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Collective alternative dispute resolution (ADR) for the private enforcement of EU competition law

Egelyn Braun

Thesis submitted for assessment with a view to obtaining the degree of
Master in Comparative, European and International Laws (LL.M.)
of the European University Institute

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Department of Law

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Supervisor

Giorgio Monti, European University Institute

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Summary

The European enforcement landscape is undergoing significant changes that are leading to a departure from the actors, tools and processes traditionally associated with delivering justice. This thesis examines these themes while developing a solution to the private enforcement gap that continues to leave a large number of victims without a remedy, particularly if they have suffered low-value individual harm as a result of competition infringements. In order to ensure that the private enforcement of EU competition law leads to the effective enforcement of EU rights and to the full compensation of all victims, a collective redress device must be developed. In particular, this thesis will explore whether optimal private enforcement outcomes could be achieved through the integration of collective alternative dispute resolution ('collective ADR') into a regulatory enforcement architecture as a first choice redress avenue. To date, the use of collective ADR as a private enforcement mechanism has not been considered as a serious policy option on the European level. While this thesis focuses on the use of collective ADR in the context of competition enforcement, it also confronts issues that could be expanded to private enforcement in other fields. Ultimately, the enforcement toolbox should be diversified not only to ensure the successful fulfilment of the regulatory goals, but also to facilitate the transformations that are occurring in the enforcement landscape more broadly.

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Introduction

The European enforcement landscape is undergoing significant changes that are leading to a departure from the actors, tools and processes traditionally associated with delivering justice. These changes include the increasing collectivisation and privatisation of enforcement, as well as the abandonment of the binary distinction between public and private enforcement.¹ Against this background, it is unfortunate that the development of a European collective redress device has not yet culminated with a legislative instrument, leaving many victims without an adequate remedy.² In particular, there is an identifiable enforcement gap for large-scale low-value damage resulting from competition infringements, which is predominantly suffered by consumers. In order to ensure that the private enforcement of EU competition law leads to the effective enforcement of EU rights and to the full compensation of all victims, a collective redress device must be provided. Ultimately, the enforcement toolbox should be diversified not only to ensure the successful fulfilment of the regulatory goals, but also to facilitate the transformations that are occurring in the enforcement landscape more broadly.

This thesis examines whether it would be possible to achieve private enforcement outcomes for large groups of victims that are currently without a remedy in the most optimal manner with the consent of all parties involved. It is submitted that such outcomes can be achieved through the integration of collective alternative dispute resolution ('collective ADR') into a regulatory enforcement architecture as a first choice redress avenue. To date, the use of collective ADR as a private enforcement mechanism has not been considered as a serious policy option on the European level. The thesis explores the collective ADR proposal in the context of competition enforcement, however, it also confronts issues that could be expanded to private enforcement in other fields.

This thesis is structured as follows. The first chapter sets the scene by defining collective ADR, its relationship with collective litigation, the policy developments on the EU level

¹ H.-W. Micklitz & A. Wechsler (eds), *The Transformation of Enforcement: European Economic Law in Global Perspective* (Hart Publishing 2016).

² A decade of policy developments culminated with a non-binding instrument; 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, OJ L 201. A collective redress device was also notably absent from the competition damages directive; Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349.

regarding collective redress and private enforcement, and the presence of collective ADR in existing legislation, particularly in the Damages Directive. The second and third chapter will start to construct the regulatory enforcement architecture that would be necessary for the successful integration of collective ADR. In particular, the second chapter inspects the incentives that would have to be created for the infringing undertakings, victims and their representatives in order to consensually initiate collective ADR, after which the third chapter considers the safeguards that would have to be created in order to ensure fairness guarantees. After outlining the theoretical framework, the fourth chapter presents a comparative analysis of two collective ADR models in the national enforcement architectures of the UK and the Netherlands in order to illustrate how collective ADR works in practice and to draw lessons for the development of a European model. The fifth chapter reflects on the proposal more broadly, particularly on its ability to meet the goals of private enforcement and its transformative implications for the European Commission's current practice. The thesis concludes with preliminary policy recommendations for the development of a collective ADR model.

Chapter 1: Setting the scene

1.1 What is collective ADR?

Collective ADR is an umbrella term that will be used to describe voluntary alternative-to-court dispute resolution processes that can be used in collective harm cases in order to reach a consensual outcome. Foremost, collective ADR is a voluntary and consensual process. The expression of consent can occur at different stages – for instance, the initiation of ADR is generally voluntary for all parties involved, however, if national civil justice systems made ADR a mandatory step in civil proceedings, then compliance with the ADR outcome would nevertheless be voluntary. Furthermore, ADR processes are generally confidential, subject to some legal and practical limitations, particularly in case a large number of parties are involved. The collective dimension would start from two or more victims and include both legal and natural persons. Moreover, ADR processes could function with an intermediary public or private entity, or without the involvement of any third parties. Third party involvement could take several forms, ranging from simply facilitating negotiations to issuing a binding decision. If the ADR process is successful, then it could lead to a binding or non-binding outcome. A binding agreement could take the form of a settlement, whereas a binding decision could be any arrangement that was accepted by the parties prior to the initiation of a third party procedure (e.g. arbitration, which leads to an arbitral award). Finally, in contrast with court judgments, there is generally more flexibility as to the substantive content of the ADR outcomes.

The current landscape of ADR mechanisms and entities in the Member States is highly multifaceted and new forms of offline and online dispute resolution are in continuous development. It is therefore important not to exclude any innovative forms of ADR through the use of rigid definitions. In order to give a systematic account of the different forms of *collective* ADR that exist, the following categorization could be developed. The categories are presented in a hierarchical order according to the level of formalism and bindingness that they feature:

Collective negotiation without an ADR entity - The most informal type of collective ADR is direct negotiation aimed at reaching a consensual agreement in the form of a settlement. Direct negotiations are generally conducted without the use of ADR entities and rely on the

legal representatives of the parties. The direct negotiation category could also include various internal complaint mechanisms, which the undertaking has developed.

Collective negotiation through an ADR entity - The key examples of negotiation-based forms of ADR are mediation and conciliation, in which a third party actively assists the parties in coming to a consensual agreement, but does not issue a binding decision. With conciliation, the third party also makes a suggestion for terms of the settlement or issues a non-binding opinion.

Collective adjudication through an ADR entity - ADR entities other than arbitral tribunals can offer adjudicative procedures, in which a third party issues a decision, which is binding through contracts. However, such decisions will generally provide less certainty in terms of recognition and enforcement. Moreover, ADR entities across the EU have limited experience with mass claims.³

Collective Ombudsman procedures through an ADR entity - A public or private Ombudsman is an independent third party, who can employ various ADR mechanisms, including adjudicative procedures or mediation, which result in a binding or non-binding decision. Ombudsmen are often created as sector-specific ADR entities. As there are many procedural variations in existence, the definition of Ombudsman is far from harmonized.

Collective arbitration through an arbitration tribunal - The most court-like type of collective ADR is arbitration, in which an adjudicating third party issues a decision - the arbitral award - that is binding on the basis of contract law and international agreements. Due to its formal adjudicative nature, combined with strong recognition and enforcement effects, arbitration is sometimes distinguished from other forms of ADR. Moreover, unlike other ADR entities, arbitration tribunals do have considerable experience with managing mass claims, which are often referred to as multi-party or class arbitration, depending on their opt-in or opt-out nature.

³ For a comparative study on consumer ADR entities and mass torts, see C. Hodges & A. Stadler (eds), *Resolving Mass Disputes: ADR and Settlement of Mass Claims* (Edward Elgar Publishing 2013).

Having obtained a basic overview of ADR mechanisms and entities, the next preliminary point regards the context in which collective ADR will be placed in this thesis - the private enforcement of EU competition law.

1.2 Why competition law?

To begin with, the EU enjoys a high level of competence in competition matters, which has allowed for the harmonization of substantive competition law. As demonstrated by the rapid development of private enforcement on the EU level, substantive harmonization has made the harmonization of procedural rules significantly easier to justify.⁴ A significant step towards harmonizing competition-specific tort rules has already been taken with the adoption of the Damages Directive.⁵ However, despite these developments, the current framework is inadequate for the weakest victims of competition infringements.

In particular, collective proceedings are still missing from the private enforcement toolbox and additional measures must be envisioned in order to ensure the ‘effective enforcement of EU rights’ and ‘full compensation’ for all victims. The presence of an identifiable enforcement gap for large-scale low-value damage sets EU competition law apart from many other fields. Currently, private enforcement claims are only being brought by a specific group of undertakings: competitors and direct purchasers. According to research conducted in the UK, Germany, France, Italy and Spain, barely any cases have been brought by indirect purchasers and none by umbrella purchasers.⁶ One of the primary reasons for this dynamic is the fact that competitors and direct purchasers generally have the sufficient resources to bring actions and due to their close connection to the infringement, their claims are substantively and procedurally easier to establish. It is submitted that this enforcement gap could be closed by introducing a collective redress device.

Moreover, both anecdotal and empirical evidence would suggest that a large share of EU competition law disputes never reach courts because they are settled.⁷ For instance,

⁴ M. Ioannidou, *Consumer Involvement in Private EU Competition Law Enforcement* (2nd edn, Oxford University Press 2015), p. 189.

⁵ Damages Directive (n 2).

⁶ I. Lianos, P. Davis & P. Nebbia, *Damages Claims for the Infringement of EU Competition Law* (Oxford University Press 2015), p. 73.

⁷ D. Waelbroeck, D. Slater & G. Even-Shoshan, ‘Ashurst Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules’, Brussels, 31 August, 2004, p. 134; for a UK study, see B.

settlements could be preferred in order to reduce costs and inconvenience, as well as to maintain existing relationships and safeguard one's reputation. If the out-of-court settlement of claims is already the hidden reality of private enforcement, then targeted regulation could be envisioned, for instance in order to ensure fairness guarantees for the weaker parties.

Finally, the existence of powerful public enforcers distinguishes competition law from many other fields. For instance, victims that suffer large-scale low-value damages are generally consumers and they could equally benefit from collective devices in other consumer-oriented fields. However, the existence of a competition-specific public enforcer enables the creation of additional incentives for the initiation of collective ADR. This interplay between public and private enforcement turns competition law into a valuable testing ground for collective ADR.

1.3 A toolbox of collective redress

Before starting the exploration of collective ADR as a tool of private enforcement, some basic considerations must be provided in favour of collective proceedings. In essence, the lower transaction costs of aggregated proceedings make them a necessary tool for the achievement of efficient private enforcement outcomes in large-scale low-value damage scenarios. The economic advantages of collective proceedings over individual proceedings are obvious in relation to the lower individual costs borne by the victims. Savings can also be envisioned for the defendants, who would not have to engage on several fronts and could benefit from the certainty of once-and-for-all outcomes. Aggregation is also capable of lowering the broader public costs resulting from the administration of justice. This would arguably not be the case if collective proceedings lead to the introduction of claims which would otherwise not have been brought at all. Yet, the multifaceted societal benefits resulting from the increased access to justice and deterrence of wrongdoing could counterbalance the costs associated with the additional claims arising from gap-filling areas.

Two categories of collective proceedings could be considered in order to reap the aforementioned benefits: collective litigation and collective ADR. The former is a formal process that requires initiation on behalf of the victims, whereas the latter is an informal,

Rodger, 'The Consumer Rights Act 2015 and Collective Redress for Competition Law Infringements in the UK: a Class Act?' (2015) *Journal of Antitrust Enforcement* Vol. 3(2), 258, and B. Rodger, 'Private Enforcement of Competition Law, the Hidden Story: Competition Litigation Settlements in the United Kingdom, 2000-2005' (2008) *European Competition Law Review* Vol. 29(2), 96.

consensual process that requires interest from both sides. Both collective ADR and collective redress litigation can take very different procedural forms, but the key characteristics of both mechanisms are suitable for a comparative analysis. The pros and cons of both mechanisms can be compared in the abstract, but for the purposes of this thesis, it is more important to compare them in relation to achieving particular goals. In other words, the question pursued is not whether we should choose between ADR and litigation, but rather, what should be their relationship in different enforcement contexts. Ultimately, the success of collective private enforcement depends on its effectiveness in delivering compensation and creating deterrence, not on its particular mode of execution. It is proposed that any mechanism that is capable of fulfilling these objectives should be given consideration.

Collective ADR and collective litigation share several structural characteristics that are common to all collective proceedings. In particular, the effectiveness of collective proceedings is largely based on whether the grouping of victims occurs on an opt-in or opt-out basis. The use of an opt-out model, whereby non-participating victims would be bound without their explicit consent, raises important access to justice concerns, which must be addressed. Moreover, all collective proceedings require some form of representation on behalf of the victims, which raises principal-agent concerns. The representatives would also require some funding in order to start the proceedings. While the costs of litigation can undoubtedly be substantial, even the most informal negotiation-based forms of ADR are not costless. Finally, in order to achieve sufficient finality, the international recognition and enforcement of the collective outcome would have to be ensured. Although the shared characteristics of collective proceedings raise common themes, differences will emerge in the way these concerns are to be mitigated.

When comparing the two mechanisms, a general point of consensus is that the procedural efficiencies derived from the speed, lower costs and flexibility of ADR would be unmatched by litigation in most civil justice systems. Arbitration can be considered an exception in some cases, since it has become more expensive in recent years. Although the resolution of mass disputes would never be particularly fast, cheap or result in simple outcomes, it is likely that collective ADR is able to outperform collective redress litigation due to the consent and voluntary cooperation of the infringer. This points to the elephant in the room - the voluntary nature of collective ADR. In other words, it is only capable of delivering redress if also the infringing undertaking consents to it. This warrants the development of a regulatory

enforcement architecture, which creates incentives to induce the consent of the infringer. The construction of this architecture will be one of the key objectives of the thesis.

There are additional ways in which collective ADR could work to the advantage of both the infringers and victims better than collective litigation. Firstly, a negotiated outcome would offer the certainty of obtaining *actual* compensation, which might not be the case with litigation in case the infringer were to become insolvent as a result of lengthy litigation proceedings.⁸ Secondly, a ‘compromise’ in the context of collective ADR would not necessarily represent a relinquishment of legitimate claims on both sides of the dispute, if one considers that the value that the parties place on the particular aspects of the claim can be different.⁹ Through negotiation, the parties would receive the opportunity for a smarter trade-off that represents their real needs and interests. These ‘more precisely just’ trade-offs can lead to unique remedial outcomes that would not be possible in courts.¹⁰ Thirdly, access to evidence could be hindered by the uncooperativeness of the infringing undertakings in a litigation setting. In a confidential ADR setting, they might be more likely to disclose certain documents. Fourthly, collective ADR could also help overcome procedural obstacles that are especially prevalent with competition law infringements. For example, there are potential conflicts between victims that are direct and indirect purchasers, since the harm they suffered is intertwined. When determining a common ‘class’ in collective litigation, some national systems could prevent them from joining their efforts due to the lack of a common interest or benefit.¹¹ As long as the passing-on defence exists, conflicts between victims are capable of undermining collective redress litigation.¹² Collective ADR would be more flexible and allow the parties to decide the scope of the coverage themselves. Another example regards the serious difficulties with the quantification of harm due to the methodology and resources that would have to be spent on obtaining the relevant data and expertise. For certain victims, it would be impossible to gather the information required to make an accurate assessment of specific and individual harm for the purposes of litigation.¹³ Again, the flexibility of collective ADR would allow for custom approaches and approximations of harm.

⁸ H. Collins, *Regulating Contracts* (Oxford University Press 2002), p. 332.

⁹ C. Menkel-Meadow, ‘Whose Dispute Is it Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)’ (1995) *Georgia Law Review* Vol. 83, 2663, p. 2673.

¹⁰ Menkel-Meadow 1995 (n 9), p. 2674-2675.

¹¹ This scenario occurred in *Emerald Supplies Ltd v British Airways Plc* [2009] EWHC 741 Ch, [2010] CH 48.

¹² L. Athanassiou, ‘Collective Redress and Competition Policy’ in A. Nuyts & N.E. Hatzimihail (eds), *Cross-Border Class Actions: The European Way* (Sellier European Law Publishers 2014), p. 153.

¹³ Athanassiou 2014 (n 12), p. 156.

Ultimately, if it is possible to achieve private enforcement outcomes for victims that would otherwise not receive redress, all the while doing this in the most optimal manner with the consent of all parties involved, then why would we not explore this further?

1.4 EU policy developments

Regrettably, collective ADR has not yet been served as a serious policy option for the private enforcement of competition law nor within the broader collective redress debate. As a result, there is a scarcity of literature assessing collective ADR and its interactions with the existing redress and enforcement frameworks, especially with regards to EU competition law. In order to place the forthcoming analysis of collective ADR into context, a brief overview of recent EU-level developments on collective redress and private enforcement will be provided.

Legislative saga

The legislative initiatives on collective redress resulted from the parallel efforts by DG Competition and DG Sanco. Although their policy actions were initially uncoordinated, they were both guided by the enforcement gap for large-scale low-value damages in their respective fields of EU law infringements. In 2005, DG Competition published a Green Paper on Damages Actions for Breach of EU Antitrust Rules, which addressed the ‘underdevelopment of private enforcement’ and asked whether consumers and purchasers with small claims should have a special collective litigation procedure.¹⁴ The 2008 White Paper envisioned collective redress in the form of opt-in private actions and opt-out representative actions for those representatives that constitute qualified entities.¹⁵ Subsequently, the Commission proposed a Draft Directive that included these forms of collective redress, but the Draft was removed from the agenda during the legislative stages.¹⁶ In the end, the Damages Directive 2014/104/EU on certain rules governing actions for damages did not include any provisions for collective redress.¹⁷ Following a parallel track,

¹⁴ European Commission, ‘Green Paper on Damages Actions for Breach of the EC Antitrust Rules’ COM (2005) 672 final.

¹⁵ European Commission, ‘White Paper on Damages Actions for Breach of the EC Antitrust Rules’ COM (2008) 165 final.

¹⁶ L. Gorywoda, ‘The Emerging EU Legal Regime for Collective Redress: Institutional Dimension and Its Main Features’ in A. Nuyts & N.E. Hatzimihail (eds), *Cross-Border Class Actions: The European Way* (Sellier European Law Publishers 2014), p. 178.

¹⁷ Damages Directive (n 2), Recital 13: ‘This Directive should not require Member States to introduce collective redress mechanisms for the enforcement of Articles 101 and 102 TFEU.’

DG Sanco published a Green Paper on Consumer Collective Redress in 2008, which outlined the particular problems that consumers face and suggested collective litigation as a possible solution.¹⁸ The 2009 Consultation Paper was a highly interesting follow-up, which, for the first time, identified collective ADR as the redress option that was supported by the majority of the respondents and suggested that an architecture could be developed with ‘sticks’ that induce the initiation of ADR.¹⁹ As a stick, it not only envisioned the existence of collective litigation, but also the empowerment of public authorities with skimming-off powers and direct compensation orders.²⁰ As a non-legislative measure, it also suggested that an exemplary collective ADR model could be developed and promoted on a voluntary self-regulatory basis, backed by independent monitoring.²¹ Unfortunately, just like with DG Competition, DG Sanco did not explore these options or propose any collective redress initiatives after that. It is likely that the feedback received in response to their suggested approaches had an impact on the Commission’s enthusiasm for collective redress and a sector-specific solution. The inclusion of DG Justice in the debate led to a joint public consultation by the three Directorates in 2011, aimed at finding a ‘coherent’ European approach and signalling the end of developing sector-specific solutions in favour of a horizontal collective redress measure.²² It also left out the further exploration of collective ADR, as envisioned in DG Sanco’s 2009 Consultation Paper. This development, as it stands today, has only resulted in a non-binding 2013 Commission Recommendation on common principles for injunctive and compensatory collective redress. However, once the Commission assesses the implementation efforts by the Member States within four years after the publication of the Recommendation (26 July 2017 at the latest), legislative action could follow.

Prevailing discourse

The current scene for collective redress is unsatisfactory not only because of its soft law outcome, but also due to the positions that were adopted in the Recommendation, policy documents and legal scholarship over the last decade. The Recommendation promotes an opt-

¹⁸ European Commission, ‘Green Paper on Consumer Collective Redress’ COM (2008) 794 final.

¹⁹ European Commission, ‘DG SANCO Consultation Paper’, Brussels, May 2009, p. 13-14.

²⁰ European Commission 2009 (n 19), p. 17; the public enforcer powers were not deemed necessary in case an EU-wide legislative instrument for collective redress would be adopted.

²¹ European Commission 2009 (n 19), p. 15.

