cases.

66. Ibid., para. 1.14
67. Ibid., para. 1.15.
68. Consultation.
It was pointed out\(^69\) that the experience of other enforcers (notably the Danish Consumer Ombudsman as well as other British authorities, notably the financial services enforcer\(^70\)) was that where such regulatory powers have existed in the armouries of enforcers, it was possible to negotiate agreements with companies with considerable speed that encompassed resolution of both the public sanctioning elements and the private restitution elements at one go (in effect, a plea bargain).\(^71\) Thus, the experience has been not only that enforcers resolved cases more quickly and were able to increase their throughput, but also that victims received compensation extremely swiftly and with no transactional cost to them. A strong regulatory power would, therefore, enhance achievement of wider aims of restoring unbalanced markets.\(^72\)

In contrast to the official position, both Citizens Advice and Which? called for the authorities to have the power to require businesses to compensate affected consumers as part of the standard enforcement process. Citizens Advice favoured the public opt-out collective action (option 3) in all consumer protection legislation. Which? thought that if the OFT does not have ‘a stick’ through which it can encourage a voluntary redress mechanism, its ability to obtain adequate redress could be severely limited. Which? were also concerned about creating an ‘enforcement bottleneck’, although Citizens Advice said:

We do not agree with the concern expressed in the consultation that facilitating redress through regulators might divert the regulator from their enforcement work. We believe that this will increase the effectiveness of enforcement because it:

- provides a level playing field for businesses that do follow the rules
- removes the financial gains made from illegal practices
- alerts consumers to the bad practice by requiring the business to provide the redress
- provides the business being punished with an opportunity to recognise their bad practice and to apologise to their customers along with the redress.


\(^70\) The author is currently undertaking a detailed analysis of the adoption of redress as a formal enforcement policy of British regulatory agencies generally.

\(^71\) It is important that the incentive should be adequately attractive. In the area of criminal law, the UK Ministry of Justice was contemporaneously strongly supporting plea bargains for precisely the reasons mentioned of saving time for prosecutors and attracting whistle-blowing, although with an incentive of 33% reduction in penalty for criminal prosecutions rather than the 5-10% reduction mooted for competition penalties: Deferred Prosecution Agreements Government response to the consultation on a new enforcement tool to deal with economic crime committed by commercial organisations (Cm 8463: Ministry of Justice, October 2012), available at https://consult.justice.gov.uk/digital-communications/deferred-prosecution-agreements/results/deferred-prosecution-agreements-response.pdf.

The mechanism operated by the Danish Consumer Ombudsman has been notably efficient and effective. He is in a unique position to deal at the same time with enforcement of regulatory compliance and compensation issues, because he has powers covering both sides. His primary role is enforcement of the law through pursuing convictions in courts, but is able to conclude many cases by negotiation and agreement with companies, and this ability enables him to deal with compensation and restoration of market balance through payment of compensation as part of the public sanctioning process. Since being invested with the power, he has threatened to invoke it often but never had to institute court proceedings, since this and his combined enforcement powers result in negotiated settlement of cases on a broad basis that resolves conduct and redress issues simultaneously. Companies are protected against abuse by the right to argue the issues in court if they wish, but otherwise avoid lengthy investigations over whether an infringement has taken place and can be proved followed by further lengthy private litigation. The enforcer is therefore able to concentrate enforcement firepower on rogues. The Consumer Ombudsman is subject to the normal ‘loser pays’ rule on court costs.

[A] Conclusions on the Regulatory Options

The above analysis shows that a range of possible powers can be contemplated to facilitate compensation, and that various examples exist and are operated with success by public bodies, if adequately designed. Indeed, there is a clear trend towards the inclusion of restorative justice in the roles and duties of public enforcement authorities.

The implementation of a public restorative power, or powers, affords a considerable opportunity to deliver compensation and other redress. But the choice of powers and their precise formulation is crucial to the ability to gain the considerable benefits that can be realized. The UK Government noted that:

Some cases would be much more appropriate for the use of such a power than others: in particular, this procedure would likely be most appropriate for cartel cases involving large numbers of undifferentiated products bought by many consumers, such as milk or football shirts. As it happens, these are cases where there is often most consumer detriment in aggregate, and where bringing cases before the UK courts can be most difficult.

In 2013, the UK Government has pursued implementation of ‘enhanced consumer measures’ for the competition regulator under the Consumer Rights Bill. The proposals authorize either an enforcement order or an undertaking that a trader will, *inter alia*, offer compensation or redress to consumers who have suffered loss, or take measures

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73. The Consumer Ombudsman has requested the government to change the law so as to allow him to institute a compensation claim in an individual case, on the basis that that would add to his armoury through the ability to take action without having to wait for at least two cases to be established, as at present.

74. Consultation, para. 6.36. The Response to Consultation by Mulheron and Smith agreed that power 5 would apply ‘typically in those cases where a cartel has substantially affected individual end-consumers’ and that an opt-out class action would not work in such a situation.
intended to be in the collective interests of consumers where individual consumers cannot be identified or could not be identified without disproportionate cost, or will take compliance measures, or take measures intended to enable consumers to choose more effectively between persons supplying or seeking to supply goods or services.\(^75\)

It can be concluded that a public redress power should be effective in delivering compensation in small dispersed mass damage situations, certainly involving consumers and possibly SMEs. Further, an opt-out private collective action would in fact be ineffective in exactly those situations. Therefore, these realizations will be likely to increase the pressure on the authorities and government to ensure that the public power is available and used.

