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# COLLECTIVE REDRESS AND OPTING-OUT SYSTEM

## SOME REMARKS FROM THE PORTUGUESE LEGAL SYSTEM

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**Abstract**
The EU Antitrust Damages Actions Directive does not include provisions for collective redress. Each EU member state is free to provide national regulation on this matter. The Portuguese legal system has provided regulation on *actio popularis* since 1995. The "rational apathy" of individual consumers may lead to non-reparation of damage and be of significant benefit for the company that is in breach of the law. The Portuguese legal system follows the opt-out model. This paper first analyses the opt-out model, the rules of standing, certification, fees and oversight role of the courts and the Public Prosecutor on Service. It goes on to identify the controversial aspects of the *actio popularis* and suggests some changes with respect to the distribution of compensation to the injured consumers. The Portuguese experience could inspire other legal systems that want to promote the full compensation of mass damage caused by competition infringements. This paper argues that the Portuguese law should not be changed to meet the opt-in suggestion put forward by the Recommendation on Collective Redress.

**Keywords**: competition law, private enforcement, collective redress, opt-out system

**Summary**

1. The opt-in model suggested by the Recommendation and the hostility to the opt-out model.
2. Why is collective redress so critical for the private enforcement of competition law?
3. The Portuguese legal regime on *actio popularis.*
   3.1. *The protection of market competition through the* actio popularis.
   3.2. *Why is the opt-out model the correct one?*
4. Some controversial features – how to promote efficiency and grant procedural rights?
   4.1. *Why is the opt-out model controversial?*
   4.2. *Opt-out and* res judicata.
   4.3. *Fixing and managing the compensation determined by the court.*
5. Conclusion.

## 1. The opt-in model suggested by the Recommendation on Collective Redress and the hostility to the opt-out model

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In 2013, the Commission adopted the Recommendation on Collective Redress[2]whose principles are intended to apply to claims regarding rights granted under EU law in a variety of areas, including competition law.[3]Some previous initiatives (including some surveys) developed by the European Commission had shown the variety of national legal solutions for collective redress. In possession of this mapping, the European Commission chooses to tackle the collective redress issues by enacting a soft law instrument.[4]As we know, it is not purpose of the Recommendations to harmonise the legal regime.[5] Which means that the national legal variations on collective redress experiences will remain, in spite of the common principles for injunctive and compensatory collective redress mechanisms set out in the Recommendation. The European Commission thus identifies the main principles to be adopted by the national law of each Member State but tolerates the current range of national legal solutions. In fact, the recommendation is a not mandatory instrument by nature, and consequently it has the advantage of showing the path to be followed without imposing immediate national legal reforms. By doing so, the European Commission rejects the "one size fits all" approach.

The collective redress instruments are seen as an important tools to encourage and enhance the private enforcement of competition law in Europe.[6]The Recommendation finds that competition is one of the areas "where the supplementary private enforcement of rights granted under Union law in the form of collective redress is of value".[7]

The aim of the Recommendation "is to facilitate access to justice in relation to violations of rights under Union law and to that end to recommend that all Member States should have collective redress systems at national level that follow the same basic principles throughout the Union, taking into account the legal traditions of the Member States and safeguarding against abuse".[8]

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[2] Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU).

[3] In April 2008, the European Commission published for public consultation a White Paper on damages actions for breach of EU anti-trust rules. On 4 February 2011 the European Commission had published a public consultation working document entitled "Towards a Coherent European Approach to Collective Redress" indicating change from a sectoral to a horizontal approach to collective redress. All the Commission initiatives on collective redress can be found at http://ec.europa.eu/consumers/solving_consumer_disputes/judicial_redress/index_en.htm

[4] According to Article 288 of the Treaty on Functioning of the European Union, the "Recommendations and opinions shall have no binding force".

[5]Christopher Hodges & Stefaan Voet (2017:7), find that "There is no coherence in national class action laws, none of which correspond to the European Commission's 2013 blueprint". Paolo Buccirossi & Michele Carpagnan (2013: 3-15), suggest that "a legislative intervention on collective redress in antitrust at EU level may be needed to improve the effectiveness of the private enforcement of EU competition law. This intervention could have article 103 TFEU as legal basis and the most effective legislative act would be a regulation".

[6]Sebastian Peyer (2012: 331-359).

[7] Recital 7 of the Recommendation.

[8] Recital 10 of the Recommendation.

The Recommendation looked at the US class action regime and experience and as result of that, very clearly one of the Recommendation's main purposes is to avoid certain alleged abuses, especially those consistent with unmeritorious litigation.[9]/[10] "There is a widely held belief among corporate and government stakeholders that the US class actions regime is not the right fit for Europe".[11]

Whether the US class action regime favours "strike suits" or not is beyond the scope of this paper. In fact, the class action regime is controversial both within and outside the United States. It has several advantages and simultaneously is open to several criticisms. The advantages of class actions (including competition class actions) are: *a*) they overcome the economic barrier faced by individual claimants whose claim is too small to fund the litigation against the defendant; *b*) they aggregate a large number of individual claims, which concentrates the litigation and therefore saves the time, energy and resources of the defendant; *c)* they induce a deterrent effect through the award of treble damages.

However, the risks of class actions are well known. Critics point out that the legal industry has developed practices to secure a settlement regardless the merit of the claim. In fact, some risk-adverse defendants (who want to avoid reputational damage) prefer to pay a settlement instead of going to trial and succeeding. Another critic points out that a sole claimant receives minimal compensation. In short, according this critic, class actions have benefits and profits for the lawyers rather than for the injured consumers.

