



School of Law

Nudging Antitrust Enforcement: A Normative Design for Consumer Opt-Out Collective Redress in European Antitrust Litigation

Research and Thesis Trajectory Law and Economics

Academic Year: 2025-2026

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ABSTRACT

The breach of competition law causes the damages suffered by consumers, and these damages, when considered individually, are relatively minor compared to the costs of litigation. It is not economically rational for consumers to seek compensation for these damages on an individual basis. The European Union does not have a harmonised framework for collective action mechanisms for competition damages. Furthermore, within the context of collective action mechanisms, it is evident that the Union has favoured the opt-in mechanism over the opt-out mechanism. One of the main reasons for this choice is the constitutional concerns of Member States regarding the private autonomy of individuals, but the opt-out model yields better outcomes for consumers with small-value damages, leading to the conclusion that the opt-out mechanism is a better option for consumers' access to justice. In light of these, it is clear that the current legislative landscape of the Union is insufficient for consumers to claim damages through individual litigation for competition law violations.

To overcome this insufficiency, this study suggests a choice architecture framework to reframe default rules as protective instruments grounded in behavioural economics. To resolve the structural tension between individual autonomy and effective access to justice, this research proposes a harmonised European opt-out collective redress framework structured around a three-pillar safeguard system, including the only-benefits principle, an effective notification system and an *ex-ante* certification stage. By transforming traditional constitutional concerns into operational design requirements, this thesis demonstrates that a carefully nudged opt-out model aims to fill the legislative gap in European Union competition policy, thereby ending the dichotomy between autonomy and access to justice and securing compensation for mass consumer harm.

Keywords: Competition Law, Collective Redress, Opt-Out Mechanism, Small-Value Claims, Choice Architecture, Access to Justice, Private Autonomy, Only-Benefits Principle

1. Introduction

1.1. Background and Context of the Thesis: The Enforcement Gap

The European Union's (EU) competition policy is theoretically founded on a dual-pillar system comprising public enforcement by supervisory authorities, such as the Commission and National Competition Authorities, and private enforcement whereby individuals bring claims for compensation for damages arising from competition infringements before the national courts of Member States. While the Court of Justice of the European Union (CJEU) has firmly established that any individual has a "direct right" under Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) to demand compensation for harm caused by anti-competitive conduct, the legislative landscape is still not fully harmonised.¹ The Antitrust Damages Directive (2014/104/EU) (ADD) was a milestone in harmonising rules for individual actions, such as access to evidence and limitation periods.²

However, a deliberate and critical legislative omission occurred during the drafting of the ADD and collective redress mechanisms were excluded.³ This omission creates an enforcement gap, particularly in antitrust infringements involving mass consumer harm where individual losses are small-value claims, such as inflated prices on mass-consumer goods due to a cartel.⁴ From a behavioural economics perspective, consumers facing small-value harms suffer from rational apathy, as when individual litigation yields a negative expected value due to asymmetric financial risk, traditionally exacerbated by the loser pays principle, the rational choice for the consumer is inaction.⁵

While opt-in mechanisms, requiring active consumer participation, have been favoured by traditional continental European legal traditions to preserve private autonomy, empirical data show they fail to overcome this behavioural inertia, often yielding participation rates below

¹ Juliane Kokott and Hanna Schröder, 'Respective Roles of EU and National Law' in Barry J Rodger, Miguel Sousa Ferro and Francisco Marcos (eds), *Research Handbook on Private Enforcement of Competition Law in the EU* (Edward Elgar Publishing 2023) 83.

² Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1.

³ Csongor István Nagy, 'Collective Redress and Aggregation of Claims' in Barry J Rodger, Miguel Sousa Ferro and Francisco Marcos (eds), *Research Handbook on Private Enforcement of Competition Law in the EU* (Edward Elgar Publishing 2023) 343.

⁴ Blanka Szupera and others, 'Towards a Harmonised Collective Redress Mechanism for the Private Enforcement of EU Competition Law' (2020) 21 ERA Forum 267, 272.

⁵ Sonja Keske, 'Collective Redress - (Too) Great Expectations?' in Mel Marquis and Roberto Cisotta (eds), *Litigation and Arbitration in EU Competition Law* (Edward Elgar Publishing 2015) 50.

1%.⁶ Conversely, opt-out mechanisms, where affected individuals are automatically included unless they explicitly exit, effectively overcome rational apathy by shifting the default rule.⁷ Yet, EU policymakers and Member States have long resisted opt-out frameworks due to deeply rooted constitutional concerns regarding unauthorised representation, Article 6(1) of the European Convention on Human Rights (ECHR), and the fear of importing a United States of America (US) style “abusive litigation” culture.⁸ Consequently, a structural tension remains between protecting procedural autonomy and ensuring effective access to justice.

1.2. The Research Question and Sub-Questions

To address this enforcement gap, this thesis aims to explore how an opt-out collective redress mechanism can be designed for the EU without violating the constitutional and procedural traditions of Member States.

The main research question of this thesis is formulated as follows:

“How can the EU design a harmonised framework to ensure a class action mechanism for competition law damages with an opt-out mechanism that is viable for small-value consumer claims, while balancing constitutional principles and avoiding abusive litigation practices?”

To answer the main research question, the following sub-questions are addressed:

1. What is the current EU legislative framework on collective redress for damages arising from competition law infringements and what is the rationale behind the adoption of the current framework?
2. How does this current EU legislative framework affect consumers, especially the ones with small-value claims, and what are the shortcomings for these consumers to claim individual claims within this framework?
3. What are the advantages of the opt-out mechanism in class action systems for consumers with small-value claims, and how do these compare to the model’s limitations, particularly in light of constitutional concerns raised by EU policymakers and the risk of abusive litigation?

⁶ Sofia Pais and Anna Piszcz, ‘Package on Actions for Damages Based on Breaches of EU Competition Rules: Can One Size Fit All?’ (2014) 7 SSRN Electronic Journal <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2741618> accessed 3 May 2026, 214.

⁷ Csongor István Nagy, ‘Collective Redress and Aggregation of Claims’ in Rodger, Ferro and Marcos (n 3) 336.

⁸ *ibid* 350-354.

4. How can a harmonised opt-out model for collective redress in competition damages be reconciled with the constitutional principles of Member States in order to protect small-value consumer claims, whilst mitigating the drawbacks of the opt-out mechanism?

1.3. The Academic and Practical Relevance of the Research

A strong scholarly consensus already exists on the problem diagnosis: EU competition law is built on a dual enforcement model, yet the private pillar remains structurally incomplete when harm is dispersed across large numbers of consumers with individually small-value losses.⁹ The European Commission (Commission) itself acknowledged early that, while individuals have a right to claim damages for antitrust harm, damages actions in the Member States were (at the time) “totally underdeveloped” and that small consumer claims are “very unlikely for practical reasons, if not impossible” to litigate individually.¹⁰ The Commission, therefore, explicitly placed “collective actions” on its agenda as a potential solution to protect consumer interests and consolidate scattered losses into a single procedure.¹¹

Building on that starting point, a large part of the literature debate has explained why the EU has repeatedly avoided adopting an opt-out collective redress mechanism for competition damages: constitutional concerns about representation without explicit authorisation, diverging national traditions of party autonomy, the perceived tension with the right to be heard and political resistance driven by fear of importing US style “entrepreneurial” litigation dynamics.¹² The Commission’s early consultation documents raised collective actions as an option for debate, while later soft-law instruments emphasised safeguards against abusive litigation, a compensatory rather than punitive approach, and controls on funding incentives, as seen in the EU-level “common principles” approach in the collective redress policy framework.¹³ However, this approach has not been reflected during the adoption of the ADD and the Representative Actions Directive (EU 2020/1828) (RAD).

The legislative gap is the institutional and procedural design question of what an EU-credible, rights-compatible and workable opt-out mechanism for competition damages should actually look like under European conditions, such as loser-pays, constitutional pluralism, decentralised

⁹ Szupera and others (n 4) 272.

¹⁰ European Commission, ‘Green Paper - Damages actions for breach of the EC antitrust rules’ COM (2005) 672 final 2-5; European Commission, ‘White Paper on Damages Actions for Breach of the EC Antitrust Rules’ COM (2008) 165 final 2; European Commission Recommendation 2013/396/EU of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law [2013] OJ L 201/60.

¹¹ Green Paper - Damages actions for breach of the EC antitrust rules (n 10) 5.

¹² Csongor István Nagy, ‘Collective Redress and Aggregation of Claims’ in Rodger, Ferro and Marcos (n 3) 350.

¹³ European Commission Recommendation 2013/396/EU (n 10) [26], art. II.

civil procedure and the continued priority of public enforcement. In other words, existing research has offered strong explanations of non-adoption and strong warnings about risks, but it has produced fewer operational design criteria that translate the EU's stated policy constraints into a feasible model for "negative-expected-value" consumer claims.¹⁴ The Commission's Green Paper on damages actions for breach of the EC antitrust rules (Green Paper) is illustrative here, as it identifies the economic irrationality of small consumer claims and points toward collective mechanisms, but (as a Green Paper) primarily frames questions and options rather than specifying a stable architecture capable of functioning across the Member States.¹⁵

The academic relevance of this research lies at the intersection of law, behavioural economics, and institutional design. While standard legal literature frequently debates the abstract merits of opt-in versus opt-out models, this study moves beyond this dichotomy by employing a choice architecture framework. By analysing the default nature of opt-out regimes through a law and economics lens, this thesis contributes to the academic discourse with a functional, protective model that reframes default rules as tools for constitutional equilibrium rather than as violations of consumers' right to access justice.

The practical relevance is highly pronounced given the ongoing evaluation of the RAD and the continuous evolution of national competition litigation hubs. As NCAs and the European Commission increasingly call for effective private compensation to complement administrative fines, policymakers require concrete legislative designs. This thesis offers a practical utility to the EU and national legislators by providing a three-pillar safeguard system with the only-benefits principle, effective notification and an *ex-ante* certification stage that is capable of overcoming the constitutional tension between two principles, namely private party autonomy and access to justice.

A distinctive contribution of the thesis is that it does not treat "opt-out" as a binary choice. It is aimed to address opt-out as conditionally permissible when paired with a design that makes passive class membership "only benefits" and embeds safeguards that address directly to Member States' party-autonomy concerns. Establishing a structure consistent with these rights lies the design of a robust opt-out mechanism that enables consumers to make an effective choice. Although policymakers assume that consumers make rational decisions, consumers are often less informed than assumed. In complex competition damages cases, an opt-out

¹⁴ Csongor István Nagy, 'Collective Redress and Aggregation of Claims' in Rodger, Ferro and Marcos (n 3) 332-335.

¹⁵ Green Paper - Damages actions for breach of the EC antitrust rules (n 10) 5.

mechanism, in which consumers are automatically included and may withdraw at their discretion, is likely to be more advantageous for consumers. To address constitutional concerns associated with the opt-out mechanism in Member States, it is necessary to ensure effective notification of passive class members, facilitate the exercise of their right to withdraw and apply the only-benefits principle, which guarantees that the procedure imposes no financial risk on individuals. Contrary to the criticism that the opt-out mechanism harms consumers' private autonomy, this thesis aims to establish an opt-out mechanism that provides a path enabling consumers to make an informed choice.

1.4. The Research Methods and Approach

This research employs a multi-disciplinary approach, combining qualitative legal analysis with economic theory to evaluate the necessity and feasibility of harmonising collective redress in EU competition law.

- 1. Doctrinal Legal Research:** The thesis's foundation lies in an analysis of the existing EU legal framework. Regarding the primary sources, a thorough examination of ADD and RAD will be conducted. The jurisprudence of the CJEU is analysed (e.g., *Courage v Crehan*, *Manfredi*).
- 2. Comparative Legal Analysis (Functional Method):** To assess how an opt-out mechanism can be integrated into the EU legal order without violating European legal traditions, this study employs the functional method of comparative law, functional comparison. Rather than merely comparing statutory texts line by line, this method focuses on how different legal systems address the same societal and economic problem: the under-enforcement of small-value consumer claims and overcoming the Member States' constitutional concerns regarding the opt-out mechanism. To that end, during the research process, Portugal as a Member State's collective redress mechanisms, and non-EU countries' class action mechanisms, those of the US and the United Kingdom (UK) were assessed. These choices of jurisdictions are deliberate. Portugal is one of the few Member States adopted the opt-out mechanism with an only-benefit principle, thus Portuguese regime is used a basis for this thesis while offering an only-benefit principle in the framework. The US model is one of the oldest and most well-established models of collective actions to enforce competition policy and, as explained above, the most feared model for the EU policymakers. However, the collective actions should be associated with the shortcomings of the US model, as there are also lessons to learn from it. In order to address the concerns of the EU policymakers, which are mostly

originated from the US model, the model needs to be analysed during the thesis. Lastly, the UK model is essential because when the UK adopted the opt-out mechanism, it was part of the EU. Thus, while adopting the mechanism, the policymakers of UK also took into EU values and policies into consideration. Moreover, the UK model offers a well-established notification system for collective actions, which is used as an example for the notification system offered in this thesis.

- 3. Normative Assessment:** This thesis adopts a normative framework asserting that victims of competition law infringements possess an inherent right to full compensation. This framework emphasises a justice-oriented approach because the main argument of the thesis is that every consumer should have equal opportunities to claim damages for infringements of competition law, with the most important aim being to ensure equal access to judicial redress. The normative framework offered by this thesis aims to address EU policymakers' concerns about the constitutional values of European legal tradition regarding the opt-out mechanism by prioritising the removal of procedural barriers. Member States' sensitivity regarding private autonomy stems from their view that involving a person in a lawsuit without their consent is a constitutional issue. However, without an opt-out approach, the consumer's right to access to justice is also jeopardised. To address the tension between private autonomy and access to justice, this thesis proposes a framework in which opt-out is permissible provided it adheres to specific normative principles governing default mechanisms. In complex compensation cases arising from competition law breaches, an opt-out option, where consumers are included by default and may opt out, is preferable to an opt-in option.

To address constitutional concerns about the opt-out in Member States, this thesis offers three elements for the harmonised European framework, namely the adoption of the only-benefit principle, effective notification and an *ex-ante* certification mechanism. These elements ensure that the opt-out mechanism offered in the thesis does not undermine consumers' autonomy; instead, it provides consumers with an option and enables them to make an informed decision. Within such a framework, opt-out class actions can serve to maximise deterrence in the enforcement of EU competition policy.

1.5. Structure of the Thesis

The remainder of this thesis is structured into four subsequent chapters:

Chapter 2 establishes the foundational status quo, traces the historical evolution of private enforcement in the EU, examines the rationale behind the deliberate exclusion of collective

redress from competition damages legislation and analyses the constitutional and political concerns, particularly representation without authorisation, that have shaped EU policymakers' resistance to opt-out mechanisms.