The problem is illustrated by the *Cardiff Bus* case\(^76\), in which the OFT decided that there was an infringement but declined to act as the market (and therefore extent of detriment) was too small.\(^77\) A private action was subsequently fought at huge cost, over some years, resulting in a CAT award of GBP 33,818.79 in compensatory damages plus loss of interest, which was clearly grossly uneconomic in terms of cost-benefit, even with the exemplary damages of GBP 60,000 awarded exceptionally in this case. Within months of the initial infringement, the smaller competitor had gone out of business, since its commercial model was unsustainable. It would have been far more effective if OFT had used ‘restorative oversight’ powers to persuade the dominant company to make a modest payment at the time that the infringement was identified, which was when the smaller competitor needed help and consumers would have benefited.

Further, it is clear that where the powers are designed effectively, public authorities have been able to deliver compensation swiftly and cost-efficiently. It is the ability to resolve the *combination* of public and private consequences that provides the crucial incentive for swift settlement of both sanctions and compensation. As the Danish experience shows, firms that rely on market reputation have incentives to (a) avoid the reputational loss and cost of a private collective action, especially if full joint and several liability can be avoided, and (b) gain the possibility of a reduction in fine by paying compensation swiftly before the fine is set.\(^78\)

The argument that restoration of market balance, and hence compensation, is not the function of a public authority is looking thin and outdated. The author has pointed out that the current enforcement policies of European competition authorities fail to identify whether the combination of public and private enforcement has achieved restoration of market balance or competitive conditions, or are even capable of identifying the extent to which infringers’ anti-competitive activities have distorted the

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\(^76\) 2 Travel Group Plc (In Liquidation) v Cardiff City Transport Services Limited [2012] CAT 19. The CAT also awarded GBP 60,000 in exemplary damages.

\(^77\) Decision No CA98/01/2008, 18 Nov. 2008. However, this case needs to be interpreted in the context that the claimant’s continued viability was questionable in view of its inherent financial model, and there was a danger of protecting a competitor rather than competition.

\(^78\) Response by Mulheron and Smith notes: ‘… many companies will, we believe, wish to be seen to make good the harm caused to restore their reputations and will wish to avoid an order if at all possible. This will particularly be true where an undertaking applies for immunity or seeks to settle a public enforcement proceeding.'
Thus, it should be the duty of a competition regulator to ensure not just that compensation is paid, but to establish how much is paid. That proposition was supported by Which? Ezrachi and Ioannidou have noted that the black line distinction between the functions of a public and private actors has started to crumble. It is no longer appropriate that public actors just deal with findings of infringement in those cases that they choose to deal with and only then impose fines, but do not look at the restorative functions and the market effects.

The argument that the public authority’s limited resources should not be diverted from its principal role (investigation, enforcement and deterrence) is countered by the empirical evidence that certain enforcers are able to reduce the time spent on the enforcement process if they have the right powers, and hence increase their throughput of cases. The Danish Consumer Ombudsman is an example of such efficiency, and this is also indicated by the FSA’s use of new powers that it received in 2010, and evidence from other UK regulators including Ofcom, Ofgem and Ofwat. The point is that the addition of a compensation power to investigation and sanctioning powers can short-circuit time spent in establishing infringement, since the incentive for the firm is to reach ‘global peace’ in a single negotiation. Overall, it may be asked why competition enforcers have not used such restorative powers before now.

§8.05 OPTION 3: PRIVATE ACTION

The third option for obtaining compensation is through bringing a private action for damages. A private action may be brought by an individual, or on a representative or collective basis. As with the other two tracks discussed above, there are a number of options by which mass claims may be processed. Individual actions may be formally joined or remain unconsolidated but be managed together under the courts’ case management powers.

It is widely accepted that small or complex claims give rise to rational apathy in potential claimants, which impedes their bringing claims, even on an aggregated basis. The United States legal system includes large incentives to overcome this impediment. But the European consensus on collective redress rejects many of the US incentives since they are held to comprise a ‘toxic cocktail’ that gives rise to ‘abusive’ collective litigation. Statements to this effect have been made by the European Commission.

80. Response to Consultation by Which?
83. Amongst many statements to this effect by EU leaders, see Communication from the Commission ‘Towards a European Horizontal Framework for collective Redress’, COM(2013) 401/2, para. 2.2 (““Class actions” in the US legal system are the best known example of a form of collective redress but also an illustration of the vulnerability of a system to abusive litigation.’); European Commission DG SANCO, MEMO/08/741, 2009, p. 4 (‘The U.S. style class action is not
Parliament,\textsuperscript{84} consumers\textsuperscript{85} and business.\textsuperscript{86} The European Commission’s model for collective actions, as set out in its 2013 Recommendation, specifies a series of safeguards.\textsuperscript{87}

- **Admissibility.** Collective actions should only be brought when certain admissibility conditions are fulfilled.

- **Standing.** In representative actions it should be ensured that the representative entity acts genuinely in the best interests of the group represented. The Commission defines the conditions for standing in representative actions in the commission Recommendation.