The Recommendation is very cautious, even conservative, with respect to the US experience of class actions. In keeping with this approach, the Recommendation states that "elements such as punitive damages, intrusive pre-trial discovery procedures and jury awards, most of which are foreign to the legal traditions of most Member States, should be avoided as a general rule".[12]Some

[9] "For the Commission, any measures for judicial redress need to be appropriate and effective and bring balanced solutions supporting European growth, while ensuring effective access to justice. Therefore, they must not attract abusive litigation or have effects detrimental to respondents regardless of the results of the proceedings. Examples of such adverse effects can be seen in particular in 'class actions' as known in the United States. The European approach to collective redress must thus give proper thought to preventing these negative effects and devising adequate safeguards against them" - Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Towards a European Horizontal Framework for Collective Redress" Brussels, xxxCOM (2013) 401/2, p. 3. Contrasting the European regime and the US experience, see Douglas H. Ginsburg (2005: 427-439).

[10] "The 'American rule' that each party pays its own costs and attorney's fees, in combination with the aggregating power of the class action, may exert extortionate pressure upon an innocent defendant to settle the claim against it." – see Ginsburg (2010: 54). Damien Geradin (2015: 2) finds this allegation "questionable".

[11]Damien Geradin (2015: 9).

[12] Recital 15 of the Recommendation.

authors detect a "clear hostility towards the US class actions regime, which is perceived as a source of excessive litigation and unmeritorious claims".[13]

The Recommendation acknowledges that collective redress mechanisms are crucial to achieving an effective *private enforcement of the competition law*. And perhaps the European regulator recognizes that the US class action regime promotes such effectiveness. Understandably, is neither possible nor desirable to advocate a complete and blind "legal transplant"[14] of the US class action experience to the European legal regime. Nor should it be forgotten that a number of factors have contributed to the current US class action legal regime (economic, social, legal environmental, litigation culture). It is to be expected that such an attempt at "legal transplant" would not succeed. The European Commission is aware of the problems caused by the legal transplant or "legal borrowing".[15] Of course, tolerating class action abuses would be neither desirable nor help to cultivate efficiency. Unarguably, the misuse of class action lawsuits must not be tolerated under the European regulation.

According to the European Commission Recommendation, the principal aim and purpose of this recommendation it to "stop illegal practices and enable injured parties to obtain compensation in mass harm situations caused by violations of rights granted under Union law, while ensuring appropriate procedural safeguards to avoid abusive litigation".[16]However, whether or not the current US class action legal regime incorporates the right procedural safeguards to ensure that only reasonable, well-grounded actions are allowed to proceed is controversial among authors. Furthermore, it is important to consider whether or not the peculiarities of national traditions in Europe, the "path dependence", contribute to the same kind of abuses that are allegedly practised by the US legal industry.

The European Commission consistently puts forward a number of "principles common to injunctive and compensatory collective redress" that are designed tobe followed by the national legal regimes on collective redress. These principles cover a wide range of legal aspects: *a*) standing to bring a representative action; *b*) admissibility; *c*) information on a collective redress action; *d*) reimbursement of legal costs of the winning party; *e*) funding; *f*) cross-border cases. Then the European Commission identifies the "specific principles relating to injunctive collective redress".

For the purposes of this paper, I have looked at the "specific principles relating to compensatory collective redress",[17] in particular the recommendation concerning the "constitution

[13] Damien Geradin (2015:13).
[14] See Alan Watson (1993).
[15] See Holger Fleicher (2005), *passim*.
[16] Recommendation, no.1.
[17] Recommendation, no. 19-20.

of the claimant party by the 'opt-in' principle".[18] The Recommendation suggests that the "The claimant party should be formed on the basis of express consent of the natural or legal persons claiming to have been harmed ('opt-in' principle). Any exception to this principle, by law or by court order, should be duly justified by reasons of sound administration of justice".[19]

This option is contrary to Rule 23 of the US Federal Rules of Civil Procedure, which adopts the "opt-out" model as follows: "(B) For (b)(3) Classes. For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires;(v) that the court will exclude from the class any member who requests exclusion;(vi) the time and manner for requesting exclusion; and(vii) the binding effect of a class judgment on members under Rule 23(c)(3)". As matter of fact, the option for the "opt-out" model is clear when Rule 23 (B) states that the notice will declare "(v) that the court will exclude from the class any member who requests exclusion".

The recommendation rejects the contingent fee arrangement for paying the lawyer. In fact, this model for paying lawyers implies an economic incentive to litigation, but it is permitted in some European member states.

Concerning *follow-on collective redress actions* (particularly important for the private enforcement of competition law), the Recommendation states that "the Member States should ensure that in fields of law where a public authority is empowered to adopt a decision finding that there has been a violation of Union law, collective redress actions should, as a general rule, only start after any proceedings of the public authority, which were launched before commencement of the private action, have been concluded definitively. If the proceedings of the public authority are launched after the commencement of the collective redress action, the court should avoid giving a decision which would conflict with a decision contemplated by the public authority. To that end, the court may stay the collective redress action until the proceedings of the public authority have been concluded".[20]

It is expected that this recommendation will trigger some legal reforms across the European national laws on collective redress, mainly in the field of the private enforcement of competition law.

[18] Recommendation, no. 21.
[19] Recommendation no. 21.
[20] Recommendation no. 33.

However, the legal reforms endorsed by this recommendation depend on a political choice or political decision. Of course, the recommendation aspires to be a driving force for bringing the national rules on collective redress closer together. According to the Recommendation's proposal, harmonization or legislative approximation will be achieved not through mandatory directives but by soft law that suggests the principles to be adopted by each national jurisdiction.

Given that the Recommendation is a soft law instrument, it is appropriate that each member states makes a legal assessment of the effectiveness of the Recommendation's provisions. As will be seen, some of the suggestions put forward by the Commission should not be implemented, because they do not introduce effectiveness-driven solutions.

## 2. Why is collective redress so critical for the private enforcement of competition law?

Competition has some special features. In fact, competition resembles a public commodity – it has benefits for everybody because it brings lower prices, a wider choice, greater efficiency, more products and services that meet consumers' needs. Rivalry among enterprises leads to the elimination of the less efficient firms and business. This is the expected outcome of the competitive market.[21]

However, there is a market failure that must be addressed by regulation – market forces themselves cannot ensure compliance with the competition rules. In the European Union, public enforcement by public authorities allows respect for competition, but they have no authority to seek the full compensation of consumers harmed by competition infringements. The ECJ's *Crehan* and *Manfredi* rulings asserted the right of each consumer to seek full compensation for the losses caused by the competition infringement.