²² European Commission, ‘Staff Working Document, Public Consultation: Towards a Coherent European Approach to Collective Redress’ SEC (2011) 173 final.

in model, limits the standing of profit-making representative entities, prohibits contingency fees and punitive damages, and instils the loser pays principle, which, in combination, are unlikely to be financially incentivizing enough for victims with large-scale low-value damage. The reason for these ‘safeguards’ is the fierce desire to avoid the US class action model, which has been deemed to be a ‘toxic cocktail that should not be introduced in Europe.’²³ Instead of adjusting particular aspects of the model to remove the possibilities for abusive litigation, the Recommendation has arguably eliminated all financial incentives from the procedure. Empirical evidence would unequivocally suggest that using an opt-in model for large-scale low-value damages would be ineffective and result in a low participation rate.²⁴ If the same safeguards had been introduced in combination with an opt-out model, it would have been more likely to achieve effective private enforcement for the weakest victims. Moreover, an opt-out model is no longer foreign to the European legal tradition, as evidenced by the numerous opt-out collective devices that have been adopted in recent years.²⁵ Yet, as it currently stands, the adoption of a financially-incentivized European collective redress litigation device appears to be politically unacceptable, which prompts the exploration of alternative avenues.

In the competition law context, these problems have manifested in an additional way. The tension between ‘deterrence’ or ‘compensation’ as the appropriate objective for EU private enforcement has arguably contributed to the limited collective redress outcomes in the Damages Directive. Emphasizing either objective would have an impact not only on the policy choices regarding the relationship between public and private enforcement, but also regarding the types of mechanisms that will be used for private enforcement. The US has approached private enforcement from a deterrence perspective and therefore utilized mechanisms, such as class actions, that are most likely to empower private parties to bring claims. The EU has acknowledged both deterrence and compensation, but arguably, the emphasis has been on the latter. With *Courage* and *Manfredi*, the Court of Justice established a rights-based corrective justice narrative with the ‘right to full compensation’,²⁶ which is also

²³ European Commission, ‘Press Release of 27 November 2008, Green Paper on Consumer Collective Redress – Questions and Answers’ MEMO/08/741, p. 4.

²⁴ For example, see the comparative study R. Mulheron, ‘Reform of Collective Redress in England and Wales: A Perspective of Need. A Research Paper for Submission to the Civil Justice Council of England and Wales’ (2008) Civil Justice Council of England and Wales.

²⁵ Subject to limitations and sector-specific application, opt-out models are available in the UK, the Netherlands, Denmark, Bulgaria, Belgium, Portugal and Germany.

²⁶ Lianos, Davis & Nebbia 2015 (n 6), p. 22; Case C-453/99, *Courage Ltd v Crehan* [2001] ECR I-6297; Joined cases C-295/04 to C-298/04 *Manfredi and others* [2006] ECR I-6619.

represented in Art. 3 of the Damages Directive. This perspective could result in favouring enforcement mechanisms that, at least in theory, offer stronger protection for individual rights at the expense of the potential deterrence benefits that could be achieved through opt-out aggregation. Although the Court and the Commission have repeatedly acknowledged the deterrence effects of private enforcement,²⁷ its implications on collective redress mechanisms have been limited. As discussed above, the development of a deterrence-oriented mechanism was ultimately halted and the rights-based compensation narrative remains predominant.

1.5 Collective ADR in EU law

As evidenced by the policy developments on collective redress, there are no tailor-made instruments focusing collective ADR on the EU level yet. However, individual forms of ADR have received ample attention in the last decade, resulting in the establishment of minimum safeguards that would also apply to collective ADR. Mediation has been a particular subject of interest, as illustrated by the adoption of the 2008 Mediation Directive, which harmonised several substantive and procedural elements.²⁸ Consumers also benefit from several EU-level safeguards. In particular, the Consumer ADR Directive was adopted in 2013, covering claims arising from contractual obligations in sales or service contracts between consumers and traders in both domestic and cross-border scenarios.²⁹ It set minimum rules on transparency, cost, duration, expertise, independence, impartiality and fairness of the ADR entities and procedures, and granted monitoring tasks to the competent national authorities. Although its scope is limited for the purposes of collective private enforcement of competition law, it provides an overview of the minimum protections applicable in consumer ADR contexts, as it largely mirrors the Unfair Terms Directive, the Brussels I Regulation and the relevant case law. For instance, Art. 1 states that Member States are allowed to make ADR procedures mandatory in B2C scenarios, as long as resorting to litigation after the procedure is still possible. Art. 10 (1) ensures that pre-dispute agreements are unable to make the outcome of the ADR procedure binding on the consumer. Finally, Art. 11 establishes that the outcome reached cannot deprive the consumer of the mandatory protections from its Member State of

²⁷ Ioannidou 2015 (n 4), p. 52-62.

²⁸ Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ L 136.

²⁹ Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR), OJ L 165.

habitual residence. All of these safeguards must be taken into account when developing a model of collective ADR.

The following sections will take a closer look at the two instruments that are most closely connected to the introduction of a collective ADR mechanism for the private enforcement of EU competition law - the Damages Directive and the Commission Recommendation on Collective Redress.

Damages Directive

Despite often going unnoticed as one of the features of the Damages Directive,³⁰ collective ADR was acknowledged and encouraged in the different parts of the Directive. To begin with, Recital 5 stipulates that litigation is just one facet of private enforcement next to ‘alternative avenues’. The Directive highlights only one particular benefit of using ADR, which is, somewhat surprisingly, not the speed or lower cost of the procedure. Rather, Recital 48 emphasizes the ‘certainty’ gained from what it refers to as ‘once-and-for-all’ solutions, which should be encouraged by including as many victims and infringers in the consensual settlement as possible. While such settlements include various efficiency gains, the emphasis was placed on the broad scope of private enforcement that could be achieved through the use of collective ADR. The different forms and effects of ADR that were prescribed in the Directive will be assessed in more detail.

Consensual dispute resolution - Interestingly, the Directive does not use the term ‘alternative dispute resolution’, but instead chooses to call it ‘consensual dispute resolution.’ Art. 2 (21) defines consensual dispute resolution as ‘any mechanism enabling parties to reach the out-of-court resolution of a dispute concerning a claim for damages’ and the successful outcome of the procedure is defined in Art. 2 (22) as a ‘consensual settlement.’ When comparing this concept to the definition of ADR used in this thesis, they could readily be viewed as synonyms. Perhaps the reason for using the term ‘consensual’ dispute resolution stems from the fact that the Damages Directive primarily envisions a form of consensual negotiation, which would lead to an agreement in the form of settlement terms. Yet, such a vision would be unnecessarily limiting, although it may very well reflect the most common and efficient ADR technique for achieving voluntary compensation. All of the other forms of ADR

³⁰ Damages Directive (n 2).

identified in the ADR definition outlined in this thesis would also fall under the definition provided by the Directive. There is no conflict because the other forms of ADR are also consensual out-of-court processes that culminate with an agreement. The consensus is expressed by agreeing to submit the dispute for consideration to a third party, such as an arbitral tribunal, Ombudsman or ADR entity, and the decision that the third parties issue would serve as the agreement or the settlement terms. The Directive confirms this interpretation in Recital 48, which gives examples of consensual dispute resolution, which cover not only negotiation-based ADR forms such as mediation and conciliation, but also arbitration.

Incentives by the public enforcer - Returning to the broad definition of ADR, Recital 5 names ‘public enforcement decisions that give parties an incentive to provide compensation’ as an example of an alternative private enforcement mechanism. The concept ‘public enforcement decisions’ is only mentioned in this particular Recital and is not elaborated upon elsewhere in the Directive using that terminology. The inclusion of this example acknowledges and promotes the prospect of a public enforcer inducing voluntary compensation through the provision of direct incentives. The only manifestation of this public and private enforcement fusion can be found in Art. 18 (3), which allows competition authorities to take into account successful ADR compensation as a ‘mitigating factor’ in setting the fine. This provision strengthens the legitimacy of fine reduction initiatives that include collective ADR.

Suspensive effects - Two important suspensive effects of using collective ADR were clarified. Firstly, Art. 18 (1) stipulates that the limitation period will be suspended for the duration of ADR procedure. Secondly, Art. 18 (2) stipulates that ongoing litigation proceedings can be suspended for up to two years if ADR procedures are initiated. Both the victim and the infringer could benefit from the added time for building a stronger case for litigation or for reaching a mutually satisfactory settlement.

Joint and several liability - In case of more than one infringing undertaking, the Directive articulates the relationship between the infringers that decided to engage in collective ADR and settle, and those that did not. In essence, Art. 19 (1) and (2) stipulate that the infringers that decided to enter into a consensual settlement should no longer be held jointly and severally liable along with the non-settling infringers. This is a coherent consequence of the fact that the victim would no longer have any existing harm left vis-à-vis the settling infringer

as a result of the compensation received through the settlement. The Directive has thereby attempted to increase the certainty felt by a settling infringer and encourage a favourable setting for the use of collective ADR. However, this favourable setting is hindered by Art. 19 (3), which proceeds to give the Member States the discretion to derogate from that outcome in case the non-settling infringers are ultimately unable to pay. Foremost, this situation can be avoided altogether by explicitly excluding it in the settlement terms. If that was not done, however, the goodwill of the settling infringer would be discredited by potentially forcing it to compensate for the portion of the harm created by the insolvent co-infringers. As explained in Recital 51, this turn of events would be justified by the need to guarantee the right to full compensation. At the very least, Recital 52 urges national courts to ‘take into account’ the amount of compensation already paid, so that the settling infringer would not have to pay the full amounts remaining.

In sum, the Damages Directive has clearly promoted the use of collective ADR for private enforcement. Important definitions, suspensive effects and joint and several liability implications were outlined. Finally, the most interesting addition from the perspective of integrating collective ADR into the broader competition law enforcement architecture - it proposed the creation of incentives in the form of fine discounts for voluntary compensation efforts.

Recommendation on Collective Redress

Although the bulk of the Recommendation³¹ is focused on establishing principles for the guidance of collective *litigation* procedures for injunctive and compensatory redress, it also addresses and encourages the use of collective ADR. To begin with, paragraph 2 states that the procedures designed in accordance with the principles of the Recommendation should be ‘fair, equitable, timely and not prohibitively expensive,’ which is also applicable to collective ADR. In particular, the Recommendation highlights one benefit of using collective ADR - efficiency. The different forms and effects of ADR that were prescribed will be assessed in more detail.

Availability - Recital 16 stipulates that collective ADR should always be available in addition to or as a voluntary step within the collective redress litigation proceedings. Furthermore,

³¹ Commission Recommendation (n 2).

paragraphs 25-26 specify that collective ADR can be initiated during the pre-litigation stage as well as throughout the subsequent litigation stages prior to the issuing of a judgment. Paragraph 25 appears to focus on negotiation-based ADR procedures, which aim to arrive at a consensual out-of-court or court-based settlement. A reference was made to the Mediation Directive, which harmonized the minimum standards applicable to mediation entities. Whereas, paragraph 26 appears to address other ADR procedures ('appropriate means of collective ADR') and specifies that their 'use', which is likely to mean their initiation, should be based on consensus.

Suspensive effects - Paragraph 27 states that ongoing litigation proceedings will be suspended for the duration of collective ADR proceedings. The Recommendation asserts that ADR procedures can come to an end when one or both of the parties 'expressly withdraw' from it. It is unclear how this would correspond to the functioning of collective ADR mechanisms, which are initiated by consensual agreement, but are thereafter autonomous proceedings resulting in a binding outcome issued by an ADR entity.

Judicial review - In case of a binding outcome in the form of a settlement, paragraph 28 stipulates that it should be subjected to court verification on 'legality' and that the 'appropriate protection of interests and rights of all parties' should be taken into account. Again, it is unclear whether this form of judicial review is reserved exclusively for settlements or whether ADR procedures that result in a binding outcome are also included. Further, the substantive scope of the review was left ambiguous.³²

In sum, the Recommendation on collective redress was brief yet explicit on the necessity of ensuring the availability of collective ADR in addition to and throughout collective redress litigation proceedings. However, the Recommendation was not entirely consistent or accurate in its assessment of the procedures and outcomes resulting from different collective ADR procedures. In particular, further distinctions need to be drawn between the procedures resulting in a settlement and those resulting in a decision issued by an ADR entity.

Conclusion

³² European Law Institute, 'Statement of the European Law Institute on Collective Redress and Competition Damages Claims', 2014, p. 42.

The current state of play regarding the development of effective and efficient EU collective devices is unsatisfactory. The use of collective ADR as a private enforcement mechanism has not yet been considered as a serious policy option. However, the introduction of collective ADR into the private enforcement toolbox would be in perfect accordance with the pro-ADR positions advanced in recent years, particularly in the Damages Directive and the Recommendation on Collective Redress. Ultimately, it is submitted that collective ADR could help close the enforcement gap for large-scale low-value damage if integrated into a regulatory enforcement architecture that creates incentives for its voluntary use. The next chapters will develop this hypothesis further.

Chapter 2: Incentives

Although collective ADR constitutes a distinct private enforcement device, the conceptual analysis developed in this section requires looking at the broader context in which it functions. In particular, the analytical framework will make use of the term ‘regulatory enforcement architecture’, which refers to the sum of the public *and* private enforcement of competition law. Put differently, it is suggested that the effective functioning of collective ADR necessitates some degree of fusion between private and public enforcement, and that coordination between the two can be mutually beneficial for the achievement of compensation and deterrence outcomes.³³ With that in mind, the following questions will be explored further: How could the voluntary use of collective ADR be triggered? What should be its relationship with the other components of the architecture? The normative objective of the analysis is to identify key elements of an architectural model that is capable of successfully integrating collective ADR and thereby providing compensation to all victims, particularly to those suffering large-scale low-value damage. In order to trigger the ‘voluntary and consensual’ use of collective ADR, the architecture needs to provide incentives for two categories of entities: (1) the infringing undertakings, and (2) the victims and their representatives. After exploring these incentives, this section will conclude by sketching the basic structure of a behaviourally-informed regulatory enforcement architecture.

2.1 Infringing undertakings

Designing an architecture that induces ‘voluntary compensation’ efforts through collective ADR from undertakings that have infringed competition law, calls for critical inquiries into behavioural research and regulatory enforcement theories. In order to shed some empirical light on the behaviour of infringers, this section will cover findings from social psychology, management studies and self-regulatory compliance programmes. As a word of caution, behavioural research is often criticised for the notorious difficulty of drawing general conclusions from complex, conditional and relational findings.³⁴ Despite the possible epistemic, institutional and normative objections to utilizing behavioural findings in law and

³³ It is accepted that the private enforcement of competition law is capable of achieving not just compensation but also deterrence objectives; European Commission 2008a (n 15), p. 3.

³⁴ Addressing the ‘nudge-scepticism’ of using behavioural research for law and regulation, see P. Cserne, ‘Making Sense of Nudge-Scepticism: The Challenges to EU Law’s Learning from Behavioural Sciences’ in A. Alemanno & A.-L. Sibony (eds), *Nudge and the Law: A European Perspective* (Hart Publishing 2015).

regulation, certain data has found widespread recognition and will be discussed below.³⁵ As a final disclaimer, behavioural research will be explored in order to confirm the possibility of infringers initiating collective ADR, which will be viewed as a form of compliance. The effects of behavioural research on competition policy, substantive competition law and its public enforcement - meaning compliance more broadly - are not explicitly assessed.

Undertakings with economic, social and normative motivations

As a starting point, undertakings will be viewed as multidimensional entities that operate in complex contexts under the influence of laws and regulation.³⁶ These entities can simultaneously be viewed as collections of individuals with different characteristics and ambitions, tied together through organizational structures. Individual behaviour is impacted by an organizational structure that incorporates the intersections of different interests, behaviours and norms. Yet, the public enforcement of EU competition law is largely based on a more one-dimensional view of undertakings, which rests upon the neoclassical microeconomic assumption that they are unitary and rational utility-maximizing entities that only comply with the law if it is their economic interest to do so.³⁷ In recent decades, enforcement strategies from other disciplines have started to build upon the rationality assumption and often employ a two-dimensional distinction between ‘good faith’ and ‘bad faith’ undertakings. The good faith undertakings are viewed as having internalised moral norms and are deemed willing to act upon them under certain circumstances, whereas bad faith undertakings would only consider norms as external restraints and act exclusively on the basis of economic self-interest.³⁸ It is implied that for rational, bad faith undertakings, infringements would be conscious decisions to violate the law.³⁹ If the rationality assumption is a guiding principle of the enforcement strategy, then a conclusion that generally follows is that enforcement design should be aimed at the bad faith undertakings, who require a

³⁵ A. Alemanno & A.-L. Sibony (eds), *Nudge and the Law: A European Perspective* (Hart Publishing, 2015), p. 3.

³⁶ C. Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge University Press 2002), p. 5.

³⁷ A.R. Mele & P. Rawling (ed), *The Oxford Handbook of Rationality* (Oxford University Press 2004), p. 381-384.

³⁸ Y. Feldman & H.E. Smith, ‘Behavioral Equity’ (2014) *Journal of Institutional and Theoretical Economics* Vol. 170, 137, p. 138.

³⁹ S.S. Simpson & M. Rorie, ‘Motivating Compliance: Economic and Material Motives for Compliance’ in C. Parker & V.L. Nielsen (eds), *Explaining Compliance: Business Responses to Regulation* (Edward Elgar Publishing 2011), p.60.

sufficient amount of deterrence in order to comply.⁴⁰ Although this is a convenient paradigm, empirical findings suggest that the distinction between the two categories might not be clear-cut in all circumstances, since even good faith undertakings are capable of displaying opportunistic behaviour.⁴¹ This can be particularly pertinent if their goodwill is not acknowledged and given an appropriate outlet. A fundamental conclusion that will be elaborated upon later, is that focusing on the bad faith undertakings and using an exclusively deterrence-oriented strategy would lead to a failure to make use of the untapped potential of good faith undertakings and compliance-oriented avenues. It is clear that for undertakings that exclusively require economic incentives to initiate collective ADR, the architecture must simply make voluntary compensation an economically rational option. However, the main focus of the subsequent discussions on behavioural research is on the exploration of non-economic incentives and how to best make use of them.

Behavioural findings have put forth several considerations that explain why undertakings - as collections of individuals with cognitive limitations - behave in a particular way. The following five considerations will be deemed most relevant for explaining collective ADR, when viewed as voluntary compensation or a form of compliance: (1) Individuals respond to social influences, which means that they are influenced by what they perceive to be the behaviour, knowledge and beliefs of others around them.⁴² Therefore, when individuals perceive that others want to comply, then they could be more likely to comply themselves. However, various organizational pressures are capable of undermining such compliance motivations, e.g. the encouragement of risk-taking to advance, the lack of personal responsibility towards the outcome, the submission to group decisions in order to avoid conflicts and the discouragement of whistleblowing in the name of loyalty to the undertaking.⁴³ Some of these individual-organization tensions could be overcome by connecting the individual will to comply with the profitability and economic rationality of the undertaking. This connection is often exemplified by making a 'business case' for self-regulatory compliance programmes and corporate social responsibility.⁴⁴ (2) Individuals

⁴⁰ I. Ayres & J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press 1992), p. 20.

⁴¹ C. Hodges, *Law and Corporate Behaviour: Integrating Theories of Regulation, Enforcement, Compliance and Ethics* (Hart Publishing 2015), p. 30-31.

⁴² A. Alemanno & A.-L. Sibony (eds), *Nudge and the Law: A European Perspective* (Hart Publishing, 2015), p. 4.

⁴³ Parker 2002 (n 36), p. 33-36.

⁴⁴ E.C. Kurucz, B.A. Colbert & D. Wheeler, 'The Business Case for Corporate Social Responsibility' in A. Crane (ed), *The Oxford Handbook of Corporate Social Responsibility* (Oxford University Press 2008), p. 85-92.

could be more likely to comply when they perceive the compliance objectives and processes to be legitimate and procedurally fair.⁴⁵ This suggests that the promotion of a *genuine* compliance culture could increase the individual motivation towards to comply. For instance, successful self-regulatory compliance programmes generally have the following features: managerial support and commitment, integration into decision-making procedures, designated compliance personnel, public regulator pressures, private stakeholder pressures through civil justice systems, and stakeholder involvement through public opinion.⁴⁶ (3) Individuals experience inertia, meaning they tend to stick to the status quo and not work towards long-term change, even if it is in their best interest to do so.⁴⁷ Therefore, if the status quo within an organization is to comply, then individuals are more likely to accept it as a given and act accordingly. (4) Individuals are influenced by the framing and presentation of information. Ambiguity and flexibility about the process of compliance could increase ‘moral deliberations’ on how to comply with the given rules and objectives.⁴⁸ In some contexts, leaving discretion on how comply could create space for compliance motivations to emerge. (5) Individuals have been found to have difficulties in the rational assessment of the probabilities and risks involved with certain types of conduct.⁴⁹ This suggests that infringements could sometimes be the result of poorly calculated misperceptions and ‘entrepreneurial delusion’, rather than perfectly calculated economic thinking.⁵⁰ For instance, decision-making is often based on intuition, information is taken into account selectively and when the economic or personal stakes are higher, the likelihood of taking risks becomes greater.⁵¹ Ultimately, it is submitted that a fuller understanding of the cognitive limitations of individuals and organizations might improve the effectiveness of existing enforcement strategies.