- The ‘opt-in’ model is preferred, but since some Member States already have ‘opt-out’ mechanisms, that approach should be ‘duly justified by reasons of sound administration of justice’.\textsuperscript{88}

Envisaged. EU legal systems are very different from the U.S. legal system which is the result of a “toxic cocktail”—a combination of several elements (punitive damages, contingency fees, opt-out, pre-trial discovery procedures)…. This combination of elements – “toxic cocktail” – should not be introduced in Europe. Different effective safeguards including, loser pays principles, the judge’s discretion to exclude unmeritorious claims, and accredited associations which are authorised to take cases on behalf of consumers, are built into existing national collective redress schemes in Europe.’;

\textsuperscript{84} European Parliament Resolution of 2 Feb. 2012 on ‘Towards a Coherent European Approach to Collective Redress’ (2011/2089(INI) at http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2012-0021&language=EN&ring=A7-2012-0012 (accessed on 1 Oct. 2013). The resolution warned against the risks of abusive litigation; calls for strong and effective safeguards to avoid unmeritorious claims and disproportionate costs for businesses \textit{inter alia}:(i) no punitive damages, (ii) no contingency fees, (iii) no third-party financing of collective cases; (iv) maintaining the ‘loser pays’ rule; (v) any European approach to CR should be based on the opt-in principle; (vi) all necessary measures should be taken to forbid forum-shopping (however no specifications given); (vii) any other features which encourage a litigation culture such as lack of control over the representative entities standing in court, the possibility of lawyers soliciting and actively looking for plaintiffs, and the discovery procedure for bringing evidence to court are not compatible with the European legal tradition and should be forbidden. Actions could be brought only by entities duly recognized at national level e.g. public authorities such as Ombudsmen or consumer organizations, in accordance with a common set of criteria that consumer organizations must fulfill to have a court standing, to be defined by the Commission, in consultation with the Member States.

\textsuperscript{85} See \textit{Collective Redress. Where & how it works} (BEUC, 2012): ‘BEUC has long advocated that any European system should have carefully inbuilt safeguards to guarantee only meritorious cases are considered and exorbitant damages are avoided… To begin with, cases must prove they are well-founded before being fully heard. In court, a judge—not a jury—will hear the facts and evaluate compensation, thereby deciding cases strictly in accordance with the law. Thirdly, punitive damages would be unavailable. This prevents excessive settlements and victims would be compensated for the actual loss suffered.’

\textsuperscript{86} See \textit{EJF Key Messages}, European Justice Forum, 23 Feb. 2009, at http://europeanjusticeforum.org/storage/EJF%20KEY%20MESSAGES.pdf (accessed on 1 Oct. 2013); ‘If collective litigation is unavoidable, there must be safeguards to avoid abuse.’


\textsuperscript{88} It should be noted that an opt-out class action does not work for litigation funders. The Australian Full Federal Court had to reverse the statutory opt-out rule and permit an opt-in approach in order to make the arrangements work for litigation funders, since there would
-- Effective provision of information to potential claimants.
-- Interplay with public enforcement. In certain areas (competition, environment and data protection), public enforcement plays a major role, which must not be put in jeopardy by litigation being commenced before the conclusion of the public investigation. The Commission proposes that this can be achieved by rules restricting public access to documents obtained or produced by the public authority and by suspending limitation rules. Punitive damages should not be permitted.
-- Effective cross-border enforcement. The Commission is not persuaded to introduce a specific rule for collective claims beyond the existing rules.\(^89\)
-- Availability of consensual dispute resolution. This should be encouraged\(^90\) but remain voluntary, although judges should not be prevented from inviting parties to seek a consensual solution.\(^91\) Where a consensual solution is reached, the court should verify the legality of the outcome and confirm it.\(^92\)
-- Funding of collective action. The ‘loser pays’ principle should apply to collective redress cases. ‘An inappropriate system of third party financing runs the risk of stimulating abusive litigation or litigation that does little to serve the best interests of litigants.’ Therefore, third-party financing should be made subject to certain conditions. The Commission did not find it necessary to recommend direct support from public funds.

Two major problems exist with this ‘model’ of a collective action. Firstly, Member States may vary from it in their national rules, and be either more or less restrictive. Forum-shopping will, therefore, emerge. For example, the UK has already introduced a form of contingency fees,\(^93\) and has proposed to allow opt-out for competition collective claims.\(^94\) The effect of national rules on ‘loser pays’ varies widely. Considerable challenges arise in regulating third-party financing. Secondly, a classic ‘catch 22’ situation arises. Regulation of litigation by means of safeguards may both reduce the

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91. This is already the case for mediation in cross-border disputes, where, in accordance with Article 5 of Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters, courts before which an action is brought may invite the parties to use mediation in order to settle the dispute.
92. Point 30 of the Commission Recommendation.
93. Damages Based Agreements, introduced under The Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 45, amending s 58AA of the Courts and Legal Services Act 1990, but they are not to be permitted for competition claims.
94. Consumer Rights Bill 2013, Sch. 7.
risk of abuse but at the same time act as a barrier to litigation. The EU model is intended to regulate against abuse, but the effect will presumably reduce both the volume of litigation and certain types of claims, notably small value claims even when aggregated.