Despite the legal and judicial recognition, the right to full compensation for the losses caused by competition infringements faces an economic obstacle. The ordinary consumer ("mom-and-pop shopper") who suffers damage caused by a cartel which pushes up the price of the bread by1 euro has no economic incentive to bring a cartelist before justice. Even though the claimant will be successful, the legal costs are higher than any restitution they receive from the cartelist. If the damage is relatively small from the economic point of view the harmed consumer tends to be apathetic and absorb the damage – this is rational behaviour, from an economic point of view. "Consumers with dispersed interests and low individual stakes need special protection in market transactions, in political process and in adjudication".[22]

[21] Maria Elisabete Ramos, 2016, 28:
[22] Mariusz Maciejewski, 2015: 7.

However, consumer apathy is not a desirable outcome from the macroeconomic perspective. This apathy benefits the cartelist, because they keep the economic profits arising from the cartel and the injured consumer gets no remedy. The loss of 1 euro means millions of euros if it is multiplied by millions of harmed consumers.[23] If we consider the loss suffered by society as a whole, we realize how important it is to create legal mechanisms that can overlap the consumer's rational apathy. In fact, consumer apathy precludes the complete recovery of damages, jeopardizes the deterrent effect and does not promote market efficiency. "Ideally, for consumers and for businesses, when a consumer suffers damage the redress should be available fully and timely and at minimal costs. This allows restoring the efficient allocation of resources and achieving other social goals such as justice and equal treatment, and levelling the playing field between the defaulting enterprise and its competitors".[24]

Collective redress by allowing the aggregation of several individual claims in a single action solves the economic problem faced by the consumer whose loss is too small to motivate them to litigate.[25]Popular action (*actio popularis*) efficiently solves another problem, which concerns the standing to sue, "when the interests harmed by the anticompetitive practises are not related to a specific case." The problem is solved by "freeing the private individuals from the need to demonstrate infringement of an individual right".[26]

It must be recognized that a wide range of factors can contribute to the effectiveness or ineffectiveness of the concrete collective redress legal regime. This is a very complex balance because on one hand it merges the efficiency requirements and on the other it cultivates the preservation of individual rights, particularly procedural rights. The assessment of this balance varies according the legal choice on collective redress made by each of the legal regimes. This paper examines the choices made by the Portuguese legal regime on *actio popularis*.

## 3. The Portuguese legal regime on *actio popularis*

### **3.1.** *The protection of market competition through the actio popularis*

The Portuguese legal regime on *actio popularis* (Law no.85/95, 31.8) precedes the European Commission Recommendation on collective redress, since it was published on 31August 1995 and came into force 60 days afterwards.[27] Delatre finds the Portuguese legislation on *actio*

[23] Mateus, 2006.
[24] Mariusz Maciejewsk, 2015: 6.
[25] On the decision to litigate, see Orlando Vogler Guiné (2014): 225.
[2626] Sérvulo Correia, 2010:111.
[27] On this legal regime see, Delatre 2011: 39. See also Machete, 1996; Lebre de Freitas (1996: 237)

*popularis* "far reaching" and "the closest equivalent in Europe to the US class action".[28] Hodges qualifies the Portuguese legal regime as "the most liberal in Europe".[29]

In fact, Article 52(3), of the Constitution of the Portuguese Republic, titled "Right to petition and right of *actio popularis*" states that "Everyone is granted the right of *actio popularis*, including the right to apply for the applicable compensation for an aggrieved party or parties, in the cases and under the terms provided for by law, either personally or via associations that purport to defend the interests in question. The said right may particularly be exercised in order to: a) Promote the prevention, cessation or judicial prosecution of offences against public health, consumer rights, the quality of life or the preservation of the environment and the cultural heritage; b) Safeguard the property of the state, the autonomous regions and local authorities".[30]

These constitutional provisions must be substantiated by the ordinary law.At the level of the ordinary law, the *actio popularis* is regulated by Law no. 83/95, of 31 August (hereinafter, LAP). Concerning the areas covered by collective redress (scope of application), Article 1(2) of the LAP states that the interests protected by *actio popularis* are public health, environment, quality of life, consumer rights, cultural heritage, and public domain".[31]"In the Portuguese Law, popular action may not be used indiscriminately, but only to protect meta-individual interests materially qualified by the Constitution or the law".[32]The *actio popularis* endeavours to protect the *diffuse interests* and collective interests, defined as 'supra–individual' (i.e. above the individual), together with homogeneous individual (i.e. fragmented) interests or rights.

*Competition* is not expressly included in the list of the interests granted by the *actio popularis*. Furthermore, the Portuguese Competition Law (Law no. 19/2012, 8 May) does not provide for collective redress mechanisms.[33]In spite of this legal silence, one must argue that the Portuguese legal regime on *actio popularis* can also to be used to seek compensation for damage arising from infringements of competition law, at least when consumer protection is at stake.[34]The Portuguese legal regime allows the private enforcement of competition law through the compensatory *action popularis*. The legal grounds that sustain this position are: a) the reference in the Portuguese Constitution and in Article 1(2), of the LAP is not exhaustive;[35] b) the Supreme

[28] Delatre, 2011:37.
[29] Delatre, 2011:57, finds that "The Portuguese model, although it has, to date, not led to any of the excesses commonly attributed to the opt-out class action, remains perhaps too broad in its scope".
[30] On the constitutional provisions regarding *diffuse interests*, see Gomes Canotilho, 1992; Gomes Canotilho, 1996. Gomes Canotilho & Moreira (2007: 698).
[31] Rossi, L., & Sousa Ferro, M. (2014: 263-318).
[32] Sérvulo Correia, 2010 112. On this topic, see M. Teixeira de Sousa, 2003: 293; Remédio Marques, 1999: 277 ff.; Machete (1996: 269).
[33] For an overview on Portuguese Competition Law, see Lúcio Tomé Féteira (2012) 3 (6): 557-561.
[34] See Coutinho de Abreu, 2011: 108.
[35] Rossi, L., & Sousa Ferro, M. (2013), p. 49, 50.