⁴⁵ T.R. Tyler, ‘The Psychology of Self-Regulation: Normative Motivations for Compliance’ in C. Parker & V.L. Nielsen (eds), *Explaining Compliance: Business Responses to Regulation* (Edward Elgar Publishing 2011), p. 84-85. This has been challenged by some research; for an ADR-based example regarding voluntary compliance with Ombudsman decisions, see N. Creutzfeldt, ‘How Important is Procedural Justice for Consumer Dispute Resolution? A Case Study of an Ombudsman Model for European Consumers’ (2014) *Journal of Consumer Policy* Vol. 37, 527.

⁴⁶ Parker 2002 (n 36), p. 50.

⁴⁷ C.R. Sunstein, ‘Empirically Informed Regulation’ (2011) *The University of Chicago Law Review* Vol. 78(4), 1349, p. 1350-1351.

⁴⁸ Feldman & Smith 2014 (n 38), p. 147.

⁴⁹ Sunstein 2011 (n 47), p. 1358-1359.

⁵⁰ Hodges 2015 (n 41), p. 23.

⁵¹ S. Bhattacharya & R. Van den Bergh, ‘The Contribution of Management Studies to Understanding Firm Behaviour and Competition Law’ (2014) *World Competition* Vol. 37(4), 517, p. 521-522.

While these behavioural findings provide some insights into how to fine-tune the incentives provided by the regulatory enforcement architecture, they also reveal that human behaviour can be a complex variable, which is subject to a number of influences other than law and regulation. Some undertakings will comply for the sake of complying, others can be persuaded or threatened to do so; some undertakings are perfect profit-maximizing entities, whereas others do not live up to that standard. Undertakings could also be motivated by a combination of factors, which can change through time and depend on the context and individuals involved. The best a regulatory enforcement architecture can do is to respond to this plurality of behavioural considerations by providing an avenue towards compliance outcomes for as many undertakings as possible. In doing so, deterrence should be viewed as a necessary backup to ensure the success of the architecture, but compliance should be facilitated as the first choice strategy for those that would be willing to comply if given the right incentives. As will be elaborated later in the section, the integration of collective ADR into the regulatory enforcement architecture would be illustrative of such a ‘compliance-oriented’ strategy.

Case study: Lufthansa and the air cargo cartel

Unfortunately, there are no empirical studies about the particular behavioural processes that have led to the initiation of collective ADR in a competition infringement scenario. However, an illuminating example of such behaviour could be brought from the recent air cargo cartel, which involved price-fixing behaviour on surcharges between some of the biggest airline companies in the world, spanning between 1999-2006.⁵² Lufthansa ‘discovered’ the cartel shortly after creating an internal compliance programme and proceeded to approach all of the competition authorities in relevant jurisdictions to report the cartel with a plea for leniency. The public prosecution of the air cargo cartel resulted in more than 2,5 billion euros worth of fines worldwide,⁵³ with 799 million euros fined by the European Commission in 2010.⁵⁴ The public enforcement was followed by private enforcement efforts, including collective redress

⁵² The infringement decision was subsequently appealed and the General Court annulled most of the decisions in December 2015; Cases T-9/11 Air Canada, T-28/11 Koninklijke Luchtvaart Maatschappij, T-36/11 Japan Airlines, T-38/11 Cathay Pacific Airways, T-39/11 Cargolux Airlines International, T-40/11 Latam Airlines Group and Others, T-43/11 Singapore Airlines and Others, T-46/11 Deutsche Lufthansa and Others, T-48/11 British Airways, T-56/11 SAS Cargo Group and Others, T-62/11 Air France-KLM, T-63/11 Société Air France and T-67/11 Martinair Holland v Commission.

⁵³ H. Bergman & D.D. Sokol, ‘The Air Cargo Cartel: Lessons for Compliance’ in Beaton-Wells & Tran (eds), *Anti-Cartel Enforcement In A Contemporary Age: Leniency Religion* (Hart Publishing 2015), p. 302.

⁵⁴ European Commission, ‘Antitrust: Commission Fines 11 Air Cargo Carriers €799 Million in Price Fixing Cartel’ IP/10/1487, Brussels, 9 November 2010.

litigation in the form of class actions in the US. Lufthansa's actions in the air cargo cartel are illuminating not just for the role that their (1) self-regulatory compliance programme and (2) leniency application played, but also for their (3) voluntary use of collective ADR to compensate the victims even prior to the publication of the infringement decision. Thanks to the research conducted by Bergman and Sokol,⁵⁵ we have insights into the behind-the-scenes development of these steps through to the interviews with Lufthansa's in-house legal and compliance counsel. The aim of this sub-section is not to summarize their work, but to point out the key empirical findings that are of special relevance for understanding voluntary behaviour in the context of this thesis.

Lufthansa is a large undertaking with diverse airline services and total annual revenues exceeding 30 billion euros.⁵⁶ Its Compliance Office was created in 2003 at the persistence of the General Counsel von Ruckteschell and as a response to the compliance failure scandals in the US and EU at the time. Compliance with competition law was deemed as the main priority of the programme and was made binding as internal policy in 2004. Lufthansa made genuine attempts to develop a compliance culture with regards to competition law by securing the support of top executives, as well as by educating managers and employees through lectures and meetings, both in person and online.⁵⁷ According to Lufthansa, employees were encouraged to speak up and report any concerns without suffering adverse consequences. Due to the lack of a strictly hierarchical corporate structure, employees were able to cooperate and communicate freely between different units. Lufthansa also stressed the importance of integrating lawyers into its business operations, so that their presence would become a natural part of the decision-making processes. Shortly after these compliance activities had been initiated, employees reported to the Compliance Office that price-fixing activities with other airline companies had been going on for years and that such 'negotiations' were thought to be legal or even required by law.⁵⁸ When the findings were presented to the executive board, it allegedly took them only 10 minutes of deliberation to authorize bringing the cartel to the attention of competition authorities and seeking leniency. Lufthansa's compliance and legal teams started collaborating with external legal counsel and embarked upon full cooperation with competition authorities in 2006 - an expensive process that lasted for three years, but ultimately, Lufthansa received full immunity in all jurisdictions. Shortly after the

⁵⁵ Bergman & Sokol 2015 (n 53), p. 301-314.

⁵⁶ Lufthansa, 'Annual Report 2014', Frankfurt, March 2015.

⁵⁷ Bergman & Sokol 2015 (n 53), p. 308-309.

⁵⁸ Bergman & Sokol 2015 (n 53), p. 310.

investigations became public, Lufthansa became the target of 20 class action claims in the US and one in Canada. According to Lufthansa, their decision to engage into collective ADR and seek an out-of-court settlement was the result of: (1) a cost-benefit analysis, and (2) reputational considerations.⁵⁹ Despite paying out 85 million euros in settlements,⁶⁰ some of which were considered to be ‘overstated figures’ by the claimants, Lufthansa believes that by voluntarily settling the claims even prior to the rendering of the infringement decision, they not only saved money by avoiding class action proceedings, but also protected their reputation in the airline industry.⁶¹

In sum, it is clear that voluntary behaviour in the form of whistleblowing to receive leniency is considered to be an indispensable element of the EU competition enforcement architecture. Leniency as a form of compliance fits well into the deterrence-oriented enforcement strategy that public enforcement employs. The use of leniency is substantiated by the rationality assumption, whereby under certain circumstances, betraying the cartel is assumed to become economically more beneficial than continuing the participation in the collusive behaviour.⁶² Yet, other forms of voluntary behaviour such as self-regulatory compliance programmes or voluntary compensation through collective ADR are not expressly promoted or rewarded. This could be due to the inability to explain such compliance behaviour using a deterrence-oriented rationale. However, as evidenced by the experience of Lufthansa, the inclusion of undertakings in the prevention, detection and *mitigation* of competition law violations should not be disregarded, since as a calculated element of a regulatory enforcement architecture it could prove to be a source of untapped potential. This thesis focuses on its potential for private enforcement, particularly through the encouragement of collective ADR and other voluntary compensation efforts.

2.2 Victims and their representatives

Obtaining the consent of the infringing undertaking could be deemed as the biggest impediment to the initiation of collective ADR, which is why the regulatory enforcement architecture is predominantly oriented towards the infringers. Once the infringers are offering to consider voluntary compensation, victims and their representatives would be likely to

⁵⁹ Bergman & Sokol 2015 (n 53), p. 312.

⁶⁰ Lufthansa, ‘Annual Report 2006’, Cologne, March 2007.

⁶¹ Bergman & Sokol 2015 (n 53), p. 312.

⁶² Bhattacharya & Van den Bergh 2014 (n 51), p. 517.

explore that opportunity. Next to the increasingly secure prospects of receiving compensation, the victims and their representatives could also be incentivized the informal and non-judicial nature of collective ADR proceedings, which generates speed, lower cost, confidentiality and procedural flexibility. Next to these ‘inherent incentives’, there are two particular issues that must be addressed for the successful functioning of collective ADR within the regulatory enforcement architecture.

Victims - With collective ADR, the victims would constitute as ‘non-participating parties’ to the proceedings, since they would ultimately be represented by a third entity. The direct incentives that can be provided for the victims mainly occur at the stage, where they must either opt-in or opt-out of the collective proceedings. In case the victims suffered large-scale low-value damage, individual activity levels would be very low due to the low value of the claim and the incentives that can be provided to spur any form of victim participation would thereby be limited as well. The choice between an opt-in or an opt-out model is therefore critical for the success of collective proceedings, for both the ADR and litigation varieties. Using opt-in as the default regime has been empirically proven to lead to lower participation rates, especially with low-value claims, whereby the victims might often not be aware of their claim at all.⁶³ To illustrate, the only opt-in collective competition damages claim brought under the UK’s pre-reform Competition Act 1998 was the 2007 *JJB Sports* case, which achieved compensation for approximately 0.1% of the victims affected.⁶⁴ In comparison, the Dutch opt-out settlement regime produced a participation rate of approximately 97% of the victims affected in the 2007 Dexia securities case. While the exact figures can vary, it is clear that any type of activity levels - whether to opt-in or opt-out - are very low with low-value claims, so if the aim of the enforcement architecture is to ensure that as many victims as possible receive compensation, then an opt-out model should be preferred. As discussed in chapter 1, the EU-level policy discussions on collective redress were largely focused on avoiding opt-out models for a number of reasons, including the desire to avoid a US-style litigious culture and to safeguard individual procedural rights. This was reflected in the 2013 Commission Recommendation on Collective Redress, which explicitly promoted an opt-in

⁶³ Z. Juska, ‘Obstacles in European Competition Law Enforcement: A Potential Solution From Collective Redress’ (2014) *European Journal of Legal Studies* Vol.7(1), 125, p. 143. For an overview on the advantages and disadvantages of both models, see Mulheron 2008 (n 24).

⁶⁴ UK Department for Business Innovation & Skills, ‘Private Actions in Competition Law: A Consultation on Options for Reform’, April 2012, p. 11; *The Consumer Association v JJB Sports Plc* (2007) CAT Case No. 1078/7/9/07.

model as the default option, only allowing opt-out in exceptional cases.⁶⁵ However, in light of the considerations above, this approach should be reconsidered. The possibility of an opt-out model for collective litigation would increase the threat of litigation and thereby induce the use of collective ADR within the regulatory enforcement architecture. Likewise, the possibility of an opt-out model for collective ADR would increase its attractiveness for the infringers, who could thereby achieve international ‘once-and-for-all’ solutions and limit their exposure to multiple claims for an extended period of time. In sum, although the exact scope of the coverage for collective ADR outcomes it is ultimately up to the parties to consensually decide, the architecture should at least facilitate the possibility of an opt-out application to ensure the overall success of the system for large-scale low-value claims.

Representatives - The direct incentives that the architecture could create for representative entities regard their funding. Although collective ADR is likely to involve fewer expenses than collective litigation, even the most informal negotiation-based forms of ADR are not costless. Once the infringer’s consent has been induced by the architecture, then the offer to start collective ADR proceedings or to receive a complete redress scheme can be incentivizing enough for the representative entities or their funders due to the high certainty of receiving their share of the compensation. However, particularly in case the threat of collective litigation needs to be established in order for collective ADR to be induced in the first place, additional financial incentives for representative entities would be needed. There are at least six categories of funding sources that could be relevant for collective redress scenarios: (1) contingency fees, (2) legal aid, (3) individual contributions, (4) insurance, (5) special funds, (6) third party funding. When considering the merits of these funding options, it should be kept in mind that the ‘loser pays’ principle,⁶⁶ which is applied in most Member States,⁶⁷ already creates major disincentives to start an action, which is why a combination of adequate funding mechanisms is imperative. Contingency fees allow the representative to make representation fees contingent on a successful outcome, which could incentivize law firms in particular; however, only a few Member States allow them and the Commission 2013

⁶⁵ Commission Recommendation (n 2), Recital 21, exceptions allowed in case such actions would be ‘duly justified by reasons of sound administration of justice’.

⁶⁶ The ‘loser pays’ principle stipulates that the losing party would have to cover the legal costs of the opposing party.

⁶⁷ Juska 2014 (n 63), p. 133.

Recommendation on Collective Redress explicitly prohibited such practices.⁶⁸ National legal aid is often very limited and unlikely to cover cross-border situations.⁶⁹ Individual contributions are likely to be insignificant in case the victims suffered large-scale low-value damage. Likewise, insurance for legal expenses is likely to be restricted when it comes to collective proceedings. Special funds could be a great solution, whether European or national, if pooled with the help of donations from successful claimants, confiscated profits, injunctive orders, competition law violation fines, *cy-près* damages or crowdfunding.⁷⁰ Finally, third party funding could be the most viable option, whereby the representative entity would be funded by another entity that would receive a portion of the final compensation amount.⁷¹ Such funding could also be provided on a contingency basis, however, the 2013 Commission Recommendation on Collective Redress prohibited this form of contingency as well.⁷² Overall, the particular funding arrangements that are deemed most appropriate for collective proceedings could be left for the Member States to determine. When making such policy decisions, it should be considered that each funding arrangement could be individually scrutinized during an *ex post* fairness review of the final outcomes of collective ADR. Ultimately, representative entities should have sufficient incentives to represent victims in collective ADR proceedings, as long as Member States do not create significant restrictions for third party funding and legal counsel fees.

2.3 Designing a regulatory enforcement architecture

In order to develop a well-informed architecture that takes behavioural intricacies and multilayered incentives into account, this section will start exploring enforcement theories that can help guide the manner in which collective ADR is integrated into the architecture.

Enforcement theories aim to uncover effective and efficient strategies that would ensure the fulfillment of the regulatory objectives. However, these theories often present idealised

⁶⁸ Commission Recommendation (n 2), Recital 31, exceptions allowed in case Member States ‘provide for appropriate national regulation of those fees in collective redress cases, taking into account in particular the right to full compensation of the members of the claimant party’

⁶⁹ European Law Institute 2014 (n 32), p. 33.

⁷⁰ European Law Institute 2014 (n 32), p. 34.

⁷¹ R. Mulheron, ‘Third Party Funding and Class Actions Reform’ (2015) *Law Quarterly Review* Vol. 131(Apr), 291, p. 294.

⁷² Commission Recommendation (n 2), Recital 32, the only exception: ‘unless that funding arrangement is regulated by a public authority to ensure the interests of the parties’.

hypotheticals that are unlikely to be found in the real world in their purest prescribed form.⁷³ At one end of the spectrum, there exist several variations of the command-and-control theory, which is still the primary approach used by competition law public enforcers. These strategies are based on the idea that the prescribed standards of conduct will be enforced using coercion, deterrence or ‘punishment’ in the form of criminal or civil sanctions. At the other end of the spectrum, there are incentive-based theories, which do not rely on coercion, but rather attempt to ‘persuade’ the regulatees into compliance.⁷⁴ In between these two extremes lie enforcement theories that can be considered a more accurate representation of what an optimal regulatory enforcement mix might look like in practice. They entail a pluralistic, responsive, reflexive and smart approach that provides an avenue for different punish-and-persuade synergy scenarios of inducing compliance. These intermediate enforcement theories are deemed most relevant for guiding the use of collective ADR and will be explored further.

As the seminal work that sparked a mass of research in the field of regulatory enforcement, Ayres and Braithwaite’s ‘responsive regulation’ theory takes into account the plurality of motivations that different undertakings have for complying with rules and concludes that a one-size-fits-all strategy would be ineffective. Instead, the theory prescribes that the regulator should respond to the behaviour of undertakings in a tit-for-tat manner, with the starting point always being voluntary compliance. The starting point of voluntary compliance is important as not to punish the undertakings that are willing to comply, in addition to the fact that, from the regulator’s perspective, persuasion would generally be cheaper than punishment.⁷⁵ If the undertaking does not comply voluntarily, then the regulator can escalate their response in an enforcement pyramid that leads up to the strongest sanction, which could be, for instance, a criminal penalty.⁷⁶ It is essential that a regulator possesses a ‘big stick’ penalty, however, this stick would ideally never have to be used for more than a light ‘tap on the shoulder’,⁷⁷ since its very existence would be enough to induce voluntary compliance.⁷⁸ The theory of responsive regulation has spanned a family of different theories that are based on the same core idea - responsiveness - but which move beyond some of the limits set by the enforcement

⁷³ N. Gunningham, ‘Enforcement and Compliance Strategies’ in R. Baldwin, M. Cave & M. Lodge (eds), *The Oxford Handbook of Regulation* (Oxford University Press 2010), p. 122.

⁷⁴ N. Gunningham, ‘Strategizing Compliance and Enforcement: Responsive Regulation and Beyond’ in C. Parker & V.L. Nielsen (eds), *Explaining Compliance: Business Responses to Regulation* (Edward Elgar Publishing 2011), p. 199.

⁷⁵ Ayres & Braithwaite 1992 (n 40), p. 19.

⁷⁶ Ayres & Braithwaite 1992 (n 40), p. 35-39.

⁷⁷ C. Hodges, *The Reform of Class and Representative Actions in European Legal Systems: A New Framework for Collective Redress in Europe* (Hart Publishing 2008), p. 212.

⁷⁸ Ayres & Braithwaite 1992 (n 40), p. 40-41.

pyramid.⁷⁹ The follow-ups have also highlighted some criticisms about the appropriateness of a rigid gradual escalation in serious risk and single interaction situations.⁸⁰ For instance, Gunningham and Grabosky's 'smart regulation' theory builds upon responsive regulation by adding new surrogate regulators and regulatory tools to the mix. It includes commercial and non-commercial actors and third parties, who can deploy different regulatory methods to affect behaviour.⁸¹ The theory does not limit itself to escalating enforcement action within a single enforcement pyramid and allows for escalation interactions between the different sides of a three-dimensional enforcement pyramid by different actors.⁸² While the focal point in each of these responsive theories can differ, they share common principles that can prove to be helpful even when applied in broader enforcement contexts.

Responsive private enforcement: carrots and sticks

A straightforward application of the enforcement theories described above to 'private enforcement' would not be entirely sound. The controversy stems from the fact that private enforcement is not a form of 'enforcement' as it is traditionally understood.⁸³ In particular, enforcement by private actors through the civil justice system does not always fit easily within the enforcement theories that are built upon the archetype of a public regulator. Moreover, the objective of the civil justice system is not governance in the direct sense as it is with public regulation. However, modern enforcement theories commonly recognise that a wide range of actors and tools could be utilised to achieve the desired outcomes. This connects to what some authors have identified as a broader 'transformation of enforcement', which also regards the functions and methods traditionally deployed for public and private

⁷⁹ Many enforcement theories in the responsive regulation family do not concentrate on the compliance and deterrence dichotomy in a hierarchical setting, but mainly highlight additional aspects of enforcement strategy. For instance, Baldwin and Black's 'really responsive regulation' theory focuses on a holistic performance assessment by extending the rationale of responsiveness to additional aspects of the broader regulatory enforcement architecture, such as the undertakings' internal frameworks, broader institutional frameworks, interactions between different regulatory strategies, performance of the regulatory architecture, and finally, towards any changes to the aforementioned elements; R. Baldwin & J. Black, 'Really Responsive Regulation' (2008) *Modern Law Review* Vol. 71(1), 59, p. 61. Another example regards 'risk- or problem-based regulation' theories, which focus on the objectives and targeting of enforcement rather than the particulars of the regulatory response; R. Baldwin, M. Cave & M. Lodge, *Understanding Regulation: Theory, Strategy, and Practice* (Oxford University Press 2012), p. 268.

⁸⁰ Baldwin & Black 2008 (n 79), p. 62-64.

⁸¹ Baldwin, Cave & Lodge 2012 (n 79), p. 266.

⁸² Gunningham 2011 (n 74), p. 200.