The outcome may be that competition damages claims by consumers or small businesses, even if aggregated, may fail to be financially attractive, and not be funded. The UK government stated in 2012 that the minimum threshold of viability for bringing an individual competition case is damages of GBP 500,000, and more like GBP 3 million, given that costs per case are between GBP 6 million and GBP 9 million for stand-alone cases and between GBP 3 million and GBP 5.4 million for follow-on cases. It cited a survey finding that half of those who thought they had been a victim of anti-competitive behaviour did not consider bringing a legal claim because the expected costs outweighed the benefits. In the JJB Sports case, individual compensation payments were only between GBP 10 and GBP 20.

Private sector funders do not currently find aggregated small claims attractive. If any funder is to invest in a case, the risk-benefit ratio needs to be sufficiently attractive to satisfy the funder’s risk proportionality requirement. The calculation is affected by multiple factors, especially in collective litigation, and in complex litigation such as competition damages cases. The funder’s calculation in Europe must, therefore, take into account factors such as the following:

- the cost of funding the case (fees of courts, lawyers and experts), and the cost of finance over the lifetime of the case;
- the chances of success;
- the amount that might be recovered at the end if the case is won (both from the defendants and, if the funder is not a party, from claimants);
- whether the investment risk is rational and the return is sufficient.

Official rhetoric may be that individuals should be empowered to exert their own rights. But the simple economics of competition damages litigation make it highly questionable whether consumers, consumer associations or SMEs and their associations would themselves be able to fund collective litigation, or would be acting

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96. Impact Assessment, supra n. 6, paras 67 and 85.
98. Impact Assessment, para. 156, citing The deterrent effect of competition enforcement by the OFT (OFT, 2007).
100. The Consultation includes the following statements: ‘3.9 However, consumers and businesses also have a fundamental right to seek redress for themselves for damages that they have suffered.’ and ‘6.26 … The Government believes that empowering those who have suffered loss to take direct action against those who have caused it is the best way, in general, to increase deterrence and secure redress.’
rationally or properly with use of others’ funds if they did so. The evidence is that larger businesses have the resources to fund litigation, but consumers and SMEs do not. The European consumer body said in 2012: “Without appropriate funding, no collective redress mechanism will work in practice.”

If funding is not to come from consumers or SMEs or their representatives, it must be provided independently. The state will no longer fund private actions of this kind. Companies in some jurisdictions have legal expenses insurance, albeit subject to limits and conditions. Otherwise, the two main sources of independent finance for consumer or SMEs are lawyers and litigation funders. Both those groups can be incentivized to act if the return on investment is sufficient. Lawyers might act if the fee for success is sufficiently attractive, taking into account the risk of a case. They might also act on a pro bono basis, but this is unlikely in relation to lengthy and expensive litigation. Litigation funders have emerged to fund competition damages cases. Lawyers have historically not acted on group actions in England and Wales unless there was funding from legal aid. They have not been attracted by the conditional fee agreement (CFA) regime of the past decade in relation to mass actions: a small number of co-financed cases have occurred outside the competition area.

Third-party litigation funding can be available for individual claims that have sufficiently good prospects of success, but must involve damages of at least GBP 500,000 and more likely GBP 1 million. There are concerns about independent litigation funding, but it is expanding across Europe. The state of the litigation funding market is that a number of major funders based across Europe do invest in certain large competition damages cases. Funders currently take 30% to 40% of victims’ recoveries, usually net, after legal and financing costs. If they were to fund

101. The risk of adverse costs is omitted from all US analyses, such as that of McAfee et al. quoted in the Consultation, since a cost-shifting rule does not apply in US But it does apply almost everywhere else across the world, and in UK jurisdictions.


105. Any other funder that might emerge, such as the Access to Justice Foundation, would be at risk of being wiped out by adverse costs if only a small percentage of cases that it funded were lost. It is that reality that has prevented a Conditional Legal Aid Fund (CLAF or related SLAS) from being created, despite much talk over some decades.


107. BEUC considers that third party funding raises various fundamental concerns, and if it is to be endorsed at EU level, precautions and safeguards will have to be taken to ensure risks inherent to this mechanism are eliminated: Litigation funding in relation to the establishment of a European mechanism of collective redress. BEUC position (BEUC, 2012), at http://www.beuc. org/custom/2012-00074-01-E.pdf (accessed on 1 Oct. 2013).

108. The author has interviewed almost all of the major litigation funders in Europe in the past two years. There is no particular secrecy about their approaches to business, which appear to be consistent and economically rational.
small consumer claims that level of cost would reduce any gain for consumers to negligibility.

The cases that litigation funders choose are only follow-on cartel cases, and not stand-alone cartels or abuse of dominance cases. The reasons for that policy are not hard to understand. A follow-on action might take some years and tie up the capital investment but it has a high likelihood of success, since the authority has already made a finding of infringement. The funder does not have to fund investigation costs into liability issues in order to assess the chances of success. Instead, he has to investigate the claimant’s individual evidence on causation and quantum of loss, so as to make an assessment of the chances of success and whether the net return on investment, after costs, is sufficiently attractive. Some cases will be too small in terms of quantum of damages and hence return. Cases in Europe that involve mass small individual losses are unattractive to funders in view of the problems and cost of individual proof of loss and quantification, and high administrative costs. Further, competition claims per se are inherently unattractive to funders because of the inherent challenges of establishing dominance or proving quantum. Those factors make even follow-on competition claims unattractive to funders, and knock out abuse of dominance cases. There is no likelihood that this situation will change in the foreseeable future. Current reality is that only B2B follow-on cases involving large individual damages are sufficiently cost-effective, and offer far more attractive returns than could be obtained from C2B or SME cases.

