ARE SMALL JURISDICTIONS LIKE MALTA SQUEAKING MICE?: OPT-OUT COLLECTIVE REDRESS AS A NECESSARY TOOL FOR EFFECTIVE ENFORCEMENT OF EU COMPETITION LAW IN MALTA

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Abstract *Small jurisdictions like Malta face unique obstacles in enforcing EU competition law through private means. This paper argues that the country's current opt-in model for collective redress is inherently ineffective, hindered by rational apathy, procedural burdens, and limited public awareness. Drawing on comparative case studies and EU-level developments, it advocates for a shift towards an opt-out or hybrid system. Such a transition, aligned with the principle of effectiveness, would ensure more meaningful access to justice, bolster deterrence against anti-competitive conduct, and help Malta shed its role as a "squeaking mouse" in the enforcement landscape.*

Keywords Antitrust law, collective redress, opt-out mechanism, private enforcement, consumer protection, litigation process, small jurisdictions, EU competition law, principle of effectiveness, rational apathy.

1. ADDRESSING THE SMALL INJUSTICES: THE ROLE OF COLLECTIVE REDRESS IN HOLDING COMPANIES ACCOUNTABLE

If you find that there are fewer biscuits in a packet than advertised or that a few extra cents are charged on your streaming subscription, you might not think it's worth pursuing legal action. Even if the financial impact is more significant, the costs of litigation or the difficulty of taking on a large company may discourage individuals from seeking justice. This creates an environment where it can be financially beneficial for companies to engage in such practices.*

Collective redress mechanisms, where a representative brings a case on behalf of many affected consumers, offer a way to address these small but widespread issues and hold companies accountable for their actions.

Public enforcement, carried out by national competition authorities and the European Commission, plays a vital role, but it is insufficient on its own. Private enforcement, which empowers individuals and businesses to pursue legal action against those who infringe competition law, is equally crucial. It complements public enforcement by providing a mechanism for redress and acting as a deterrent against anti-competitive behavior. This dual enforcement approach enhances the overall effectiveness of the EU competition law framework.

1.1. Spotlight on Malta: Challenges for Small Jurisdictions in Private Enforcement

However, effective private enforcement presents unique challenges for small jurisdictions like Malta. These jurisdictions often have limited resources, including a smaller pool of legal professionals specializing in complex competition law cases, and a potentially smaller number of potential claimants.

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* The introduction was inspired by the introductory paragraph in Beate Gsell, *"The New European Directive on Representative Actions for the Protection of the Collective Interests of Consumers – A Huge, but Blurry Step Forward"* (2021) 58 Common Market Law Review 1365–1400, *"If you find a few grams of powder missing in a detergent pack or pay a few cents too much for a mobile phone bill, you usually have better things to do than sue for damages."*

This can lead to under-enforcement, meaning that breaches of competition law may go unaddressed, leaving businesses and consumers vulnerable. The question arises whether these jurisdictions, despite their commitment to the EU legal framework, are rendered effectively powerless, acting as "squeaking mice" with insufficient influence to ensure their citizens and businesses reap the benefits of a robust competition law regime.

1.2. Research Question & Methodology

A crucial question arises: are these jurisdictions, like Malta, merely "*squeaking mice*"[1] with insufficient influence to guarantee a level playing field for their businesses and consumers?

The core argument of this paper posits that Malta needs to adopt an opt-out collective redress system, or a meticulously designed hybrid model, to achieve genuinely effective enforcement of EU competition law. The current opt-in system suffers from inherent limitations, particularly within a small jurisdiction like Malta. These limitations will be explored in detail, followed by a comprehensive explanation of how alternative models, such as an opt-out or a well-crafted hybrid system, can effectively address these shortcomings.

Ultimately, the aim is to demonstrate how such a shift can empower Malta to create a more robust competition law environment that ensures fair competition and protects the interests of its citizens and businesses operating within the EU market.

2. COMPARING OPT-IN AND OPT-OUT SYSTEMS

2.1. Limitations of Opt-In Systems

These models' effectiveness in achieving broad compensation for widely dispersed damages can be limited by the reliance on active participation.[2] Opt-in systems are characterized by the requirement that individuals must actively choose to join a collective action to be bound by its outcome.[3] This explicit consent is a key feature that aims to protect individual autonomy, by

1 Harsági, 2014.

2 Leskinen, 2010: 5.

3 Hamuľáková, 2018: 96.

allowing class members to freely decide whether or not to participate in the proceedings or not.[4]