Chapter 3 demonstrates the damages arising from antitrust infringements, namely infringements of Articles 101 and 102 of the TFEU, how these damages affect consumers, and why the individual litigation offered in ADD is insufficient to compensate consumers' damages, as the value of claims is too small to be litigated.

Chapter 4 conducts a comparative legal assessment of constitutional and procedural risks by introducing both opt-out and opt-in models. Then, the chapter demonstrates the advantages of opt-out mechanisms for small-value claims and addresses core objections to opt-out regimes, such as the right to a fair trial and the fear of frivolous lawsuits.

Chapter 5 synthesises these findings into a normative institutional design. It constructs the proposed European opt-out framework to offer consumers access to justice in case of competition law violations, where they should be able to claim compensation without facing the shortcomings of the individual litigation, detailing its core operational safeguards: the only-benefits principle, effective notification systems, and an *ex-ante* certification stage, and concludes with a comprehensive summary of the research.

2. The Status Quo and the Rationale for Non-Adoption of a Collective Redress Mechanism for Competition Damages in the EU

2.1. Introduction

Private enforcement of competition law is a newly developed part in the EU compared to public enforcement but this does not lessen its value of being an integral part of the system for enforcing competition rules.¹⁶ While, the ADD was a milestone in harmonising rules for individual actions, the deliberate decision was made not to include collective redress during its drafting.¹⁷ In this chapter, the aim is to demonstrate the evolution of private enforcement of competition law and the collective actions during this process. This chapter further argues that collective redress has repeatedly been sidelined in the context of competition law, and one of the reasons for this deliberate exclusion is the EU-specific constitutional and political concerns regarding representation without authorisation.

2.2. Private Enforcement Development through the Case Law of the CJEU

Private enforcement of EU competition law began essentially through a series of CJEU decisions, followed by soft-law instruments and lastly, the ADD was adopted in 2014. The first landmark decision is the *Courage v Crehan* decision in 2001, in which the CJEU stated that actions for damages in national courts can substantially enhance the preservation of competition within the EU.¹⁸ However, there was no EU-level legislation governing the private enforcement of competition law at the moment of decision. Therefore, the CJEU further articulated that each Member State's domestic legal system is responsible for designating the courts and tribunals with jurisdiction and establishing the specific procedural rules governing actions to protect rights that persons derive directly from EU law.¹⁹ The logic behind the decision actually stems from the fact that the nullity of anti-competitive agreements stated in Article 101(2) TFEU is unequivocal and can be invoked by any party, as such agreements yield no effects between the contracting parties and are unenforceable against third parties.²⁰ Considering the horizontal direct effect of the EU antitrust regulations, domestic courts are obligated to protect the rights established for persons.²¹ Consequently, any individual may invoke violations of these

¹⁶ Richard Whish and David Bailey, *Competition Law* (OUP 2024) 323.

¹⁷ Csongor István Nagy, 'Collective Redress and Aggregation of Claims' in Rodger, Ferro and Marcos (n 3) 343.

¹⁸ Case C-453/99 *Courage Ltd v Crehan* [2001] ECR I-6297 [27].

¹⁹ *ibid* [29].

²⁰ Richard Whish and David Bailey, 'Private Enforcement of Competition Law: Its Role and Development in the EU' in Barry J Rodger, Miguel Sousa Ferro and Francisco Marcos (eds), *Research Handbook on Private Enforcement of Competition Law in the EU* (Edward Elgar Publishing 2023), 8.

²¹ Johan W van de Gronden and Catalin S Rusu, *Competition Law in the EU* (Edward Elgar Publishing 2024) 277.

requirements, even if they are not parties to contracts that restrict competition.²² With this decision, the CJEU enhanced private law enforcement of Article 101 and 102 TFEU by instituting the EU right to seek damages.²³ Although the decision stands as a landmark ruling of the CJEU, it caused some further questions regarding procedural matters, such as what type of damages would be compensated, or how someone could prove the existence of harm, which leads to the development of further case law.²⁴

Following *Courage v Crehan*, in 2006 the CJEU concluded the *Manfredi* decision.²⁵ In this decision, the Court held that punitive damages are not *per se* prohibited, though unjust enrichment must be avoided.²⁶ As to the scope of compensation, the Court established that recoverable heads of damage must encompass “actual loss (*damnum emergens*), loss of profit (*lucrum cessans*) and interest”.²⁷ *Manfredi* elucidated, albeit not comprehensively, how the legal frameworks of Member States should structure significant procedural components of damages proceedings arising from EU antitrust violations.²⁸ However, the case introduced “abstract rules” without a description of how to apply these rules.²⁹

After *Manfredi* ruling, the Court examined how the principle of effective judicial protection interacts with the private enforcement of EU competition law in its *Otis* decision in 2012.³⁰ The Commission played a dual role in the case, by acting as the public authority enforcing Article 101 TFEU by finding an infringement, and also representing the EU institutions as victims seeking damages in a Belgian civil court.³¹ The CJEU confirmed that any party, including the EU itself, may claim compensation for harm suffered and regarding the key elements of a civil damages action, infringement, loss and causality, the Commission’s infringement decision satisfies the first requirement, which the national court must accept.³² However, the national court retains responsibility for assessing whether a loss occurred and whether it was caused by the infringement.³³ The CJEU concluded that this division of roles does not breach Article 16

²² *ibid* 277.

²³ *ibid* 277-278.

²⁴ Murat Şahin, *Rekabet Hukukunda Tazminat Talepleri* (2nd edn., On İki Levha Yayıncılık 2018), 75.

²⁵ Joined Cases C-295/04 to C-298/04 *Manfredi and Others v Lloyd Adriatico Assicurazioni SpA and Others* ECLI:EU:C:2006:461.

²⁶ *ibid* [83]-[100].

²⁷ *ibid* [95].

²⁸ van de Gronden and Rusu (n 21) 278-279.

²⁹ Giorgio Afferni, ‘Case: ECJ - Manfredi v Lloyd Adriatico’ (2007) 3 European Review of Contract Law <<https://doi-org.utrechtuniversity.idm.oclc.org/10.1515/ERCL.2007.011>> accessed 27 May 2026, 182.

³⁰ van de Gronden and Rusu (n 21) 279.

³¹ Case C-199/11 *Otis GmbH and Others v Land Oberösterreich and Others* ECLI:EU:C:2012:684, [27].

³² *ibid* [30]-[77].

³³ *ibid* [65].

of Regulation 1/2003 and the Commission cannot be considered both judge and party in these circumstances.³⁴

Finally, in 2014, the CJEU clarified the causation requirement, regarding the concept of umbrella pricing in its *Kone* decision. The concept of umbrella pricing refers to a situation where undertakings which do not participate the cartel set their prices higher than they otherwise would, in response to the cartel's practices, which raises the question of whether cartelists can be held liable for losses suffered by customers of non-cartelists, where those losses result from higher prices set by independent undertakings.³⁵ The Court observed that, under Austrian national law, compensation was generally excluded in umbrella pricing scenarios, as the direct contractual relationship between the cartelists and the victims does not exist and non-cartelists made independent decisions to raise prices.³⁶ However, the Court considered whether umbrella pricing could be a consequence of cartel conduct, if the cartel were, given the circumstances and market characteristics, likely to result in umbrella pricing by independent undertakings and the cartelists could not have been unaware of this possibility.³⁷ All these case law developments still did not answer numerous procedural questions, such as access to evidence, burden of proof, which eventually led to the adoption of ADD, which is discussed below.

2.3. Private Enforcement Development through Legislative Process in the EU

During these decisions, the Commission adopted several soft-law instruments in parallel. Whilst these judicial developments established the right to compensation as a matter of principle, the Commission left procedural arrangements for the enforcement of rights through private law almost entirely to the discretion of the Member States. The Commission has therefore sought to address this fragmentation through a range of soft-law instruments. In 2004, the Commission published the Ashurst Report, "Study on the conditions of claims for damages in case of infringement of EC competition rules". The Report was adopted to identify and analyse the barriers to enforcing successful damages actions regarding competition law infringements in the Member States.³⁸ A high level of diversity and lack of development in the

³⁴ *ibid* [66].

³⁵ van de Gronden and Rusu (n 21) 280.

³⁶ Case C-557/12 *Kone AG and Others v ÖBB-Infrastruktur AG* ECLI:EU:C:2014:1317, [14].

³⁷ *ibid* [28], [30]-[31], [34]-[35], [37].

³⁸ Denis Waelbroeck, Donald Slater and Gil Even-Shoshan, 'Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules' (Ashurst, 2004) <<https://competition-policy.ec.europa.eu/document/download/836e9374-09c3-4c0d-8f0d->

courses of Member States, both in the EU and their domestic actions, was observed during the study.³⁹ The Report identified various national and procedural shortcomings that hinder the more efficient development of the system of private competition litigation, specifically regarding procedural matters.⁴⁰ These shortcomings pointed out mainly concern the situations in which the plaintiff bears the burden of proof with a “high standard of proof,” a requirement that restricts “access to evidence”.⁴¹ Further complications arise from the ambiguity regarding whether NCAs’ decisions are binding for the national courts, as well as from the plaintiffs’ obligation to prove the causal link, particularly in cases involving the “indirect purchaser”.⁴² Following the Report, the Commission published the Green Paper in 2005, which was the Commission’s first systematic attempt to diagnose the underdeveloped private competition law enforcement across the EU. It catalogued the structural obstacles, namely evidentiary asymmetries, divergent fault requirements, uncertainty around passing-on defences, and prohibitive litigation costs, and proposed options to address each.⁴³ Its significant feature for this thesis is its discussion of collective redress. In the document, the Commission acknowledged that consumers with low-value losses would find individual litigation practically impossible and that collective actions can aggregate a large number of smaller claims into a single action, allowing them to save time and money.⁴⁴ The Commission further offered only two hesitant options for collective actions: a cause of action for consumer associations and a special provision for group purchaser actions.⁴⁵

The Green Paper was followed by the adoption of the White Paper on Damages Actions for Breach of the EC Antitrust Rules (White Paper) in 2008. The White Paper set out policy options and specific measures to ensure that victims of EU competition law infringements can access effective mechanisms for redress, thereby receiving full compensation for the harm suffered.⁴⁶ It included measures regarding standing, access to justice, binding effect of NCA decisions, fault requirement, damages, passing-on overcharges, limitation periods and costs of damages actions.⁴⁷ Collective actions were also mentioned here and the Commission further

[828929b54008_en?filename=damages_actions_claims_for_damages_infringements_study_comparative_report.pdf](https://ec.europa.eu/competition/antitrust/actions_claims/828929b54008_en?filename=damages_actions_claims_for_damages_infringements_study_comparative_report.pdf) accessed 11 April 2026, 25-26.

³⁹ *ibid* 1.

⁴⁰ van de Gronden and Rusu (n 21) 284.

⁴¹ Waelbroeck, Slater and Even-Shoshan (n 38) 4-6.

⁴² *ibid* 4-6.

⁴³ Green Paper - Damages actions for breach of the EC antitrust rules (n 10) 2-6.

⁴⁴ *ibid* 5.

⁴⁵ *ibid* 5.

⁴⁶ White Paper on Damages Actions for Breach of the EC Antitrust Rules (n 10) 1.

⁴⁷ *ibid* 2-7.

acknowledged an obvious necessity for collective actions in the EU for competition law damages.⁴⁸ The difference between the White Paper and the Green Paper regarding collective actions is quite important because the Commission explicitly rejected opt-out mechanisms, insisting instead on opt-in collective actions in the White Paper. In an opt-in mechanism, potential class members must actively join the class proceeding by completing a specified action within a defined timeframe.⁴⁹ Conversely, the opt-out model, in which individuals are considered class members unless they explicitly request exclusion from the action and its judgment, has been predominantly adopted in common law jurisdictions.⁵⁰ The opt-out model was evaluated under the Impact Assessment report for the White Paper on actions for damages for breach of the EU antitrust rules (IAWP). IAWP Option 1 proposed the Union-level opt-out mechanism but was dismissed because it is far from European legal traditions and would require significant, costly changes to the legal systems of all Member States.⁵¹ The Commission excluded opt-out actions due to an unsatisfactory cost/benefit ratio, high administrative costs, and the potential for abuse.⁵² This distinction between the papers is of great importance for the future of the collective redress process under EU competition law. The Commission has limited its proposals to representative actions brought by qualified organisations that have been pre-authorised through “participatory” class actions, thereby excluding the opt-out model from the outset of the legislative process.

Lastly, the Commission adopted the Recommendation of 11 June 2013 on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States (Collective Redress Recommendation). The Collective Redress Recommendation addresses situations where breaches of EU-level rules have caused or may cause harm to natural or legal persons.⁵³ The scope covered many areas in which EU rights are granted, including competition.⁵⁴ The Commission recognised that individual actions, such as small claims procedures in consumer cases, are typically used to resolve disputes, prevent harm and seek

⁴⁸ *ibid* 2.

⁴⁹ Žygimantas Juška, ‘The Effectiveness of Antitrust Collective Litigation in the European Union: A Study of the Principle of Full Compensation’ (2017) 49 IIC - International Review of Intellectual Property and Competition Law 63.

⁵⁰ Rachael Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (1st edn., Hart Publishing 2004) 29.

⁵¹ Commission, ‘Impact Assessment Accompanying the Proposal for a Directive on Antitrust Damages Actions’ (Staff Working Document SWD(2013) 203 final, 11 June 2013) 80-81.

⁵² *ibid* 31, 80.

⁵³ European Commission Recommendation 2013/396/EU (n 10) [6].

⁵⁴ *ibid* [7].

compensation.⁵⁵ In this context, small-value claims refer to claims brought by usually consumers who faced damages as a result of an infringement of competition law breach, whilst individually these claims may be of minor value, collectively they can amount to a significant sum.⁵⁶ In terms of access to justice, it was noted that collective actions can be more effective when the cost of individual proceedings would discourage affected individuals from pursuing their claims.⁵⁷ As a result, the Collective Redress Recommendation aims to facilitate access to justice for violations of rights under Union law. It recommends that all Member States establish national collective redress systems based on common principles, while respecting national legal traditions and including safeguards against abuse.⁵⁸ Recital 15 of the Collective Redress Recommendation emphasises the importance of maintaining procedural safeguards and protecting the rights of all parties involved in civil actions. To prevent the emergence of an abusive litigation culture in cases involving mass harm, it is essential that national collective redress mechanisms incorporate the core safeguards outlined in the Collective Redress Recommendation. For instance, features such as punitive damages, extensive pre-trial discovery and jury awards are generally unfamiliar within the legal systems of most Member States and should therefore be avoided. The Collective Redress Recommendation's emphasis on the opt-in mechanism and its implied rejection of opt-out model reflect the maintained fundamental concern underlying the White Paper.⁵⁹ The conclusion to be drawn from this is that collective redress mechanisms, if designed with an overly broad scope, carry the risk of fostering a litigation culture that is fundamentally at odds with European legal traditions.