The UK Consultation itself noted that ‘it has sometimes been suggested that stand-alone cases will not occur’ and dismissed this by citing a study of collective actions in Canada between 1997 and 2008, which showed approximately 25% of competition cases were stand-alone actions. The validity of such a comparison is, however, affected by differing levels of damages and costs between the various jurisdictions (Canada itself has several jurisdictions with different rules). The study reported in this book shows that a different picture exists in Europe, and it is misleading to consider stand-alone cases without separating the very different types of B2B and consumer cases. The former are brought but the latter are not.

109. The Response to Consultation from UEA noted that ‘In the toys case, the cost of distributing the award is likely to be higher than the individual loss of each consumer.’

110. For example, chemical cartel cases in various EU jurisdictions are funded by Brussels-based CDC, and air freight cartel cases are funded by Dublin-based (and Australian-funded) Claims Funding International: see C. Hodges, J. Peyner and A. Nurse, Litigation Funding: Status and Issues (Centre for Socio-Legal Studies, Oxford and Lincoln U. 2012).

111. Consultation, para. 5.13, citing R. Mulheron, Competition Law Cases under the Opt-out Regimes of Australia, Canada and Portugal (Queen Mary U. London 2008).

It may be asked whether litigation economics will be affected by the prospect of earlier settlement than has occurred historically. But here again the outcome does not seem to change. The funding cost will be reduced if defendants agree settlements earlier, and do not fight all the way to the end of trial. The availability of ADR might assist earlier settlement but would not itself act as an inducement. The inducement to settle a case will primarily be economic (based on a weighing of the multiple factors of chances of success and cost), and may be to protect market reputation. In such a calculation, follow-on cases are inherently likely to settle earlier than (at least some, if not most) stand-alone cases. In theory, settlements in litigation should reflect the relative bargaining position of the parties, principally the merits of the parties’ cases, and the relative economic factors, such as which party has greater resource. What happens in practice in litigation is that settlements are agreed at amounts that are less than scientifically rational. This is particularly so in competition damages cases, where the extent of technical evidence and complexity of issues are considerable. Incentives to settle stand-alone cases will be increased where costs, complexity and duration are reduced, or the ability of a defendant to defend itself is lessened. An opt-out model, cost-capping for claimants, presumptions of loss and similar techniques may achieve the latter, but may offend principles of justice. However, even these factors may not be sufficient to induce defendants to settle unless there are added a collection of factors such as a no-cost-shift (or one way cost shift) rule, triple or similarly enhanced damages as standard, large success fees. These factors are not acceptable in European jurisdictions. So the pressures to settle litigation early, that are a factor of the US and some other jurisdictions, will not apply here.

The result is that mass competition damages claims break down into some clearly defined categories. Claims involving a small number of larger businesses are currently brought by the firms involved, with their own funding arrangements (which may include litigation funding outsourcing or legal expenses insurance). Claims involving multiple consumers and SMEs are not brought, since the scale of funding required means that they can effectively only be funded by litigation funders. Funders might be attracted to some SME claims if the size of quantum and net return is sufficient, and the case is a follow-on type. But competition damages cases are complex and expensive. Almost all stand-alone and many follow-on SME claims and almost all consumer claims that might be contemplated will not be attractive to litigation funders, on both

113. Note the additional and different type of incentive referred to supra that comes from certain regulatory powers.

114. The Response to Consultation by the ICC stated: ‘3.21 .. claimants can group and do group together on an ad hoc basis to bring consolidated actions in individual cases, for example the claim brought by Deutsche Bahn and other train operating companies in respect of Carbon and Graphite Products [2010] EWCA Civ 1284. This enables claims to brought in an efficient and cost-effective manner, at least by businesses, without any need for a specific mechanism. … 3.28 … the business community generally does not require access to any enhanced collective action regime in order to bring private claims in order to obtain redress for breaches of competition law. … 3.29 The large majority of businesses who may be affected by anti-competitive behaviour can, and do, bring such claims already, as reflected in the significant and increasing number of follow-on claims brought in both the CAT and the High Court (in relation to which the UK is becoming a jurisdiction of choice for claims following on from EU Commission cartel decisions), with many more claims (and pre-claim disputes) settling without proceedings or through ADR’.
economic and liability grounds. So the very type of cases that the Government wishes to assist will not be funded, or brought, even under an opt-out class action regime, as is proposed by the Government in England and Wales.

The above analysis points to the conclusion that litigation, whether individual or mass, will not succeed in solving the problem of problems of ultimate purchasers. The evidence does not suggest that collective cases are settled early in Europe.