2.2. Economic, Psychological & Social Barriers

The necessity of opting in could discourage potential claimants, as many may be reluctant to invest the time and effort required.[5] Furthermore, there is a risk that claimants may delay their decision to join until they observe the outcome of the collective action, hoping to assess whether the result will be favorable.[6] This delay could undermine the effectiveness of the action, particularly in cases involving small individual claims, where a limited number of plaintiffs would fail to exert a sufficient deterrent effect. Consequently, the opt-in model may not be suitable for actions involving minor damages claims.[7]

University of Leuven's study on alternative consumer redress mechanisms found that the participation rate in opt-in collective actions within the European Union has been consistently low, with fewer than 1% of consumers engaging in such actions, in stark contrast to the significantly higher participation rates observed in opt-out actions.[8]

For example, in the Netherlands, the participation rate for opt-out collective actions has been reported at 97%, and nearly 100% in Portugal.[9]

From the defendant's perspective, the opt-in model presents a challenge due to the uncertainty regarding the number of individual claims that may emerge later, complicating the assessment of potential financial exposure. Likewise, courts may face considerable burdens if numerous individual claims are filed subsequent to the collective action, which could strain judicial resources.[10]

2.3. Rational Apathy

Another critical limitation of opt-in systems is the phenomenon of "rational apathy". This is where individuals choose not to participate in a collective

4 Art. 21 EC Recommendation ("*the claimant party [i.e., the class] should be formed basis of express consent of the natural or legal persons claiming to have been harmed").*

5 Hamuľáková, 2018: 29.

6 García Cachafeiro, 2008: 164.

7 Micklitz and Stadler, 2006: 1499.

8 Study Centre for Consumer Law, 2007: 289.

9 BEUC, 2022 & Mulheron, 2008: 153.

10 Mulheron, 2005: 54.

action because their individual contribution is minimal and the perceived impact of their participation on the overall outcome is negligible.[11]

In the majority of cases, the process of opting in is typically straightforward, especially when standardised model forms are provided by representatives to facilitate participation. Nevertheless, this seemingly straightforward task appears to be enough of an inconvenience which disincentivises parties to the case.[12]

This is particularly relevant in cases where individual claims are small, and the time and effort required to join the action outweigh the potential gains, as the football shirts case brought by *Which?* demonstrates.[13] Approximately 2 million individuals were affected, with total damages estimated at around £50 million. The action, initiated by the consumer organization *Which?* on behalf of 130 consumers, later saw around 1,000 additional participants opt in. This represents a mere 0.0008% of the total number of injured parties.

2.4. Advantages of Opt-Out Systems

Opt-out systems, in contrast, automatically include individuals in a collective action unless they actively choose to withdraw.[14] This automatic inclusion drastically increases participation rates, which is a significant advantage when pursuing collective redress. The higher participation can be linked to the success of group litigation because larger groups are more likely to prevail and defendants are more willing to offer larger settlements.[15]

In opt-out systems, harmed individuals can make an informed choice about whether to stay in the group or opt-out. As per the U.S system one may opt out after the case has been filed[16] or, else, one may also do so when a settlement has been proposed[17], ensuring that plaintiffs are not obligated to accept unfavorable settlements if they think that an individual action could be more successful.[18]

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11 Hamuľáková, 2018: 108.

12 European Commission, 2008: 60.

13 Case CP/0871/01, *Decision No CA98/06/2003: Price-Fixing of Replica Football Kit*.

14 Hamuľáková, 2018: 96.

15 Issacharoff, S. & Miller, G.P., 2012: 37-68.

16 Fed. R Civ. P. 23(c)(2)(b).

17 Fed. R. Civ. P. 23(e)(4).

18 Leskinen, 2010: 40.

This addresses informational asymmetries by ensuring broad participation without requiring each individual to actively opt-in and thereby ensuring a more comprehensive representation of harmed individuals.[19]

Furthermore, the enhanced participation under opt-out systems may increase the amount of settlement as there are more individuals involved, which makes the litigation a greater risk for the defendant. The system also ensures that the defendant has to deal with the majority of harmed consumers and can avoid future litigation. Additionally, the increase in scale in opt-out systems may serve as a greater deterrent to infringers. In cases where individual claims are small and dispersed, the opt-out approach can provide a more effective way for consumers to obtain redress.[20]

2.5. Overview Hybrid Systems

Hybrid systems combine elements of both opt-in and opt-out models, aiming to harness the benefits of both approaches while mitigating their drawbacks. These systems are often more flexible and adaptable to specific circumstances.[21]

A hybrid model may be more suitable depending on the type of claim and the jurisdiction. For instance, Danish law[22] mainly applies opt-in actions but allows opt-out actions in specific cases, namely, low-value claims.[23] However, only the Ombudsman can file opt-out actions, as consumer associations and other entities lack active legitimacy.