Court confirmation of this point of view;[36] c) Article 1(2) of the LAP clarifies the meaning of the expression "consumer rights" used in Article 52(3), of the Constitution of the Portuguese Republic "when defence of popular action is admitted in order to prevent, terminate and legally prosecute infringements of the 'protection of the consumption of goods and services'".[37]

Generally, according to the Portuguese Code of Civil Procedure, any party injured directly or indirectly by an unlawful anticompetitive act has sufficient legal standing to file a damages action (Article 30 of the Code of Civil Procedure). If various parties are injured by the same unlawful act, each with a claim for compensation arising from a different material relationship, they can,in principle, join their claims (Article 36 of the Code of Civil Procedure).

Given the particularities of the *actio popularis*, the LAP establishes special rules of legal standing to sue. According to the LAP, *any natural person* (legal entities are excluded) is entitled to the legal standing to sue provided they are in full enjoyment of their civil and political rights.It is also open to associations and foundations whose articles of association focus on the promotion of the interests recognized by Article. 1, regardless their direct interest in the outcome of the action (Article 2(1), LAP). It seem that neither Article 52(3) of the Constitution nor Article 2(1) of the LAP "impose any requirement of material connection between the citizen that initiates the action and the infringement in question (meaning, e.g., that a citizen need not have personally suffered damage as a result of the antitrust infringement in order to have standing to initiate an *actio popularis*".[38]

Under the Portuguese legal regime on *actio popularis* a company (such as an SME) that is a client or consumer of the undertaking responsible for the competition infringement may not file an *actio popularis*, as the lead plaintiff.

The legal standing to sue is also recognized in local authorities, which can seek compensation for the injured persons living within the territorial boundaries of the local authority (Article 2(2), LAP). Finally, the legal standing to sue is recognized in the Public Prosecution Service[39](Article 16 LAP).[40] However, only actions brought by individuals, associations or foundations claiming compensation for the losses caused by competition infringements will be

[36] SC 7 October 2003.
[37] Sérvulo Correia, 2010: 112.
[38] Rossi, L., & Sousa Ferro, M. (2013), p. 50.
[39] According to Article 219(1), of the Constitution of the Portuguese Republic, "the Public Prosecutors' Office has the competence to represent the state and defend the interests laid down by law, and, subject to the provisions of the following paragraph and as laid down by law, to participate in the implementation of the criminal policy defined by the entities that exercise sovereignty, exercise penal action in accordance with the principle of legality, and defend democratic legality".
[40]See, too, Article 31 of the CPC.

considered as a *private enforcement suit*.[41]Actions brought by the Public Prosecution Service or by local authorities do not deserve this qualification.

In the field of private enforcement, the Portuguese *actio popularis* may be used to file a "collective stand-alone action" or a "collective follow-on action". However, given the circumstances, it is expected that the collective follow-on actions will be more prevalent.

**3.2.***Why is the opt-out model the correct one?*

In April 2008, the European Commission launched a White Paper for public consultation on damages actions for breach of EU anti-trust rules. It proposed that EU legislation implement an "opt-in" collective action.

"The opt-out model has been the subject of considerable attention during the public consultation held by the Commission on the topic of a coherent approach to collective redress. As explained by Judge Jones in his contribution to the public hearing on collective redress held by the Commission on 5 April 2011,7 the opt-out system presents undeniable advantages and must be examined, not from the perspective of American class action litigation, but from the perspective of European experience, with a view to devising a European mechanism for collective redress that will ensure access to justice and compensation, but which will present acceptable safeguards to prevent the excesses that have repeatedly been attributed to the US model".[42]

The White Paper does not give reasons for preferring the opt-in model. However, the staff working paper[43] briefly addresses the issue, weighing the pros and cons of the opt-in versus opt-out solution. It explains that: "An opt-in collective action system would usually result in a smaller number of victims claiming damages than in an opt-out system, thereby limiting corrective justice, and would have as a consequence that some of the illicit gain may be retained by the infringers, thereby limiting the deterrent effect of the mechanism. By requiring the identification of the claimants (and the specification of their alleged harm suffered), an opt-in collective action may also render the litigation in some way more complex since it increases the defendant(s) possibility to dispute each victim's harm. However, the analysis in the field of competition suggests that an opt-in collective action should be preferred to an opt-out collective action in which a person can bring an action on behalf of a class of unidentified persons. Combined with other features, such opt-out actions have in other jurisdictions been perceived to lead to excesses. In particular, there is an increased risk that the claimants lose control of the proceedings and that the agent seeks his own

[41] Sérvulo Correia, 2010:113.
[42] Delatre, 2011: 2.
[43]Commission, 'Commission Staff Working Paper accompanying the White Paper on Damages Actions for Breach of EC Antitrust Rules' COM (2008) (Staff Working Paper) 165 final,

interest in pursuing the claim (principal/agent problem). Opt-in mechanisms are more similar to traditional litigation, and would therefore be more easily implemented at national level.".

The objective set out in the White Paper was to ensure that "all victims of infringements of EU competition law have access to effective redress mechanisms so that they can be fully compensated for the harm they suffered." However, a question arises: given that objective, is the opt-in group action the best way to achieve it? Some authors argue that "the compensation of all victims of EU competition law infringement is impossible. The concern is therefore to ensure that as many victims as possible will be compensated for the harm they suffered. In this context, the choice of which type of procedure should be developed – opt-in or opt-out – is fundamental".[44]

The preference for the opting-in model has been renewed by the Recommendation of 2013 (paragraph 21, Collective Redress Recommendation). It seems that this option for an opt-in running model is aligned with the intention to avoid the abuses allegedly occurring in the USA class actions experience.