After the Collective Redress Recommendation, the Commission adopted ADD in 2014. The collective redress mechanisms are deliberately excluded from the scope of ADD, which can be observed from the Impact Assessment Report regarding ADD. The Commission removed the collective redress mechanism from the scope of the directive, as small-value damages are not unique to competition law but also occur in other fields, such as consumer and environmental law and it was necessary to address the issue through a horizontal framework to avoid unnecessary fragmentation of national civil laws across the EU.⁶⁰ The horizontal framework argument posits that a common set of principles for collective redress should be established

⁵⁵ *ibid* [8].

⁵⁶ Ondřej Dostal, 'Collective Actions for Infringement of Competition Law' (2020) 7 *European Studies* 390, 391-397.

⁵⁷ European Commission Recommendation 2013/396/EU (n 10) [9].

⁵⁸ *ibid* [10].

⁵⁹ Duncan Fairgrieve and Geraint Howells, 'Collective Redress Procedures - European Debates' (2009) 58 *International and Comparative Law Quarterly* 379, 400.

⁶⁰ Commission, 'Impact Assessment' (n 51) 55.

across all areas of EU law, rather than adopting exclusively for competition law.⁶¹ The Commission and the European Parliament preferred this because it would provide consumers and small and medium-sized enterprises (SMEs) with a unified mechanism to obtain effective redress without fragmenting national civil laws.⁶² However, there is also another layer regarding the exclusion of the collective redress mechanism from the scope of the ADD. During the public consultations, while consumers strongly supported binding EU measures on collective redress, the majority of businesses were opposed.⁶³ Regarding Member States, 10 of the 15 responding governments favoured a binding EU instrument, while 5 preferred a non-binding approach.⁶⁴ Whilst all stakeholder groups agree that private collective redress and sanctions imposed by public authorities are distinct tools serving different purposes, businesses tend to place greater emphasis on public sanctions, whereas other stakeholder groups generally hold the view that both tools are, in principle, equally important and should function as independent and complementary mechanisms.⁶⁵ Ultimately, the ADD was adopted but, although the necessity of collective redress had been acknowledged repeatedly, the mechanism was excluded from the scope of the directive on the grounds that it needed to be incorporated into an EU-wide horizontal framework.

The horizontal framework to which the ADD referred for collective redress, the RAD, came into force in 2020. According to RAD, Member States are required to establish procedures enabling “qualified entities” to initiate representative actions, which can be both opt-out and opt-in bases, to seek injunctions, damages and other forms of redress for groups of consumers harmed by infringements of specified EU consumer protection laws.⁶⁶ However, upon examination of Annex I of the RAD, namely the list of provisions of EU law referred to in Article 2 (scope) of the directive, competition law is not included in the list, while areas such as data protection, financial services, travel, energy and telecommunications are included.⁶⁷ Thus, the horizontal framework mentioned during the adoption of ADD was finally implemented, but competition law was excluded, thus leaving damages arising from competition law infringements outside the scope of the EU-level collective redress mechanism.

⁶¹ *ibid* 11.

⁶² *ibid* 54-55.

⁶³ *ibid* 10.

⁶⁴ *ibid* 10.

⁶⁵ *ibid* 10.

⁶⁶ Whish and Bailey (n 16) 339.

⁶⁷ Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC [2020] OJ L409/1, Annex I, art 2, recital 13.

2.4. Why the EU Lacks a Binding Collective Redress Instrument for Competition Damages

There are several reasons why there is no EU-level binding instrument for collective actions for infringements of competition law, three of them will be discussed here as they are regarded as the main ones.⁶⁸ The first of these reasons is the EU's desire to avoid replicating the abusive litigation culture associated with the US model.⁶⁹ Whilst US antitrust law served as a source of inspiration during the development of private enforcement under EU competition law, there was no direct transfer of the US model to the EU.⁷⁰ The Commission does actually wish to establish an effective and robust private enforcement mechanism as a complement to public enforcement under EU law. Nevertheless, various documents state that adopting the US model, which is perceived as alien to the European legal tradition, should be avoided.⁷¹ The Commission has viewed the US class action system as a model that contradicts European legal traditions and is destructive to businesses.⁷² The Commission described the combination of features underpinning the US model as a "toxic cocktail" in 2008.⁷³ One of the elements of the US system which the Commission aims to avoid is that whilst European law aims to provide full compensation for the victim's actual loss and to prevent unjust enrichment, the US system awards punitive damages of up to three times the amount of the loss for the purpose of deterrence.⁷⁴ Moreover, in the US, the practice of lawyers financing cases and taking a percentage of the awarded damages has been viewed as an incentive leading to lawyers in Europe acting in an "entrepreneurial" manner by bringing unmeritorious or abusive lawsuits against companies, a practice considered unorthodox to public policy in most Member States.⁷⁵ It has been argued that these practices, which are unfamiliar to European procedural law, create massive financial, administrative and reputational pressure on defendant companies, according to the Commission.⁷⁶ It must be stated here that, these features are mostly related to opt-out mechanisms in the US model. Furthermore, representation in a case where the court's decision would be binding on the individual without their express consent in the opt-out mechanism has

⁶⁸ Juška (n 49) 68.

⁶⁹ Dostal (n 56) 391-392.

⁷⁰ Csongor István Nagy, 'Collective Redress and Aggregation of Claims' in Rodger, Ferro and Marcos (n 3) 338-339.

⁷¹ Commission, 'Impact Assessment' (n 51) 61.

⁷² Scott Dodson, 'An Opt-in Option for Class Actions an Opt-in Option for Class Actions', (2016) 115 Michigan Law Review 171 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2733450> accessed 16 May 2026, 496.

⁷³ Ander Maglica, *Collective Dimensions of Access to Justice* (Springer Nature 2025) 121-122.

⁷⁴ Dostal (n 56) 391-392.

⁷⁵ Csongor István Nagy, 'Collective Redress and Aggregation of Claims' in Rodger, Ferro and Marcos (n 3) 340.

⁷⁶ Dostal (n 56) 391-392.

been viewed in many EU Member States as a violation of “party autonomy” and the “right to a fair hearing” and “representation without authorisation” has been blocked by constitutional barriers.⁷⁷

The second reason is the concern that adopting a collective redress mechanism for competition damages would create uncertainty regarding the leniency programme, and that those seeking to benefit from the leniency programme would be disclosed, thereby all victims would claim damages as they came forward.⁷⁸ Leniency programmes in the EU operate by offering immunity or reduced fines to cartel members in exchange for voluntarily disclosing their participation to the Commission or NCAs.⁷⁹ The effectiveness of the mechanism depends to a large extent on the confidentiality of the corporate statements submitted by applicants.⁸⁰ While designing a private enforcement mechanism, EU policymakers were required to balance public and private enforcement mechanisms, as stated above. Despite the stated objective of facilitating damages claims, the ADD primarily aims to maintain the effectiveness of public enforcement, particularly leniency programs.⁸¹ The EU has expressed concern that private actions could damage the significance of the leniency programme, which is essential for uncovering and terminating long-term cartel violations.⁸² One of the main concerns here is that a violator, when weighing the benefits of the leniency programme against the risk of facing large-scale class actions, might prefer to remain silent rather than cooperate. The ADD has directly addressed this tension by stipulating that leniency statements are categorically protected from disclosure in compensation claims and by limiting the legal liability of those covered by immunity.⁸³ However, as previously mentioned, the scope of the ADD covers only individual claims, and collective actions are excluded. This exclusion, justified on grounds of leniency protection, demonstrates a preference of the EU between the consumers’ claims and violators’ cooperation. However, as stated by Wils, “it would also be unjust to deprive, wholly or partially, the victims

⁷⁷ Csongor István Nagy, ‘Collective Redress and Aggregation of Claims’ in Rodger, Ferro and Marcos (n 3) 345-349.

⁷⁸ Juška (n 49) 69; Szupera and others (n 4) 273.

⁷⁹ OECD, ‘Leniency Programmes’ (Working Party No 3 on Co-operation and Enforcement, DAF/COMP/WP3/WD(2023)20, 2023) 1.

⁸⁰ Whish and David, ‘Private Enforcement of Competition Law: Its Role and Development in the EU’ (n 20) 19.

⁸¹ Juška (n 49) 73.

⁸² *ibid* 78.

⁸³ Directive 2014/104/EU (n 2) recitals 27, 38.

of antitrust infringements of their subjective right to claim compensation for the harm caused to them by the antitrust offenders”.⁸⁴

Third, when drafting the ADD, the Commission focused on addressing specific procedural barriers to individual damages claims, including limitation periods, the binding effect of NCA decisions, passing-on defence rules and joint and several liability. Including collective redress within this framework would have introduced a politically sensitive issue that could have disrupted the legislative process, which constitutes the third reason of the exclusion of collective redress for competition damages.⁸⁵ As shown by the earlier soft-law developments, Member States, businesses and consumer organisations held fundamentally different positions on collective redress. To maintain progress on the technical aspects and reach consensus on less controversial provisions, the decision was made to exclude collective claims from the ADD.⁸⁶

Furthermore, during the adoption process of the RAD, as mentioned above, competition damages were excluded from the scope of the Directive. As a result, collective redress was excluded once again, as its inclusion would have complicated the negotiations. In the preamble of RAD, it was clearly stated that Member States are free to choose an opt-in or an opt-out, or a hybrid model, but for Member States which are going to choose the opt-out mechanism, they are obliged to provide that “consumers should be required to explicitly express their wish not to be represented by the qualified entity in the representative action for redress measures”.⁸⁷

These three factors demonstrate that the absence of a binding EU framework for collective redress in relation to damages under competition law does not stem from a single policy issue. Rather, it reflects an ongoing and complex institutional and political choice, evident at various stages of the legislative process, to limit the role of collective redress under EU competition law. Moreover, even though Member States seem free to choose their collective redress model, based on an opt-in or opt-out mechanism, it is clear that the EU policymakers favoured the opt-in model even in RAD.

⁸⁴ Wouter PJ Wils, ‘The Relationship between Public Antitrust Enforcement and Private Actions for Damages’ (2009) 32 World Competition 3 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1296458> accessed 12 April 2026, 31.

⁸⁵ Juška (n 49) 69.

⁸⁶ *ibid* 69.

⁸⁷ Directive (EU) 2020/1828 (n 67) recital 44.

2.5. A Choice of the EU Policymakers: Opt-in or Opt-out

Having examined why no binding EU framework exists for competition damages, this chapter now turns to a distinct but related question: why has the opt-out model specifically proven so resistant to adoption in the EU.

The opt-out mechanism is a system in which potential victims who have suffered a particular harm are automatically included in the collective action unless they actively notify their wish to withdraw, as defined above. This system does not require express, informed consent from individuals, and the final judgment binds all victims who have not opted out.⁸⁸ This situation is regarded in some EU Member States as a violation of party autonomy and the right to a fair hearing, which is why it has encountered constitutional barriers. The continental European legal tradition has historically been built on individual rights and the freedom to pursue individual claims.⁸⁹ Party autonomy, one of the most fundamental principles in law, means that an individual is the master of their own case and is entirely free to decide whether to bring a claim, when to do so, and how to conduct it.⁹⁰ The opt-out mechanism represents an individual without that person's knowledge, making them a party to proceedings they may be unaware of. This is characterised in law as representation without authorisation, depriving the individual of this freedom of choice. Binding individuals through a legal decision taken without their knowledge and imposing upon them an authority they never granted is regarded as a constitutional interference with private autonomy. The fact that a court's decision may bind a person without their express consent, and possibly without their even being aware of the proceedings, is seen as directly conflicting with the right to a fair trial guaranteed by Article 6 of the ECHR.⁹¹ Being deprived of the ability to defend one's own rights and of the opportunity to present one's own case before a court is considered a serious procedural injustice. This theoretical and constitutional resistance to representation without consent has produced very concrete barriers in the legal systems of major European countries. In Germany, the opt-out mechanism is regarded as seriously violating the right to be heard (*Recht zum rechtlichen Gehör*) and the principle of disposition (*Dispositionsgrundsatz*) enshrined in the German Constitution.⁹² Notably, the German Federal Cartel Office (Bundeskartellamt), despite its strong support for private enforcement, explicitly rejected the opt-out class action model in 2005 precisely because

⁸⁸ Mulheron (n 50) 29.

⁸⁹ Csongor István Nagy, 'Collective Redress and Aggregation of Claims' in Rodger, Ferro and Marcos (n 3) 349.

⁹⁰ Jurgita Malinauskaite, *Harmonisation of EU Competition Law Enforcement* (Springer 2020) 116.

⁹¹ Csongor István Nagy, 'Collective Redress and Aggregation of Claims' in Rodger, Ferro and Marcos (n 3) 350.

⁹² *ibid* 351.

of its conflict with these constitutional principles.⁹³ Additionally, French civil procedural law contains the deeply rooted principle of *nul ne plaide par procureur*, no one may plead by proxy.⁹⁴ Since this rule requires the claimant to have a direct, personal and active interest in the proceedings, it constitutes a constitutional and structural barrier to opt-out systems based on unauthorised representation.

These constitutional arguments have carried significant weight in shaping EU legislative choices. However, their validity as absolute barriers to opt-out mechanisms are less clear than their political influence might suggest. Representation without authorisation, when combined with the right to opt-out, requires a distinct legal approach. This aligns with the position of the US Supreme Court, which has held that class actions involving representation without explicit authorisation satisfy due process requirements provided that individuals can choose to opt-out. In contrast, arguments asserting that such mechanisms are inherently unconstitutional have not been supported by the European Court of Human Rights (ECtHR) or by national constitutional courts.⁹⁵

Considering these deep constitutional concerns that are foreign to European legal culture, the Commission adopted the opt-in system as the general rule in its Collective Redress Recommendation, requiring victims to join proceedings of their own volition, and implicitly rejected the opt-out model. Those jurisdictions in Europe, such as the Netherlands and Portugal, that have managed to integrate opt-out mechanisms to a limited extent into their legal systems have done so only by rendering them constitutionally compatible through the “only benefits principle”.⁹⁶ This principle guarantees that the presumed-consenting victim can only gain a benefit from the proceedings and will not be exposed to any litigation costs or financial risk, thereby partially mitigating the tension between opt-out mechanisms and constitutional principles of party autonomy.⁹⁷

The practical consequence of this sustained exclusion, however, falls disproportionately on a specific category of victim: consumers who have suffered small-value losses as a result of competition law infringements. For these individuals, the existing framework of individual damages actions, the only mechanism the EU has made available, is structurally ill-suited to their situation, as the following chapter examines.