In certain jurisdictions, specifically Belgium, judges have the discretion whether to adopt an opt-in or opt-out mechanism depending on the circumstances of the case.[24] However, there are clear exceptions to the rule; an opt-in system is mandatory for specific types of damages, such as personal injury or non-material harm, and the opt-in system must be used when group members are not domiciled in that jurisdiction.[25] Having said this, should

19 Schnell, 2007: 617.

20 Leskinen, 2010: 40.

21 Hamuľáková, 2018: 97.

22 Retsplejeloven (Administration of Justice Act) 2019, Chapter 23a.

23 European Commission, 2008: 29.

24 Belgian Act of 28 March 2014, Article XVII.38, Section 1(2) and Article XVII.43, Section 2(3) Code of Economic Law.

25 Ibid.

both parties within the Belgian jurisdiction agree, they may choose whether they prefer the system to be opt-in or opt-out.[26]

A hybrid approach, therefore, could also be suitable, allowing participants or the court to decide the system. However, this might reduce the predictability of court proceedings. Despite being significantly more favourable than the opt-in method, it is still, according to the author's opinion, an inferior method to that of the opt-out one.

3. THE EUROPEAN COMMISSION'S STANCE ON COLLECTIVE REDRESS

At the European level, the journey toward establishing collective redress mechanisms "has been a long and tortuous one."[27] European policymakers have faced the challenge of balancing two competing priorities: ensuring that all individuals affected by mass harm have meaningful access to justice, while simultaneously putting in place robust safeguards to prevent the misuse of litigation processes.[28]

3.1. The 2013 Recommendation on Common Principles for Collective Redress[29]

This non-binding instrument sought to guide Member States in developing their national collective redress systems, with the primary aim of improving access to justice for individuals and businesses seeking remedies for violations of EU law.[30] Regressively, the Recommendation adopted a conservative approach, advocating for an opt-in system.[31]

The preference was stated in the Recommendation: "*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.*"

26 Falla, 2017: 87-92.

27 BEUC, 2023: 5.

28 Ibid.

29 European Commission, 2013.

30 Nagy 2013: 530.

31 European Commission, 2013: §21.

Despite a well-intended step, though controversial preference, the non-binding 2013 Recommendation attempted to provide a guidance to Member States in integrating collective redress mechanisms into their legal systems. However, a 2018[32] report by the European Commission revealed significant disparities in the implementation of these mechanisms across the EU, with some Member States still lacking any form of collective redress.

The Dieselgate[33] scandal, where car manufacturers manipulated emissions tests, underscored these shortcomings. While U.S. consumers received compensation within months, many European consumers were left without remedies – a situation described as a "cold shower"[34] by former EU Justice Commissioner Vera Jourova. The scandal highlighted the inadequate tools available in much of Europe to address mass harm and secure justice for affected consumers.[35]

3.2. The 2020/1828 Directive

Unlike the 2013 Recommendation, which was non-binding, the 2020/1828 Directive[36] is legally binding, mandating that all Member States implement representative actions for both injunctive and redress measures.

In addressing gaps in consumer protection across the EU, Directive 2020/1828 mandates all Member States to implement some form of representative action for injunctions and damages into their national legal frameworks, irrespective of any existing consumer protection measures.[37] Under Article 5[38], such representation must be carried out by qualified entities that meet strict requirements for financial transparency and are subject to adequate oversight by public authorities.

The Directive aims to harmonize collective protection processes through representative actions, moving away from the American class action model, while also aiming to deter harmful practices. It rejects punitive damages and uses the term "representative action" instead of "class action" to avoid

32 European Parliament, 2018.

33 Case C-693/18 *C/Volkswagen AG* [2020] ECLI:EU:C:2020:438.

34 European Commission, 2018.

35 Ibid supra note 27.

36 Directive (EU) 2020/1828.

37 Directive 2020/1828, Article 9.9.

38 Ibid, Article 5.

associations with the US system.[39] The rationale behind this approach is to prevent the emergence of a litigation industry focused more on generating financial profit for litigators than on securing benefits for consumers.[40]

Christopher Smithka[41] argues that Europe has consistently rejected the adoption of a system that allows for the awarding of large punitive damages. He highlights that some lawyers have turned this procedural mechanism into a business, benefiting from high fees and substantial legal costs.