In spite of the European Commission rejection of the opt-out model, the fact is that it is part of the European experience and tradition.[45]Portugal has adopted the opt-out model consistently since 1995. Pursuant to Article 15 of the LAP, the claimant party is formed on the basis of the non-exclusion of the persons who have been harmed. Other European Union Member States follow this model in varying degrees (Netherlands, the UK, and Belgium).[46] After 2013, several European Union Member States adopted new collective redress regimes. In France, the Consumer Act was enacted in 2014, following the opt-in model. Under Belgian law it is for the judge to decide whether an action can be based on an opt-in or opt-out model. This legal possibility does not exist in Portuguese law. The judge has no authority to decide the model on which the *actio popularis* is based.

Under the UK the Consumer Rights Act 2015,[47] the Competition Appeal Tribunal must state in the collective proceedings order whether the collective proceedings are opt-in or opt-out. Consequently, the Competition Appeal Tribunal has the authority to authorize that the proceedings

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[44] Jocelyn G. Delatre, 20011: 36.

[45] See Robert Gaudet 2009: 107, points out that Swedish, Norwegian, Danish, and Dutch experiences contradict several reasons given in the Commission's White Paper for favouring opt-inover opt-out class actions. Lacking persuasive reasons to reject Europe's most powerful mechanism, the Commission should take a hard look at opt-out class actions.

[46] See Matthijs Kuijpers / Stefan Tuinenga/ Stephen Wisking / Kim Dietzel /Suzy Campbell Alexander Fritzsche (2015) 6 (2): 129-142. According to the European Commission, the vast majority of large antitrust damages actions are currently being brought in three Member States—the Netherlands, Germany, and the United Kingdom. These actions are mostly follow-on damages claims and almost exclusively relate to cartel infringements. See also Matthijs Kuijpers /Stefan Tuinenga/ Elaine Whiteford /Thomas B. Paul (2017) 8 (1): 47-65, This survey discusses the developments with regard to claims for damages resulting from competition law infringements in the three most prominent jurisdictions in this area: the Netherlands, the United Kingdom, and Germany. This survey relates to the period July 2014–July 2016.1

[47] On Consumer Rights 2015, see Ashley E. Bass & Kenny A. Henderson (2015) 6 (10): 716-721.

will follow the opt-out model, which is more appropriate in situations involving a large number of consumers with small claims.[48]

The Portuguese legal system does not have a requirement regarding either the "numerosity" of the members or the "adequacy of representation" (a requirement that the persons who represent the group of the claimants will fairly and adequately protect the interests of the class).[49]Furthermore, according to Article 14 of the LAP, the plaintiff, on their own initiative, without the need for a mandate or express authorization, *represents all the other holders* of the right or interests in question who do opt-out. Consequently, according to the Portuguese legal regime, the association, the consumer or the client who files the *actio popularis* against the defendant (company) will *represent* all the consumers/clients who suffered damage as a result of that infringement.

In order to opt-out, the potential claimants are informed about the filling of *actio popularis* through announcements published in the social media or through public notices (Article 15(2)(3), LAP).[50] These publications serve the interest of each claimant by letting them decide whether they want to exercise their right to self-exclusion or not. This decision must be taken within the deadline fixed by the judge, within the period fixed for the presentation of evidence or within similar phase in the proceedings.

No opt-out decision is assimilated to the acceptance of the proceedings. In mass harm situations it may be admitted that the *actio popularis* will cover consumers or clients who are not aware of their right to full compensation for the loss, because: *a*) the announcements will not identify all the injured parties; *b*) the consumer is not aware of the loss; *c*) the consumer has no access to the announcements. In all these situations the consumer or client will be part of the group represented by the applicant.

In the Portuguese experience, as far as I know there is only one case still pending where the plaintiff is claiming compensation for damage caused by competition infringements.[51] On 12 march 2015, the Portuguese Competition Observatory (a non-profit organization) filed a mass damages claim against Sport TV seeking to compensate over 600 000 clients for damage caused by restrictive practices. Under this *actio popularis*, the Portuguese Competition Observatory sought compensation for the damage caused to consumers who were excluded from access to the premium channel due to the price increase induced by restrictive practice. The suit was filed on

[48] See Section 47 (B) 2 and Section 47(B)(4). See also Damien Geradin (2015) 22.
[49] See on this question Payam Martins, 1999: 112.
[50] Gouveia & Garoupa 2012, p. ??? point out that "poster or press may not be the best way to notify potentially interested parties when those interests might be diffused (especially for well-defined homogeneous groups of individuals)".
[51] Miguel Sousa Ferro (2015:299); Sofia Pais (2016: 191, ff.

behalf of all consumers. But it also sought to compensate the pay-television service consumers who were affected by the reduced competition between 2005 and 2013.[52]/[53]

As Leonor Rossi and Miguel Sousa Ferro noticed, "There is, thus, a rather substantial gap between the theoretical possibilities presented by the Portuguese popular action mechanism, often singled out as an exceptionally pragmatic system within the EU, and its use in practice".[54]

However, the Portuguese legal experience internationally mentioned as being an incentive to get very high participation rates. In fact, Mulheron's[55] study on the Portuguese experience (none of the cases studied were related to competition law infringements) estimates the rate of participation in opt-out class actions in Portugal to be close to100%, considering the low number of victims who opt-out.