⁹³ *ibid* 351.

⁹⁴ Malinauskaite (n 90) 116.

⁹⁵ Csongor István Nagy, ‘Collective Redress and Aggregation of Claims’ in Rodger, Ferro and Marcos (n 3) 349-350.

⁹⁶ *ibid* 352.

⁹⁷ Csongor István Nagy, *Collective Actions in Europe* (Springer Nature 2019) 64.

3. The Limitations of Individual Claims: Shortcomings of the EU Antitrust Damages Framework for Small-Value Claimants

3.1. Introduction

Chapter 2 demonstrated that the absence of an EU-level binding collective redress mechanism for competition damages is the product of a deliberate choice. This chapter examines the practical consequences of this choice for a specific category of victims, namely consumers who have suffered small-value losses arising from competition law infringements. It first establishes the nature of the harm caused by infringements of Articles 101 and 102 TFEU and identifies end consumers as the most numerous yet least visible victims of such conduct. It then introduces the concept of small-value claims and demonstrates why the structural features of individual litigation, high transaction costs, the loser pays principle, information asymmetry and the negative-expected-value problem render individual enforcement economically irrational for consumers. Finally, it argues that collective redress mechanisms offer a structural solution to this problem that individual litigation has demonstrably failed to provide.

3.2. Competition Law Infringements and Consumer Damages

In this thesis, competition law infringements leading to damages refer to breaches of Articles 101 and 102 of the TFEU. Article 101(1) TFEU provides that agreements between undertakings, decisions of associations of undertakings or concerted practices that affect trade between Member States and, by object or effect, prevent, restrict or distort competition in the internal market are prohibited.⁹⁸ As stated above, Article 101(2) TFEU further stipulates that such agreements or decisions shall be considered void, thereby enabling the invocation of claims for damages.⁹⁹ On the other hand, Article 102 TFEU states that it is illegal for dominant undertakings to abuse this dominance in the “internal market or a substantial part of it”, if their actions “affect the trade between Member States”.¹⁰⁰

3.2.1. Damages Arising from Article 101 TFEU Infringements

Article 101 TFEU prohibition, namely collusion, includes both horizontal and vertical agreements. In this section, only the horizontal agreements are considered, as the harm caused to consumers by infringements arising from vertical agreements is not as apparent or quantifiable from the perspective of case law and economics analysis as the horizontal ones.

⁹⁸ Treaty on the Functioning of the European Union [2008] OJ C115/47, art 101(1).

⁹⁹ *ibid* art 101(2).

¹⁰⁰ *ibid* art 102.

Horizontal agreements are those between actual or potential competitors.¹⁰¹ Actual competitors operate in the same product and geographical market, while “potential competitors” are undertakings that require further investment or other critical “switching costs” to enter the relevant market.¹⁰² In horizontal agreements, the undertakings coordinate to prevent, restrict or distort competition in the market, which would result in a different outcome if they had competed without coordination. The aim or outcome of this coordination is to increase their profits, while prices and quantities may differ from those in a market with undistorted competition, ultimately causing a deadweight loss.¹⁰³ The consequences of these agreements vary depending on the type of cartel, such as price fixing, market sharing, bid rigging or information exchange.¹⁰⁴

For instance, a price-fixing cartel might set prices above those a functioning competitive market would set, causing market agents to face higher prices than in a competitive market.¹⁰⁵ A higher price leads existing customers to buy smaller quantities, as a result of an overcharge that affects different levels of the distribution or production chain.¹⁰⁶ However, in such cases, the claimant is generally a direct customer of an undertaking participating in the cartel, and not the end customer in the production chain.¹⁰⁷ For the direct customers, there are three main elements for the damages to be relevant: (i) the overcharge (the price-effect of the cartel); (ii) the pass-on rate (the portion of the overcharge shifted to downstream levels); and (iii) the volume effect (the profit margin lost due to diminished sales volumes at the higher price point).¹⁰⁸ According to Article 2(20) of the ADD, overcharge is defined as the price discrepancy between the amount effectively paid and the counterfactual price that would have materialised under competitive conditions.¹⁰⁹ In economic terms, determining the overcharge involves calculating how much

¹⁰¹ Commission, ‘Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements’ [2011] OJ C11/1, [10].

¹⁰² *ibid* [10].

¹⁰³ Maximilian Langer and others, ‘The Economics of Private Enforcement of Competition Law’ in Miguel Sousa Ferro, Francisco Marcos and Barry J Rodger (eds), *Research Handbook on Private Enforcement of Competition Law in the EU* (Edward Elgar Publishing 2023) <<https://doi.org/10.4337/9781800377523>> accessed 4 May 2026, 33-34.

¹⁰⁴ Eda Şahin, *Collective Redress and EU Competition Law* (Routledge 2018) 82.

¹⁰⁵ Cento Veljanovski, *Cartel Damages: Principles, Measurement, and Economics* (Oxford University Press 2020) <<https://academic-oup-com.utrechtuniversity.idm.oclc.org/oxford-law-pro/book/57699/chapter/470243854>> accessed 12 May 2026, 21.

¹⁰⁶ Oxera, A Komninos and others, *Quantifying Antitrust Damages - Towards Non-Binding Guidance for Courts*, (Study prepared for the European Commission, Publications Office of the EU 2009) 16.

¹⁰⁷ Pier Luigi Parcu, Giorgio Monti and Marco Botta, *Private Enforcement of EU Competition Law* (Edward Elgar Publishing 2018) <<https://ebookcentral.proquest.com/lib/uunl/detail.action?docID=5520133>> accessed 6 April 2026, 72.

¹⁰⁸ Franziska Weber, ‘The Volume Effect in Cartel Cases - a Special Challenge for Damage Quantification?’ (2020) 9 EUR Research Repository (Erasmus University Rotterdam) 436, 437.

¹⁰⁹ Directive 2014/104/EU (n 2) art 2(20).

of the amount paid in an actual scenario was solely caused by the legal infringement, typically expressed as a percentage of the total value of trade affected, by comparing actual market outcomes with a benchmark representing counterfactual outcomes.¹¹⁰ Ultimately, this means that when direct purchasers buy goods during an infringement period, they bear the overcharge by paying an artificially inflated price.¹¹¹

Second element, pass-on (or passing-on), refers to the commercial practice where a purchaser, who is forced to pay an overcharge due to a competition law infringement, mitigates its own economic loss by transferring all or a portion of that overcharge down the supply chain to its own customers, namely the indirect purchasers.¹¹² In ADD, the concept of passing on serves two primary functions in litigation. The first is as a defence mechanism, meaning that a defendant can invoke the passing-on defence to transfer their liability to a direct purchaser. The infringer argues that the direct purchaser suffered no actual loss, or at least less than the overcharge, because it successfully passed the overcharge on to its own buyers.¹¹³ The rationale behind this defence is to prevent the direct purchaser from being unjustly enriched or overcompensated for a loss they did not ultimately bear.¹¹⁴ The second is as a claim, meaning that indirect purchasers (such as final consumers) can use the concept of passing-on to establish their own right to claim damages.¹¹⁵ These purchasers can argue that the overcharge was passed down through the distribution chain to their consumption level, meaning that they are the ones who ultimately suffered from the financial harm caused by the cartel.¹¹⁶ Lastly, although overcharging constitutes an important aspect of the assessed damages, it is imperative to evaluate the degree to which the overcharging has been transmitted through the value chain, in addition to the profit margin forfeited on units no longer sold by the downstream entity due to rising input costs resulting in elevated prices, namely the “volume effect”.¹¹⁷

All these damages are claimable under Article 12 of the ADD by those harmed, including both direct and indirect purchasers of the product or service within the relevant market where the

¹¹⁰ Langer and others (n 103) 37.

¹¹¹ Germain Gaudin and Franziska Weber, ‘Antitrust Damages, Consumer Harm, and Consumer Collective Redress’ (2021) 12 *Journal of European Competition Law & Practice* 370 <<https://academic-oup.com/utrechtuniversity.idm.oclc.org/jeclap/article/12/5/370/6065010>> accessed 24 April 2026, 372.

¹¹² White Paper on Damages Actions for Breach of the EC Antitrust Rules (n 10) 5; Antonio Robles Martín-Laborda, ‘Indirect Purchasers and Passing-On’ in Barry Rodger, Miguel Ferro and Francisco Marcos (eds), *Research Handbook on Private Enforcement of Competition Law in the EU* (Edward Elgar Publishing 2023) 243.

¹¹³ Commission, ‘Impact Assessment’ (n 51) 8.

¹¹⁴ White Paper on Damages Actions for Breach of the EC Antitrust Rules (n 10) 4.

¹¹⁵ Commission, ‘Impact Assessment’ (n 51) 9.

¹¹⁶ Martín-Laborda ‘Collective Redress and Aggregation of Claims’ in Rodger, Ferro and Marcos (n 112) 242-243.

¹¹⁷ Parcu, Monti and Botta (n 107) 72.

cartel functions. Direct purchasers of the cartel can be sellers themselves or end consumers, and both would have faced the overcharge, and these purchasers are the ones who are most motivated to claim damages for the overcharge.¹¹⁸ Furthermore, in the event of a violation of Article 101 TFEU, Article 14(2) of the ADD establishes a rebuttable presumption that the harm resulting from such violations is passed on to indirect purchasers.¹¹⁹ However, the ultimate harm to particular direct and indirect purchasers from the overcharge (and the effect on the volume purchased) will depend on the extent to which the cartel-induced price increase is passed along the supply chain.¹²⁰ Even though both direct and indirect purchasers are entitled to claim full damages from the cartel members, thereby recovering the overcharges they have suffered, the workability of this mechanism is questionable with respect to consumers' damages, as explained in detail below.

3.2.2. Damages Arising from Article 102 TFEU Infringements

Regarding Article 102 TFEU, both exploitative and exclusionary abuses need to be considered.¹²¹ Exploitative abuses occur, for instance, where a dominant undertaking imposes unfair purchase or selling prices on its trading partners or consumers.¹²² From an economic perspective, a dominant firm, unlike in a competitive market, sets output at the point where marginal revenue equals marginal cost, thereby reducing quantity below the competitive level and raising prices above it.¹²³ This generates two distinct categories of consumer harm. First, a transfer of consumer surplus to the dominant undertaking in the form of an overcharge.¹²⁴ Second, a deadweight loss arises from consumers who are priced out of the market entirely, foregoing a product they would have purchased at a competitive price, a welfare loss that accrues to neither party.¹²⁵

Exclusionary abuses, on the other hand, occur when a dominant undertaking engages in conduct that forecloses competition in the market, such as predatory pricing, tying arrangements or refusal to supply, thereby causing indirect harm by eliminating competitors and ultimately

¹¹⁸ William H Page, 'Indirect Purchaser Suits under the Class Action Fairness Act' in Stefan Wrba, Steven Van Uytsel and Mathias Siems (eds), *Collective Actions: Enhancing Access to Justice and Reconciling Multilayer Interests?* (CUP 2012) <<https://doi-org.utrechtuniversity.idm.oclc.org/10.1017/CBO9781139109383>> accessed 12 May 2026, 90.

¹¹⁹ Directive 2014/104/EU (n 2) 14(2).

¹²⁰ Oxera, A Komninos and others (n 106) iii.

¹²¹ Şahin (n 104) 83.

¹²² Langer and others (n 103) 34.

¹²³ W Kip Viscusi, Joseph Emmett Harrington and David Edward, *Economics of Regulation and Antitrust* (MIT Press 2018) 86.

¹²⁴ *ibid* 74.

¹²⁵ Oxera, A Komninos and others (n 106) 14.

reducing consumer choice and quality.¹²⁶ Unlike exploitative abuses, exclusionary conduct operates on an intertemporal model: the dominant undertaking initially sacrifices its short-term profits, for instance by pricing below average avoidable cost, in order to push its rivals out of the market.¹²⁷ Once competitors are eliminated and market power is consolidated, the dominant undertaking would set prices above competitive levels, expose consumers to long-term overcharges, reduce product variety and diminish innovation.¹²⁸ The consumer harm in exclusionary cases is hence not immediately observable but can be seen over time as the competitive constraint vanishes.

The harm caused by an abuse of dominance may, similar to collusion damages, affect different levels of the distribution chain. A dominant undertaking engaging in excessive pricing, for instance, sets prices above competitive levels, thereby imposing a direct overcharge on its customers.¹²⁹ Like cartel overcharges, this price increase may be passed along the supply chain, meaning that indirect purchasers and ultimately end consumers bear a significant share of the harm. Thus, as with Article 101 TFEU infringements, harm resulting from the abuse of dominance is not limited to dominant undertakings' competitors but may extend across the supply chain to reach end consumers.¹³⁰ Notably, unlike cartels, infringements of Article 102 TFEU do not benefit from the rebuttable presumption of harm introduced by Article 14(2) of the ADD. Victims of abuse of dominance must therefore establish the existence and extent of their loss from the outset, without the procedural advantage afforded to cartel claimants, a burden that falls particularly heavily on end consumers, who are the most distant from the infringing conduct.¹³¹

3.3. Small-Value Claims and Inadequacy of Individual Litigation

As demonstrated above, competition infringements cause harm to different levels of distribution or the production chain. Although consumers are among these affected groups, they remain the least visible ones, as the number of affected consumers is generally large and individual claims are not economically viable to litigate, this gives rise to what is termed a small-value claim.¹³² Additionally, small-value claims are generally of a negative expected

¹²⁶ *ibid* 17.

¹²⁷ Gunnar Niels, Helen Jenkins and James Kavanagh, *Economics for Competition Lawyers* (3rd edn, OUP 2023) 266.

¹²⁸ *ibid* 266.

¹²⁹ *Oxera, A Komninos and others* (n 106) 17.

¹³⁰ *ibid* 17.

¹³¹ *Langer and others* (n 103) 32.