The 2020/1828 Directive marks a notable shift by allowing for both opt-in and opt-out mechanisms. This is a departure from the 2013 Recommendation's preference for opt-in, and it acknowledges that some Member States have already introduced opt-out models.[42] The Directive permits Member States to choose between opt-in, opt-out, or a combination, and allows them to decide when consumers can express their preference.[43]

This flexibility is intended to accommodate different legal traditions and can give more traction to the opt-out model, especially for member states that already have such mechanisms.[44] The opt-out system could facilitate greater consumer participation, but the Directive's flexibility means that its implementation will vary by Member State, possibly jeopardising the Directive's success.[45] The political feasibility of the directive was prioritized over a robust harmonization of rules. While it provides a base for collective redress, its design is not complete and that creates uncertainty.[46]

39 Agulló Agulló, 2022: 130.

40 Spier, 2013: 224.

41 Smithka, 2009: 187.

42 Gsell, 2021: 1377.

43 Directive (EU) 2020/1828, Art. 9(2) & Recital 43.

44 Directive 2020/1828, Recital 43.

45 Gsell, 2021: 1399.

46 Gsell, 2021: 1399.

4. MALTESE CONTEXT AND LEGAL FRAMEWORK FOR COLLECTIVE REDRESS

4.1. The Maltese Context: Economic Structure, Consumer Awareness, and Legal Expertise

Malta has a small, open, and highly developed economy, with key sectors including tourism, financial services, and iGaming. Its economic activity is strongly influenced by its membership in the European Union. This integration means that Maltese businesses and consumers are subject to EU laws, including those related to competition and consumer protection.

Despite the presence of consumer protection laws, there is a notable lack of public awareness regarding collective redress mechanisms.[47] The British Institute of International & Comparative Law, in its study on the Maltese Collective Redress system, suggests that there is insufficient education and understanding among both consumers and legal professionals about the potential of the Collective Proceedings Act and related opportunities.[48] This lack of awareness may contribute to the limited utilisation of the existing collective redress mechanisms.

The Collective Proceedings Act, "*An Act to provide for representative actions for the protection of the collective interests of consumers, and to carry out other consequential amendments*", came into force on the 25th of June 2023 introduces a legal novelty in Maltese procedural law. The legal framework for class actions is relatively new and the complexity of these cases requires specialized knowledge.

4.2. Historical and Legislative Evolution

Before specific collective redress legislation, Maltese procedural law provided a basic form of collective action through Article 161(3) of the Code of Organisation and Civil Procedure (COCP)[49]. This allowed multiple plaintiffs to join a single action if their claims shared common ground. However, this was insufficient for handling complex mass claims, necessitating more sophisticated mechanisms.

47 British Institute of International and Comparative Law, 2023: 10.

48 British Institute of International and Comparative Law, 2023: 12.

49 Code of Organization and Civil Procedure (COCP), Chapter 12, Article 161(3) (Malta).

The Collective Proceedings Act (CP Act), enacted in 2012[50], was a significant step forward, introducing a structured framework for collective redress. Initially, its scope was limited to actions arising under the Consumer Affairs Act, the Product Safety Act, and the Competition Act. This Act has since been amended to apply solely to competition issues and has been renamed the Collective Proceedings (Competition) Act. The more recent Representative Actions Act of 2023[51] transposes the EU Directive on representative actions and broadens the scope of collective actions. It enhances consumer protection and covers sectors like data protection, financial services, and utilities.

5. MALTA'S UNSUITABLE OPT-IN MECHANISM FOR COLLECTIVE REDRESS

The Act establishes an opt-in system for collective proceedings, requiring individuals to expressly consent by joining a collective proceedings agreement[52], which is submitted to the court by the class representative. After filing, the court holds a pre-trial hearing to determine if the legal requirements are met[53].

If approved, the court publishes a decree via the Government Gazette, local English and Maltese newspapers, and other media, inviting third parties to opt in within five months[54], with late opt-ins allowed only by court permission if the delay was not the applicant's fault and does not cause significant prejudice.[55] The class representative must maintain a register of all members and provide it to the defendant(s).[56]

Despite permitting consumers to decide whether or not they would like to be represented by the qualified entity[57], the Act does not clarify whether class members can opt out during proceedings, though it may be allowed if the

50 Collective Proceedings Act, 2012, *Government Gazette of Malta*, No. 18,932, 19 June 2012.

51 Collective Proceedings (Competition) Act, Chapter 520, as amended by Act XVII of 2023, s.53, Malta.

52 Collective Proceedings (Competition) Act, Art. 8(1)(c).

53 Ibid Article 8(5).

54 Ibid Article 8(8)(vi).

55 Ibid Article 8(13)(a).

56 Ibid Article 8(2)(c).

57 Ibid Article 8(10).

collective proceedings agreement permits it. As will be delved into shortly, past agreements, however, did not include opt-out terms.