Looking again to the Portuguese experience, we could conclude that the opt-out mechanism even though may be considered as "an incentive in itself"[56] it is not sufficiently powerful to trigger collective redress for competition claims.[57]

## 4. Some controversial features – how to promote efficiency and grant procedural rights?

### **4.1.** *Why is the opt-out model controversial?*

The Recommendation on collective redress suggests that the right path to follow is the opt-in model: each claimant declares that they want to participate in the collective redress claim. According to the recommendation, the opt-in model grants access to the justice – unarguably a fundamental right in the democratic societies. Having required the consent of each of the members in the class action, the current opt-in model grants the procedural rights of the claimants. Only the persons who consent join the *actio popularis* will claim the compensation. Natural or legal persons who do not consent are not affected by the binding outcome of the collective redress claim and consequently retain their right to sue and seek access to justice. This is, undoubtedly, one of the virtues of the opt-in model.

However, we should not forget that the *Courage/Crehan I* ruling broadened the scope of the principle of subjective effectiveness "to horizontal within the framework of competition law".[58] The

[52] Sousa Ferro, 2015; Sousa Ferro, 2016; Sofia Pais, 2016.
[53] For some examples of class actions filed in other Member-States, see , Sofia Pais, 2016: 198.
[54] Rossi, L. & Ferro, Miguel S. (2013), p. 36.
[55]Mulheron, 2008.
[56] Delatre 2011: 49.
[57] See Coutinho de Abreu, 2011: 111, Rossi, L. & Ferro, Miguel Sousa, 2013: 67, ff.
[58] Sérvulo Correia, 111.

outcome of the opt-in model may be less effective than that of the opt-out. It should not be forgotten that consumers may be not aware of the loss caused by competition infringements that, by nature, amount to a "mass harm situation". If they are not aware, they do not seek compensation. Even if consumers are aware of the harm caused by the competition infringement, they may weigh up, on one hand, the legal costs, and the time and energy expended and, on the other, the benefits accruing from the action, and decide not to claim compensation. As matter of fact, the opt-in model depends on "active consent", whereas for the opt-out model is enough the "passive consent", which means that "inaction allows one to remain part of the procedure".[59]

It is expected that the rates of passive consent would be higher than the rates of active consent.[60] In mass harm situations caused by competition law infringements, rational apathy motivates the harmed consumer to remain passive. In cases of a small loss spread around a large group of injured parties, in particular, the opt-out model is the right path to take to achieve, if not full compensation, at least the widest.

The requirement of active consent results in the opt-in model facing several barriers: economic, psychological or social. "This is particularly true with small claims, in which many victims consider the amount of damages awarded not worth overcoming all these barriers, or simply not worth their time and effort".[61]

By not suing the perpetrators of the competition infringement, by not skimming the illegal profits generated by anticompetitive practices, consumers do not promote sound market functioning. The complementary role of private enforcement becomes effective if the legal environment creates the conditions that encourage each consumer to play the role of private enforcer or "private attorney".[62]

During the public consultation launched by the European Commission to debate the proposals of the White Paper, several objections to the opt-out model were pointed out. These criticisms are listed below.

*a*) Cost of opt-out action in terms of legal costs (lawyers' fees and court costs) and the cost of distributing the compensation. There is the allegation that the contingent fees tend to increase the litigation costs. Another factor that supposedly boosts the litigation costs is the cost of certification. The Portuguese law on class actions, for example, does not provide for a preliminary

[59] Delatre, 45.
[60] See the case of the Action in Joint Representation, an opt-in representative action, brought in France by *UFC-Que Choisir*, a consumer group, against the three main French mobile providers *Orange France, SFR* (Vodafone) and *Boygues Telecom*. In this case, the rate of participation was a mere 0.03% (see Delatre, 47).
[61] Delatre (2011: 46).
[62] Reza Rajabiun(2012) 8 (1): 187-230, points out "the specialization of tasks between public and private enforcers: competition authorities focus on the regulation of dominance, while private litigants tend to identify collusion in contractual relations".

certification mechanism regarding the entitlement to take action, and the legislator does not appear to want to change this situation for the time being.

*b*) The Principal-agent Problem and the Right to a Day in Court – the represented consumers have no effective resources to monitor the conduct of the lead plaintiff or the lawyers and this situation could trigger a conflict of interests. This objection is especially relevant in the cases where the injured party is not aware of being part of the *actio popularis* and, under those circumstances, cannot opt-out. There is the fear that rather than the represented group, the settlements negotiated by the plaintiff mainly benefit the interests of the lead plaintiff or the lawyer. Some legislations recognize the right to opt-out from the settlement. This solution is not applicable under Portuguese law, as plaintiffs are only allowed to opt-out until the end of the production of evidence phase. However, it must be stressed that the Portuguese law on *actio popularis* allows the Public Prosecution Service to step in when the plaintiff undermines the interests at stake (Article 16 of the LAP). So, the Public Prosecution Service may step in and take over the case if it believes the proposed settlement is not fair. The court can also assess the fairness of the proposed settlement.[63]Portuguese law endows the court and the Public Prosecution Service with the authority to be the "gatekeepers" of the sound development of the *actio popularis*.

*c*) A very popular and widespread objection points out that the opt-out model favours or triggers unmeritorious litigation, the so-called strike suits which are filed in order to extract a settlement regardless of the intrinsic merit of the claim. A way to solve this problem would be to give the court the authority to decide whether the action follows the opt-out or the opt-in model. This alternative does not exist under Portuguese law, but is recognized in other jurisdictions.[64] Another alternative would be to give the court the authority to assess the fairness of the settlement. However, the Portuguese experience shows how few *actio popularis* claims have been filed. Which suggests, perhaps, that the risk of the unmeritorious litigation is fuelled by a wide range of factors, besides the opt-out model. The low number of filed *actio popularis* claims may not be assimilated either to the redundant nature of the collective redress mechanisms (it might be argued that the low number of *actio popularis* claims is a sign there is no need of such mechanism) or to the full compliance with the law by companies and enterprises. In fact, "understanding the extent to which the reduced (virtually inexistent) use of *actio popularis* for antitrust private enforcement is explained by economic factors (and, specifically, by microeconomic factors)".[65] Over the years, the Portuguese National Competition Authority (Autoridade da Concorrência) detected and punished

[63] Rossi & Franco, Miguel Sousa, 54.
[64] See UK Consumer Act 2015
[65] Rossi, L.&Ferro, Miguel S. 67.

several cartels. However, this outcome of the Autoridade's activity did not stem the flow of collective follow-on actions.[66]As noted by Delatre, "The European experience shows that these excesses are not simply a by-product of the opt-out class action".