[A] Private Action as the Last Resort

Both the European Commission and European Parliament have stated that the private damages action is the third option that should be available, as a last resort, since ADR is to be firmly encouraged and any public enforcement action should be concluded before any private collective action is permitted. Thus, there should be a sequencing of techniques: the litigation option, whether an individual or class proceeding, should not be available if there was a reasonable prospect either that that the public authority was considering not only its position on infringement proceedings but also any redress orders or undertakings, and/or of an ADR solution achieving a solution. Many observers wrongly assume that a class action would be readily available.

In England and Wales the policy that litigation should be a last resort was established in 1999 for the civil procedure system and has been repeated by the Coalition Government, both in general and in relation to numerous types of disputes, including public sector bodies, tax disputes with the state, family...
disputes, and employment disputes. This policy is implemented in civil procedure and through the court having managerial control of all cases, and an overriding objective of dealing with cases justly.

It is important to realize, therefore, in considering the operation and impact of the proposed private class action procedure, that it will not automatically be available to claimants, lawyers and funders on an unrestricted basis. This point has major impact in practice. Effective ADR facilities and procedures are available as a preliminary option, possibly through an enhanced competition-specific ADR facility, are likely to become available. As discussed above, the use of new regulatory procedures are also likely to be more available. Accordingly, litigation would be more limited than some may anticipate. Further, there is little point in bringing a representative action after market forces such as adverse publicity have incentivized a company to make voluntary reparation, such that the number of claimants with outstanding uncompensated losses is minimal: this situation largely occurred in the sole UK follow-on case brought by the consumer association (involving replica football T-shirts). Overall, therefore, various incentives would encourage rational attempts to apply both the ADR and regulatory tracks, and any other possible option, before commencing litigation.

[B] Conclusions on Private Actions

The assumption by the Commission and various governments that a private right of action would solve the problem of competition damages is misguided. Private litigation is no answer for cases where individual and/or total damage is less than the viability threshold. Cases involving B2B firms are brought now and seem to need little assistance. The problem types are cases involving SME claimants and mass consumers. Those typically involve small or limited individual losses, which are not viable for anyone to fund other than a well-capitalized independent third-party litigation funder.

123. Legal aid is not available unless the parties have attempted mediation. See also D Norgrove, *Family Justice Review. Final Report* (Ministry of Justice, 2011).
124. Under the Enterprise and Regulatory Reform Act 2012 all prospective claimants are required to notify ACAS before instituting proceedings.
125. through pre-action protocols; a ‘nudge’ in the Allocation Questionnaire that a party has to complete at the start of the procedure (CPR 26.4); listing ADR as an agenda item on Guides for Case Management Conferences (e.g., CAT Rule 44 (3)); a professional duty on solicitors to advise on outcome options (Code of Conduct 2011, O(1.12)); and judges’ discretionary power in awarding litigation costs (CPR Part 44.3(5). For the rare circumstances in which judges may penalize litigants who unreasonably refuse ADR, see Halsey v. Milton Keynes General NHS Trust [2004] EWCA Civ 576 and Burchell v. Bullard [2005] EWCA Civ 358. In the latter, the court penalized a party who unreasonably ignored an offer to mediate made at the pre-action stage.
126. CPR 1.1(2) that term to include ‘saving expense; dealing with the case in ways which are proportionate: i. to the amount of money involved; ii. to the importance of the case; iii. to the complexity of the issues; and iv. to the financial position of each party’.
Such litigation funders currently fund follow-on actions but not stand-alone actions, and appear to find collective actions involving mass small claims unattractive. Litigation funders cannot operate an opt-out collective action model, and require an opt-in model, so as to ensure that all claimants have agreed to their terms and there are no free riders. All of this means that the proposed opt-out class action model will be ineffective for the key claimants for whom it is intended. Moreover, the number of claims that might be brought is quite unclear, but appears to be low. The argument that private actions unnecessary duplicate public enforcement in follow-on compensation claims is gaining serious support. Accordingly, if the authority is involved, it is going to be cheaper for the economy, and also far quicker for victims, if the authority can somehow bring about payment of compensation by the infringers.

§8.06 OPTION 4: COMBINING TECHNIQUES

The UK government’s approach, announced in February 2013, contains all three of the techniques discussed above:

(1) Settlement and ADR are to be ‘strongly encouraged’, so businesses can be allowed to restore their reputations voluntarily. The CMA will take a strong and leading role, with reductions of up to 10% in fines. Companies can offer to make redress and arrange settlement schemes. This can be introduced in secondary legislation. A collective settlement procedure, based on the Dutch model, will enable negotiated settlements to be implemented on a binding basis. The Competition Appeal Tribunal (CAT) will be able to approve settlements, and will be able to call on expert assistance to evaluate them.