⁸³ D. Ashton & D. Henry, *Competition Damages Actions in the EU: Law and Practice* (Edward Elgar Publishing 2013), p. 3, fn. 9.

enforcement.⁸⁴ When abandoning a binary distinction between public and private enforcement, a more functional hybrid approach can emerge.⁸⁵ If the responsive theories were applied in a functional manner to a regulatory enforcement architecture integrating collective ADR, then the following principles would emerge: (1) An exclusively deterrence-based approach is not effective as a first choice strategy. Behavioural findings would even suggest that sticking with a confrontational deterrence strategy could lead to the development of defensiveness and intentional non-cooperation on behalf of the infringing undertakings.⁸⁶ The cooperative and consensual nature of collective ADR as the compliance-oriented first choice strategy would offer an outlet for the distinct economic, social and normative motivations that undertakings possess. Only in situations where collective ADR was unable to result in compensation, should the enforcement escalate to collective litigation, which serve a deterrence-oriented function. (2) Enforcement results could be reached more effectively and efficiently by granting a degree of freedom to the regulatees for figuring out how to meet the regulatory goals, while making full use of their resources and knowledge.⁸⁷ Collective ADR could provide this flexibility and directly involve the infringing undertakings in the dispensing of compensation, especially when compared to litigation alternatives. Furthermore, using the information and resources of the infringing undertakings to dispense redress could be more cost-effective than using the resources of the court system and thereby, the resources of the victims and other non-victim taxpayers. (3) The regulatory enforcement strategy should not undermine the desirable characteristics of the social practice that it is ultimately regulating.⁸⁸ This would be particularly prevalent in case the pro-competition and pro-consumer goodwill that manifests in the form of voluntary compensation and other compliance efforts would not be taken into account by the architecture. The rewarding of collective ADR could take various direct and indirect forms, which will be outlined in more detail below.

⁸⁴ See Micklitz & Wechsler 2016 (n 1).

⁸⁵ C. Hodges & N. Creutzfeldt, 'Transformations in Public and Private Enforcement' in H.-W. Micklitz & A. Wechsler (eds), *The Transformation of Enforcement: European Economic Law in Global Perspective* (Hart Publishing 2016), p. 115. For a discussion on the hybrid approach in competition law, see C. Hodges, 'European Competition Enforcement Policy: Integrating Restitution and Behaviour Control' (2011) *World Competition* Vol. 34(3), 383.

⁸⁶ Gunningham 2011 (n 74), p. 201.

⁸⁷ J. Stapleton, 'Regulating Torts' in C. Parker and others (eds), *Regulating Law* (Oxford University Press 2004), p. 128.

⁸⁸ H. Collins, 'Regulating Contract Law' in C. Parker and others (eds), *Regulating Law* (Oxford University Press 2004), p. 25.

Building upon the principles above, a responsive strategy would suggest that compensation becomes more likely if infringing undertakings were provided a range of private enforcement avenues to follow, while presenting collective ADR as the first choice. These avenues could be offered by various surrogate regulators, who do not necessarily have to be public enforcers. A typical collective ADR avenue would result in a consensual agreement between the infringing undertaking and the victims as surrogate regulators, which would fulfill the regulatory objective of compensation. This process could be aided by various incentives provided by public enforcers, courts, victims, third parties, institutional and procedural characteristics, which would take the form of a compliance-oriented carrot or a deterrence-oriented stick. Although both sets of incentives are aimed at inducing voluntary compensation, the difference in their presentation could result in distinct behavioural effects on undertakings, who possess diverse motivations and capacities to comply.

Carrots - A direct carrot incentive could be a fine reduction that is issued by the public enforcer in case the collective ADR took place before or in the course of the investigation procedure. The fine reduction could result from considering compensation as a mitigating factor in the fining guidelines or as a result of following a more regulated collective ADR avenue prescribed by the public enforcer. Such incentives would be less attractive for those infringers that received full immunity from the fines through leniency, unless considerations would be given to an amendment to the leniency policy that adds compensation as a condition for full immunity. Next to the public enforcer incentives, collective ADR also holds inherent carrot incentives derived from its procedural characteristics, which would have to be facilitated by the architecture. As an informal and non-judicial device, it offers speed, lower cost, confidentiality and procedural flexibility. As a voluntary device, it harbours distinct reputational benefits that could be used by infringers, whose business models are sensitive to public perception. As a consensual device, it allows the infringers to display cooperative traits that can be used to remedy pre-existing business or consumer relationships. Depending on the procedural rules applicable to collective ADR regarding its opt-in or opt-out application, and the recognition and enforcement of its outcomes, it could serve as the device for achieving once-and-for-all international settlements, which allows the infringers to avoid multiple dispute resolution processes and minimize their global exposure to litigation.

Sticks - A direct stick incentive could be the threat of collective litigation. Legislators and courts could provide additional incentives by taking the prior use of collective ADR into

account; for instance, when deciding whether a claim should proceed on an opt-in or opt-out basis, or when determining the distribution of the costs of litigation. Moreover, certain procedural characteristics of collective ADR that were highlighted as potential carrot incentives for some infringers, could serve as stick incentives for others in case collective litigation operates with the same characteristics. In particular, the broad coverage of victims through opt-out application and guaranteed recognition and enforcement, could make the threat of collective litigation more intense. Even if the alternative is to enter into collective ADR proceedings with the same characteristics, the informal and flexible arena could be the ‘lesser evil’ for many infringers. Next to litigation, the refusal to try collective ADR, when proposed by the victims, could serve as an aggravating factor in the fining guidelines, which would be analogous to the fine reductions offered by the public enforcer. Since collective ADR is ultimately a voluntary device, then the aggravating aspect of their refusal would have to be supported by additional circumstances, such as the deliberate misleading of the victim representatives with the purpose of increasing their financial expenditure or weakening their potential litigation claim.

As evident from the discussions above, there are limits to what the biggest deterrence stick can be within the boundaries of ‘private enforcement’. Unless even greater fusion between private and public enforcement is sought, then the public enforcer’s powers will be limited to influencing the consensual compensation process by the private actors. Further fusion between public and private could result in a stronger stick; for example, the public enforcer could directly order the payment of compensation themselves or have the opportunity to represent the victims in collective litigation proceedings. However, the architecture envisioned in this thesis will limit itself to private enforcement with mere inducements from public enforcers, since proposing further measures would warrant a deeper assessment of the roles of public and private enforcement of competition law, which is not the aim of the present inquiry.⁸⁹ While public enforcers are given an important role in achieving compensation within the regulatory enforcement architecture envisioned in this thesis, it will not go as far as to suggest that ensuring compensation should be the direct task of public enforcers.

⁸⁹ For a discussion on competition authorities dispensing redress, see Hodges 2011 (n 85) and Ioannidou 2015 (n 4), p. 171.

In sum, the attraction of a responsive enforcement strategy is derived from the plurality of actors, incentives, behavioural considerations and approaches involved. If behavioural findings suggest that the affected parties would use collective ADR under certain circumstances, then the architecture should set up the relevant incentives in a way that induces such outcomes. Ultimately, when executed effectively, using collective ADR as a tool of private enforcement would not only result in compensation for the victims, but it would achieve it in the most optimal manner with the consent of all parties involved.

Chapter 3: Safeguards

A wholesome understanding collective ADR as a tool of private enforcement should not only focus on its role within a regulatory enforcement architecture, but also on its implications for the civil justice right to the restoration of harm. This section will tread more traditional themes associated with ADR and collective redress, and address the following questions: What should be the procedural characteristics of a collective ADR device in order to achieve effective and efficient outcomes? How to ensure fairness guarantees within informal out-of-court collective proceedings that feature non-participating victims? The analysis subjects collective ADR to the scrutiny of access to justice considerations in an attempt to establish additional elements that should inform its use within the architecture envisioned. When addressing the criticisms, risks and rights-capabilities of collective ADR, comparisons will be drawn against its formal adjudicative counterpart, collective litigation.

3.1 When, how and under what circumstances

Few would fundamentally dispute the potential contributions of ADR to increasing access to justice, seeing as the last decades have moved the question of whether the use of ADR is appropriate from ‘for or against’ to ‘when, how and under what circumstances.’⁹⁰ In particular, concerns can arise when ADR is applied *collectively* in mass harm cases and in areas that fall within the public policy domain; both of which would be present when proposing the use of collective ADR for the private enforcement of competition law. On a conceptual level, the critique of collective ADR in this context is largely based on the private nature of the redress mechanism and the inherent value that is bestowed upon judicial determination. Despite their formal independence, courts are an extension of state power and while they have the capacity to resolve disputes, that is not their only task.⁹¹ The courts are considered to be in charge of dispensing justice and taking into account the values of the civil justice system when issuing a judgment. With collective ADR, whether an adjudicative ADR entity issues a decision or the parties reach a mutually pleasing compromise, such outcomes could be viewed as being far from achieving justice due to the lack of a public dimension. In line with this limiting view, ADR entities are seen as mere rent-a-judge entities that are

⁹⁰ Menkel-Meadow 1995 (n 9), p. 2665.

⁹¹ S. Roberts & M. Palmer, *Dispute Processes: ADR and the Primary Forms of Decision-Making* (Cambridge University Press 2005), p. 221.

considered suitable to deal with issues of fact, but not with issues of law.⁹² Consequently, in sensitive areas that touch upon critical societal values, proponents of this view would argue that it is more important to have justice through courts than to have peace through ADR.⁹³ In essence, these criticisms imply that collective ADR is exclusively based on private interests (often only the individual interests of the stronger party) and ultimately void of values that only a public dimension could provide. This argument is likely to constitute an oversimplification that places such private processes into a legal and societal vacuum. Proponents of ADR submit that consensual dispute resolution mechanisms are based on several values that correspond to those promoted by the civil justice system; such as participation, harmony, respect, empathy, consensus, privacy, community and equity.⁹⁴ While the courts receive their legitimacy from their connection to the state, collective ADR procedures are legitimized by the consent of the individual parties. Some even view ADR as a social movement or a value system, which can act as a democratic assertion of individual justice or as an ideology that introduces a new dimension to civil justice.⁹⁵ Moreover, the advancement of private interests with ADR does not exclude the parallel advancement of public interests, which can occur through increased deterrence. The criticisms addressed above also disregard the broader processes of formalisation and informalisation that increasingly blur the line between public and private. The informalisation is evidenced by the development and widespread acceptance of ADR mechanisms, the inclusion of ADR in court proceedings and tasking the judges with case settlement objectives; whereas formalisation constitutes the increased regulation and juridification of ADR mechanisms, through which informal ADR processes are integrated into a formal framework to meet due process requirements and obtain court-like qualities.⁹⁶

The extent to which the concerns about the loss of a ‘public dimension’ are relevant when discussing the private enforcement of competition law, can vary. It will be argued that criticisms of such nature have a limited impact in the scenarios that involve the use of collective ADR under the architecture envisioned in this thesis, for the following reasons:

⁹² A. S. Kim, ‘Rent-a-judges and the Cost of Selling Justice’ (1994) *Duke Law Journal* Vol. 44, 166, p. 166.

⁹³ O.M. Fiss, ‘Against Settlement’ (1984) *Yale Law Journal* Vol. 93, 1073, p. 1085.

⁹⁴ Menkel-Meadow 1995 (n 9), p. 2670.

⁹⁵ M. Palmer, ‘Formalisation of Alternative Dispute Resolution Processes: Some Socio-Legal Thoughts’ in Zekoll, Bälz & Amelung (eds), *Formalisation and Flexibilisation in Dispute Resolution* (Brill 2014), p. 17; Menkel-Meadow 1995 (n 9), p. 2676.

⁹⁶ Palmer 2014 (n 95), p. 23, 42-44.

(1) It should be considered that using collective ADR - a voluntary device - is likely to occur predominantly in the course of on-going public investigations or as a follow-on claim after the infringement decision. The follow-on nature of the claims will effectively mitigate several concerns. It is less likely that undertakings would voluntarily agree to take proactive compensatory action in stand-alone claims without the existence of any investigations or infringement decisions, unless the substantive and procedural rules of a legal system are sufficiently favourable to materialize a serious threat of stand-alone collective litigation.

(2) The use of collective ADR would occur directly in the ‘shadow of the law and the courthouse’, meaning the dispute would be assessed in reference to the rules of competition law, tort law and civil procedure, as well as considering the infringement decision, the likelihood of impending private damages litigation and its possible outcome. The consensual resolution of the dispute would therefore not be unprincipled or detached from the law, as the critics of ADR often fear; it would be directly dependant on the relevant legal variables. Consequently, if there is uncertainty about the content or application of the relevant rules, then it is likely to be reflected in the collective ADR process.

(3) The precedential and educational value of claims, which would be lost if collective ADR were to be used instead of litigation, should not be overstated. From the perspective of clarifying substantive competition law, follow-on claims could essentially be deemed useless.⁹⁷ The potential contribution of such claims would be limited to clarifying procedural tort elements, such as establishing harm and causation. The contribution of stand-alone claims would be more significant, however, the proposed addition of collective ADR as first choice would never *exclude* the use of litigation. This means that the less straightforward cases that contain procedurally or substantively uncertain claims are less likely to be settled voluntarily through ADR to begin with and would be presented in courts, where the law could be clarified. Furthermore, such legal issues could equally be clarified through legislative action or mass torts from other disciplines.

(4) Finally, not all disputes trigger the need for the public and judicial clarification of laws and societal values. The development of collective ADR should not be hindered by simply classifying all mass torts as requiring public oversight in the form of litigation due to the

⁹⁷ W. Wils, ‘The Relationship between Public Antitrust Enforcement and Private Actions for Damages’ (2009) *World Competition* Vol. 32(1), 3, p. 5.

amount of parties involved. With follow-on actions in particular, concerns regarding the ‘public interest’ and the ‘need for the avoidance of abuse’ have largely been taken into account already when the initial decision by the public authority was rendered.⁹⁸

In sum, the scenarios that involve the use of collective ADR under the regulatory enforcement architecture envisioned in this thesis, do not pose serious concerns that negate the use of private dispute resolution mechanisms. However, collective ADR is not without its challenges, which nevertheless warrants the development of public oversight.

Consenting to collective ADR

The key concern with collective ADR is not its non-judicial and private nature, but the existence of genuine consent to the proceedings and to its binding outcome. As a starting point, it is clear that any inequalities of power that would exist with collective litigation would also exist with collective ADR. The infringing undertakings would continue to possess economic and information advantages in informal processes. It is also true that the confidentiality of the proceedings combined with the relaxation of procedural requirements would not always work in the favour of the weaker party.⁹⁹ The basic rhetoric of consensus assumes a level of equality between the parties, often envisioning ‘a quarrel between two neighbours’, which could be best solved by coming to a ‘compromise.’¹⁰⁰ This idealized vision of private autonomy does not represent diffuse large-scale low-value damages, which is why an aggregation of private claims would be necessary to balance the scales. However, since consent can be considered a cornerstone of ADR, it would be important to determine whether genuine consent can be retained with collective ADR if several non-participating victims are involved. Post-dispute multi-party proceedings that only cover the participating parties and result in a binding agreement are not *per se* problematic or likely to encounter significant difficulties with the recognition and enforcement of the outcome. Yet, the attraction of collective proceedings in mass harm situations lies in its ability to deliver once-and-for-all solutions with broad coverage of the relevant victims. Achieving such outcomes could necessitate the use of an opt-out model, whereby the outcome would be made binding

⁹⁸ The same argument is made in Commission Recommendation (n 2), Recital 22 - “Moreover, in the case of collective actions following a decision by a public authority (follow-on actions), the public interest and the need to avoid abuse can be presumed to have been taken into account already by the public authority as regards the finding of a violation of Union law.”

⁹⁹ Roberts & Palmer 2005 (n 91), p. 54.

¹⁰⁰ Fiss 1984 (n 93), p. 1076.

on victims that never explicitly agreed to be included in the proceedings. If an opt-out application is considered to be problematic even in the context of litigation, then it would require even more careful scrutiny in the context of ADR. Furthermore, introducing collective ADR could produce additional consent-related scenarios that need to be considered. For instance, it makes a difference whether the agreement to engage in collective ADR occurs before or after the dispute has arisen. Moreover, in case the victims include consumers, concerns can arise regarding their ability to consent to the proceedings in the first place, given the inequalities of power with the infringing undertakings. These concerns have a direct impact on determining the level of public oversight that would be required to ensure due process and fairness guarantees. The following analysis will feature a mix of positive and normative evaluations by first outlining the state of play in the EU and then assessing its implications for the regulatory enforcement architecture.

No consent - The most straightforward problem with consent would arise if it were to be eliminated altogether by making the ADR proceedings mandatory by law. With consumers as victims, the Court of Justice established in *Alassini* that making ADR proceedings mandatory would not violate the consumer's right to effective judicial protection, as long as it does not force the consumer to be bound by the outcome and create disproportionate costs or delay.¹⁰¹ Therefore, the key problem lies with the finality of the ADR proceedings, meaning that mandatory ADR that results in a binding outcome (i.e. arbitration) would be prohibited. However, non-binding forms of ADR would be allowed because if the parties fail to come to a consensual agreement, then they could always resort to litigation. Thus, in B2C situations, Member States have the discretion to make non-binding forms of ADR mandatory. In B2B situations, businesses are subject to different treatment under national laws and are unlikely to enjoy similar protections. In any case, the mandatory nature of *collective* ADR proceedings has not yet been explicitly addressed, but the complexities of mass harm are likely to trigger more careful consideration under national laws. Even so, the utility of making non-binding collective ADR mandatory would be rather low in the first place, since it would not lead to the certainty of once-and-for-all outcomes if the victims could choose not to be bound by the outcome after all. Ultimately, the aim of the regulatory enforcement architecture is to create different avenues for private enforcement and promote collective ADR as the first *choice* through facilitation and inducements, not on a mandatory basis.

¹⁰¹ Joined cases C-317/08-C-320/08 *Alassini and others v Telecom Italia* [2010] ECR I-2213.

Pre-dispute consent - Additional problems with consent can arise in case the infringing undertakings and their victims have concluded a pre-dispute agreement that stipulates the use of ADR for subsequent disputes related to or arising from the contract. Although many victims will not have any contractual connection to the infringing undertakings, it is likely that some of the potential parties to the collective proceedings will. Such an agreement can take the form of a standardized clause in a contract, which would generally be accepted by the victim due to their lack of knowledge or bargaining power. Again, the key problem regards the validity of pre-dispute consent in case of binding ADR proceedings. In B2C situations, the Unfair Terms Directive would render such clauses that have not been individually negotiated as unfair in case they ‘exclude or hinder the consumer’s right to take legal action.’¹⁰² Member States have interpreted the consequences of the unfairness differently - either by making the clauses automatically void or simply avoidable under certain conditions - but most pre-dispute binding ADR clauses with consumers would be prohibited.¹⁰³ In B2B situations, businesses are subject to different treatment under national laws and are unlikely to enjoy similar protections. However, some Member States are also considering the adoption of consumer-like unfair terms protections for SME-s.¹⁰⁴ Again, the pre-dispute consent to *collective* ADR proceedings has not been explicitly addressed yet, but the limitations with consumers would apply in any case and weaken the desirability of the mechanism for the infringers. Some Member States have introduced special rules for opt-in multi-party arbitration, e.g. consumer arbitration in Spain and shareholder arbitration in Germany.¹⁰⁵ The particular finality of pre-dispute arbitration clauses that aim to bind victims in an opt-out manner warrants further analysis. The US ‘class arbitration’ experience can prove to be an illuminating case study and will be discussed further below.

Post-dispute explicit consent - Obtaining the post-dispute consent of every victim in an explicit manner is the least problematic scenario. Ideally, all relevant victims would be sufficiently informed and join collective ADR proceedings voluntarily after the infringement has taken place, which would amount to an opt-in model. As discussed in chapter 1, an opt-in model was considered the most ‘European’ and politically acceptable approach throughout the collective redress policy developments. However, despite the obvious merits of an explicit

¹⁰² Council Directive 93/13/EEC on unfair terms in consumer contracts, Art. 3 (1) & Annex (q).

¹⁰³ I. Bantekas, *An Introduction to International Arbitration* (Cambridge University Press 2015), p. 259-260.

¹⁰⁴ UK Department for Business Innovation & Skill, ‘Protection of Small Businesses When Purchasing Goods and Services: Call for Evidence’, March 2015.

¹⁰⁵ S.I. Strong, *Class, Mass, and Collective Arbitration in National and International Law* (Oxford University Press 2013), p. 19-20.

consent model, it must be reconciled with the reality that the participation rates with opt-in proceedings are very low in case of low-value damages due to economic, procedural, social and cognitive reasons.¹⁰⁶ Moreover, the limited coverage of victims would undermine the attractiveness collective ADR for the infringing undertakings and therefore be unlikely to solve the private enforcement gap. Although the choice regarding the extent of collective ADR's coverage is ultimately up to the parties to decide, an opt-in model would not serve as the most potent utilisation of the device.

Post-dispute implicit consent - Obtaining the post-dispute consent of non-participating victims in an implicit manner by including them in the proceedings unless they explicitly opt out, is more problematic from an individualistic procedural justice perspective. However, as discussed above, an opt-out is model capable of producing superior participation rates and is ultimately necessary to ensure the effective private enforcement of low-value damages. The individual due process and fairness concerns could be mitigated by a fairness review, which will be addressed later in this section. Ultimately, an opt-out model in combination with adequate safeguards should be facilitated to secure compensation for as many victims as possible and to increase the attractiveness of voluntary compensation for the infringing undertakings. The 'facilitation' of an opt-out model within the architecture means providing the possibility to receive approval and recognition of the opt-out coverage during the fairness review and for its subsequent cross-border enforcement.