¹³² *Gaudin and Weber* (n 111) 375.

value nature, meaning that the cost of the individual litigation exceeds the compensation to be won.¹³³ The expenses, as discussed below, incurred separately for each individual lawsuit constitute a significant barrier to access to justice, increasing transaction costs and ultimately leading to rational apathy, a phenomenon whereby the disproportionate costs of litigation relative to the potential recovery render it economically irrational for plaintiffs to pursue their claims.¹³⁴

One of the major reasons for this situation is the loser pays principle, under which the losing party is responsible for legal costs.¹³⁵ In most Member States, this principle applies and legal costs are generally the responsibility of the losing party, meaning that legal expenses should not hinder the enforcement of meritorious claims if the plaintiff prevails.¹³⁶ The rule stands as a deterrence mechanism for “abusive litigation”, as it prevents consumers from bringing a claim just for a settlement, if the defendant’s chance to prevail is higher, and because of the rule, they would not cover their legal costs.¹³⁷ This mechanism is also suggested in the Collective Redress Recommendation, which encourages Member States to adopt this principle in their collective redress mechanisms.¹³⁸ However, in cases of damages arising from competition law infringements, if the consumer could not prevail, they are obliged to pay both their own legal fees and the opposing party’s substantial legal and court costs, while their own damages are relatively too small.¹³⁹ The economic consequences of this situation are particularly striking because of the tendency to avoid imposing excessive risk on consumers, given the asymmetric risk between the consumer and the infringer. Even if the consumer is entirely convinced of their right, a very small risk (for example, 1%) of losing the case makes the expected value of the claim negative, demonstrating the claim’s negative expected value.¹⁴⁰ For example, a consumer facing a total legal cost risk of 5,000 Euros for a claim of 500 Euros would find that a 1% chance of losing the case makes bringing the action mathematically irrational. In fact, the rational apathy described above stems precisely from this risk asymmetry, namely that the consumer prefers to avoid exercising their right to claim compensation because the burden of

¹³³ Csongor István Nagy, ‘Collective Redress and Aggregation of Claims’ in Rodger, Ferro and Marcos (n 3) 333.

¹³⁴ *ibid* 332-335.

¹³⁵ *ibid* 337.

¹³⁶ *ibid* 331.

¹³⁷ L Visscher and M Faure, ‘A Law and Economics Perspective on the EU Directive on Representative Actions’ (2021) 44 *Journal of Consumer Policy* 455, 472.

¹³⁸ European Commission Recommendation 2013/396/EU (n 10) [13].

¹³⁹ Nagy (n 97) 11.

¹⁴⁰ *ibid* 13.

potential adverse consequences is disproportionately higher than the marginal benefit of compensation.¹⁴¹

Furthermore, in practice, the prevailing party is often unable to recover its full legal costs from the losing party. This situation results in two main shortcomings of the legal systems in the Member States. The first is the procedural difficulty of proving and documenting every minor expense, as the burden of proof lies with the claimant, exposing them to the risk of evidence arising from factual uncertainties.¹⁴² Following that, statutory caps on lawyers' fees in many Member States also contribute to this problem.¹⁴³ These costs must be borne by the claimant regardless of the outcome of the case. Whilst market rates for specialised competition law services are high, the difference between these actual costs and the maximum recoverable amounts set by law further reduces consumers' willingness to bring a case. In the small-claims case, where there is nearly no economic margin for profit, even the smallest costs are critical.¹⁴⁴ Secondly, the costs associated with preliminary legal assessments are also high. Due to the complexity of antitrust cases, the litigation risk is case-specific and further compounded by "information asymmetry".¹⁴⁵ The preliminary assessment for the case, which includes the costs if the case is viable for the plaintiff, also constitutes an obstacle to an individual taking a claim to court. As the plaintiff lacks adequate legal knowledge to assess the case, they will need legal assistance for this process.¹⁴⁶ This process also causes high costs. Moreover, the inherent risk of losing the lawsuit encompasses legal and factual uncertainties regarding the outcome, which compounds the potential burden of legal costs.¹⁴⁷ In reality, nearly every case is inherently risky, even if it is a good one; such risks include enforcement problems and the possibility of the defendant's insolvency.¹⁴⁸ For instance, even if the plaintiff wins the case, enforcement might not be successful if the decision results in the defendant's bankruptcy.

For the competition-related damages explained above, these barriers do not make it reasonable for consumers to bear the risk of individual litigation from the economic perspective. According

¹⁴¹ Žygimantas Juška, 'Obstacles in European Competition Law Enforcement: A Potential Solution from Collective Redress' (2014) 7 SSRN Electronic Journal 133.

¹⁴² Csongor István Nagy, 'Collective Redress and Aggregation of Claims' in Rodger, Ferro and Marcos (n 3) 331.

¹⁴³ Barry J Rodger, 'Part I, Chapter 2: Institutions and Mechanisms to Facilitate Private Enforcement' in Barry J Rodger (ed), *Competition Law: Comparative Private Enforcement and Collective Redress across the EU* (Kluwer Competition Law 2014), 59-70.

¹⁴⁴ Silvia Venda, *Private Enforcement of EU Competition Law and Class Actions* (Kluwer Law International BV 2025) 218.

¹⁴⁵ Nagy (n 97) 330-332.

¹⁴⁶ Gaudin and Weber (n 111) 375.

¹⁴⁷ Visscher and Faure (n 137) 457-458.

¹⁴⁸ Nagy (n 97) 13.

to a recent empirical study documenting 444 court decisions on cartel overcharges across 20 countries, privately owned companies initiated 54% of the claims, while entities from the broadly defined public sector accounted for a further 34%, comprising publicly owned companies (16%), local authorities (15%), and central governments (3%).¹⁴⁹ Of the 444 decisions surveyed, only 14 were brought by end consumers.¹⁵⁰ This figure is highly significant because, despite final consumers being the most numerous victims of cartel overcharges, they account for a negligible fraction of the litigation. This disparity is not a coincidence, as it reflects the reality that consumer harm in competition cases is, by its nature, of small individual value, rendering individual litigation economically irrational regardless of the legal merits of the claim.

Ultimately it is clear that the ADD remains an inadequate mechanism for end consumers. Since this legislation focuses on harmonising individual procedural rules, it fails to address the fundamental issue of class actions and leaves the right to compensation purely theoretical, without a workable procedural mechanism. The shortcomings of individual litigation for consumer damages described above can be overcome by adopting a collective redress mechanism in the EU, enabling consumers with small damages to unite and claim them collectively, which can constitute a valuable amount and allow them to share the costs and risks.

¹⁴⁹ Jean-François Laborde, ‘Cartel Damages Actions in Europe: How Courts Have Assessed Cartel Overcharges (2025 ed.)’ (2025) *Concurrences* N° 7-2025, 4-6.

¹⁵⁰ *ibid* 6.

4. Constitutional Risks: A Comparative Analysis of Opt-In and Opt-Out Mechanisms

4.1. Introduction

As explained in the previous chapters, it is not economically feasible to claim small-value competition damages through individual litigation. This situation creates a major problem for consumers' access to justice. As a solution, collective redress mechanisms are more advantageous compared to individual litigation, as the cost-benefit ratio faced by consumers in class actions is substantially different from that in individual cases.¹⁵¹ In this chapter, in order to demonstrate why collective actions are more advantageous, firstly, the two categories of collective redress mechanisms are introduced, namely opt-in and opt-out models. It is worth noting here that both models are available for Member States to adopt, but the Commission favours the opt-in option during its legislation period regarding collective redress, as the Collective Redress Recommendation clearly states that any exception to the opt-in principle "by law or by court order, should be duly justified by reasons of sound administration of justice."¹⁵² Following the introduction, comparison of these two models is illustrated in law and economics terms and behavioural economics characteristics. By the end of the chapter, the EU policymakers' deliberate choice is highlighted in light of the private autonomy and access to justice.

4.2. Introduction of Opt-In and Opt-Out Mechanisms

In an opt-in mechanism, potential class members must actively join the class proceeding by completing a specified action within a defined timeframe.¹⁵³ This process is required to attain class membership, to be bound by judgments or settlements on common issues and to qualify for any resulting benefits. Consumers who did not choose to join the collective redress cases have the right to bring claims individually.¹⁵⁴ One of the reasons why EU policymakers favoured the opt-in model is that this model respects private party autonomy, it requires explicit consent from consumers to join the lawsuit, and thus it is believed to be more compatible with the civil law systems.¹⁵⁵ Further, it was clearly stated in the European Parliament resolution that

¹⁵¹ Ricardo Dawidowicz, 'Class Action Lawsuits in Europe: A Comparative and Economic Analysis' in Klaus Mathis (ed), *Law and Economics in Europe* (Springer 2013) <<https://doi.org/10.1007/978-94-007-7110-9>> accessed 3 May 2026, 232-233.

¹⁵² European Commission Recommendation 2013/396/EU (n 10) para. 21.

¹⁵³ Filippo Valguarnera, 'Legal Tradition as an Obstacle: Europe's Difficult Journey to Class Action' (2010) 10 *Global Jurist* <<https://doi-org.utrechtuniversity.idm.oclc.org/10.2202/1934-2640.1362>> accessed 18 May 2026, 8

¹⁵⁴ Mulheron (n 50) 30.

¹⁵⁵ Rachael Mulheron, 'A Channel Apart: Why the United Kingdom Has Departed from the European Commission's Recommendation on Class Actions' (2015) 17 *Cambridge Yearbook of European Legal Studies* 36, 54.

the European framework requires a collective redress system that complies with the “principle of subsidiarity” and operates on an opt-in basis, designed to prevent “abusive litigation”, whilst seeking to maximise compensation for victims and ensure procedural efficiency without undermining the defendant’s “presumption of innocence”.¹⁵⁶ This approach was also followed by the Commission in its Collective Redress Recommendation as stated above.

Another reason is that, the opt-in model ensures legal certainty, as the class members express their consent to join the lawsuit, making it easier to determine the number of claimants.¹⁵⁷ Moreover, for collective actions to be accepted by the court at the certification stage, the claims of the individuals in the group must be “homogeneous” to a certain extent.¹⁵⁸ As all claimants are specifically identified in the opt-in system, the court can define the common legal or factual issues more clearly. Consequently, the court can compare the individual circumstances of the group members with the case’s common issues in a much more transparent manner.¹⁵⁹ This enables the courts to assess the value of the harm and “both the merits of the case and the admissibility of the collective action” more easily than in the opt-out model.¹⁶⁰

On the other hand, the opt-out mechanism, under which individuals are considered class members unless they explicitly request exclusion from the action and its judgment, has been predominantly adopted in common law jurisdictions.¹⁶¹ The opt-out approach enables a collective action to proceed at the initiative of the representative plaintiff without the explicit consent of class members.¹⁶² Within this mechanism, a case also must pass through a certification stage prior to proceeding, where the court acts as a gatekeeper by defining the specific group of individuals, known as the class, whose rights will be litigated in various jurisdictions.¹⁶³ During this stage, the court evaluates the representative’s ability to protect the class’s interests, examines the commonality and typicality of the claims and determines whether

¹⁵⁶ European Parliament Resolution of 2 February 2012 on ‘Towards a Coherent European Approach to Collective Redress’ (2011/2089(INI)) https://www.europarl.europa.eu/doceo/document/TA-7-2012-0021_EN.html, accessed 3 May 2026.

¹⁵⁷ Estelle Hurter, ‘Opting in or Opting out in Class Action Proceedings: From Principles to Pragmatism?’ (2017) 50 De Jure 60 <<https://doi.org/10.17159/2225-7160/2017/v50n1a4>> accessed 10 May 2026, 69.

¹⁵⁸ Barry J Rodger, ‘Part I, Chapter 5: Collective Redress Mechanisms and Consumer Case Law’ in Barry J Rodger (ed), *Competition Law: Comparative Private Enforcement and Collective Redress across the EU* (Kluwer Competition Law 2014) <<https://www-kluwercompetitionlaw-com.utrechtuniversity.idm.oclc.org/document/KLI-KCL-B- Rodger-Ch05>> accessed 13 May 2026, 184.

¹⁵⁹ Dodson (n 72) 194.

¹⁶⁰ Ioannis Lianos, Peter J Davis and Paolisa Nebbia, *Damages Claims for the Infringement of EU Competition Law* (OUP 2015) 65.

¹⁶¹ Mulheron (n 50) 29.

¹⁶² *ibid* 29.

¹⁶³ Rachael Mulheron, ‘The United Kingdom’s New Opt-out Class Action’ (2017) 37 Oxford Journal of Legal Studies 814, 821.

collective action offers substantial efficiency compared to individual lawsuits. Upon certification, all individuals meeting the established criteria are automatically included as class members.¹⁶⁴ To uphold the constitutional right to be heard and to ensure party autonomy, the court or a representative must notify potential class members.¹⁶⁵ This notice informs them that litigation is being initiated on their behalf, outlines the nature of the claims and specifies their procedural rights, which constitutes a key safeguard of the individual's right to request exclusion from the action.¹⁶⁶ If this right is exercised within the designated period, the individual is excluded from the class and is not bound by the outcome.¹⁶⁷ Conversely, if a class member does not opt out, they are legally bound by the final judgment or settlement in the case.¹⁶⁸

4.3. Comparison of Opt-In and Opt-Out Mechanisms

4.3.1. The Law and Economics Perspective

When comparing these two models, each has certain advantages and shortcomings. As stated above, the opt-in model is favoured by the European policymakers. One of the main reasons behind this preference is that opt-in mechanism is a more respectful mechanism regarding the individuals' consent compared to opt-out model, which makes it more compatible with the legal traditions of the Member States. Due to the "principle of individual autonomy" underlying the opt-in mechanism, claimants are granted "freedom of choice", thereby upholding the principle that a person's explicit consent is required regarding the determination of their legal rights.¹⁶⁹ It was further argued that this explicit consent in opt-in model "provides superior due process protections, and avoids the loss of individual rights".¹⁷⁰ Furthermore, when compared to the opt-out mechanism, it was argued that consent under the opt-out model is not sufficient as most class action members will refrain from exercising their right to opt-out, regardless of whether they wish to remain in the case or not.¹⁷¹

¹⁶⁴ 'Rule 23. Class Actions' (*LII / Legal Information Institute* 2009) <https://www.law.cornell.edu/rules/frcp/rule_23> accessed 3 May 2026.

¹⁶⁵ Dodson (n 72) 195.

¹⁶⁶ Rodger, 'Part I, Chapter 5' (n 158) 184.

¹⁶⁷ Mulheron (n 50) 30.

¹⁶⁸ Mulheron, 'A Channel Apart: Why the United Kingdom Has Departed from the European Commission's Recommendation on Class Actions' (n 155) 11.

¹⁶⁹ Hurter (n 157) 68-69.

¹⁷⁰ Debra Lyn Bassett, 'U.S. Class Actions Go Global: Transnational Class Actions and Personal Jurisdiction' (2003) 72 *SSRN Electronic Journal* <<https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=3920&context=flr>> accessed 9 June 2026, 89.

¹⁷¹ Dodson (n 72) 186.