The Portuguese legal experience shows an *under-enforcement* of the antitrust infringements,[67] even the collective follow-on actions are almost non-existent.

Briefly, in my opinion the opt-out system is more effective than the opt-in model.[68] The choice that each lawmaker has to make between the two models must incorporate the information on the peculiar circumstances of litigation culture and assess which solution better serves the compromise between efficiency and the preservation of procedural rights. The issues that must be addressed include those related to the scope of the *res judicata* and to the distribution of the compensation to the consumers who suffered harm and who are part of the class.

### **4.2.** *Opt-out and res judicata*

The current opt-out model accepts and tolerates that natural persons or legal persons can be covered by the *actio popularis* without being aware either of that fact or of its legal consequences. One of the most relevant (but not unique) consequences is the binding effect or the *erga omnes* effect of the *res judicata* of the decision adopted by the court. If each consumer of the class or group is affected by the *res judicata*, whether the decision is favourable or unfavourable to the claimant group, it means that every consumer is barred from taking any further legal action against the perpetrators in order to seek compensation. Even though, the actual consumer was not aware during the proceedings that they were part of the claimant group.

In fact, as a result of the previous considerations, we can say that the opt-out model may be not granting the procedural rights of the claimants. A compromise must be achieved between efficiency and respect for the claimants' procedural rights.

The Portuguese legal regime on *actio popularis* provides for *special rules* (that is, rules different from those laid down in the Portuguese Code of Civil Procedure), regarding the scope of *res judicata*. Pursuant the Portuguese Code of Civil Procedure, the effects of *res judicata* are restricted, in principle, to the parties to the dispute. According to the legal regime on *actio popularis*, the general rule is that any member of the group or class who does not opt-out is bound by the *res judicata* (Article 19 of the LAP).This means that those members of the group cannot file an autonomous action against the enterprise that is the defendant in the *actio popularis*. It is important

[66] See Coutinho de Abreu, 2010: 111, ff.
[67] See Coutinho de Abreu, 2010: 111.
[68] See Coutinho de Abreu, 2010: 108.

to note that according to the Portuguese Code of Civil Procedure the *exceptio rei judicatae* (Articles 576, 577 of the Portuguese Code of Civil Procedure) determines that the court must dismisses the action.

However, under the Portuguese *actio popularis* law, there are two important exceptions to this *erga omnes* effect of *res judicata*: *a*) when an action fails due to insufficient evidence*; b*) when the court should decide differently, considering the specific characteristics of the case in question (see Article 19 of the LAP).

Lebre de Freitas argues that the solution to preserve procedural rights in the Portuguese opt-out collective redress mechanism is to assert that only a favourable *res judicata* should bind the members of the group who did not exercise the opt-out. These members would retain their procedural rights and the access to the justice in the event of a non-favourable *res judicata.*[69] de Freitas believes this solution complies with the Portuguese Constitution.

Sérvulo Correia, in the field of private enforcement and assessing "the factors for effectiveness" and "the causes of inadequacy" elects the "*material scope of the res judiciata*" as a factor which "weakens the contribution of the judicial decisions to the effectiveness of the legal rules of competition. The effects of the *res judicata* are restricted, in principle, to the parties to the dispute and there are no procedural mechanisms for extending the effects of the decision to the benefit of others seeking justice in an identical situation".However, the same author says that the "admissibility of a popular action initiated by an association to protect homogeneous individual interests does not exclude the alternative possibility of multiple individual actions."[70] Suggesting some perspectives for reform, Sérvulo Correia argues that the rules of the scope of *res judicata* should be reformed to "establish a mechanism of 'mass cases' (…) which would allow the effects of a decision to be extended to other cases that do not present any specificity".[71]

**4.3.***Fixing and managing the compensation determined by the court*

Sérvulo Correia stresses that the opting-out model and the compensation fixed on an overall basis represent two important factors for the effectiveness of the Portuguese legal regime.[72] "The possibility of fixing the compensation on an overall basis means that the perpetrators can be prevented from gaining advantage from the damage even when it is not possible to establish the exact extent of the individual damage suffered".[73]

[69] Lebre de Freitas (1996: 241).
[70] Sérvulo Correia, 2010: 118.
[71] Sérvulo Correia, 2010:118.
[72] Sérvulo Correia, 2010: 112.
[73] Sérvulo Correia, 2010: 112.

In fact, compensation may be ruled by the court whenever there is no agreement between the claimant and the company found liable.

The LAP provides for the fact that, in a popular action, compensation may be awarded notonly to individually identified interests but also to those that are not individually identified.[74]Typically, in the case of competition collective redress procedures only some injured parties are individually identified during the proceedings, or perhaps none of the parties are identified. As Rossi and Sousa Ferro note, "in a great number of cases, it will simply not be rational to even attempt to take the option of individual identification of injured cases".[75] According to Article 22(3), of LAP "the holders of interests who are identified are entitled to the corresponding compensation in accordance with the general rules of civil liability" and Article 22(2), of LAP states that "compensation for a violation of the interests of parties who are not individually identified is set globally". The interpretation of these provisions is disputed in the Portuguese legal literature.[76]The cases where an overall compensation may be awarded are also disputed.[77]This legal solution should be clarified for the sake of legal certainty.

The Portuguese LAP does not specify which authorities or entities are entitled to distribute the compensation to the harmed consumers. This is a major issue. In the cases where the court fixes an overall sum of compensation, it is crucial to identify the entities charged with distributing the compensation to the persons covered by the *res judicata*.