Case study: class arbitration

A special category of collective ADR could illustrate an additional consent-centred dynamic. The preceding discussions have primarily focused on obtaining the consent of the victims, with the assumption that the infringers would be interested in collective ADR as a result of the incentives provided by the architecture. However, the infringers could also use arbitral clauses (or other contractual ADR agreements) in an abusive way to limit their exposure to collective proceedings. As a starting point, the characteristics of arbitration prescribe that every potential participant of collective arbitration must have an arbitral agreement with the infringing undertakings. If the victims do not have an arbitral agreement with the infringing

¹⁰⁶ Discussed in chapter 2 regarding the incentives for victims and their representatives; for further analysis, see Mulheron 2008 (n 24).

undertakings, then it will not be possible to use arbitration in any manner.¹⁰⁷ If the victims do have an individual arbitral agreement, then it would be possible to join their claims for collective arbitration. The joinder might involve a preliminary certification phase whereby the arbitral tribunal determines the suitability of the relevant victims.¹⁰⁸ If the joinder occurs on an opt-in basis, then it would simply be a multi-party form of arbitration, which does not raise concerns *per se*. However, if the joinder occurs on an opt-out basis, then a similar set of concerns that were discussed in the previous paragraph would arise. Opt-out collective arbitration is commonly referred to as ‘class arbitration’ due to its US origin. In particular, the US experience has highlighted three scenarios of consenting to class arbitration.¹⁰⁹

(1) The agreement explicitly prescribes class arbitration - Although rare in practice, when given the right incentives, class arbitration would ideally be used in this manner. In the US, the existence of such an arbitration agreement would allow to bind non-participating parties on an opt-out basis. The EU does not yet feature class arbitration regimes.

(2) The agreement is silent on class arbitration - The US Supreme Court dealt with silence on two occasions. Initially, in *Green Tree v Bazzle* (2003) the possibility of class arbitration in case of silence was left for the arbitral tribunal to decide.¹¹⁰ This would have been in accordance with the Kompetenz-Kompetenz principle that allows arbitrators to assess their own competence to arbitrate. However, the situation changed with *Stolt-Nielsen* (2010), which established that ‘arbitration is fundamentally based on consent’ and silence could therefore not constitute an acceptance of class arbitration.¹¹¹ It is likely that a similar position would be adopted in most Member States, given the lack of class arbitration regulation and the importance of consent in regular arbitral proceedings. In case the infringer is not cooperative, this would work against the victims and prevent them from joining their claims. If silence were to be interpreted as implicit consent, then questions could arise about whether the ‘nature of arbitration’ is affected. An affirmative interpretation would be more victim-

¹⁰⁷ It could be possible to convert a settlement into an arbitral award, but not in case the settlement included victims without pre-existing arbitral agreements on an opt-out basis; S.I. Strong, ‘From Class to Collective: The De-Americanization of Class Arbitration’ (2010) *Arbitration International* Vol. 26(4), 493, p. 506.

¹⁰⁸ American Arbitration Association, ‘Supplementary Rules for Class Arbitration’ (AAA 2003) and Judicial Arbitration and Mediation Services, ‘Class Action Procedures’ (JAMS 2009) are most frequently used as specialized guidance; Strong 2013 (n 105), p. 44.

¹⁰⁹ P. Billiet (ed), *Class Arbitration in the European Union* (Maklu 2013), p. 12; Strong 2013 (n 105), p. 171-172.

¹¹⁰ *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003).

¹¹¹ *Stolt-Nielsen S. A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662 (2010).

friendly, especially since the unexpected class arbitration could have easily been avoided by the infringing undertakings by drafting more explicit arbitral clauses.

(3) The agreement explicitly prohibits class arbitration with a class waiver - Such waivers compel the victim to individual arbitration and explicitly exclude class arbitration. Following *AT&T v Concepcion* (2011), waivers were found to be ‘conscionable’ and thereby permitted even in standardised contracts with consumers.¹¹² In the antitrust case *American Express v Italian Colors Restaurant* (2013), waivers were not found to impede the right to ‘effective vindication’ even if resorting to individual arbitration would make it too expensive for any action to be taken at all.¹¹³ Allowing undertakings to effectively eliminate any threat of collective proceedings - both ADR and litigation - through individual arbitration clauses, is very concerning and likely to magnify existing inequalities of power. In this regard, the US experience can serve as an example of the choices to avoid. Considering the high level of consumer protection in the EU, pre-dispute non-negotiated class waivers that exclude litigation would be prohibited. However, with businesses as victims, the situation would vary per Member State.

In sum, the existence of genuine consent to collective ADR is a multi-layered issue that requires an assessment of all consent-related scenarios that could emerge. As collective ADR has not yet been regulated on the EU level, there are many gaps in the law. To date, the EU has introduced minimum safeguards that protect consumers from certain abuses, but in case the victims are businesses, their protection would be subject to different treatment in the Member States. Ultimately, particular attention must be paid to an opt-out application of collective ADR, whereby many non-participating victims would be included on the basis of implicit consent.

3.2 Balancing incentives and safeguards

As evidenced by the preceding discussions, collective ADR is exposed to certain risks and tradeoffs, especially in its most potent opt-out form. This warrants the development of public oversight in order to ensure due process and fairness guarantees. It is imperative, however, to develop a balanced approach towards regulating collective ADR’s weaknesses as not to

¹¹² *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

¹¹³ *American Express Co. v. Italian Colors Restaurant*, 570 U.S. ____ (2013).

diminish its strengths. In particular, as a private dispute resolution mechanism, collective ADR should not receive the exact same treatment as collective litigation. While some tradeoffs are inevitable with any form of collective proceedings, it will be argued that the key concerns with collective ADR can be mitigated by the architecture. The following sections will first dissect the different ‘outcomes’ that collective ADR proceedings can produce and then suggest how the fairness concerns could be addressed.

Once-and-for-all: recognition and enforcement

Voluntary engagement in collective ADR would not be as desirable for the undertakings if they were uncertainties about the cross-border recognition and enforcement of the outcome of the proceedings. Achieving ‘once-and-for-all’ solutions that cover as many victims as possible, has been highlighted as one of the most desirable features of collective ADR.¹¹⁴ Unfortunately, the recognition and enforcement of collective ADR outcomes remains a problematic issue, since in some contexts their *res judicata* effect is not viewed as a benefit, but as a risk. Since the EU is still relatively unfamiliar with collective ADR, the situation is worsened by the presence of gaps in the private international law regime. For a streamlined analysis, a distinction will be made between the different possible outcomes of collective ADR proceedings.

ADR entity decisions - The decisions issued by ADR entities are accepted as binding on the basis of a contractual agreement between the parties. In order to bind victims in an opt-out manner, court approval would be needed to secure sufficient legal certainty. While this is a common route for negotiated mass settlements, ADR entities have barely any experience in this regard. Generally, compliance with ADR entity decisions is only ensured within national borders with specific enforcement measures in the national laws.¹¹⁵ Adding the requirement of judicial approval for every decision is likely to undermine the autonomy, functioning and attraction of ADR entities, unless their role is reduced to settlement facilitators.

¹¹⁴ See the Damages Directive (n 2), Recital 48: “Achieving a ‘once-and-for-all’ settlement for defendants is desirable in order to reduce uncertainty for infringers and injured parties. Therefore, infringers and injured parties should be encouraged to agree on compensating for the harm caused by a competition law infringement through consensual dispute resolution mechanisms, such as out-of-court settlements (including those where a judge can declare a settlement binding), arbitration, mediation or conciliation. Such consensual dispute resolution *should cover as many injured parties and infringers as legally possible*. The provisions in this Directive on consensual dispute resolution are therefore meant to facilitate the use of such mechanisms and increase their effectiveness.” [emphasis added]

¹¹⁵ For an overview on the coverage of consumer ADR entities in Europe, see C. Hodges, I. Benöhr & N. Creutzfeldt-Banda (eds), *Consumer ADR in Europe* (Hart Publishing 2012), p. 392.

Settlements - As with the decisions of ADR entities, settlements are accepted as binding on the basis of a contractual agreement between the parties and in order to bind victims in an opt-out manner, court approval would have to be secured. The Brussels I Regulation Recast clarified the status of settlements in Art. 2 (b), which declared both litigation settlements and out-of-court settlements that received court approval, as ‘court settlements.’ Therefore, the court that approves such settlements needs to assert jurisdiction in accordance with Brussels I and if the settlement is successfully approved, Art. 58-59 stipulate that it must be enforced in all Member States. The only exception arises in case the settlement would be manifestly contrary to public policy. Public policy concerns can arise with settlements that cover opt-out victims due to a lack explicit consent. The requirements regarding the consent of such victims have not been clarified in the Brussels I Regulation or by the Court of Justice. In this regard, the Court has referred to the choice of forum provision (Art. 25) of Brussels I, which can be satisfied with implicit consent.¹¹⁶ However, the question of whether ‘not using the opportunity to opt-out’ is considered as implicit consent has not been clarified and Member States can develop different approaches, which is capable of threatening the effectiveness of opt-out settlements. The boldest cross-border opt-out jurisdiction assertions occur in the Netherlands and will be assessed further in chapter 4.

Arbitral awards - Arbitration is excluded from the scope of the Brussels I Regulation by Art. 2 (d) as the recognition and enforcement of arbitral awards is governed by the New York Convention. Multifaceted competition damages claims would be covered due to the broad interpretation of ‘commercial disputes’.¹¹⁷ However, the intricacies of collective arbitration, especially opt-out class arbitration, are largely ungoverned by the existing regime. Nevertheless, Art. V of the Convention includes several grounds for refusal, which could become relevant for class arbitration. Firstly, if the applicable law does not allow for class arbitration, then the underlying arbitral agreement could be deemed invalid.¹¹⁸ Secondly, the agreement could also be invalid if the subject matter is not considered arbitrable in that state. This could occur in case the arbitral award attempts to bind EU consumers in a mandatory

¹¹⁶ A. Stadler, ‘Mass Damages in Europe – Allocation of Jurisdiction – Cross-border Multidistrict Litigation’ in W.H. van Boom & G. Wagner (eds), *Mass Torts in Europe: Cases and Reflections* (Walter de Gruyter 2014), p. 214.

¹¹⁷ Strong 2010 (n 107), p. 524-525.

¹¹⁸ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), Art. V (1)(d).

manner.¹¹⁹ Thirdly, if the class arbitration proceeding did not include sufficient due process for the non-participating parties, such as notification and an opportunity to participate, then the award could be refused.¹²⁰ The sufficiency of the procedural safeguards will generally be interpreted in accordance with the law of the seat.¹²¹ Fourthly, the award could be refused if the opt-out models would breach the public policy of the enforcement state.¹²² However, the relevant standard is that of ‘international public policy’, which requires serious substantive or procedural concerns and is rarely a successful refusal basis in practice.¹²³ All in all, these grounds for refusal are capable of threatening the effectiveness of class arbitration.

In sum, the cross-border recognition and enforcement of ADR outcomes that attempt to bind non-participating victims in an opt-out manner, is a problematic issue regardless of the type of collective ADR procedure chosen. Regardless of the opting model used, if the aim of the EU’s private international law regime is facilitate collective proceedings, then the existing legislation could benefit from numerous procedural clarifications.¹²⁴ Although this thesis will not go into depth about the possible private international law reform proposals in this context, it is acknowledged that improving the enforcement regime is imperative for the effective functioning of the regulatory enforcement architecture and could be achieved by introducing special provisions on collective redress in the Brussels I Regulation. The following subsection will delve further into mitigating the issues that underpin the resistance to collective ADR’s finality and broad coverage.

Fairness review

Collective proceedings with non-participating parties produce specific tensions that must be addressed by the legal system in which it operates or by the system to which it is submitted for recognition and enforcement. As a normative starting point, the elements that require balancing are not the traditional principles of procedural justice and the efficiencies of collective ADR, but rather, two different notions of procedural justice. A distinction could be made between the ‘individual fairness’ of binding victims out-of-court with representatives, especially in an opt-out manner, and the ‘collective fairness’ that includes the victims,

¹¹⁹ New York Convention (n 118), Art. V (2)(a).

¹²⁰ New York Convention (n 118), Art. V (1)(b).

¹²¹ Z.S. Tang, *Electronic Consumer Contracts in The Conflict of Laws* (2nd edn, Hart Publishing 2015), p. 327.

¹²² New York Convention (n 118), Art. V (2)(b).

¹²³ Billiet 2013 (n 109), p. 27; Strong 2010 (n 107), p. 541-547.

¹²⁴ Stadler 2014 (n 116), p. 201.

infringers and the society as a whole. Collective fairness encompasses the access to justice gains achieved for victims that would not have been compensated otherwise, the public benefits of deterrence, the removal of illicit gains,¹²⁵ the promotion of consensual dispute resolution and the once-and-for-all coverage benefits for the infringers. Collective fairness is greater than the sum of its individual fairness parts.¹²⁶ Put differently, using collective ADR with large-scale low-value claims produces positive externalities that go beyond the vindication of separate or joined individual rights. Instead of resorting to *per se* unfairness on the basis of individualistic procedural justice, the broader implications of collective ADR should be scrutinized while taking into account the relevant regulatory objectives and the limitations of the existing enforcement frameworks. This balancing exercise adopts a broader approach to access to justice, which is not limited to legal formalism and a single goal of individual compensation.¹²⁷ Access to justice requires a contextual understanding of the needs, solutions and impacts of the legal response, which takes into account the cultural, economic and psychological realities of individual and organizational behaviour.¹²⁸ Ultimately, collective ADR provides more than just procedural efficiencies; it can advance notions of collective fairness for all affected parties.

While some tradeoffs between individual and collective fairness are inevitable with any form of collective proceedings, it is submitted that the the key access to justice concerns with collective ADR can be mitigated by a fairness review. In order to preserve the autonomous character of out-of-court collective ADR, the review and approval of the outcome should take place after the proceedings have concluded. For stand-alone and follow-on claims, the review can take place during the enforcement stage by the courts; for the follow-on claims that are settled in the framework of ongoing investigations, the review could take place concurrently with the public investigation and involve the public enforcer as a reviewer. In the latter scenario, the involvement of neutral third party reviewers could be envisioned.¹²⁹ Additional court entanglement at an earlier stage would not only threaten the procedural efficiencies of collective ADR, but also undermine the internalization of the due process and fairness

¹²⁵ R. Fentiman, 'Recognition, Enforcement and Collective Judgments' in A. Nuyts & N.E. Hatzimihail (eds), *Cross-Border Class Actions: The European Way* (Sellier European Law Publishers 2014), p. 107.

¹²⁶ M. Shapiro, 'Class Actions: The Class as Party and Client' (1998) *Notre Dame Law Review* Vol. 73(4), 913, p. 933; Ioannidou 2015 (n 4), p. 112.

¹²⁷ Ioannidou 2015 (n 4), p. 115-117.

¹²⁸ M. Cappelletti, 'Alternative Dispute Resolution Processes Within the Framework of the World Wide Access to Justice Movement' (1993) *Modern Law Review* Vol. 56(3), 282, p. 283.

¹²⁹ For instance, the 'voluntary redress schemes' under the UK architecture assign a significant review role for independent experts, as will be discussed later in the thesis.

requirements in the dispute resolution process.¹³⁰ An *ex post* fairness review would put pressure on the parties and, if applicable, on the relevant ADR entities, to meet these requirements in a way that best accommodates the consensual nature of the process. In other words, with *ex post* fairness review, the parties would have to work harder to present a wholesome package that gives due regard to collective interests, whereas with *ex ante* preliminary review, they would be partly relieved of this task by the court-determined class certification. The following non-comprehensive benchmarks are a compilation of common elements found in several collective litigation models and, depending on how they would be applied in the national systems, have the capacity to represent a fair balance for the *ex post* fairness review.

(1) *Compensation* - The review should not determine whether an even better outcome could be reached, but whether the outcome that has been agreed upon is adequate.¹³¹ It should identify unequivocal signs of unfairness, conflicts of interest and a lack of reasoned explanations with regards to the compensation amount agreed upon.¹³² In particular, the fairness of the compensation allocation between different categories of victims (i.e. direct and indirect purchasers) and the compensation for the representative entity should be reviewed. It should also consider that a negotiated outcome would offer the certainty of obtaining actual compensation, which might not be the case with litigation in case the infringer were to become insolvent. Moreover, the broadness of the coverage (i.e. choosing to include indirect purchasers) could have warranted compromises in other aspects. All in all, a reasonable review of the compensation achieved is warranted due to the existence of a large number of non-participating parties to collective agreements.

(2) *Notification and participation* - The notice should provide minimum substantive and procedural information about the dispute and the chosen dispute resolution procedure, the parties involved, the representatives, the binding nature of the outcome and any possibilities for direct participation. The victims that intend to opt-in or opt-out would have to receive guidance as to the reasonable steps that they would have to take for that end. In case confidentiality is insisted upon, the notice should specify the terms under which the recipient

¹³⁰ C.J. Buckner, 'Due Process in Class Arbitration' (2006) Florida Law Review Vol. 58, 185, p. 238.

¹³¹ E.g. the US class action and class arbitration rules prescribe a 'fair, reasonable and adequate' standard, although exact state-level interpretations diverge; see Federal Rules of Procedure Rule 23(e), AAA Rule 8, JAMS Rule 6(a)(2); Buckner 2006 (n 130), p. 200.

¹³² J.R. Macey & G.P. Miller, 'Judicial Review of Class Action Settlements' (2009) Journal of Legal Analysis Vol. 1(1), 167, p. 183-185.

may discuss the matters relating to the dispute. The specific manner in which the notification requirement could be satisfied, can be left for the Member States to decide, but a ‘reasonable’ standard would be advisable in case the identification of victims is problematic.¹³³

(3) *Representation* - The review should primarily identify any conflicts of interest between the representative entity and the victims. The exact standards can be left for the Member States to determine, especially in case they deem additional protections to be necessary for the opt-out application. For instance, conflicts would be unlikely to emerge in case the entity is dedicated to the protection of certain categories of victims, like consumers. The funding of representative entities should be addressed under the general review of the compensatory outcome.

(4) *Plans for unclaimed compensation* - Leftover funds are likely to occur with any low-value claims due to the low motivation for taking action.¹³⁴ This would be the case regardless of whether an opt-in or opt-out model was used, although they are more likely with the latter. In such cases, the development of *cy-près* solutions should be encouraged, especially if the identification of victims and the distribution of compensation would be problematic.¹³⁵ *Cy-près* would put the unclaimed funds in their ‘next best use’, for example by investing in a victim- or infringement-related cause. In choosing the best *cy-près* outlet, emphasis should be placed on contributing to the relevant collective interest, especially in order to justify an opt-out application. If a common collective interest is difficult to identify, then investing in access to justice funds for future low-value claims could be considered. Simply reverting the unclaimed compensation back to the infringing undertaking would be less likely to serve such interests, unless it is coupled with a comprehensive compliance-oriented proposal. The responsive and flexible nature of *cy-près* makes it a good fit for the regulatory enforcement architecture.

Even with these benchmarks in mind, assessing the fairness of collective ADR outcomes could undoubtedly be challenging for the reviewer, especially considering the presentation of

¹³³ E.g. the US class action and class arbitration rules prescribe ‘reasonable efforts’ for developing the ‘best notice practicable under the circumstances’; see Federal Rules of Procedure Rule 23(c)(2)(b), AAA Rule 6(a), JAMS Rule 4.

¹³⁴ As discussed above in relation to opt-in and opt-out models; for further analysis, see Mulheron 2008 (n 24).

¹³⁵ R. Mulheron, ‘Cy-Près Damages Distributions in England: A New Era for Consumer Redress’ (2009) *European Business Law Review* Vol. 20(2), 307, p. 329-331.

a non-adversarial 'unified front' and the difficulty of reaching a consensual solution.¹³⁶ With competition damages in particular, there could be contention regarding the distribution of compensation between the different categories of victims and the approximations of harm underlying the compensatory amounts. However, the fairness review ultimately provides the opportunity to balance all of these considerations, while giving due regard to the advanced stage of the dispute resolution process. In sum, in order to ensure the effective and efficient functioning of collective ADR, the regulatory enforcement architecture needs to include reasonable fairness safeguards for non-participating victims and an adequate private international law regime for securing sufficient finality.

¹³⁶ For a discussion on the challenges of approving cartel damages settlements in Canada, see R. Mulheron, 'A Spotlight on the Settlement Criteria Under the United Kingdom's New Competition Class Action' (2016) *Civil Justice Quarterly* Vol. 35(1), 14, p. 23-27.

Chapter 4: A comparative analysis of collective ADR in the Netherlands and the UK

A comparative analysis could illustrate how collective ADR works in practice and point towards important considerations for the development of a European collective ADR model. The Netherlands and the United Kingdom were chosen as the subjects of the comparative study since, unlike most Member States, they both feature a national regulatory enforcement architecture that integrates collective ADR. In order to develop a better understanding of collective ADR as a tool of private enforcement, this chapter will be divided into two parts. The first part provides a detailed overview of both national architectures, including an assessment of the toolbox of collective redress proceedings that are available, as well as insights into the capacities of the public enforcer to affect the provision of voluntary compensation. Building on that information, the second part develops a comparative analysis focusing on the key issues that determine the functioning and potential success of a collective ADR model within both national systems.