5.1. Limitations of Opt-In Systems in Small Jurisdictions

The opt-in system, where individuals must actively express their desire to participate in a collective action, presents numerous challenges, particularly within the context of a small jurisdiction like Malta.

The Maltese Consumers Association has explicitly criticized the opt-in model, arguing during a public consultation that an opt-out system would better ensure access to justice for consumers harmed by unlawful conduct. They contend that opt-out mechanisms allow more victims to seek compensatory redress, particularly in cases involving small claims where economic barriers would otherwise make legal action impractical.[58] By contrast, opt-in systems risk excluding legitimate claims from victims who may face difficulties in actively joining the proceedings, even if they are not indifferent to the harm suffered.[59]

5.2. The "Rational Apathy" Phenomenon and Its Relevance to Malta

As alluded to earlier, rational apathy refers to the tendency of individuals to remain inactive or disengaged when the personal costs of taking action outweigh the perceived benefits.[60] In the context of collective redress, this means that potential class members may choose not to participate in an opt-in action if the expected gain is minimal, particularly when balanced against the perceived time, effort, and potential costs associated with doing so.

A key argument for automatic membership in collective actions is the significant reduction in administrative costs. Low-value cases are often not pursued due to the minimal personal benefit relative to the high cost of litigation. While group litigation generally lowers individual litigation costs, automatic membership further amplifies this reduction by eliminating the need for a registration process.[61]

Collective redress in competition law cases often involves many consumers who have each suffered relatively small losses due to price-fixing or other

58 Consumers Association, 2011.

59 Spiteri, 2012: 68.

60 Ibid supra note 11.

61 Szalai, 2014: 85.

anti-competitive practices.[62] The dispersed and low-value nature of these claims makes the opt-in system particularly unsuitable, due to the rational apathy, because:

- **Small Claims Predominate:** Many consumer disputes, particularly those arising from competition law infringements, involve small amounts of damages for each individual consumer.
- **Dispersed Harm:** These infringements often affect a large number of consumers, with the damages spread thinly across the population, further diminishing the incentive for individual action.
- **Information Asymmetries:** Provided that the Act has been barely used since its introduction, many consumers may not be aware of their legal rights or the availability of collective redress mechanisms, making them unlikely to opt in. Additionally, even when consumers are aware, the cost and effort of gathering information about the settlement, the expected judgement or other options, might make them apathetic.
- **Lack of Education on the Act:** As in the study conducted by The British Institute of International & Comparative Law, the absence of proper education on the Collective Proceedings Act and the opportunities it presents contributes to the reluctance to pursue class actions.[63]

5.3. Case Studies Highlighting the Deficiencies of the Maltese Opt-In System

While the is hardly any case law on this issue, the scarce number of cases entered into collectively highlight a number of issues with the current Maltese model, and offer examples that demonstrate the need for reform:

The Malta Consumer Association noe v Global Capital Financial Management Limited cases[64]: These two cases show that the few collective actions that are filed can be impeded by technicalities, resulting in an eventual settlement. While in these cases the claims were eventually

62 Holmes and Girardet, 2011.

63 British Institute of International and Comparative Law, 2023.

64 *Għaqda tal-Konsumaturi et v GlobalCapital Financial Management Ltd* [2014] Civil Court, First Hall, 25. April; *Għaqda tal-Konsumaturi et v GlobalCapital Financial Management Ltd* [2019] Civil Court, First Hall, 14 January.

resolved, this does not guarantee that the legal process is effective or accessible to consumers in general. Moreover, the small number of class members (4 in the first case, 3 in the second) demonstrates how difficult it is to get consumers to opt-in.

The *Fantasy Tours* case[65]**:** This case involved 138 claimants who were assisted by the Malta Consumer Rights Association and the University of Malta, who were considering bringing a lawsuit against a travel package provider that went bankrupt. The claimants filed an initial pre-litigation judicial letter but eventually never filed an application for collective proceedings after the Government of Malta launched a refund scheme. This case illustrates the inability of the opt-in system to effectively activate collective action, as the consumers relied on a separate scheme to get their redress instead of the Collective Proceedings Act.

General Lack of Use of the Act: Neither the Collective Proceedings Act nor the Representative Actions Act have been widely used since its introduction. This limited use is a strong indicator of its ineffectiveness in delivering collective redress, which can be largely attributed to the inadequacies of the opt-in model. Furthermore, none of the large EU-wide consumer cases pursued in other Member States have ever been pursued in Malta, highlighting the system's limitations.