This situation also forms the basis for another reason for EU policymakers' choice, which is that opt-in mechanism is less likely to result in "unmeritorious lawsuits", in other words, more likely to advertise "meritorious claims".¹⁷² This is actually originated from a shortcoming of the opt-out model. Automatic inclusion of opt-out mechanism results in millions of people in the class, such scale can force the defendant undertakings to submit to settlements that amount to "blackmail", even if the case has no legal basis or merit.¹⁷³ However, in the opt-in model, as the number of participants is far more limited and specific, this pressure on the defendant is eliminated. Thus, the opt-in model encourages defendant undertakings to defend themselves in court and contest baseless claims, rather than settling out of fear of such claims.¹⁷⁴

Moreover, in opt-out mechanisms, there is a much higher risk that the lawyers or representatives initiating the case will take control of the proceedings and pursue their own financial interests, such as high legal fees, rather than the interests of the victims, as the mechanism is founded on the basis that unidentified groups are passively involved in the cases.¹⁷⁵ Such mechanism is more likely to result in "principal-agent problem" compared to opt-in model, as in opt-in model victims participate in the case of their own free, the scope for representatives to engage in such abuses and baseless claims is significantly reduced.¹⁷⁶

However, there are certain advantages of opt-out mechanism as well. As stated above, in opt-in cases, the participation rate is lower than in opt-out cases, as each participant must consent to participate. In other words, the opt-out mechanism generally has more members because it is typically more inclusive than the opt-in mechanism, as opt-out cases have a broader pool of potential claimants because members are included by default.¹⁷⁷ Consequently, economies of scale are greater in this type of case, making small-value claims more reasonable and facilitating procedural economy by preventing a fragmented landscape of litigation.¹⁷⁸ As explained above, individual claims, particularly those arising from competition law infringements, are costly and having multiple claims involving shared issues heard simultaneously, rather than individually, provides crucial benefits for both individuals and judicial resources. Consequently, preventing the repetition of cases reduces the burden on court resources and eliminates the possibility of

¹⁷² Maria Elisabete Ramos, 'Private Enforcement and Opt-out System Risks, Rewards and Legal Safeguards' (2018) 11 Yearbook of Antitrust and Regulatory Studies 85, 101.

¹⁷³ Christopher Hodges, 'Evaluating Collective Redress: Models, Evidence, Outcomes and Policy' in Alan Uzelac and Stefaan Voet (eds), *Class Actions in Europe* (Springer 2021) 21; Pais and Piszcz (n 6) 214.

¹⁷⁴ Szupera and others (n 4) 272.

¹⁷⁵ Ramos (n 172) 93.

¹⁷⁶ *ibid* 93; Dodson (n 72) 186.

¹⁷⁷ Hurter (n 157) 71.

¹⁷⁸ Dodson (n 72) 185.

inconsistent rulings on the same issue arising in different cases.¹⁷⁹ Furthermore, classes with numerous claimants help establish a stronger case against defendants, such as large corporations with powerful legal teams.¹⁸⁰

Another aspect to compare is the free-riding issue raised in the opt-in system, which is also observable in individual litigation. In individual cases, consumers are likely to wait for a test case decision before deciding whether to pursue their claims in court. Given the low value of their damages, this situation is exaggerated in individual cases. Similarly, under the opt-in mechanism, consumers are generally waiting for a precedent-setting decision, as explained above, because they have the right to claim their damages individually if they do not opt into the collective case, which ultimately creates a free-riding problem.¹⁸¹ On the other hand, an opt-out mechanism can address the free-rider problem inherent in test cases by automatically aggregating all potential claims into a single proceeding, thereby internalising the litigation risks that would otherwise fall solely on individual plaintiffs and ensuring that the infringer faces the true aggregate harm of their conduct from the outset.¹⁸²

Furthermore, with an opt-in mechanism, high organisation costs can be prohibitive.¹⁸³ A opt-in mechanism for competition damages from the consumers' harm perspective would be insufficient, as in opt-in systems each victim must bear a transaction cost, including time, information gathering and risk analysis, to join the lawsuit.¹⁸⁴ On the other hand, an opt-out mechanism can solve this situation by generating economies of scale.¹⁸⁵ Under the opt-out mechanism, as there is initially no need to identify any victim or obtain their active consent, the identification of claimants and the process of submitting evidence are deferred not to the very start of the proceedings, but to the stage following a successful claim, namely the distribution phase.¹⁸⁶ The initial costs of communication and administrative record-keeping are reduced to almost zero, which leads to the transaction costs falling.¹⁸⁷ Moreover, because the number of participants in opt-out cases is dramatically higher than in opt-in cases, the average cost per

¹⁷⁹ *ibid* 185.

¹⁸⁰ *ibid* 185.

¹⁸¹ Paolo Buccirossi and Michele Carpagano, 'Is It Time for the European Union to Legislate in the Field of Collective Redress in Antitrust (and How)?' (2012) 4 *Journal of European Competition Law & Practice* 3, 10.

¹⁸² Csongor István Nagy, 'Collective Redress and Aggregation of Claims' in Rodger, Ferro and Marcos (n 3) 334.

¹⁸³ *ibid* 336.

¹⁸⁴ Jules Stuyck, 'Class Actions in Europe? To Opt-in or to Opt-Out, That Is the Question' (2009) 20 *European Business Law Review* 483, 490-491.

¹⁸⁵ Csongor István Nagy, 'Collective Redress and Aggregation of Claims' in Rodger, Ferro and Marcos (n 3) 331.

¹⁸⁶ Vanda (n 144) 212.

¹⁸⁷ Csongor István Nagy, 'Collective Redress and Aggregation of Claims' in Rodger, Ferro and Marcos (n 3) 333.

individual is significantly lower. Thus, the opt-out mechanism allows the consolidation of common factual and legal issues, thereby reducing the per-claimant litigation costs.

4.3.2. The Behavioural Economics Perspective

Another comparison between these two models should be made in terms of behavioural economics to demonstrate the tension between private autonomy and access justice discussed in the following section. Firstly, it must be stated that, despite the traditional assumption, consumers are not as rational as policymakers assume.¹⁸⁸ Furthermore, behavioural economics demonstrates that choices are frequently shaped momentarily based on how an alternative is offered, which is a concept known as “choice architecture”.¹⁸⁹ As these choices are not fixed, the default mechanism serves as an implicit suggestion, or “nudge,” from the policymakers and significantly influences the final outcome.¹⁹⁰ Particularly in the case of small-value claims, whilst opt-in mechanisms tend to fail because consumers are “usually lazy” to act under this model, this issue does not arise under the opt-out model, as it operates as the “default mechanism”.¹⁹¹ Moreover, as a typical default mechanism, the opt-out mechanism is “sticky,” hence the likelihood of opting out is low.¹⁹² As stated above, rational apathy is one of the main shortcomings of individual litigation for competition damages. Even though collective redress mechanisms can address rational apathy more effectively than individual litigation, the problem described in the opt-in model also involves rational apathy. However, by making participation the default, opt-out systems align the procedural framework with the reality of consumer behaviour, automatically including consumers who take no action in the case, without them having to spend time, money or effort and entitling them to a share of any compensation awarded. The opt-out mechanism actually can overcome rational apathy, which would otherwise prevent participation, because inaction means inclusion, rather than exclusion.¹⁹³ This structural reversal is what makes opt-out mechanisms suited to small-value consumer

¹⁸⁸ Thomas S Ulen, ‘European and American Perspectives on Behavioural Law and Economics’ in Klaus Mathis (ed), *European Perspectives on Behavioural Law and Economics* (Springer 2015) 11; Klaus Mathis and Ariel David Steffen, ‘From Rational Choice to Behavioural Economics’ in Klaus Mathis (ed), *European Perspectives on Behavioural Law and Economics* (Springer 2015) 37.

¹⁸⁹ Antonios Karampatzos, *Private Law, Nudging and Behavioural Economic Analysis* (1st edn., Routledge 2020), 25.

¹⁹⁰ Eric J Johnson and Daniel G Goldstein, ‘Defaults and Donation Decisions’ (2004) 78 *Transplantation* 1713, 1714.

¹⁹¹ Pais and Piszcz (n 6) 213-214.

¹⁹² Ulen (n 188) 11.

¹⁹³ Jocelyn G Delatre, ‘Beyond the White Paper: Rethinking the Commission’s Proposal on Private Antitrust Litigation’ (2011) 8 *Competition Law Review* 29 <<https://ssrn.com/abstract=2008621>> accessed 20 May 2026, 45.

claims, where the individual cost of taking action will almost always outweigh the expected marginal benefit, thereby rendering a protective default framework structurally indispensable.

As stated above, the practical difference between the two models is most evident in their respective participation rates, which directly impact the effectiveness of private enforcement of competitive law, especially its enforcement for the benefit of consumers. However, in the system favoured by the EU policymakers, the requirement for active participation creates a significant procedural barrier, as explained above. For instance, in the UK, the inherent flaws of the opt-in mechanism were highlighted in the *Consumer Association v JJB Sports plc* case regarding the price-fixing of football shirts.¹⁹⁴ Despite extensive public outreach, only 144 individuals joined the action, a participation rate of less than 0.1% for a class estimated at 1.5 million consumers.¹⁹⁵ Consequently, the case was settled and withdrawn on the condition that each consumer would be paid compensation of up to £20.¹⁹⁶ This case is a typical example of rational apathy, which occurs when an individual's participation costs exceed the expected marginal benefit of a small claim (such as the £20 in this case).¹⁹⁷ Moreover, opt-in collective actions necessitate costly awareness campaigns via mass media and other channels to inform affected parties and encourage participation, effectively acting as a transaction cost that further exacerbates information asymmetry. The challenges associated with this approach are exemplified by the *Mobile Cartel* opt-in collective action in France. In this case, litigation costs amounted to approximately 0.5 million Euros, while the total value of the claim was 0.8 million Euros, with 12,530 consumers joining the action and an average claim of 60 Euros.¹⁹⁸ Despite these efforts, less than 1% of consumers participated, and the litigation required the employment of 21 staff members and the expenditure of 2,000 hours to prepare the action.¹⁹⁹

These examples demonstrate that without an opt-out mechanism, the majority of small-value consumer claims remain uncompensated, because the structure of opt-in systems prevents

¹⁹⁴ *The Consumer Association v JJB Sports PLC* [2009] CAT 3.

¹⁹⁵ Mantas Pakamanis, 'The Role of Class Actions in Ensuring Effective Enforcement of Competition Law Infringements in the European Union' [2016] *International Comparative Jurisprudence* 126; Barry J Rodger, 'Let's Talk about Consumers: Competition Law Compensation for Indirect Purchasers' Losses - a United Kingdom Perspective' (Social Science Research Network, 5 July 2022) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4154511> accessed 20 May 2026, 405

¹⁹⁶ Rodger, 'Let's Talk about Consumers: Competition Law Compensation for Indirect Purchasers' Losses - a United Kingdom Perspective' (n 195) 405.

¹⁹⁷ Barry J Rodger and Mary Catherine Lucey, 'Private Enforcement in the UK and Ireland' in Barry J Rodger, Miguel Ferro and Francisco Marcos (eds), *Research Handbook on Private Enforcement of Competition Law in the EU* (Edward Elgar Publishing 2023) 397.

¹⁹⁸ Juška (n 49) 83.

¹⁹⁹ *ibid* 83.

effective participation. These cases illustrate that rational apathy is not a theoretical concern but an empirically observable phenomenon that opt-in mechanisms cannot overcome. This leads to the conclusion that, in expense of protecting private autonomy, EU policymakers neglect access to justice for consumers' claims for damages arising from competition law violations.

4.4. The EU Policymakers' Choice

It is well known that the EU has always favoured the opt-in model and has consistently opted for it. There are various reasons behind this preference. In this section, first the non-constitutional concerns are briefly introduced and then the constitutional concerns are deeply considered, as the main focus of the thesis is to overcome constitutional concerns.

A closer examination of the concerns underlying EU policymakers' resistance to opt-out mechanisms reveals that many of them conflate the structural features of the US collective action system with the opt-out mechanism itself. Indeed, as European commentators note, the fear of US-style class actions stems from a failure to isolate the opt-out mechanism from the broader US procedural "toxic cocktail", which includes "punitive damages", wide pre-trial discovery and jury trials.²⁰⁰ In the White Paper, it was clearly pointed out that "the legal framework for more effective antitrust damages actions should be based on a genuinely European approach".²⁰¹ Furthermore, in the Collective Redress Recommendation, while the Member States are discouraged to adopt contingency fee, it was also stated that punitive damages, like in the US model, are prohibited.²⁰²

However, these frequently pointed out non-constitutional concerns, such as the risk of abusive litigation driven by entrepreneurial lawyers incentivised by contingency fees and punitive damages, is not an inherent feature of opt-out systems but a specific feature of the US legal environment, which is absent in European legal tradition.²⁰³ In the European jurisdictions that had already adopted opt-out mechanisms prior to the White Paper, namely Portugal, the Netherlands, Denmark and Norway, none of these issues has been materialised.²⁰⁴ Moreover, the number of cases brought remained modest, no wave of unmeritorious claims followed and

²⁰⁰ Maglica (n 73) 125.

²⁰¹ White Paper on Damages Actions for Breach of the EC Antitrust Rules (n 10) 2.

²⁰² European Commission Recommendation 2013/396/EU (n 10) [29-31].

²⁰³ Csongor István Nagy, 'Collective Redress and Aggregation of Claims' in Rodger, Ferro and Marcos (n 3) 340, 352-353.

²⁰⁴ Delatre (n 193) 56-58.

defendants were not subjected to blackmail settlements.²⁰⁵ The empirical European experience thus directly contradicts the theoretical concern articulated by the European policymakers. Similarly, as stated above, the principal-agent problem, the risk that class representatives pursue their own interests at the expense of passive class members, is a legitimate concern, but one that is addressable through design.²⁰⁶ Robust judicial oversight at the certification stage, mandatory representation by qualified and independent entities and court approval of any settlement is established safeguards that directly counteract this risk without requiring the abandonment of the opt-out model altogether.²⁰⁷

On the side of constitutional concerns, another aspect of this choice needs to be addressed: the tension between private party autonomy and access to justice. In the Chapter 2, it was explained that various Member States have concerns regarding the opt-out model. It is recognised that whilst the opt-in model provides a framework that is more respectful of private party autonomy, it restricts consumers' access to justice due to low participation rates. However, although the opt-out model facilitates access to justice due to high participation rates, it is not accepted by EU Member States from the perspective of private party autonomy because of implied consent.²⁰⁸ The EU's policymakers' choice in this sense is political, but this choice does not change the fact that the opt-in mechanism is inadequate to compensate consumers harmed by competition law violation, which leads to a choice between private party autonomy and access to justice, which should actually function together. In order to explain this dilemma, the tension between private autonomy and access to justice must first be addressed.