However, Article 31 of the Portuguese Securities Code makes provision for the securities class actions. In accordance with Article 31(2) of the Portuguese Securities Code [CVM], the court's judgement should indicate the entity in charge of receiving and managing the compensation due to those shareholders not individually identified, designating, according to the circumstances, sinking funds, associations for the defence of investors or one or various shareholders identified in the action."[78]This is a wise and useful solution that could be applied to applied by judicial decisions on the competition mass damages actions.

If the harmed consumers are not identified, Article 31(2) of the Portuguese Securities Code states that "Indemnities that are not paid, due to prescription or the impossibility of identifying the respective shareholders, should revert to: *a*) The sinking fund relating to the activity giving rise to the indemnity; *b*) In the absence of the sinking fund described in the previous sub-article, the investors' compensation system."

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[74] Figueiredo Dias, 1999: 58, see this situation as "atypical".
[75] Rossi, L. & Ferro, Miguel Sousa, 2013: 56.
[76] See Rossi & Sousa Ferro: 57, ff.
[77] See Rossi & Sousa Ferro: 57.
[78] Rossi & Sousa Ferro, 2013: 78 ff. On Article 31 of the CVM, see Nascimento Rodrigues,2001, *passim*.

Regarding the right to compensation, the Portuguese *actio popularis* establishes a 3-year limitation period (Article 22 (4) (5)).Compensation corresponding extinguished rights will revert to the Ministry of Justice, which will commit these resources to support access to justice, if required by the persons entitled to *actio popularis*.This solution means that any compensation that is not distributed to harmed consumers will be used to pay the *actio popularis* legal costs, if required by the plaintiff.

**Conclusion**

This paper has examined *competition collective redress* as a private enforcement mechanism. The Portuguese National Competition Authority has no powers of redress. Portugal relies on private parties pursuing litigation aimed to compensate losses caused by competition infringements.

Generally, according to the Portuguese Code of Civil Procedure, any party injured directly or indirectly by an unlawful anticompetitive act has sufficient legal standing to file an action for damages (Article 30 of the Code of Civil Procedure). If several parties have been injured by the same unlawful act, each with a claim for compensation arising from a different material relationship, in principle, they can join their claims (Article 36 of the Code of Civil Procedure).

When the infringement of competition law is also an infringement of the disparate interests of consumers, the *actio popularis* may be a suitable legal mechanism to claim compensation for the losses caused to consumers. The Portuguese *actio popularis* lays down special rules (that is, rules different from the general rules set out in the Code of Civil Procedure) on legal standing to sue, procedural costs, judge's powers to investigate, fixing compensation, provision of evidence and special period for the prescription of the right to compensation.

The legal standing to sue is recognized in any consumer who is(co) holder of the affected diffuse interest and the associations and foundations which, pursuant to the Articles of Association, uphold the interest subject to the action at stake /(Articles 2 and 3 of the LAP). The plaintiff or applicant (consumers or association or foundation) represents all the persons entitled to compensation for breach of competition law, except those who opt-out (Articles 14 and 15 LAP).

Consistently since 1995, the Portuguese law on *actio popularis* has applied the opt-out model, regardless of the concrete circumstances of the claim or of the claimants. Under Portuguese law, the judge has no authority to decide whether the *actio popularis* follows the opt-in model or the opt-out model. Under Portuguese law, the claimant party is formed on the basis of the opt-out model, regardless of the "specific principles relating to compensatory collective redress" put forward

by the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under the Union Law (2013/396/EU).

Portuguese legislation does not meet some of the principles set out by the European Commission Recommendation. According to a survey published in 2017, none of the member states comply with all the principles suggested by the European Commission Recommendation. According to some authors there is no single European tradition on collective redress, only several national experiences. Some of those experiences follow the opt-out model in varying degrees, even though the European Commission Recommendation favours the opt-in model for compensatory collective redress.

In fact, the current opt-out models solve the crucial economic problem caused by a large number of consumers or clients who have suffered a small loss because of competition law infringements. Under those circumstances, it is rational to be apathetic, because it can be foreseen that the cost of filingfor compensatory damages will exceedthe restitution obtained from the defendant. By not requiring an active consent of each of the claimants, the opt-out model is more effective than the opt-in model. The rational apathy of the parties injured by competition law infringements favours the wrongfully acting companies by not extracting the illegal gains from them.

The opt-out model faces several criticisms: *a)* it triggers unmeritorious litigation whose main purpose is to extract a settlement favourable to the plaintiff's lawyers; *b)* it does not safeguard the claimants' procedural rights; *c*) it promotes a principal agent problem, because the members of the class are not equipped to monitor the lead plaintiff's decisions and a degree of conflict of interest may arise.

It is questionable whether these criticisms and objections are grounded on empirical evidence and data research. In any case, they are relevant and non-negligible. Portuguese lawdoes establish some procedural safeguards to protect the proper development of the *actio popularis* and prevent its misuse. These safeguards include: *a)* each claimant may opt-out until the production of evidence phase; *b*) in the event of settlement, the Public Prosecution Service may step in and substitute the plaintiff to check the fairness of the settlement; *c*) some authors argue that a *res judicata* unfavourable to the claimants may not bind them, otherwise it would be an unconstitutional interpretation.

Portuguese legislation on collective redress is qualified by foreign authors as "liberal", close to the US class actions. It might be expected that such characteristics would lead to a significant number of collective redress actions and promote the private enforcement of competition law through the collective follow-on actions. Since 2003 (date of its inception), the Nacional Competition

Authority has detected and punished various cartels that could provide a basis for a collective follow-on action. One case is still pending.

Some factors explain the gap between the "law in books" and the "law in action". Some reforms should be implemented to make the Portuguese system more effective: a) clarify the special rules on the fixing and managing of compensation; b) allow some private entities to manage the distribution of compensation to the injured consumers and clients. Some authors suggest introducing contingent fees and the third party litigation funding mechanisms.

To sum up: the Portuguese law should not be changed in order to comply with the opt-in Recommendation.

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