6. OPT-IN SYSTEM & THE PRINCIPLE OF EFFECTIVENESS IN EU LAW

6.1. The Principle of Effectiveness in EU Law

The principle of effectiveness, also referred to as *l'effet utile,* is a cornerstone of EU law, ensuring the practical application and impact of EU law across all Member States. It mandates that national laws and procedures should not undermine the full and uniform application of EU law.[66] The principle of effectiveness requires that rights granted by EU law are effectively protected and can be enforced by individuals before national courts. This includes ensuring that the procedural provisions of the Member States will not make

65 *Azzopardi Karl et noe v X* [2014] Civil Court, First Hall, 4 February, per Zammit Mc Keon J.

66 Treaty on European Union (TEU), Art. 19(1).

it virtually impossible or excessively difficult to pursue claims based on EU Law.[67]

6.2. Article 47 of the Charter of Fundamental Rights of the European Union

Article 47 of the Charter of Fundamental Rights of the European Union[68] guarantees the right to an effective remedy and a fair trial. This right is directly applicable to competition law, ensuring individuals and businesses can protect their rights. It requires Member States to provide accessible and effective mechanisms, enabling individuals and businesses to seek redress for violations of their rights under EU law. As dictated in the *Manfredi*[69] case, this includes the right to compensation for damages resulting from breaches of competition rules.

The opt-out mechanism is potentially perceived as conflicting with Article 6 of ECHR[70] whereas the individual does not explicitly consent if he/she/it wishes to go to court. However, it serves to enhance access to justice by balancing this right with the provision of effective remedies as enshrined in Article 13[71]. It is also worth noting that implicit consent – where silence is interpreted as agreement – is a legitimate form of consent and recognized in most legal orders. This is further reinforced by procedural safeguards that ensure individuals are appropriately informed and afforded adequate time to exercise their right to opt out.[72]

6.3. Ironic Discouragement from Culture of Private Enforcement

The opt-in collective redress system, as seen in Malta and similar jurisdictions, can hinder the achievement of EU competition law objectives, potentially violating the principle of effectiveness. The requirement for individuals to actively opt-in to a collective action can create significant barriers, particularly when combined with the practical difficulties of funding proceedings against large corporations. The EU Courts and the European Commission have

67 Krzysztofik, 2022: 97; see also CJEU, Case C-45/76 *Comet*, ECLI:EU:C:1976:191.

68 Charter of Fundamental Rights of the European Union, Article 47 [2012] OJ C326/391.

69 *Joined Cases C-295/04–C-298/04 Manfredi v Lloyd Adriático Assicurazioni SpA* [2006] ECR I-6619, § 61.

70 European Convention on Human Rights (ECHR), Art. 6, 1950.

71 ECHR, Art. 13, 1950, as amended.

72 BEUC, 2022.

sought to foster a "culture" of private enforcement of EU competition law.[73] However, the opt-in mechanism, ironically, can discourage such private enforcement.

The imbalance of resources between individual claimants and large corporations makes it difficult to pursue competition law claims. Large companies have extensive legal resources, while individuals may struggle to fund litigation or even get representation. This imbalance, along with the "loser pays" principle, discourages claimants since they risk paying the defendant's expenses if they lose.[74] As such, the opt-in model may fail if it does not consider the costs of actions, rendering the rights claimed useless.

Given the absence of unified procedural rules within the EU governing antitrust damages actions, these cases are instead subject to the procedural frameworks of individual Member States, resulting in significant variability across jurisdictions.[75] This lack of harmonization exacerbates the risk of inconsistent treatment and fosters legal uncertainty, making it challenging for both claimants and defendants to predict the outcomes of such actions.[76] Additionally, the limited number of antitrust damages cases pursued within the EU underscores the inefficacy of the current system of private enforcement, which is further hindered by the high burden of proof required and restricted access to necessary evidence.[77]

As detailed by Miguel Sousa Ferro in "*Consumer Antitrust Private Enforcement In Europe- As Complete a Survey as Possible (Extended Version)*", the numbers are indeed bleak and distressing. Specifically, between mid-2020 and mid-2022, a mere 27 opt-out antitrust consumer actions for damages were filed across 29 surveyed countries, relating to only 19 distinct cases. When the UK and Portugal are excluded, this figure plummets to a meager 5 actions, concerning just 3 cases. Moreover, during the same period, a further 10 pre-filing discovery class actions were initiated in Portugal and Spain, relating to just 3 cases, highlighting the challenges faced by claimants even at the preliminary stages of litigation.