4.1 The Netherlands

4.1.1 Toolbox of collective proceedings

The Netherlands does not have a competition-specific private enforcement regime featuring collective ADR. However, the collective devices within the existing cross-sectoral regime would also be applicable to competition damages claims. In particular, this section will provide an overview of two devices: (1) opt-out collective litigation, and (2) opt-out collective settlements. Next to these devices, the Netherlands features different collective joinder procedures that bundle individually brought claims. Although they will not be included in this section, these procedures bear a mention, since they have been used to obtain competition damages.¹³⁷ However, in case of large-scale low-value claims, the existence of the joinder device would not create significant incentives for the voluntary initiation of collective ADR, since the victims are unlikely to bring individual claims in the first place.

¹³⁷ J.S. Kortmann & M.C. Buiten, 'Private Enforcement and Collective Redress in European Competition Law' (2015) FIDE 2016 Questionnaire, p. 20. For example, special purpose vehicles were created by the Cartel Damages Claims group for the candle wax cartel, by the East-West Debt group for the elevator and escalator cartels, and by several groups for the air cargo cartel.

Collective litigation

Less known than its settlement counterpart, the Netherlands has featured an opt-out collective litigation device since 1994, housed in Art. 3:305a of the Dutch Civil Code. However, it is of limited use for compensation claims as the collective proceeding can result in every remedy *except for compensatory damages*.¹³⁸ The claims can only be brought by non-profit representative entities that have a clear connection to the collective interest of the victims they represent (i.e. in their articles of association). Despite lacking a compensatory remedy, representative entities have sought injunctions and declaratory judgments with the aim of setting the scene for subsequent individual claims. For instance, the biggest consumer association in the Netherlands, the Consumer Union (*Consumentenbond*), has successfully achieved declaratory judgments that resulted in follow-on damages claims.¹³⁹ The device could also be used to induce settlements, since collective ADR is promoted as a pre-litigation step in Art. 3:305a(2), which stipulates that the representative entity could only have a right to action if their attempts at negotiation with the defendant were not successful. However, due to the lack of a compensatory remedy and the difficulty of bringing individual follow-on claims, the collective litigation device is ultimately unable to create any significant incentives for the voluntary initiation of collective ADR for victims of large-scale low-value damage. In 2014, the Dutch Minister of Security and Justice devised a preliminary draft bill with amendments that would remove the prohibition on compensatory damages.¹⁴⁰ The draft was accompanied by a public consultation, but no legislative action has been taken yet.

Collective settlements

The Netherlands also features an opt-out collective settlement device that was meant to fill the compensation gap left by collective litigation. The Dutch Act on the Collective Settlement of Mass Damage Claims (*Wet Collectieve Afwikkeling Massaschade*, WCAM) was created in order to facilitate consensual settlements and grant them binding effect on the relevant victims affected by the infringement in an opt-out manner. The WCAM entered into force through amendments to the Civil Code (Art. 7:907-7:910) and Code of Civil Procedure (Art. 1013-

¹³⁸ It covers injunctions, declaratory judgments, performance of a contractual duty, termination or rescission of contract.

¹³⁹ F. Weber, *The Law and Economics of Enforcing European Consumer Law: a Comparative Analysis of Package Travel and Misleading Advertising* (Ashgate Publishing 2014), p. 169.

¹⁴⁰ Dutch Minister of Security and Justice, 'Dutch Draft Bill on Redress of Mass Damages in a Collective Action', 7 July 2014.

1018) in July 2005, and has subsequently been amended. Since its introduction, the WCAM has been used to reach a number of successful settlements,¹⁴¹ however, it has not yet been used for a competition damages claim. It has proven to be an attractive device for international settlements due to its unique features and bold jurisdictional application that facilitates the broadest possible victim coverage. According to interviews with stakeholders from some of the aforementioned settlements, the initiative to start the WCAM procedure originated from the infringing undertakings.¹⁴² To balance its incentivizing application, the WCAM includes several fairness safeguards encompassed in the judicial review, notification requirements and eligibility conditions for representative entities.

In order to negotiate a settlement on behalf of the victims, one or more representative entities need to be established. The representatives can be foundations or associations that are connected to the collective interests of the victims.¹⁴³ Moreover, the Consumer Authority can represent victims that are consumers,¹⁴⁴ but it has not made use of its powers yet.¹⁴⁵ Following the 2013 merger between the Consumer and Competition Authorities, it remains to be seen whether the merger will impact the private enforcement of competition law in case the victims include consumers. As for the private representatives, a Dutch ‘foundation’ is relatively easy and inexpensive to create, and can serve the *ad hoc* purpose of representing the victims in the WCAM procedure. An ‘association’ is a more controlled entity that has members and additional objectives. Both representative entities must be non-profit, but receiving third party funding is allowed and the WCAM is silent on the legal counsel’s fees, which generates some financial incentives. Interestingly, in the *Converium* settlement, the court took ‘customary US fee practices’ as a reference point when approving a 20% fee for the US-based legal counsel, which was considered to be excessive and contrary to Dutch

¹⁴¹ The WCAM has produced the 2006 DES settlement on prenatal pharmaceutical drugs, the 2007 Dexia settlement on the failure to warn about the risks of securities lease products, the 2009 Vie d’Or settlement on the bankruptcy of an insurance company, the 2009 Shell settlement on misleading statements concerning their oil and gas reserves, the 2009 Vedior settlement on insider trading, the 2011 Converium settlement on false statements about the company’s financial position, the 2014 DES II second settlement and the 2014 DSB Bank settlement on the violation of a duty of care by a bankrupt bank. In 2016, negotiations were initiated in order to reach a Volkswagen settlement for losses related to their emissions testing fraud, covering securities publicly traded outside of the US; see Volkswagen Investor Settlement Foundation 2016.

¹⁴² I. Tzankova & D. Hensler, ‘Collective Settlements in the Netherlands: Some Empirical Observations’ in C. Hodges & A. Stadler (eds), *Resolving Mass Disputes: ADR and Settlement of Mass Claims* (Edward Elgar Publishing 2013), p. 98.

¹⁴³ Dutch Civil Code, Art. 7:907.

¹⁴⁴ Not stipulated in the WCAM, but added by Art. 2.6 of the Act on the Enforcement of Consumer Protection Law.

¹⁴⁵ Weber 2014 (n 139), p. 168.

public policy by the objecting parties.¹⁴⁶ Ultimately, the limited restrictions on representative entities and the lack of funding regulation in the WCAM can be powerful incentives for bringing large-scale low-value claims.

Once a consensual out-of-court settlement has been reached, the parties must jointly request approval from the Amsterdam Court of Appeal, which has exclusive jurisdiction to review the settlement. One of the reasons for appointing this particular court to determine all WCAM settlements was the possibility to benefit from the financial expertise of its Enterprise Division.¹⁴⁷ In case the Court disapproves of the settlement, the parties could jointly appeal to the Dutch Supreme Court, which would act in cassation.¹⁴⁸ The settlement should contain an overview of the damage-causing event, any distinctions between the different categories of victims, an approximate number of victims, the compensation awarded for each victim per category and the conditions the victims need to fulfill to receive the compensation.¹⁴⁹ When deciding whether to approve the settlement, the Court considers various elements, for instance: (1) the ‘reasonableness’ of the compensation amount, (2) the appropriateness of the representative entity to represent the collective interests of the victims, (3) the number of victims intended to be covered, (4) whether sufficient security is present for the payment of the compensation amount, (5) the reasonableness of the conditions under which the victims can claim their individual compensation amount, (6) whether the interests of the victims cannot be safeguarded in other ways.¹⁵⁰ In case the legal counsel’s fee is extracted from the settlement, the court would assess it under the general ‘reasonableness’ review.¹⁵¹ The Court also has additional powers: it can seek the counsel of experts,¹⁵² suggest changes to the settlement (although the parties are not obliged to accept them)¹⁵³ and assign the costs of undertaking the negotiations to one of the parties after the approval of the settlement.¹⁵⁴

Key safeguards were established by notifying all ‘interested parties’ (i.e. the non-participating victims) and providing an opportunity to opt-out at any stage of the proceedings. The notification is a two-stage process, which requires a notice once the settlement has been

¹⁴⁶ Tzankova & Hensler 2013 (n 142), p. 101.

¹⁴⁷ B. Krans, ‘The Dutch Act on Collective Settlement of Mass Damages’ (2014) *Global Business & Development Law Journal* Vol. 27(2), 281, p. 295.

¹⁴⁸ Krans 2014 (n 147), p. 288.

¹⁴⁹ Dutch Civil Code, Art. 7:907(2).

¹⁵⁰ Dutch Civil Code, Art. 7:907(3).

¹⁵¹ Tzankova & Hensler 2013 (n 142), p. 100.

¹⁵² Dutch Code of Civil Procedure, Art. 1016.

¹⁵³ Dutch Civil Code, Art. 7:907(4).

¹⁵⁴ Weber 2014 (n 139), p. 171.

submitted for approval and again once the final settlement has been declared binding by the court. The notification requirements can be modified by the Court, but generally, they must involve direct contact with known victims (i.e. by mail) and a public notification in the newspapers for the unknown victims.¹⁵⁵ In case the victims reside abroad, the Court would additionally scrutinize the notice according to international and European instruments.¹⁵⁶ As a minimum standard, the victims have at least 3 months to opt-out after the final notification has been issued.¹⁵⁷ The settlement could be made conditional on an opt-out percentage, so that it could be terminated in case the coverage turns out to be too small.¹⁵⁸ Overall, this two-stage notification process, coupled with court scrutiny, appears adequate to safeguard the interests of non-participating victims.

Finally, a decisive element of the WCAM's attraction is its broad jurisdictional application. In particular, the 2010 *Converium* settlement extended its scope significantly, since none of the liable parties and only 3% of the victims were from the Netherlands.¹⁵⁹ As highlighted in chapter 2 of this thesis, the existing EU private international regime is not adequate for addressing collective proceedings. However, the Amsterdam Court of Appeal has developed two interpretations of the existing regime in order to facilitate the cross-border opt-out application of the settlement. One interpretation considers the infringers to be the 'claimants' and the victims to be the 'defendants' for the purposes of Brussels I Regulation Recast. Since the settlement represents a consensual agreement, not adversarial litigation, then the nature of the claimants and defendants would not depend on the infringement itself, but rather, against whom the settlement would be enforced. Accordingly, Art. 8(1) of the Brussels I Regulation Recast could be used to claim jurisdiction over multiple defendants that are not domiciled in the Netherlands, if the claims are found to be 'so closely connected' that there would be a risk of irreconcilable separate judgments.¹⁶⁰ Another jurisdictional interpretation focuses on the Netherlands as the 'place of performance' in Art. 7(1) of the Brussels I Regulation Recast. It would deem all relevant parties to be bound by the 'matters relating to the contract', including

¹⁵⁵ Dutch Code of Civil Procedure, Art. 1017(3).

¹⁵⁶ Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, OJ L 324; Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague, 1965).

¹⁵⁷ Dutch Civil Code, Art. 7:908(2).

¹⁵⁸ W.H. van Boom, 'Collective Settlements of Mass Claims in the Netherlands' (2009) Rotterdam Institute of Private Law Accepted Paper Series, p. 15.

¹⁵⁹ H. Van Lith, *The Dutch Collective Settlements Act and Private International Law* (Maklu 2011), p. 22.

¹⁶⁰ Tang 2015 (n 121), p. 321-322.

the compensation stipulated in the settlement.¹⁶¹ For victims that are domiciled outside of the EU, Art. 3 of the Dutch Code of Civil Procedure is used to declare a 'sufficiently close connection' to the Dutch legal order.

4.1.2 Public enforcer capacities

In order to gain a better understanding of the Dutch regulatory enforcement architecture beyond the private enforcement toolbox, the following section will outline additional elements that can indicate the public enforcer's capacities to facilitate collective ADR. The relevant public enforcer is the Netherlands Authority for Consumers and Markets (ACM) that was created following the merger between the Consumer Authority, Competition Authority and Independent Post and Telecommunications Authority on 1 April 2013.

Treatment of voluntary compensation - According to the ACM Fining Policy Rule, voluntary compensation is regarded as a mitigating circumstance that may be taken into account when setting a fine. Art. 2.10 stipulates that the infringer 'providing full compensation to the parties injured' is considered to be such a circumstance.¹⁶² The wording of the article suggests that only 'full compensation' is covered, however, no further guidance is provided. In practice, several instances of voluntary compensation can be identified: The 2005 *Interpay* case featured two voluntary redress schemes that resulted in an 18% fine reduction. Interpay is a joint venture for a PIN-transaction network service between Dutch banks and functions as the sole provider, which compels retailers to buy their services to use PIN payments with their customers.¹⁶³ In 2004, the Competition Authority established that Interpay abused its dominance by charging excessive prices and that, as shareholders, the Dutch banks were engaging in an agreement and/or a concerted practice with the object of preventing, restricting or distorting competition.¹⁶⁴ After the 2005 administrative appeal, the parties negotiated a structured resolution, which included: (1) the creation of a €10 million fund by donating to the Foundation for the Promotion of Efficient Payments (*Stichting Bevorderen Efficiënt Betalen*), and (2) the creation of a redress scheme that offers the retailers a 1 cent discount for

¹⁶¹ Van Lith 2011 (n 159), p. 50.

¹⁶² Dutch Minister of Economic Affairs, 'Policy rule of the Minister of Economic Affairs, no. WJZ/14112617, on the imposition of administrative fines by the Netherlands Authority for Consumers and Markets', 4 July 2014.

¹⁶³ M. Bredenoord-Spoek, 'The Dutch Competition Authority Considers Cooperation and Joint Selling of Network Services for PIN-transactions to be an Infringement of the Cartel Prohibition (Interpay)' (2005) e-Competitions Bulletin Excessive Prices Art. No. 35979.

¹⁶⁴ *Superunie vs Interpay*, Dutch Competition Authority, 28 April 2004, Case no. 2978/56.

every PIN transaction. In return, they received a fine reduction (from €17 million to €14 million) regarding the cartel and the abuse of dominance charges were dropped.¹⁶⁵ In addition, the 2004-2005 *Construction Cartel* case featured a voluntary redress scheme that resulted in a fine reduction amounting to 10% of the compensation amount paid, with an upper limit of a 10% reduction of the total fine amount.¹⁶⁶ More than 1300 construction undertakings were involved in a public tender bid-rigging cartel. Approximately 90% of the undertakings agreed to a fast-lane procedure (resulting in a 15% fine reduction) and approximately 25% of the undertakings also benefitted from leniency. Interestingly, the victim that received the compensation was the Dutch Government (including central and local governments), which could have played a role in the development and approval of this redress scheme.

Availability of negotiation procedures - Voluntary compensation has often occurred in the context of negotiation procedures between the public enforcer and the infringers. The procedural flexibility to ‘negotiate’ is largely derived from Dutch administrative law.¹⁶⁷ In addition, a formal procedure for commitment decisions was introduced through legislative amendments in Chapter 5A of the Dutch Competition Act in 2007. If successful, negotiations between the ACM and the undertakings would result in an enforceable formal decision and the termination of the investigation.¹⁶⁸ Cartel settlement procedures, which result in an infringement decision and a fine reduction, are formally not available.¹⁶⁹ However, similar settlements were facilitated in the context of a ‘fast-lane procedure’, which required the undertakings to waive certain procedural rights and agree not to contest the facts, legal assessment and fines. The procedure resulted in fine reductions, which were given in addition to any reductions received through leniency. However, this procedure has not been codified in the relevant instruments nor has it been used in the same manner since its initial development for the construction cartel.

¹⁶⁵ Authority for Consumers and Markets, ‘Press Release: NMa Reviews Fines Imposed on Banks and Interpay’, 22 December 2005.

¹⁶⁶ O.W. Brouwer, ‘Antitrust Settlements in the Netherlands: A Useful Source of Inspiration?’ in C.D. Ehlermann & M. Marquis (eds), *European Competition Law Annual 2008: Antitrust Settlements under EC Competition Law* (Hart Publishing 2010), p. 493.

¹⁶⁷ P. Kalbfleisch, ‘The Dutch Experience with Plea Bargaining/Direct Settlement’ in C.D. Ehlermann & M. Marquis (eds), *European Competition Law Annual 2008: Antitrust Settlements under EC Competition Law* (Hart Publishing 2010), p. 481-482.

¹⁶⁸ Kalbfleisch 2010 (n 167), p. 485.

¹⁶⁹ E. Lachnit, ‘Alternative Enforcement of Competition Law – Balancing Legal Requirements in Practice’ (2013) RENFORCE Working Paper, Utrecht Centre for Regulation and Enforcement in Europe, para. 3.2.

Treatment of self-regulatory compliance - The promotion of self-regulatory compliance efforts can be indicative of the openness to facilitate compliance-oriented enforcement strategies. The ACM Fining Policy Rule does not list self-regulatory compliance programmes or other compliance efforts as relevant mitigating circumstances. It has also not published any guidelines on what well-functioning compliance programme might look like. However, in general terms, the ACM has promoted the development of self-regulatory compliance systems by undertakings, since it deems them to be a suitable mechanism for avoiding competition infringements altogether.¹⁷⁰ Compliance programmes have also been accepted in several commitment decisions.¹⁷¹ Interestingly, compliance programmes have received more explicit attention in the telecommunications sector, which now falls under the supervision of the ACM since the 2013 merger.¹⁷² For instance, the 2006 *KPN* case regarding illegal customer discounts featured fine reductions for both voluntary compensation and the creation of a compliance programme. Moreover, the regulator essentially co-developed the compliance programme together with KPN. These actions reflected the regulator's desire to focus more on the *ex ante* prevention of breaches and to build 'high trust' with the regulatees.¹⁷³ Ironically, KPN was subsequently found to have infringed again and this time around the regulator used the existence of the compliance programme as an aggravating measure to increase the fine.¹⁷⁴

4.2 The United Kingdom

4.2.1 Toolbox of collective proceedings

As of 1 October 2015, the UK features the first tailor-made EU competition enforcement architecture that integrates collective ADR. This section will provide an overview of the three devices, which were introduced by the Consumer Rights Act 2015 as amendments to the

¹⁷⁰ A. Ottow, *Market and Competition Authorities: Good Agency Principles* (Oxford University Press 2015), p. 178; statements confirming the ACM's compliance position stem from C. Fonteijn's speech on compliance before the International Chamber of Commerce on 24 January 2014.

¹⁷¹ E. Lachnit, 'Compliance Programmes in Competition Law: Improving the Approach of Competition Authorities' (2014) *Utrecht Law Review* Vol. 10(5), 31, p. 36.

¹⁷² Previously, telecommunications were governed by the Independent Post and Telecommunications Authority (OPTA).

¹⁷³ Independent Post and Telecommunications Authority, 'OPTA Annual Report and Market Monitor 2007', The Hague, 27 May 2008, p. 13-14.

¹⁷⁴ Lachnit 2014 (n 171), p. 36.

Competition Act 1998:¹⁷⁵ (1) opt-in/opt-out collective litigation, (2) opt-in/opt-out collective settlements, and (3) voluntary redress schemes. It is important to note that these devices are sector-specific to competition law infringements. In addition to the devices above, there are general collective joinder procedures (Group Litigation Order, representative joinders, test claim joinders) that bundle individually brought claims.¹⁷⁶ However, in case of large-scale low-value claims, the existence of the joinder device would not create significant incentives for the voluntary initiation of collective ADR, since the victims are unlikely to bring individual claims in the first place.

Collective litigation

The collective litigation device housed in Section 47B of the Competition Act did not feature an opt-out model prior to the 2015 amendments. However, the opt-out model was introduced with two restrictions: (1) the Competition Appeal Tribunal has discretion to decide whether the collective claim should proceed on an opt-in or opt-out basis, and (2) the opt-out only applies for victims domiciled in the UK, whereas non-domiciled victims must explicitly opt-in.¹⁷⁷ The claimants could be consumers and businesses, although the policy discussions preceding the Consumer Rights Act were largely geared at consumers. Ultimately, including businesses in collective litigation was found to be especially helpful for SME-s.¹⁷⁸

In order to litigate, a representative entity would have to be established. The Court would only authorise representative entities if they consider their appointment to be ‘just and reasonable’, taking into account: their capacity to act ‘fairly and adequately’ in the best interests of the class, whether it is a pre-existing entity, whether it is a member of the class itself, its ability to meet the costs of the proceedings and the existence of conflicts of interest.¹⁷⁹ The CAT Rules do not contain any further limitations, which suggests that law firms and special purpose vehicles can be representative entities as well, although their exclusion was explicitly

¹⁷⁵ The Consumer Rights Act entered into force on 1 October 2015. The new regime applies to claims that were raised from that date onwards, even if the infringement took place earlier. While the amended provisions are brief, detailed information can be found in two additional sources: the Competition Appeal Tribunal Rules 2015 and the Competition and Markets Authority’s Guidance on the approval of voluntary redress schemes for infringements of competition law.