Private autonomy is the right of an individual to decide, of their own free will, whether to assert a right and how to defend it.²⁰⁹ In traditional civil procedure law, private autonomy is based on the principle that litigation is "voluntary", that ultimate control over the initiation or defence of a case lies with the parties themselves, and that a person is the "master of the litigation".²¹⁰ This principle asserts that no one's legal rights can be determined without their explicit consent and

²⁰⁵ *ibid* 54-55; Rodger, 'Let's Talk about Consumers: Competition Law Compensation for Indirect Purchasers' Losses - a United Kingdom Perspective' (n 195) 496.

²⁰⁶ Alexander Stöhr, 'The Implementation of Collective Redress - a Comparative Approach' (2020) 21 *German Law Journal* 1606, 1616.

²⁰⁷ Mulheron, 'The United Kingdom's New Opt-out Class Action' (n 163) 821-822; Venda (n 144) 191; *ibid* 1616-1618.

²⁰⁸ Rodger, 'Part I, Chapter 5' (n 158) 191-192.

²⁰⁹ Nagy (n 97) 24.

²¹⁰ Hurter (n 157) 66-67.

that everyone possesses a right to a hearing.²¹¹ Furthermore, autonomy is based on the premise that the right to bring a case is a constitutionally protected form of property.²¹² This property right grants the individual not only the authority to bring a case, but also the right not to take action and the authority to prevent others from exercising this right without their permission.²¹³ In tension with this procedural autonomy, however, access to justice is a fundamental concept that ensures individuals' rights are not merely theoretical, but that justice can be sought in a practical, equitable and effective manner for everyone.²¹⁴ In states governed by the rule of law, access to justice is not merely a matter of procedural law; it is a fundamental human right enshrined in texts such as the Article 6 of the ECHR and Article 47 of the Charter of Fundamental Rights of the European Union.

The tension between these two concepts arises in collective actions, as the models of collective actions have different priorities. The EU's strong preference for opt-in mechanisms reflects Member States' constitutional sensitivities to private autonomy, but due to the low participation rates explained above, the opt-in mechanism is not the most suitable mechanism for consumers' access to justice regarding competition damages. In terms of access to justice, the opt-out mechanism can overcome this participation shortcoming, as the consumers' express consent leads to in a higher participation.²¹⁵ The EU's policymakers' choice in this sense is political but this choice does not change the fact that the opt-in mechanism is inadequate to compensate consumers harmed by competition law violation, which leads to a choice between private party autonomy and access to justice, which should actually complement each other.

The prioritisation of private autonomy over collective access to justice is deeply rooted in the constitutional traditions of several Member States. Within this traditional paradigm, the ECtHR jurisprudence on Article 6(1) of the ECHR, the right to a fair trial, is frequently invoked to argue that private autonomy must trump procedural efficiency.²¹⁶ However, this insistence that private autonomy must always outweigh access to justice represents a fundamental misunderstanding of the ECtHR's actual stance on mass claims.²¹⁷ The ECtHR has repeatedly

²¹¹ Hurter (n 157) 68; Ryan C Williams, 'Due Process, Class Action Opt Outs, and the Right Not to Sue' (2014) 115 Columbia Law Review 599 <<https://ssrn.com/abstract=2513539>> accessed 10 June 2026, 604.

²¹² Williams (n 211) 604.

²¹³ *ibid* 604.

²¹⁴ European Union Agency for Fundamental Rights and European Court of Human Rights, *Handbook on European Law Relating to Access to Justice* (Publications Office of the European Union 2016) 16.

²¹⁵ Rodger, 'Part I, Chapter 5' (n 158) 191-192.

²¹⁶ Maglica (n 73) 80-82.

²¹⁷ *ibid* 80-82.

clarified that the right of access to courts is not absolute.²¹⁸ The right is subject to implied limitations and can be regulated by States to ensure the proper and efficient administration of justice, provided that the very essence of the right is not impaired.²¹⁹ In the context of widespread but small-value harms, the ECtHR's framework suggests that individual autonomy should not be applied rigidly, as such an approach is likely to undermine the substantive right to a fair trial, meaning access to justice.²²⁰ However, in an opt-out mechanism, where the consumer has been provided with an effective notification and an unhindered right to opt out is offered, the consumer's failure to opt out may be considered as a "tacit consent" within the choice architecture.²²¹ This does not undermine autonomy; on the contrary, it protects it. Indeed, as has been observed in the context of national constitutional debate, where claims are individually unrecoverable, the practical alternative to a collective action is not individual litigation but no access to justice at all. Thus, the tension is not between two irreconcilable constitutional values, but rather a policy choice, one that has been shaped as much by fear of hypothetical excesses as by genuine constitutional necessity, and one that the next chapter seeks to resolve through a normative framework design.

²¹⁸ *Golder v UK* App No 4451/70 (ECtHR, 21 February 1975) paras 35-36.

²¹⁹ *Ashingdane v UK* App No 8225/78 (ECtHR, 28 May 1985) para 57.

²²⁰ *Airey v Ireland* App No 6289/73 (ECtHR, 9 October 1979) para 24.

²²¹ *Sejdovic v Italy* App No 56581/00 (ECtHR, 1 May 2006) paras 91-95; *Hermi v Italy* App No 18114/02 (ECtHR, 18 October 2006) paras 73-76; Hurter (n 157) 72.

5. Designing a European Opt-Out Framework

5.1. Introduction

The analysis in the previous chapters concludes that excluding a collective redress mechanism from EU competition damages enforcement inevitably results in inadequate compensation for small-value consumer claims. As established in the previous chapter, the constitutional objections advanced against opt-out mechanisms have not been upheld as absolute barriers by the ECtHR, and European jurisdictions that have adopted opt-out frameworks have not experienced the shortcomings that held back EU policymakers. The question that remains is not whether an opt-out mechanism is constitutionally permissible in principle, but how one must be designed to be constitutionally feasible to overcome the concerns of Member States.

This chapter answers this issue by proposing a normative framework for a European opt-out collective redress mechanism for competition damages, structured around three components: the only-benefits principle as the constitutional foundation, an effective notification system to overcome the shortcomings of default mechanism and a principled certification stage designed as a rights-balancing mechanism. These three components form a coherent structure in which each element addresses a different dimension of the constitutional concerns that have historically postponed or blocked the adoption of opt-out mechanism in the EU for antitrust damages.

5.2. The Only-Benefits Principle and the Portuguese Example

As a first element of the normative framework, this subsection introduces the only benefit principle as a constitutional foundation. The only-benefits principle is based on the fact that passive class members in opt-out collective action mechanisms can derive benefits only from the outcome of the case.²²² Under the principle, no disadvantages or obligations are imposed on claimants. Consequently, there is no legal or constitutional objection to positing that claimants have implicitly consented to being represented in the case. This principle has several practical consequences. The first is that this principle enables claimants not to incur financial risk, meaning that if the group representative prevails in the case, the group members receive compensation but if the outcome is the other way, the group members in a passive position are not obliged to bear any costs.²²³ In other words, a consumer who takes no action is automatically included in the class and stands to receive compensation if the action succeeds; if the action

²²² Nagy (n 97) 64-65.

²²³ *ibid* 62.

fails, that consumer bears no costs, no adverse judgment and no negative legal consequence of any kind.²²⁴ Secondly, the principle effectively introduces an exemption to the loser pays rule, a principle within EU traditions, as explained above, which is one reason consumers do not take action to claim damages for the harm they have faced, especially in the case of small-value claims. Under this principle, in opt-out systems, group members do not face the risk of having to pay the defendant's legal costs.²²⁵ Finally, the principle limits the effect of the final judgment (*res judicata*). In some Member States, as an extension of this principle, *res judicata* issued at the end of the case is binding on the members of the class only if they have expressly consented to the decision or if the decision is solely in their interest or to their benefit.²²⁶

With the only-benefit principle, the constitutional concerns raised against the opt-out mechanism can be overcome as it operates on a specific understanding of what private autonomy requires in the context of mass consumer harm. The principle of party autonomy, which is enshrined in the German *Dispositionsgrundsatz* and is also reflected in the French procedural tradition, is essentially the right of an individual to control the legal enforcement of their own rights and to decide when and how to pursue a claim. This right is deemed threatened when an individual faces legal consequences they have not chosen of their own free will, as explained in the previous chapter. The only-benefit principle offers a solution for the risk of consequences which are not explicitly consented to, as it reframes constitutional concerns, particularly those highlighted by Member States, not in terms of whether passive group members can be represented, but rather in terms of whether the status of presumed group membership exposes these individuals to any legal or financial liability or disadvantages. In other words, this principle eliminates the argument that the opt-out mechanism undermines individual autonomy by subjecting consumers to legal consequences without their active consent, by minimising such consequences. Consequently, the constitutional objection loses its validity.

As noted in the previous chapter, the safeguard provided by this principle is supported by the consistent position of the ECtHR. The right of access to a court under Article 6(1) of the ECHR is not absolute and may be subject to regulations designed to ensure the proper administration of justice, provided that the essence of this right is not undermined. For consumers with negative expected value claims, the opt-out mechanism does not undermine the essence of the

²²⁴ Csongor István Nagy, 'Collective Redress and Aggregation of Claims' in Rodger, Ferro and Marcos (n 3) 354.

²²⁵ Ibid 354.

²²⁶ Ibid 352.

right of access to justice.²²⁷ On the contrary, the opt-out mechanism ensures that this right retains its practical significance whilst complying with the EU legal tradition. Thus, the principle guarantees that this access is provided without imposing any burden and enables passive members to participate solely to benefit from potential advantages without bearing risks.

This principle also constitutes a preliminary step with its significant implications for the design of the notification and opt-out mechanism. Indeed, in cases where passive membership covers only benefits, the right to opt out is less a constitutional requirement and more a design element that enhances the validity of the principle. A passive member who can withdraw from group membership without incurring any costs or adverse consequences is, in effect, offered a choice rather than being a party to the case. In this way, the right to withdraw from membership serves as the practical counterpart to “autonomy by default” in the context of the implied inclusion and offers consumers a choice architecture that is consistent with the reality of consumer behaviour.²²⁸

The principle is also viable under the opt-out regimes in the EU, without being called only-benefits. In this thesis, Portugal’s model is considered. The Portuguese *acção popular* (popular action) embeds it in a different form and has produced the outcome that large-scale consumer participation in competition damages proceedings without abusive litigation, entrepreneurial lawyering and the constitutional concerns associated with the US model.

Under the popular action system in Portugal, all affected parties are deemed parties to the proceedings by default unless they expressly opt out, and only those who exercise their right to opt out are excluded from the judgment.²²⁹ Although the loser pays principle applies under Portuguese law, there is an exception to this in relation to the popular action system under the Portuguese Procedural Costs Regulation.²³⁰ Under this system, the parties are exempt from legal costs, in particular court fees, expenses and the parties’ costs (including those incurred by the winning party; for example, documents, expert opinions, translations, postage costs, travel

²²⁷ Linda Mullenix, ‘Ending Class Actions as We Know Them: Rethinking the American Class Action’ (2014) 64 *Emory Law Journal* 399 <https://scholarlycommons.law.emory.edu/elj/vol64/iss2/14/?utm_source=scholarlycommons.law.emory.edu%2Felj%2Fvol64%2Fiss2%2F14&utm_medium=PDF&utm_campaign=PDFCoverPages> accessed 23 May 2026, 407-408.

²²⁸ Cass R Sunstein, ‘Autonomy by Default’ (2016) 16 *The American Journal of Bioethics* 1, 1.

²²⁹ M Sousa Ferro, ‘Collective Redress: Will Portugal Show the Way?’ (2015) 6 *Journal of European Competition Law & Practice* 299, 299.

²³⁰ Venda (n 144) 154

expenses, and the fees of attorneys and bailiffs).²³¹ Furthermore, if the claim is at least partially successful, the claimants are not required to pay any court costs or the opposing party's legal fees.²³² The law also provides that claimants shall be exempted from costs if their claims are partially upheld. In case of a total dismissal of the claim, the claimant may be ordered to pay an amount ranging from 10% to 50% of the general costs.²³³ The exact amount of this sum is determined by the national court, considering the claimant's financial circumstances and the grounds for the dismissal of the claim.²³⁴

The success of the Portuguese model is evident in the DECO v Portugal Telecom case. In this case, a Portuguese consumer association, DECO, has filed a lawsuit on behalf of all customers against Portugal Telecom, the incumbent operator in the telecommunications sector, demanding the refund of an unlawful "activation fee" that the company charged all customers for all telephone calls in 1998 and 1999.²³⁵ While the case included over two million consumers, only five of them opted out of the proceedings.²³⁶ Even though one of the legal grounds cited was Portugal Telecom's abuse of its dominant position, the case was resolved on other grounds and the issue of antitrust damages was not addressed.²³⁷ Nevertheless, the case demonstrates the potential of this mechanism to benefit consumers. DECO reached a settlement with Portugal Telecom for 120 million Euros, under which Portugal Telecom agreed not to charge customers for telephone calls on specific dates.²³⁸

The only-benefits principle is also a behavioural element. Loss aversion, one of the most robust findings in behavioural economics, argues that individuals are more strongly motivated by the possible loss than by an equivalent possible gain.²³⁹ The constitutional objection to the opt-out system is, at its core, the fear that passive participation, which is essentially an argument based on loss aversion, could be harmful for the consumers. This principle eliminates this concern at its behavioural foundation as, in situations where passive membership can only result in a

²³¹ *ibid* 154.

²³² Miguel Sousa Ferro, 'Class Actions in Portugal: The Little Regime That Could' (2021) 2 *Mass Claims* 112, 120.

²³³ Henrique Sousa Antunes, 'Class Actions, Group Litigation & Other Forms of Collective Litigation (Portuguese Report)' (Stanford Law School, 2022) 27 <https://law.stanford.edu/wp-content/uploads/sites/default/files/event/261321/media/slspublic/Portugal_National_Report.pdf> accessed 23 May 2026, 27.

²³⁴ Sousa Ferro, 'Class Actions in Portugal: The Little Regime That Could' (n 232) 120.

²³⁵ Pais and Piszcz (n 6) 218.

²³⁶ Maria Ioannidou, *Consumer Involvement in Private EU Competition Law Enforcement* (OUP 2015) 134.

²³⁷ *ibid* 134.

²³⁸ *ibid* 134.

²³⁹ Mathis and Steffen (n 188) 40-41.

potential gain and never in a loss, loss aversion ceases to operate as a constitutional objection and instead becomes a design advantage. Under this advantage, consumers who take no action incur virtually no risk, and the absence of downside risk renders the default position one that is not truly coercive. The near-zero opt-out rates observed in the DECO v Portugal Telecom case are an empirical expression of this dynamic.