These figures are even more concerning when considering the historic data from prior to mid-2020, which the author compiles. The survey found

73 European Commission, 2008a: 3.

74 Leskinen, 2010: 30.

75 Leskinen, 2008, p. 37.

76 European Commission, 2008a: 8.

77 European Commission, 2005: 5.

that only 12 antitrust consumer class actions had ever been filed in 5 of the surveyed countries, composed of 5 opt-in and 7 opt-out actions. When excluding the UK and Portugal, there were a mere 4 opt-in actions. It's crucial to note that out of these few cases, only one was successful, an opt-in claim in the UK, where a minuscule 0.007% of the estimated injured consumers received compensation.

6.4. Rights That Cannot Be Enforced Are Useless

If a right cannot be effectively enforced, it is practically useless.[78] The existence of a system on paper does not ensure practical access to justice. An opt-in system, particularly where awareness or resources are limited, can result in rights being theoretically available but practically unattainable.

Edyta Anna Krzysztofik states that "*Any procedural regulations that directly or indirectly impede, actually or potentially, the effectiveness of EU law should be considered incompatible with this law.*"[79]

Therefore, if a system such as the opt-in mechanism effectively prevents rights from being enforced, that system should not be considered compliant with the principle of effectiveness.

7. MOVING BEYOND DOMESTIC REFORMS

While domestic reforms in Malta, or any other Member State with similar issues, are crucial, a broader call for change at the EU level is imperative to establish a truly effective system of collective redress in competition law.

Jean-Claude Juncker, in his 2017 State of the Union Address, pleaded for "*a Europe that protects, a Europe that empowers, a Europe that defends. (...) [A] Europe [that] can deliver for its citizens when and where it matters*". And yet, in the context of access to justice, protection in cases of mass harm, and the right to compensation, it appears that Europe has room to improve in translating its aspirations into tangible outcomes for its citizens.[80]

A harmonized approach at the EU level is necessary to ensure fair and consistent access to justice for all.[81]

78 Howells and Wilhelmsson, 1997: 259.

79 Ibid supra note 67.

80 European Parliament, 2018: 8.

81 European Parliament, 2018: 63.

Countries like Portugal, the UK, and the Netherlands have shown the benefits of adopting an opt-out or mixed (opt-in and opt-out) approach. These jurisdictions have made it easier for consumers to seek redress through collective actions. In contrast, jurisdictions that primarily rely on opt-in mechanisms, are less effective in ensuring private enforcement of competition law.

7.1. The Case for a Harmonized Opt-Out Model

The push for hamornised collective redress mechanisms within the EU is gaining momentum, aiming to create a more consistent and predictable legal landscape.[82] A critical element of this discussion is the potential adoption of a harmonised opt-out model across all Member States.

The Commission's and the European Union's concerns about the constitutionality of opt-out collective actions are not entirely justified. While opt-in actions prevent individuals from being included without consent, they often fail to ensure access to justice, especially for small claims that are uneconomical to pursue individually. Opt-out models, by contrast, better protect this right by enabling broader participation and ensuring at least partial compensation in many cases. Advances in technology further support this model by improving the ability to inform claimants and allow them to opt out if they choose.[83]

By increasing the likelihood that companies will face collective action for wrongdoing, opt-out systems create a substantial deterrent against illegal practices, especially important in the private enforcement competition law. The defendants, knowing that they will be held liable outside traditional Competition Authorities means, are incentivised to step back from illicit activities.[84]

Now, more than ever, with the increasing trend of the so-called "cancel culture", serves as a strong enough reason for big companies to take precautionary measures in ensuring they are complaint with EU Competition Law. An opt-out mechanism, which can garner millions of plaintiffs would further increase the forbearance of engaging in anti-competitive practices. Big companies invest heavily on their public perception and a multi-million law suit against them would definitely not be on their marketing agenda.

82 European Parliament, 2018: 8.

83 Taruffo, 2001: 413.

84 European Parliament, 2018: 59.

7.2. Portugal: A Successful Opt-Out Model

Portugal provides an important example of a small country, by European standards, that has successfully adopted an opt-out model.[85] The Portuguese "popular action" comes closest to the U.S class action, allowing any citizen, local authority, association, or foundation to bring an action on behalf of collective interests, with the class consisting of all members who have not opted out within a specified timeframe.[86]

The Portuguese example demonstrates that the opt-out model is suitable for countries of all sizes and capabilities, and that an opt-out mechanism can be implemented in smaller nations that prioritize access to justice.[87]

Portugal's experience with an opt-out collective action since 1995 demonstrates that such a system can be successfully implemented and compatible with European legal systems. However, it also highlights that, without third-party funding, the system remains underutilized and ineffective. It was only with the introduction of third-party funding that a significant number of claims began to be filed, including complex cases, particularly in the field of antitrust.