¹⁷⁶ Civil Procedure Rules 19.11, 19.6, 19.15.

¹⁷⁷ Competition Act 1998 47B(4)-(7), 47B(11); Competition Appeal Tribunal Rules 2015 79(3).

¹⁷⁸ UK Department for Business Innovation and Skills, ‘Private Actions in Competition Law: A Consultation on Options for Reform - Government Response’, January 2013, section 5.19.

¹⁷⁹ CAT Rules 78(2), 78(3).

suggested by the Government in its response during the policy discussions.¹⁸⁰ If discretion was indeed left for the Court in this regard, then the creation of financial incentives for representing large-scale low-value claims could be ensured.

The Court would then determine whether the presented claims raise ‘the same, similar or related issues of fact or law’, which were also defined in the CAT Rules as ‘common issues’.¹⁸¹ The suitability of joining the claims would depend on the predicted cost and benefit ratio, the size and nature of the class, the availability of ADR, and the existence of CMA-approved voluntary redress schemes or any other attempts at voluntary compensation.¹⁸² Approving an opt-out application would additionally depend on an assessment of the strength of the claims and the individual damages amounts that victims could retrieve through an opt-in application.¹⁸³ Overall, the standards of scrutiny appear to be very responsive to the circumstances of the case (i.e. sensitive to the difficulties of large-scale low-value claims) and create direct incentives for the initiation of collective ADR by taking the voluntary compensation efforts into account.

If the collective proceedings were successful, then the compensation would be made available for the victims. In case an opt-out model applied, the Court would have the obligation to award damages to the representative entity or any other person that it ‘thinks fit’, whereas in case of opt-in, it would have the discretion not to do so.¹⁸⁴ Any unclaimed damages resulting from an opt-out model could have two outlets: a *cy-près* donation to the Access to Justice Foundation or the assignment of a part or all of the unclaimed damages to the representative entity to cover litigation costs.¹⁸⁵ Considering that contingency fees and exemplary damages are prohibited,¹⁸⁶ retaining the possibility of obtaining parts of the damages would reduce the level of risk involved. Ultimately, the provisions appear to strike a careful balance between safeguards and financial incentives, but due to the level of discretion left to the Court, it remains to be seen how the device will function in practice.

¹⁸⁰ BIS 2013 (n 178), section 5.32.

¹⁸¹ CA1998 47B(6); CAT Rules 73(2). It appears to be an easier standard to satisfy than the ‘same interest’ standard under the Civil Procedure Rules. See Rodger 2015 (n 7), p. 274; Civil Procedure Rules 19.6(1).

¹⁸² CAT Rules 79(2).

¹⁸³ CAT Rules 79(3).

¹⁸⁴ CA1998 47C(3).

¹⁸⁵ CA1998 47C(5), 47C(6).

¹⁸⁶ Exemplary damages prohibited: CA1998 47C(1). Contingency fees appear to be prohibited only in case of an opt-out application: CA1998 47C(8); Courts and Legal Services Act 1990 section 58AA(3).

Collective settlements

The collective settlement regime features two distinct devices: (1) The first device is a section 49A settlement, which only applies in the context of ongoing collective litigation. Once the collective litigation proceedings have been initiated, then resorting to ‘regular’ settlements outside of the framework of this regime would be prohibited.¹⁸⁷ The Government justified this exclusion as a way of preventing the defendant from making low settlement offers. Concerns would arise if the claimants were to reject a low settlement offer and then become liable for litigation costs in case they lost.¹⁸⁸ The Government found the more regulated settlement framework to be better suited for protecting the interests of the victims.¹⁸⁹ The regulated framework represents a tradeoff that protects the interests of representative entities and ultimately still creates incentives for bringing collective claims. (2) The second device is a section 49B settlement, which can apply even if no collective litigation has been started. At first sight, the utility of introducing a second judicially-approved settlement device could appear questionable.¹⁹⁰ However, this settlement device is mainly meant to facilitate voluntary compensation efforts that have arisen without the threatening existence of a certified collective litigation claim. It would be counterintuitive to only make opt-out settlements available in the context of litigation - especially in cases, where all of the parties have reached a consensual outcome, but the infringers would have to be formally sued before the parties have access to a settlement approval process.¹⁹¹

An application for settlement approval could either be made after a litigation order has been issued, in case of a 49A settlement, or at an earlier stage, in case of a 49B settlement.¹⁹² In the first scenario, by issuing the litigation order, the CAT has already determined that the class has an eligible claim that meets the conditions regarding the strength of the claim, the suitability of the representative entity, the size and nature of the class etc. In the second scenario, lacking an existing order, the CAT would undertake a similar certification process

¹⁸⁷ CAT Rules 94(1).

¹⁸⁸ UK Department for Business Innovation & Skills, ‘Competition Appeal Tribunal Rules of Procedure: Review by the Right Honourable Sir John Mummery: Consultation’, February 2015, section 7.9-7.12.

¹⁸⁹ UK Department for Business Innovation & Skills, ‘Competition Appeal Tribunal Rules of Procedure: Government Response’, September 2015, section 2.95.

¹⁹⁰ Mulheron 2016 (n 136), p. 19.

¹⁹¹ Mulheron 2016 (n 136), p. 20; the Government stated in its response that ‘it would be perverse to require a company to effectively invite someone to sue them in order to reach a settlement’, BIS 2013 (n 178), p. 6.19.

¹⁹² CA1998 49A(1), 49B(1).

oriented towards a settlement.¹⁹³ The application for approval must be made together by the defendant and the representative entity.¹⁹⁴ It must contain a statement stipulating that the settlement terms are ‘just and reasonable’ with supporting evidence by experts, as well as details of the claims covered, notification arrangements for non-participating victims and distribution plans for the compensation.¹⁹⁵ The Court could follow up with directions, after which a hearing will be held and the settlement terms will be scrutinized. The settlement would have to meet the ‘just and reasonable’ review standard, which covers the damages amount offered, the number of persons covered, the expert opinions, the duration, cost and chances of success with collective litigation, especially if it would be possible to obtain compensation amounts ‘significantly in excess’ of what the settlement offers.¹⁹⁶

If the settlement is approved, then the compensation will be made available to the victims according to the terms of the settlement. There appear to be no provisions prescribing the treatment of unclaimed settlement funds.¹⁹⁷ However, the plans for unclaimed funds are taken into account in the ‘just and reasonable’ scrutiny. Interestingly, the possibility of reverting funds back to the defendant is explicitly allowed.¹⁹⁸

Voluntary redress schemes

The voluntary redress schemes, housed in Sections 49C, 49D and 49E of the Competition Act, stand separate from the two devices mentioned above, since their existence is not contingent on the victims initiating collective litigation. In essence, this form of voluntary compensation can be viewed as an infringer-led out-of-court settlement, which requires the victims to opt-in by accepting the settlement amount. In other words, the settlement does not have *res judicata* effect on all relevant victims in an opt-out manner. The schemes are also not overseen by the CAT, but instead by the CMA or other sector-specific regulators with competition powers.¹⁹⁹ A scheme can be approved simultaneously with the issuing of the CMA infringement decision

¹⁹³ CA1998 49B(5); CAT Rules 96(6), (9)-(11).

¹⁹⁴ CA1998 49A(2), 49B(2).

¹⁹⁵ CAT Rules 94(4), 97(2).

¹⁹⁶ CAT Rules 94(9), 97(7).

¹⁹⁷ Rodger 2015 (n 7), p 284.

¹⁹⁸ CAT Rules 94(9)(g), 97(7)(g).

¹⁹⁹ Competition and Markets Authority, ‘Guidance on the Approval of Voluntary Redress Schemes for Infringements of Competition Law’, London, 14 August 2015, 1.1, fn. 3 p. 2. For the purposes of the discussions that follow, the CMA will be used as the main example.

or as a follow-on initiative in case of pre-existing infringement decisions by the CMA or European Commission.²⁰⁰

The most significant incentive for initiating a voluntary redress scheme is the possibility of receiving up to 20% fine reductions.²⁰¹ This option is only available in the context of upcoming CMA infringement decisions and subject to the CMA's discretion, although it states that a fine reduction would be awarded 'in the majority of the cases'.²⁰² If the applicant has proposed a scheme that the CMA would strongly consider approving, then the early intention to award a fine reduction would be mentioned in the draft penalty statement, making it visible for all parties to the investigation. When deciding the fine reduction percentage, the CMA would consider the terms and administrative costs of the scheme, the size of the penalty, as well as the existence of leniency and settlements. However, it would not consider issues such as the nature and gravity of the infringement.²⁰³

Remarkably, the task of devising the scheme was granted to third parties: the Chairperson and the Board. The applicant can only appoint the Chairperson, who should be a senior lawyer or judge with sufficient demonstrable knowledge of competition law. The Chairperson would then appoint the members of the Board, who should include an economist, an industry expert, a person representing the interests of the beneficiaries of the scheme (e.g. a consumer body, trade association) and any other person suitable due to their expert knowledge.²⁰⁴ The applicant would pay for their services and the payment could not be contingent on the outcome of the final assessment of the scheme.²⁰⁵ The Chairperson and the Board would have to meet standards of independence, impartiality, objectivity, integrity and honesty; and perform their duties with reasonable skill and care, in accordance with the law and rules relating to their professional conduct. This means that any actual or potential conflicts of interest, which might cause them to favour the applicant or the beneficiaries, are prohibited and would have to be disclosed.²⁰⁶ The Chairperson and the Board are expected to engage in extensive fact-finding and cooperation with the applicant, while respecting confidentiality

²⁰⁰ CA1998 49C(2).

²⁰¹ CMA Guidance (n 199), 3.30.

²⁰² CMA Guidance (n 199), 3.29.

²⁰³ CMA Guidance (n 199), 3.31.

²⁰⁴ CMA Guidance (n 199), 2.43-2.45.

²⁰⁵ CMA Guidance (n 199), 2.47.

²⁰⁶ CMA Guidance (n 199), 2.49-2.59.

with regards to sensitive information.²⁰⁷ They are expected to work within the parameters and wishes suggested by the applicant, but they are allowed to go beyond them.²⁰⁸ Ultimately, it is up to the Chairperson and the Board, not the applicant, to devise a comprehensive redress scheme that addresses the nature of the potential beneficiaries (e.g. whether indirect purchasers would be covered), the types of loss that are recoverable, the type of compensation offered (whether it is monetary or non-monetary compensation; although a choice between the two is insisted on by the CMA), the process of applying for compensation, the evidence requirements, the existence of a complaints process in case of the rejection of a beneficiary's claim, the advertisement plans (in addition to the publication of the schemes on the Government's websites), and the legal consequences of accepting compensation under the scheme.²⁰⁹

Although the CMA has the power to grant final approvals, it is not meant to carry out a detailed external review of the scheme, especially when it would 'duplicate or undermine' the work of the Chairperson and the Board.²¹⁰ In its review, the CMA can consider the compensation amount offered, the duration of the scheme, advertising, evidence requirements, the legal consequences of the acceptance of redress, the position of vulnerable consumers, the objectivity and independence of the Chairperson and the Board, as well as any dissenting views from the applicant, the Chairperson or the Board.²¹¹ Although the initiation of the scheme is voluntary, once the CMA gives its approval, the compensating party is under a legal duty to comply. The duty is owed to the beneficiaries of the scheme, who can bring civil proceedings in case of non-compliance.²¹² The schemes that relate to upcoming infringement decisions can be approved conditionally on the basis of an outline, subject to providing further details about the redress scheme in the future. Even if conditional approval was granted, the CMA reserves the right to approve the same scheme under other conditions, approve a different scheme as a replacement or withdraw the approval altogether.²¹³ Interestingly, the CMA was also granted the power to recover 'reasonable costs' for its services in facilitating the voluntary redress schemes. It will be interesting to see how the

²⁰⁷ CMA Guidance (n 199), 2.75-2.78.

²⁰⁸ CMA Guidance (n 199), 2.71.

²⁰⁹ CMA Guidance (n 199), 2.11-2.41.

²¹⁰ CMA Guidance (n 199), 3.5.

²¹¹ CA1998 49C(3).

²¹² CA1998 49E(1)-(4).

²¹³ CA1998 49C(4) & 49C(5)(b).

CMA approaches its cost recovery powers in practice, especially since it is allowed to revoke the entire scheme in case of non-payment.

4.2.2 Public enforcer capacities

In order to gain a better understanding of the UK regulatory enforcement architecture beyond the private enforcement toolbox, the following section will outline additional elements that can indicate the public enforcer's capacities to facilitate collective ADR. The relevant public enforcer is the Competition and Markets Authority (CMA) that was created following the merger between the Office of Fair Trading and Competition Commission on 1 April 2014.

Treatment of voluntary compensation - As already outlined in the previous section, the new voluntary redress scheme framework constitutes the first highly regulated attempt at inducing voluntary compensation. Outside of this framework, the fining guidelines do not list voluntary compensation as a mitigating factor. However, in practice, compensation has been acknowledged as a relevant circumstance on rare occasions. For instance, the 2006 *Independent Schools* case featured a voluntary redress scheme that resulted in a fine reduction.²¹⁴ The case involved fifty non-profit schools that engaged in an information exchange regarding the fixing of tuition fees for upcoming years. Their regular and systematic exchange constituted as an agreement or a concerted practice with the object of preventing, restricting or distorting competition. After the Statement of Objections was published, the schools engaged in negotiations with the OFT and reached the following resolution: admittance to the infringement, an *ex gratia* payment of £3 million to an educational trust fund for the benefit of the students that attended the schools during the infringement, and a reduced fine of £10 000 for each school.²¹⁵ Next to inducing voluntary compensation, it was also the first time that the public enforcer used a cartel settlement procedure. The OFT Chief Executive noted that the decision illustrated their responsiveness to 'consider innovative solutions' in special cases.²¹⁶ With the 2015 reforms that introduced regulated 'voluntary redress schemes', it remains to be seen how much room was left to develop any additional and innovative compensatory outcomes.

²¹⁴ *UK Independent Schools* (2006) OFT Decision No. CA98/05/2006.

²¹⁵ *UK Independent Schools* (n 214), para. 36. Some schools received further up to 50% reductions for leniency.

²¹⁶ Office of Fair Trading, 'OFT Issues Final Decision and Imposes Penalties in Independent Schools Investigation', 24 November 2006.

Availability of negotiation procedures - Considerations for voluntary compensation could emerge in the context of negotiation procedures between the public enforcer and the infringers. Commitment decisions were introduced through legislative amendments in Section 31A of the Competition Act in 2004. The accompanying guidance outlines the circumstances under which the enforcer may consider accepting commitments. If successful, the procedure would result in an enforceable formal decision and the termination of the investigation.²¹⁷ In addition, following the *Independent Schools* case discussed above, various settlement-type procedures (often referred to as 'early resolution') were informally applied. More detailed guidance was introduced in 2014, outlining the specifics of the formal settlement procedure. The settlement requires, among other things, a voluntary admission of guilt and could result in up to a 20% or 10% fine reduction, depending on whether the procedure occurred before or after the Statement of Objections was issued.²¹⁸ These reductions would be in addition to any reductions received through leniency.²¹⁹

Treatment of self-regulatory compliance - Self-regulation has enjoyed a prominent place within the enforcement strategies of various UK sector-specific regulators and has been systematically promoted by the government.²²⁰ To some extent, the CMA also reflects this policy approach by acknowledging and actively promoting the development of self-regulatory compliance programmes by the undertakings. The existence of well-functioning compliance programmes or other 'adequate steps' to ensure compliance are deemed to be mitigating factors that can result in up to a 10% fine reduction.²²¹ However, the mere existence of a compliance programme would not suffice. The undertaking would have to prove that they took the necessary steps to ensure the functioning and maintenance of the programme. Interestingly, the CMA reserves the right to use the existence of a compliance programme as an aggravating factor in exceptional cases, where, for example, the undertaking used it to deceive the enforcer and conceal an infringement.²²² The CMA has published extensive guidance documents on how to ensure compliance with competition law and even developed

²¹⁷ Office of Fair Trading, 'Enforcement: Incorporating the Office of Fair Trading's Guidance as to the Circumstances in Which it May be Appropriate to Accept Commitments' (OFT407), December 2004, para. 4.

²¹⁸ Competition Act 1998: Guidance on the CMA's Investigation Procedures in Competition Act 1998 Cases (CMA8), Competition and Markets Authority, March 2014, para. 14; OFT's Guidance as to the Appropriate Amount of a Penalty (OFT423), Office of Fair Trading, September 2012, para. 2.26.

²¹⁹ CMA 2014 (n 218), para. 14.3.

²²⁰ Hodges 2015 (n 41), p. 173, 178-182.

²²¹ OFT 2012 (n 218), para. 2.15.

²²² OFT 2012 (n 218), p. 12-13.

special guides for small businesses.²²³ It promotes a ‘four-step risk-based approach’ that includes: (1) risk identification, (2) risk assessment, (3) risk mitigation, and (4) regular programme review.²²⁴ Its understanding of self-regulatory compliance programmes is in line with the behavioural findings and organisational studies that view a top-down commitment to compliance as an essential component for the development of a compliance culture.²²⁵ In 2015, the CMA published a study on the undertakings’ understanding of competition law, including their perception of the most important reasons for compliance and their awareness of the consequences of non-compliance.²²⁶ According to the findings, undertaking of all sizes are not as familiar with competition compliance issues as expected, which would suggest that the current guidance might not be effective.²²⁷

4.3 Comparative analysis

Having obtained a sufficiently detailed overview of both national architectures, this section will continue with a comparative analysis. In particular, a selection of key issues will be analyzed in more depth: (1) the incentives that the architecture provides to initiate collective ADR, (2) the funding incentives for representative entities, (3) the structural differences between the two architectures, (4) the fairness review that the compensatory outcome is subjected to, and (5) the role of the public enforcer in facilitating collective ADR. Before starting the analysis, some preliminary consideration will be given to certain common denominators between the Netherlands and the UK, which could affect the broader discussions on the introduction of a collective ADR model: their general attitude towards ADR in civil justice and their possible aspiration to attract international legal activity.

Firstly, the presence of ADR in civil justice systems is notable in both the Netherlands and the UK. The Dutch dispute resolution landscape is illustrated by the large percentage of out-of-court resolutions and the proliferation of ADR entities, which reflects the alleged cultural

²²³ Office of Fair Trading, ‘Guidance: How Your Business Can Achieve Compliance with Competition Law’ (OFT1341), June 2011; CMA 2014 (n 218).

²²⁴ OFT 2011 (n 223), p. 9.

²²⁵ Ottow 2015 (n 170), p. 184.

²²⁶ IFF Research, ‘UK businesses’ understanding of competition law, Prepared for the CMA’, 26 March 2015.

²²⁷ B. Rodger, ‘Competition Law Compliance: the CMA 2015 Study, Compliance Rationales and the Need for Increased Compliance Professionalism and Education’ (2015) *European Competition Law Review* Vol. 36(10), 423, p. 430.

tendency towards conflict-avoidance and negotiated settlements.²²⁸ The Dutch government has promoted ADR in order to prevent unnecessary burdens on civil courts and develop a more efficient justice system.²²⁹ The courts encourage settlements and regularly make voluntary referrals to mediation. Moreover, there is a national network of Consumer Complaint Boards (*Geschillencommissie*) that provide dispute resolution services in B2C situations, which result in a binding outcome for the undertaking. However, these ADR entities have not yet managed collective cases. Finally, arbitration is generally used for industry and trade disputes, partly as a result of the existence of renowned sector-specific institutions.²³⁰ In the UK, Lord Woolf's Access to Justice review and the subsequent 1999 reforms of the civil justice systems in England and Wales ushered in a significant emphasis on ADR. The courts were tasked with various case-management powers, coupled with the objective of promoting consensual dispute resolution throughout the civil proceedings²³¹ and the use of ADR was directly incentivized by taking its use into account when deciding the amount of costs related to the litigation process.²³² Moreover, many disputes are handled by the numerous sector-specific ADR entities that can impose a binding outcome on the undertakings, which is illustrative of the broader encouragement of self-regulation in the UK.²³³ Self-regulation, coupled with ADR mechanisms, is strengthened by statutory provisions, supervision by public regulators, codes of conduct, government funding and education.²³⁴ Arbitration is generally used for industry and trade disputes, and the UK houses several important international arbitral entities. Overall, it is likely that the favourable attitude towards ADR in civil justice could have a certain impact on the functioning and potential success of collective ADR in both countries.

Secondly, it has been suggested that the Netherlands and the UK aspire to become the hotspots for international legal activity.²³⁵ If this hypothesis is true, then it could explain and

²²⁸ F. Weber & C. Hodges, 'The Netherlands' in C. Hodges, I. Benöhr & N. Creutzfeldt-Banda (eds), *Consumer ADR in Europe* (Hart Publishing 2012), p. 130; for a reference to the Dutch 'conciliatory' legal culture, see T. Arons & W.H. van Boom, 'Beyond Tulips and Cheese: Exporting Mass Securities Claim Settlements from The Netherlands' (2010) *European Business Law Review* Vol. 21(6), 857, p. 883.