However, there is also a possible risk in this element. Article 2 of Law 83/95 (the Popular Action Act) authorises citizens, associations, foundations dedicated to the defence of specific interests or local authorities to initiate collective actions.²⁴⁰ In the DECO v Portugal Telecom case, DECO, a consumer association, benefited from Article 18 of Law 24/96 (the Consumer Protection Act), which grants consumer associations support to “afford legal standing to exercise popular action”.²⁴¹ This support encompasses exemption from payment of costs, prepayments and stamp duty under Law 83/95, as well as the right to receive assistance from the State particularly in activities including consumer representation.²⁴² Additionally, consumer associations are entitled to tax benefits equivalent to those provided by law to private social welfare institutions, either currently or in the future.²⁴³ This legal framework and case demonstrate that the State’s support enables the consumer association to not follow its own interests, but rather those of consumers, and that, by addressing the principal-agent problem that leads to abusive litigation, this problem can also be overcome. However, there is no certainty that every consumer association would act in good faith and not cause what European policymakers fear, namely, abusive litigation. Moreover, it is also evident that not all Member States will have sufficient budgets to allocate such support, which raises the question of whether such an approach could be truly adoptable across the EU.

Despite this risk of the system, the DECO v Portugal Telecom, even though it was not based on damages arising from infringements of competition law, is of landmark significance in demonstrating that the only-benefits principle operates within the opt-out system and in showing the extent to which it covers consumers, as reflected in the participation rate. This

²⁴⁰ Miguel Mendes Pereira, Carla Marcelino and Rita Pimentel Torres, ‘Competition Law Class Actions in Portugal: First Court-Approved Settlement’ (*Kluwer Competition Law Blog* 16 November 2021) <<https://legalblogs.wolterskluwer.com/competition-blog/competition-law-class-actions-in-portugal-first-court-approved-settlement/>> accessed 14 June 2026.

²⁴¹ BEUC, ‘Collective Redress: Theoretical Background Document’ (Consumer PRO, 2022–2023) <www.beuc.eu/sites/default/files/publications/ConsumerPro_TBD_Collective_Redress.pdf> accessed 14 June 2026, 28.

²⁴² *ibid* 28.

²⁴³ *ibid* 28.

leads to the conclusion that the Portuguese model has adopted an opt-out approach, in line with EU traditions, by applying this principle while addressing the constitutional concerns of other EU Member States.

5.3. Effective Notification and the UK Regime

The only-benefit principle can only fulfil its constitutional function if the passive members included in the proceedings are actually informed that they have been included and of their right to opt out. No matter how well preserved a passive member's right to opt out may be, they cannot be expected to make a conscious choice if they have received no or inadequate notification of the proceedings. Hence, effective notification is the mechanism that enables implied consent to become a real exercise of autonomy. The behavioural dimension of notification is equally significant. Status quo bias, the tendency of individuals to preserve their current situation, suggests that the vast majority of class members will automatically remain in the class once included, regardless of any notification.²⁴⁴ The function of notification is therefore not to persuade class members to remain, but rather to ensure that those who would choose to exit are genuinely and consciously able to do so. Consequently, the function of effective notification here is to transform status quo bias from a constitutional weakness into a constitutional concept. In this way, the fact that class members do not take action, because they have been informed and have chosen to remain, signifies the genuine exercise of autonomy rather than its exploitation. Furthermore, present bias, the tendency to underweight future consequences relative to immediate ones, requires notification to be timely, accessible and written in plain language.²⁴⁵ A notification that is technically compliant but practically incomprehensible exploits present bias and cannot amount to more than a formality in achieving the desired outcome, which is the genuinely informed consumers.

The UK's model here stands as a precedent. In the UK, Competition Appeal Tribunal (CAT) regime, introduced by the Consumer Rights Act (CRA) 2015 and significantly developed through a decade of case law, provides an instructive model for notification design within a European legal tradition. Under CAT Rules 2015, Rules 77-79, the CAT must make a Collective Proceedings Order (CPO) before any collective action may proceed.²⁴⁶ The CPO

²⁴⁴ Russell B Korobkin and Thomas S Ulen, 'Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics.' (2000) 88 California Law Review 1051.

²⁴⁵ Jing Jian Xiao and Nilton Porto, 'Present Bias and Financial Behavior' (2019) 2 Financial Planning Review 1, 1-2.

²⁴⁶ Competition Appeal Tribunal Rules 2015, SI 2015/1648, rr 77-79.

determines the timeline and procedure required for class members to withdraw from the case in cases in which the chosen model is opt-out.²⁴⁷ The notice published to inform potential class members must include such information and be written in plain language under CAT Rules, Rule 81. In the same rule, it was also stated that these notices must be approved by the CAT before being sent to potential class members. In this way, the court ensures that the notice is unbiased, not manipulated by legal arguments and not designed to mislead class members, while eliminating information asymmetries that could impair party autonomy by providing a strong mechanism regarding how the case is handled. Moreover, it is evident that defendants are likely to deliberately make notices complicated, lengthy and incomprehensible to discourage participation or confuse plaintiffs, which is why the emphasis on plain language is also important.²⁴⁸ The requirement for clear language in the UK system allows consumers to make opt-out decision without the burden of cognitive load.

However, although the UK system provides an effective framework, especially with CAT's supervision over the notification, a significant limitation regarding the effectiveness of the notification system should not be overlooked. Whilst the use of plain language might increase the likelihood of consumers understanding the notification, there is one element that is not regulated under the UK system, which is a content length limitation. If the notification contains too much information, even when written in plain language, it could lead to information overload, meaning that consumers might not read it at all or might overlook important sections due to the sheer volume of information.²⁴⁹ The UK system in question does not present a limitation to prevent this. Whilst the aim is to enable consumers to make informed choices, that is, to opt-out, the language used must also be considered a key factor in ensuring they are not overwhelmed by information and a maximum limit on the amount of content to be included in the notification should be established.

With overcoming this content length limitation deficiency of the system, adopting this system for the EU can overcome the shortcomings of the opt-out mechanism, which stem from its being a default mechanism. The quality of the notification should go beyond simply making the individual identifiable, the notification sent to class members should be substantive, designed to overcome the consumers' structural inertia and enable them to make a real decision about

²⁴⁷ *Venda* (n 144) 175.

²⁴⁸ *Mulheron* (n 50) 356.

²⁴⁹ Veerle Colaert, 'Investor Protection in the Capital Markets Union' in Danny Busch, Emiliós Avgouleas and Guido Ferrarini (eds), *Capital Markets Union in Europe* (OUP 2018) 344.

participation or to opt out. Therefore, effective notification can perform as a protective shield that safeguards the passive individual in a state of rational inertia within the opt-out regime. If the notification system is not effectively designed, the inclusiveness provided by the default mechanism becomes a violation of constitutional rights, namely, the risk of being not fully knowingly subjected to *res judicata*. That is why an effective notification mechanism is a substantial component in overcoming the constitutional concerns of Member States regarding the opt-out mechanism, with the only-benefit principle.

5.4. Certification as a Rights-Balancing Mechanism

The only-benefits principle and effective notification mechanism together address the constitutional objection to opt-out at the substantive and procedural levels, respectively. To complete this framework, a third element is needed. This element is a certification phase that presupposes that the collective interest of aggregation is proportionate to the cost of presumed inclusion to private autonomy. This component designed in this thesis not as a detailed procedural filter, but rather as an *ex-ante* rights-balancing mechanism that empowers national courts to assess, before class formation, if a particular case justifies the specific constitutional cost of the opt-out option.²⁵⁰

This certification phase requires a *prima facie* assessment of three aspects that do not involve prejudice to the merits of the competition law claim. First, the national courts must ensure that the class is sufficiently definable and that the alleged harm is of a nature and scale that renders individual litigation structurally impractical. In other words, the claims must be of the negative expected value nature as defined in Chapter 3, so that not participating in the proceedings is genuinely superior as a means of access to justice. Second, the national courts must confirm that collective litigation offers significant procedural advantages over a series of individual proceedings and that common factual and legal issues predominate.²⁵¹ Third and most constitutionally critical, the courts must confirm that the proposed representative body has the independence, competence and resources to genuinely protect the interests of class members who are not present throughout the proceedings.²⁵²

²⁵⁰ Arianna Andreangeli, 'Part II, Chapter 7: A View from across the Atlantic: Recent Developments in the Case Law of the US Federal Courts on Class Certification in Antitrust Cases' in Barry J Rogder (ed), *Competition Law: Comparative Private Enforcement and Collective Redress across the EU* (Kluwer Competition Law 2014) 252.

²⁵¹ Mulheron, 'The United Kingdom's New Opt-out Class Action' (n 163) 822.

²⁵² *ibid* 823.

This third requirement acts as the cornerstone of the rights-balancing function. The constitutional objection to representation without authorisation is weakest where the representative is structurally incapable of subordinating the class's interests to its own. The strongest antidote against the constitutional objection raised by Member States to unauthorised representation is to create a situation where the representative is structurally incapable of subordinating the interests of the class to their own, which is precisely the task of the third component. The certification stage is the moment when the court verifies this structural alignment *ex ante*, before passive members are bound by the representative's decisions, thereby providing an assurance of procedural integrity.

Critically, the certification stage does not involve a premature judgment on whether the defendant has infringed competition law, that question is reserved for trial on the merits of the case.²⁵³ The certification addresses if this mechanism is the appropriate tool for this class. This way the stage ensures that the right to defence is protected, allowing the defendant to object to the certification on any of the three grounds mentioned above, without the need for the court to determine liability before the trial.²⁵⁴ Judicial objectivity is also preserved, as a court assessing only the suitability of the collective mechanism is not bound by any prior opinion on the merits of the case.

However, it should be noted that the certification phase presents a challenge for indirect purchasers compared to direct purchasers. As stated above, for a class action to be certified, the common benefit of the case must predominate over the benefits of individual lawsuits. Direct purchasers are generally easier to prove class-wide injury because they are directly affected by the price increase.²⁵⁵ However, in the case of indirect purchasers, the damages model must also account for the actions of "innocent intermediaries" whose actions, whether or not they passed on the exorbitant price to their own customers, are unclear.²⁵⁶ The highly individual and complex nature of proving pass-on often leads courts to reject certification on the grounds that "individual issues of impact, in other words, predominated over class issues".²⁵⁷ Furthermore, as mentioned above, it is essential for certification that the class members and how the damages will be distributed can be determined. In the case of indirect buyers, especially end consumers,

²⁵³ *Venda* (n 144) 280.

²⁵⁴ European Parliament, Motion for a Resolution on the White Paper on Damages Actions for Breach of the EC Antitrust Rules (2008/2154(INI)) 17.

²⁵⁵ *Page* (n 119) 277.

²⁵⁶ *ibid* 277.

²⁵⁷ *ibid* 277.

the lack of invoices for products purchased years ago, or the uncertainty of who purchased the product and at what price, presents a significant obstacle.²⁵⁸ Courts are likely to refuse certification of indirect buyer classes in situations where it is impossible to determine who purchased the product at the time of the infringement or to find a reasonable way to distribute compensation to those who overpaid, for example in the case of consumer goods such as food products.²⁵⁹

Despite this risk, when combined with the two elements mentioned earlier, the deterrent aspect of certification also emerges. An opt-out mechanism that reaches almost all affected consumers not only increases compensation but also aligns the defendant's total liability risk with the actual total damage resulting from the infringement.²⁶⁰ As administrative fines ordered by the Commission or NCAs cannot fully compensate the injured party, collective actions with the opt-out mechanism fill the deterrent gap left by individual litigation, as mentioned throughout this thesis. By ensuring that only well-founded collective actions proceed, the certification phase preserves this deterrent function while also preventing abuse, thus preventing "abusive litigation," one of the main concerns of the EU policymakers.

²⁵⁸ *Venda* (n 144) 136; *Ioannidou* (n 236) 132.

²⁵⁹ *Page* (n 119) 292.

²⁶⁰ *Vischer and Faure* (n 137) 478.

6. Conclusion

The previous chapter presents a systematically codified normative European opt-out collective rights frameworks for small-value claims of consumers, specifically within the context of EU competition law, encompassing both constitutional and procedural dimensions. The main thesis defended throughout the study is that the opt-out mechanism does not necessarily constitute an intervention in the legal traditions and constitutional structures of Member States. On the contrary, when designed with the right institutional architecture, the opt-out mechanism is able to address these concerns completely.

The model developed in this study is built upon three complementary pillars. The only-benefit principle alone, forming the constitutional basis of the model, overcomes the major concern of Member States, which is the “representation without authorisation”, by not imposing financial risk or procedural obligation on passive class members. As observed in Portugal’s *acção popular* model, implied consent becomes a legitimate choice architecture, provided the consumer retains the right to opt out, and the process is free from the risk of legal costs. To overcome the structural inertia and information asymmetry created by the assumed mechanisms, an effective notification system, inspired by the UK’s CAT practice, is proposed, prepared in plain language and approved by the court. Effective notification serves as a procedural shield that protects consumers’ autonomy and removes the risk of *res judicata* from the process. The *ex-ante* certification stage, conducted before the merits of the case, empowers national courts to oversee the supremacy of the collective interest over individual litigation and the independence of the representative institution. The certification phase is a strong barrier against the US-style blackmail settlements and abusive litigation culture without undermining the access to justice.

The framework proposed in this thesis directly answers the main research question: how can the EU design a harmonised framework to ensure a class action mechanism for competition law damages with an opt-out mechanism that is viable for small-value consumer claims, while balancing constitutional principles and avoiding abusive litigation practices? The answer is that reconciliation is achieved not by compromising the structural advantages of opt-out, but by designing a mechanism in accordance with three elements that together neutralise constitutional objections that has historically blocked its adoption. The only-benefits principle neutralises the objection that passive inclusion imposes unauthorised legal consequences, by ensuring that passive membership cannot result in harm. Effective notification neutralises the objection that

passive members lack genuine autonomy, by ensuring that informed opt-out right is always available. The certification stage neutralises the objection that opt-out enables abusive litigation, by requiring *ex-ante* judicial verification, that the collective interest justifies the constitutional cost of default inclusion in each specific case. Together, these three components transform constitutional concerns into design requirements, each of which makes the mechanism more protective of consumer rights rather than less.

In conclusion, in private enforcement of EU competition law, administrative fines imposed by the Commission and NCAs alone cannot provide full deterrence and fair compensation. While the opt-in model's failure to overcome rational apathy is evident, the opt-out model specific to competition law presented in this study confronts infringing undertakings with the full extent of their unjust gains. This proposed architecture ends the false dichotomy between autonomy and access to justice by respecting Member States' concerns about procedural autonomy and transforming formally existing rights into tangible gains for consumers in practice of competition policy of the EU.

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