Malta, as well as other Member States, could benefit from studying Portugal's model and adapting it to their own national legal framework.

8. A CALL TO ACTION FOR A ROBUST FUTURE OF COLLECTIVE REDRESS

The path towards a harmonized opt-out mechanism for collective redress within the European Union is fraught with significant, primarily political, hurdles.[88] These obstacles are deeply rooted in the diverse legal traditions and varying priorities of Member States, making it difficult to reach a consensus.[89]

8.1. The Complexities of the "Loser Pays" Principle

One of the critical challenges in implementing an opt-out system is the application of the "loser pays" principle. In such a system, all members of the class, including those who remain inactive, could be held liable for the

85 Sousa Ferro, 2015: 299.

86 Mulheron, 2009: 421–422.

87 Sousa Ferro, 2015: 299.

88 Nagy, 2013: 531.

89 European Law Institute, 2014: 15.

counterparty's legal costs if the case is lost. This contrasts with an opt-in system, where only the individuals who actively join the legal action are responsible for their share of the expenses. This difference creates a significant problem, as a successful defendant may find it challenging to recover their legal costs when many claimants are passive or unidentified in an opt-out action.[90]

Given these complexities, a mixed model may be a pragmatic solution, allowing qualified entities to initiate opt-out actions under specific circumstances. This approach aims to strike a balance between ensuring access to justice and mitigating the risks of abuse and unfair cost allocation.[91]

8.2. The Portuguese Paradox: Limited Resources and the Need for Broader Participation

While Portugal has successfully adopted an opt-out model, a critical observation is that only a few damages actions have been brought forward by Portuguese consumer associations due to limited resources.[92]

This highlights a crucial point: despite the efficiency of the opt-out system, its effectiveness can be hampered by a lack of resources and the complexity of court proceedings, making it difficult for individual consumers to bring claims without the backing of associations.[93]This situation underscores the need for a greater pool of plaintiffs. An effective cross-border and international class action mechanism is necessary to increase participation and to enable more effective enforcement.[94]

As it stands, approximately only 10 percent of collective redress cases involve cross-border litigation.[95] The European legal landscape concerning cross-border collective redress involves complex issues of the choice of forum (court), procedure, and substantive law, that leads to forum shopping where European plaintiffs try to use U.S. courts to resolve European disputes or choose one of the European jurisdictions where they can effectively pursue

90 European Parliament, 2018: 121

91 European Commission, 2008a.

92 Civic Consulting, n.d.: 21.

93 European Commission, 2008a: 617.

94 European Parliament, 2018: 106.

95 European Commission, 2008b.

their claims. It also involves significant risks of inconsistent or varying determinations and adjudication in different jurisdictions.[96]

8.3. Putting the Money Where the EU's Mouth Is

In situations where legislatures seek to encourage private enforcement as a substitute or supplement to public enforcement, it is essential to allow for financial incentives to some degree. Claimants involved in collective redress actions cannot be expected to enforce consumer, group, or public interests without incurring costs.[97]

If only non-profit organizations are granted legal standing, they would rely on public funding – i.e., taxpayer money – thereby becoming dependent on government resources. This dependency could give regulators undue influence over the financial capacity and operational scope of qualified claimants. A broader approach to legal standing is therefore necessary to ensure that there are potential claimants in every mass harm scenario.[98]

Mass litigation is inherently costly and carries significant risks. To alleviate individual consumers or group members from the burdens of legal expenses, procedural complexities, and potential setbacks, it is crucial that these costs be covered by an external party.[99]

Essentially, there are three possible solutions: the state could fund the litigation (as proposed in Article 15 of the Commission's proposal, though this risks misuse by regulators), the claimant's lawyer could assume the financial burden through contingency or success fees, or third-party funders could provide the necessary financing (which would result in group members paying a success fee to the funder and not receiving full compensation).[100]

Each of these options presents its own challenges, and if this cannot be reached via domestic measures, I argue that it is imperative to reach a final decision at a European Level.

In a vast ocean teeming with powerful forces, the smaller fish – though seemingly vulnerable -have the opportunity to unite with others in a collective effort to resist the predatory and anti-competitive practices of larger, more dominant entities. By joining forces, these smaller nations can assert their

96 Directorate General for Internal Policies, 2011: 48

97 European Parliament, 2018: 178.

98 European Parliament, 2018.

99 European Parliament, 2018.

100 European Parliament, 2018

presence and demonstrate the profound importance of a unified approach to consumer protection and competition law. In this way, the seemingly fragile can find strength in solidarity, challenging the status quo with a shared resolve for fairness and justice.

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