(2) Based on the ‘reality that some traders need a threat to encourage settlement’, there is to be a ‘limited’ opt-out class action in the CAT for damages ‘with strong safeguards’. However, the courts should be ‘the option of last resort’. It was said that the current opt-in regime is not working: only one case has been brought. There must be safeguards to prevent against a US regime. It was said that the opt-out regimes in Canada, Norway and Australia have not resulted in US-style litigation. Safeguards will include:


(a) Judicial certification that the case is suitable for opt-out, including a preliminary merits test.\textsuperscript{132}
(b) No treble or exemplary damages.\textsuperscript{133}
(c) No contingency fees (damages-based agreements (DBAs)).\textsuperscript{134}
(d) Loser pays will apply.\textsuperscript{135}
(e) Claimants must be ‘genuinely’ representative bodies, not law firms, third-party funders or special purpose vehicles.\textsuperscript{136}
(f) Judicial approval of the fairness and reasonableness of all settlement and of the reasonableness of fees.\textsuperscript{137}

(3) A discretionary power for the enforcement authority to certify redress schemes put forward by a business has been created in accordance with a reasonable process.\textsuperscript{138} This would not be to require a business to create a redress scheme, so as to avoid too great a burden on the authority. The process would probably be overseen by an independent panel, which would include the necessary economic, legal and accounting expertise, involve plans as to notify consumers of the existence of the scheme, and have an independent appeals process to an independent person or body within the auspices of the scheme to resolve disputes with possible claimants. The effect of certification would be that the scheme becomes legally binding so that the authority or a beneficiary who chooses to receive compensation under a voluntary redress would be able to take statutory enforcement action against a business which fails to comply with the terms of the voluntary redress scheme.\textsuperscript{139} Those who offer a redress scheme could qualify for a possible reduction of fine.

Arguments have been noted above that settlement and voluntary payment of compensation is easily the most preferable result, since it is usually the fastest and cheapest process of the available options. Some businesses may be expected to reach settlements without external pressure. B2B settlements occur against the background of commercial pressure. Some B2B or B2C settlements may be supported by the presence of wishing to maintain market reputation and commercial health. There remain circumstances in which the presence of some compulsive pressure from the legal system may be necessary. It has traditionally been thought that such pressure should take the form of a collective action for damages. However, it is increasingly recognized that external pressure may equally be from a regulator, provided the enforcer has powers that are sufficiently strong and effective. Thus, the combination of a regulatory power plus ADR may be particularly effective.

\textsuperscript{132} Proposal, para. 5.55.
\textsuperscript{133} Proposal, para. 5.58.
\textsuperscript{134} Proposal, para. 5.62.
\textsuperscript{135} Proposal, para. 5.59.
\textsuperscript{136} Proposal, para. 5.32.
\textsuperscript{137} Proposal, paras 5.72 and 6.23.
\textsuperscript{138} Proposal, paras 6.36ff.
\textsuperscript{139} Proposal, para. 6.41.
The objective would be twofold. First, the infringer would be incentivized by the advantages of being able to resolve all aspects (public sanctioning, agreement of payment of compensation, and sanctioning its own employees) at the same time, and also gaining a reduction in fine in respect of cooperation. Secondly, the public authority would wish to avoid tying up limited resources in lengthy enforcement arguments. Both these objections could be achieved by endowing the public enforcer with a sufficiently powerful power. The regulatory power proposed in UK merely to approve a proposed settlement and only to give a modest reduction in fine would clearly be an inadequate lever: it is not powerful enough. Safeguards would be necessary to guard against abuse by the public authority in forcing defendants to settle where the legal merits or settlement proposals did not justify the outcomes proposed. The availability of arguing specific issues in court would be necessary.

Facilitation by ADR will be necessary through the development of arrangements that could be swiftly deployed, and would offer independent expertise, with access to all relevant facts, and produce reliable opinions on the level of damages that should be paid to genuine claimants. Such services could be offered by a number of existing private and academic bodies. Consultants might also offer to operate distribution or claiming schemes.

§8.07 CONCLUSIONS

This analysis has gone beyond the frequently heard calls for ‘more private enforcement’ in which the assumption is that the only relevant technique requires ‘more litigation, and collective procedures’. It has looked at a wider range of possible techniques and undertaken a preliminary comparison of the options. In evaluating the various techniques, the criteria that are relevant are the effectiveness, speed and cost of each technique. It has been found that the effectiveness of the three tracks depends to a significant extent on the internal design characteristics of an individual technique but also on the scale of the (internal or external) incentives that are in place to use it. The analysis reveals questions about how well some techniques will succeed.

The three techniques comprise three pillars: private enforcement, public enforcement, and ADR. The voluntary and ADR technique offers the fastest and cheapest way of achieving payment if it can be sufficiently incentivized. Firms may have a number of incentives to instigate voluntary payment, and these can clearly be enhanced by particular choices in the design of systems. If optimal use of ADR is to be achieved, it may be necessary to design a sufficiently large incentive, such as achieving the resolution of all public sanctions and private compensation consequences at the same time, or the prospect of negotiating a sufficiently large reduction the fine or other penalty.

The theoretical incentive of adopting voluntary or ADR behaviour by avoiding a class action turns out on analysis to be of limited and probably minor relevance in practice in European jurisdictions. This is precisely because the large incentives to settle that apply under the US litigation and antitrust system do not generally apply in Europe, and would be politically unacceptable here. Even the introduction of some
features, such as an opt-out mechanism, would have limited impact, since it will be
unusable by funders, who are essential for large damages actions to be brought.
Collective actions are likely, therefore, to have very limited utility in achieving
compensation for the key groups of consumers and SMEs. If such actions are brought,
the incentives for stand-alone cases to settle early appears to be limited. The empirical
evidence that is emerging from the relatively low number of collective actions that have
been brought across European jurisdictions is that such cases take several years, which
increases their cost and reduces financial viability.

The regulatory technique offers considerable scope for achieving effectiveness.
There is a wide range of options for designing a regulatory power, and selecting the
right design is critical to its effectiveness, and ability to achieve very swift solutions at
reasonable cost. The larger the power, the greater its force as an incentive and hence
the less it is likely to be used in practice, and the quicker it is likely to operate. The
conclusion of this analysis is clear: delivery of compensation will overwhelmingly
depend in practice on combining the right design of regulatory power with an ADR
function.\textsuperscript{140}

Overall, therefore, the major policy question that arises is: which of the levers,
and, more practically, what combination of these or other incentives and compulsions,
would achieve the optimal result in practice? What incentives or compulsions work
best, individually and in what combinations? How can each of these levers be made
more effective and efficient? How many levers do you need? And what are the costs and
downsides? The answer depends more on reliable empirical evidence than political
assertion. However, the current debate is long on assertion and short on empirical
analysis. The two key challenges are:

(a) How to improve the ability of those businesses who wish to challenge vertical
restraints or abuse of dominance.
(b) How to deliver compensation to those to whom losses are passed on down the
chain, whether companies or consumers.

In relation to (a), the B2B and SME problem, the clear answer lies in speedy response
rather than damages, and in overcoming the problem that some businesses may be
reluctant to sue companies with whom they need to continue to deal with. Some
Member States’ injunction procedures inherently include significant barriers, whether
of costs or complexity of the law (what has to be proved, e.g., dominance) and the
process. The body that has the best expertise on dominance will be the NCA, so it will

\textsuperscript{140}. Response to Consultation by \textit{Which?}: ‘We query whether the Government is placing too much
emphasis on consumers and businesses being able to bring cases themselves, and would
instead support a wider range of responses, including the OFT seeking redress on the part of
consumers as part of its standard enforcement function; collective follow-on actions will
remain the most feasible action but at present the time between abuse and redress can be
significant. There appears to us to be significant merit in ensuring that the up-front regulatory
response is sufficiently strong to incentivise defendants to try and find a workable solution
(such as ADR) before collective redress is even needed.’
inevitably be more efficient and quicker in taking action in those cases that are considered to be priorities.

In relation to (b), empirical analysis shows that litigation, whether individual or mass, will not solve the problem. If that is so, solutions have to be sought elsewhere. The regulatory and ADR techniques seem to offer solutions, but only if the incentives are appropriately designed. It is time to rethink policy if the goals are to be achieved.

It seems self-evident that the quickest form of achieving repayment is where the infringer initiates the payment voluntarily and without the need to complete a court procedure. That happens where:

(a) merits (and facts) are clear and show liability;
(b) costs are disproportionate to damages or other business cost (e.g., management disruption);
(c) the payer wishes to settle.

Hence, it may be expected that cases that have strong merits and that do not give rise to unclear issues of law and fact will settle reasonably quickly. Conversely, unclear or poor cases will fight. We are currently in a transitional period in which some complex issues of law require clarification. Once that has occurred, with considerable assistance from the Commission’s proposal on rules on passing on, limitation, and so on, the settlement rate of follow-on cartel cases should speed up considerably.

How realistic is it that stand-alone cartel cases and cases that allege (as opposed to plead in defence) abuse of dominance will occur? The evidence simply does not support an expectation that either of those case types will occur to any significant extent, assuming that a fair ‘level playing field’ balance exists on the litigation playing field. If that is so, then a policy of encouraging competition enforcement through incentivization of wider litigation is either pointless or misguided, since it might upset the balance of incentives on the litigation playing field and generate an increase in more claims with poor merits that are settled on a commercial basis than claims with good merits that are currently impeded.

In any event, there is a need for procedures for competition damage claims that are cheaper and quicker than at present. Within the private enforcement pillar it may be worthwhile to scope revised fast track procedures in specialist courts with more efficient rules on factual evidence and expertise. This might involve an inquisitorial procedure. It would also certainly involve new expert ADR services. A more innovative approach would be to construct some form of private competition ombudsman scheme.

Divergences are appearing between the European Commission and some Member States in policy in delivering redress. Most civil procedure systems permit and encourage ADR, albeit with no specific arrangements for competition claims. The Netherlands has enabled court approval of voluntarily negotiated settlements, on an

opt-out basis, and this technique has proved its worth and is to be copied by the UK. The Commission and, for example, Malta, favour a litigation class action mechanism alone, but restricted to an opt-in technique. In contrast, the UK has widened its approach to encompass a publicly overseen redress mechanism, in line with such a policy for all public regulatory authorities and evidence from Denmark of its considerable success in resolving consumer issues. The Commission’s 2013 Deutsche Bahn case\footnote{Supra n. 43.} also reveals a significant shift in approach, by seeking effective redress through regulatory means. These innovations have received little scrutiny in the competition world, and deserve far greater analysis. The new public mechanisms offer both solutions to hitherto intractable problems as well as improved solutions for existing problems. More importantly, the issue arises of how the three pillars can be optimally combined in practice within a single holistic model. It appears that new thinking can at last solve many issues of redress: the key has been to think about outcomes and possible mechanisms, rather than stick to assumptions that only an existing mechanism provides the answer.