²²⁹ M. Pel, 'Regulation of Dispute Resolution in the Netherlands: Does Regulation Support or Hinder the Use of ADR?' in F. Steffek & H. Unberath (eds), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads* (Hart Publishing 2013), p. 299.

²³⁰ Pel 2013 (n 229), p. 302.

²³¹ Lord Woolf 1996; Civil Procedure Rules.

²³² Civil Procedure Rules, Rule 44.4(3)(a)(iii).

²³³ For an extensive overview, see Hodges, Benöhr & Creutzfeldt-Banda 2012 (n 115), p. 253.

²³⁴ Hodges, Benöhr & Creutzfeldt-Banda 2012 (n 115), p. 338.

²³⁵ G. Wagner, 'Mass Tort Resolution: Competition Between Jurisdictions and Mechanisms' in W. van Boom & G. Wagner (eds), *Mass Torts in Europe: Cases and Reflections* (Walter de Gruyter 2014), p. 293-294.

influence the development of particular models of collective redress. Even after the 2013 Commission Recommendation on Collective Redress, the European landscape of collective proceedings is diverse and a predominant model cannot be said to have emerged yet. Moreover, the fragmentation is fueled by the lack of a tailor-made EU private international law regime for collective proceedings. Against this background, regulatory competition could occur between different national regimes, as well as between public and private devices.²³⁶ The choice between different national regimes could include various parameters, such as the efficiency and reputability of the civil justice system as a whole. However, when choosing an avenue for collective redress, particular parameters could be determinative. Firstly, in order to attract collective legal activity from other jurisdictions, the availability of collective devices with a broad scope is essential. Secondly, the facilitation of an opt-out model could provide a competitive advantage, which enables infringing undertakings and representative entities to achieve once-and-for-all solutions by providing the broadest coverage of victims. Thirdly, given the low cost, speed and flexibility of ADR mechanisms, the creation of collective ADR devices could be very attractive for undertakings that can be incentivized to offer compensation proactively. Adopting all three of the aforementioned measures is likely to indicate the willingness and desire to facilitate international legal activity in the form of collective redress.

Overview

To recap, the core components of both regulatory enforcement architectures are summarized in the table below with collective ADR devices highlighted in grey:

²³⁶ H. Eidenmüller (ed), *Regulatory competition in contract law and dispute resolution* (Hart Publishing 2013), p. 5.

Architectural component	UK	Netherlands
Collective litigation	Yes - opt-out/opt-in collective litigation subject to the discretion of the CAT. Competition-specific regime. Opt-out application limited to UK domiciled victims.	No. However, opt-out collective litigation exists, but does not provide ‘damages’ as a remedy.
Collective settlements	Yes - opt-out/opt-in collective settlement. Opt-out application limited to UK domiciled victims. Section 49A settlement only applicable in case of ongoing collective litigation. Section 49B settlement applicable for other scenarios.	Yes - opt-out collective settlement. Opt-out application worldwide.
Regulated voluntary compensation: voluntary redress schemes	Yes. Schemes function like an opt-in settlement. Up to 20% fine reduction.	No.
Other voluntary compensation	No, formally not a mitigating factor.	Yes, mitigating factor leading to fine reductions.
Self-regulatory compliance	Yes, mitigating factor leading to fine reductions.	No, formally not a mitigating factor.
Negotiation procedures	Yes, commitments and settlements.	Yes, commitments. Settlements formally not available.

The comparative analysis now shifts to a more in-depth assessment of the five key categories that are deemed most crucial for the success of the collective ADR model:

(1) Structural incentives for collective ADR

In the Netherlands, collective ADR was introduced through opt-out collective settlements. The WCAM works well in situations, where the infringer finds the achievement of once-and-for-all opt-out settlements to be attractive due to its goodwill or in case the incentives are provided by external sources. The latter scenario can arise if the infringer is facing collective litigation in another jurisdiction or individual litigation in multiple jurisdictions. If the infringer is cooperative, the WCAM would be an excellent device, since the resulting settlement would be court approved and thereby secure legal certainty insofar as possible under the existing private international law regimes. The jurisdictional claims asserted through the WCAM have been particularly bold, covering international victims and infringers. However, in case the infringer is not cooperative, then the WCAM might not create sufficient incentives on its own. As a public trigger, the public enforcer provides direct incentives through fine reductions, since it considers compensation efforts as mitigating factors when setting the fine. However, there is a notable lack of a relevant opt-out collective litigation device. Amending their existing opt-out collective litigation device by adding the possibility to obtain damages as a remedy, would change the situation and be likely to create sufficient incentives to initiate collective ADR.

In the UK, collective ADR was introduced through competition-specific opt-out collective settlements and voluntary redress schemes. Although initiating collective ADR is entirely voluntary, strong private and public trigger incentives were set in place. The biggest incentive for early voluntary compensation is the possibility to receive up to 20% fine reductions. Moreover, collective ADR was carefully integrated into the broader collective proceedings framework. The introduction of opt-out collective litigation can be a significant incentive, as long as the victims and their representatives have access to sufficient funding in order to materialize the threat of litigation. However, the impact of the opt-out model is somewhat diluted by restricting its automatic application to UK residents, while the rest of the victims would have to opt-in. Voluntary compensation efforts, either privately or through the CMA-approved redress schemes, have a direct impact on any subsequent collective proceedings, since the initial application would have to include a statement whether the parties have

attempted to use ADR. This would bring their ADR history (or lack thereof) to the attention of the CAT right from the beginning of the proceedings. Collective ADR is thereafter taken into account when deciding whether to authorise collective proceedings on an opt-out basis, whether particular claims are eligible for the collective proceedings, and when determining the amount of recoverable litigation costs. Overall, as long as the likelihood of collective litigation is considerable, the UK architecture is capable of creating sufficient private and public triggers to initiate collective ADR.

(2) Funding of representative entities

The structural incentives outlined above were primarily directed at inducing the infringing undertaking's initiation of collective ADR. Once the infringer's consent is ensured, then the offer to start collective ADR proceedings or to receive a complete redress scheme can be incentivizing enough for the representative entities or their funders due to the high certainty of receiving their share of the compensation. However, particularly in case the threat of collective litigation needs to be established in order for collective ADR to be induced in the first place, additional financial incentives for representative entities could be needed.

The UK collective litigation device allows law firms and special purpose vehicles as representative entities. As a safeguard against the creation of a litigation culture, legal counsel was not allowed to operate with contingency fees. However, no contingency fee prohibition was stipulated for third party funders. Moreover, in case of unclaimed compensation following an opt-out application, the CAT may order that the representative entity could receive the damages 'in respect of the costs or expenses incurred', which would include the fee charged by a third party funder.²³⁷ These elements could make the funding of collective litigation financially incentivizing for third party funders. The Netherlands does not feature a collective litigation device that provides damages as a remedy. However, the treatment of funding under the WCAM opt-out settlement device bears a mention in case a similar approach were to be applied to a litigation device in the future. Notably, the WCAM sets very few restrictions on representative entities and allows for third party funding. Moreover, the judicial review of the WCAM settlement does not include the legal counsel's fees as a separate point of assessment. Only in case the fees are derived from the settlement amount would they be included in the general 'reasonableness' review of the settlement and, even

²³⁷ CA1998 47C(6); Mulheron 2015 (n 71), p. 309

then, the court has been very generous in its assessment. It would also not be difficult to circumvent the assessment of the fees by simply agreeing to an external payment method.²³⁸ Overall, the UK and the Netherlands have reasonably facilitated the creation of financial incentives for bringing collective proceedings by not creating any substantial restrictions.

(3) Structural differences

The scope of collective ADR in the Netherlands and in the UK is different, since the latter chose to limit the collective redress regime to competition claims only. A competition-specific collective redress regime was primarily developed due to an empirical need that was identified in this area, but not in others.²³⁹ The UK Government believed that the need for collective redress, especially using the opt-out model, should be assessed sector-by-sector following an impact assessment.²⁴⁰ In comparison, the Dutch Government maintains a general preference for horizontal, cross-sectoral devices. For instance, in its response to the White Paper on Antitrust Damages, the Dutch Government expressed disappointment with the choice to adopt a ‘fragmented’ competition-specific approach to collective redress.²⁴¹ Moreover, the Dutch Government believed that the Commission failed to fully appreciate the potential of out-of-court settlements with broad coverage and suggested that the WCAM could serve as inspiration for future European developments.²⁴² Overall, although the success of a collective regime would depend on a number of parameters other than its horizontal or vertical application, the development of some competition-specific rules could facilitate some flexibility with regards to problems that arise with competition damages claims. For instance, competition-specific treatment could be needed for the identification of a ‘common interest’ between direct and indirect purchasers, and for the approximations in quantifying damages.²⁴³ The UK regime does not appear to address these issues explicitly, but the oversight provided by a specialized competition tribunal could contribute to developing workable outcomes.

²³⁸ Tzankova & Hensler 2013 (n 142), p. 101.

²³⁹ The Government’s Response to the Civil Justice Council’s Report: ‘Improving Access to Justice through Collective Actions’, Ministry of Justice, July 2009, p. 5.

²⁴⁰ Ministry of Justice 2009 (n 239), p. 6.

²⁴¹ Dutch Government, ‘The Netherlands’ Response to the White Paper on Damages Actions for Breach of the EC Antitrust Rules’, 2008, p. 2. The same point was stressed in response to the Green Paper on Consumer Collective Redress - Dutch Government, ‘Dutch Response to the Green Paper on Consumer Collective Redress’, 2008, p. 3.

²⁴² Dutch Government 2008 (n 241), p. 3-5.

²⁴³ Athanassiou 2014 (n 12), p. 152-155.

The UK's opt-out settlement regime is often considered to be 'inspired' by the Dutch opt-out settlement device. Indeed, both settlement regimes share many similarities regarding their functioning. However, there are in fact two distinct settlement devices in the UK regime: (1) section 49A settlements, which applies in case of ongoing collective litigation; and (2) section 49B settlements, which can apply in other cases. Section 49A settlements are not comparable to the Dutch settlements, since they are not available for any type of out-of-court settlement scenario - they must exclusively take place in the post-certification context of ongoing collective litigation. Moreover, 'regular' out-of-court settlements would be forbidden once collective litigation is initiated. In comparison, the Dutch opt-out settlement device can be used in broader scenarios and does not have to be preceded by litigation. In that sense, only the section 49B settlement device resembles the Dutch settlement device. However, both opt-out settlement devices under the UK regime are ultimately limited in their opt-out application - only UK domiciled victims are automatically included, whereas other victims would have to explicitly opt-in. In comparison, the Dutch device has been applied very generously by the Amsterdam Court of Appeal, asserting opt-out jurisdiction over EU and non-EU victims alike. In sum, the Dutch opt-out settlement device has a much broader scope and cannot be considered an equivalent of the UK settlement devices.

Both the Netherlands and the UK facilitate voluntary compensation efforts. However, the UK developed a highly regulated framework for 'voluntary redress schemes', whereas the Netherlands did not. The Dutch public enforcer reserved the discretion to consider any types of voluntary compensation efforts as mitigating factors. On the other hand, creating a regulated framework for voluntary compensation enables to assert more public control over the process and thereby ensure fairness guarantees. Moreover, by creating specific guidelines for the successful development of redress schemes, the infringing undertakings are given more certainty that their compensation efforts would result in a fine reduction. In order to ensure that the redress scheme is adequate, the UK framework prescribes the creation of an independent body of experts (a Chairperson and the Board), which must at least include an economist, an industry expert and a person representing the interests of the beneficiaries of the scheme.²⁴⁴ Having the independent experts design the redress schemes can ensure that both the requirements stipulated by the CMA as well as the expectations of the infringing undertaking would be reasonably met. Yet, these added layers of complexity could make the voluntary redress schemes a less economical choice for certain infringing undertakings, who

²⁴⁴ CMA Guidance (n 199), 2.43-2.45.

might prefer to engage in direct settlement negotiations. After all, in addition to providing the compensation amount, the undertaking would also have to pay for the services of the independent experts. Ultimately, the UK architecture does not exclude the development of other voluntary compensation efforts, but it only provides fine reductions for the voluntary redress schemes created in accordance with the regulated framework.

(4) Fairness review

In order to achieve the recognition and enforcement of opt-out settlements, the parties would have to obtain court approval through judicial review. Both the UK and the Netherlands subject the settlement terms to scrutiny by the Competition Appeal Tribunal and the Amsterdam Court of Appeal, respectively.

In the UK, the settlement approval process starts with class certification,²⁴⁵ whereby the CAT would review whether the representative entity is suitable and whether the claims are eligible for inclusion in the class.²⁴⁶ In making these determinations, the CAT would consider the existence of common issues and the broader suitability of aggregation. Importantly, the prior use of collective ADR would be highlighted when approving the class. Moreover, victim participation is ensured by allowing them to make a submission either in writing or orally during the certification hearing. After the settlement has been presented for approval, the CAT would scrutinize the settlement terms to determine whether they are ‘just and reasonable’ by taking into account ‘all relevant circumstances’, particularly the following factors: the compensation amount and settlement terms (including payment of related fees), the number victims covered, the predicted compensation to be obtained through collective litigation (especially if the amount would be significantly in excess of the settlement), the predicted duration and cost of collective litigation, expert opinions, victim opinions, and plans for unclaimed funds.²⁴⁷ There appear to be no further provisions prescribing the treatment of unclaimed settlement funds, aside from allowing for the possibility of reverting the funds

²⁴⁵ Unless the certification has already taken place in the context of ongoing collective litigation.

²⁴⁶ CAT Rules 96(6), 96(9)-(11), 79.

²⁴⁷ CAT Rules 94(9), 97(7).

back to the defendant.²⁴⁸ Overall, the judicial review standards allow for rather intense scrutiny of all relevant circumstances related to the settlement.

In the Netherlands, the settlement approval process also includes a preliminary stage, however, it does not resemble a traditional ‘class certification’, whereby some of the substantive issues surrounding the collective claims would already be assessed. The representative parties are simply required to make a joint appeal for settlement approval, which is followed by a court hearing. Victim participation would be ensured through notification and by allowing them to make submissions during the hearing. When deciding whether to approve the settlement, the Court would consider various elements, such as: the ‘reasonableness’ of the compensation amount, the appropriateness of the representative entity to represent the collective interests of the victims (e.g. whether the foundation or association fills the formal requirement of including the protection of the victims in its articles of association), the number of victims intended to be covered, whether sufficient security is present for the payment of the compensation amount, the reasonableness of the conditions under which the victims can claim their individual compensation amount, and whether the interests of the victims cannot be safeguarded in other ways.²⁴⁹ In addition, the Court can scrutinize the notification arrangements, which have to be effective and ensure that all international victims are made aware of their right to opt-out.²⁵⁰ As is evident from the review conditions above, the Dutch review leaves the parties a lot of discretion to mold the settlement to their wishes.²⁵¹ In comparison to the UK judicial review standards, the financing of the settlement is not subjected to detailed scrutiny, although it is partly covered by the general ‘reasonableness’ review. Moreover, the appropriate treatment of unclaimed settlement funds is not prescribed, which allows the parties to revert the funds back to the defendant or design a *cy-près* solution.²⁵² Finally, in case the Court questions some of the fairness aspects of the proposed settlement, it can make non-binding suggestions and give the parties a chance to make amendments before rejecting it.²⁵³ Overall, the judicial review scrutinizes the key

²⁴⁸ CA1998 47C(5), 47C(6); CAT Rules 94(9)(g), 97(7)(g). In comparison, unclaimed funds from collective litigation were specifically highlighting the option of directing funds to the Access to Justice Foundation as a *cy-près* donation.

²⁴⁹ Dutch Civil Code, Art. 7:907(3).

²⁵⁰ Dutch Code of Civil Procedure, Art. 1017.

²⁵¹ Arons & van Boom 2010 (n 228), p. 869.

²⁵² However, in case the settlement funds are not enough to cover the claims that were made (e.g. as a result of inaccurate estimations), then the outstanding claims would have to be reduced on a *pro rata* basis; Dutch Civil Code, Art. 7:909(5).

²⁵³ Dutch Civil Code, Art. 7:907(4).

elements of the settlement, however, it allows for more flexible solutions and party autonomy than the UK review.

Different from the collective settlement procedures discussed above, the fairness of voluntary compensation would not necessarily be scrutinized by a public authority or a court in case the offer takes place outside of those frameworks. In such instances, the voluntary compensation efforts could take the form of a contractual agreement with a group of explicitly consenting victims, akin to an opt-in settlement. However, if such a compensation offer is presented with a view towards receiving a fine reduction, then a public enforcer could nevertheless conduct a review. The Dutch fining guidelines highlight voluntary compensation as a mitigating factor if the infringing undertaking ‘provided full compensation’ to the victims, which implies that the compensation must have already occurred and the enforcer would therefore not be ‘approving’ or reviewing the compensation as such. On the other hand, the UK voluntary redress schemes can be developed in parallel to the public investigation and would be subjected to a two-layered external review process. The first layer includes independent experts, who would have to devise the schemes and address all the relevant aspects, such as the target beneficiaries and the type of loss and compensation that are recoverable.²⁵⁴ They have to balance the wishes of the infringing applicant, the interests of the victims and the anticipated approval considerations of the CMA, and due to the diverse composition of the expert body, multifaceted interests could receive an outlet. The second layer of review involves the final approval process by the CMA. However, the CMA is not meant to carry out a detailed review of the scheme, especially when it would duplicate or undermine the work of the independent experts. It assesses the compensation amount offered, the duration of the scheme, various formal requirements, the position of vulnerable consumers, the objectivity and independence of the experts, as well as any dissenting views from the infringing undertaking or the independent experts.²⁵⁵ Overall, although the external review of voluntary redress schemes is multilayered, a lot of responsibility lies with the independent experts.

(5) Role of the public enforcer

²⁵⁴ CMA Guidance (n 199), 2.12.

²⁵⁵ CMA Guidance (n 199), 3.5-3.6. In addition to assessing the fairness of the redress scheme, the CMA would also determine the size of the fine reduction by considering the size of the fine and the existence of other reductions (i.e. from leniency and settlements), but it would not take into account the nature and gravity of the underlying competition infringement; CMA Guidance (n 199), 3.31.

Unlike other UK sector-specific regulation, competition enforcement has not been developed in accordance with the principles underlying responsive regulation nor has the public enforcer received redress powers.²⁵⁶ In general, the public enforcement of competition law continues to be led by command-and-control and deterrence-oriented strategies, which do not view the promotion of compensation as a priority of the public enforcer. The new regime instituted by the Consumer Rights Act 2015 altered this paradigm with the introduction of enforcer-approved voluntary redress schemes and thereby integrated the public enforcer into the promotion of collective ADR. However, it would be premature to note the emergence of a responsive, compliance-oriented or compensatory enforcement strategy. Similar points can be made for competition enforcement in the Netherlands. Although compensation efforts are explicitly taken into consideration as mitigating circumstances when setting the fine, providing redress is generally not viewed as a priority of the public enforcer. However, in the Dutch Government's response to the Green Paper on Consumer Collective Redress, it called for further investigation regarding the possible role of the public supervisory authority in contributing to collective redress 'within the framework of executing its public task'. In particular, although it affirmed the maintenance of the separation between public and private enforcement, it proposed the exploration of the public enforcer 'promoting the initiative' of the infringer to offer voluntary compensation.²⁵⁷ This could demonstrate the openness of the Netherlands to consider further integration of the public enforcer in the promotion of collective ADR. Overall, despite the limited connections between compensation and public enforcement, both the UK and the Netherlands grant an important power to the public enforcer, namely the inducement of collective ADR through fine reductions.

Conclusion

At first sight, the Netherlands and the UK share many similarities, especially regarding their enthusiasm to make collective redress and ADR devices more easily available for the victims and infringing undertakings. However, there are a number of important differences between their national architectures and the specific collective ADR devices they chose to develop. The comparative analysis studied the key issues that are crucial for the success of a collective ADR model under both national scenarios. In addition to outlining the detailed outcomes regarding the incentives, funding, procedure, fairness guarantees and interplay with public

²⁵⁶ Hodges 2015 (n 41), p. 420.

²⁵⁷ Dutch Government 2008 (n 241), p. 13-14.

enforcers, the analysis revealed broader tendencies that distinguish both architectures. Importantly, the Netherlands reflected a more flexible and functional approach to collective ADR, whereas the UK opted for a more regulated framework to ensure fairness guarantees. This chapter analyzed the implications of these policy choices in the abstract, however, the best lessons to be learned for the development of a European collective ADR model could be revealed once both national regimes are faced with a competition claim involving large-scale low-value damage. Presently, neither Member State has had the opportunity to utilize their regulatory enforcement architecture in this context, but it is undoubtedly important to follow these developments closely in the coming years and the structured analysis developed in this section could help frame the discussions that follow.

Chapter 5: The implications of integrating collective ADR into EU competition enforcement

The final chapter will be used to reflect on the proposal of integrating collective ADR from a normative, legal and practical perspective in the context of EU competition law. The first section will highlight the transformative impact of collective ADR on competition enforcement and its ability to achieve the goals of deterrence and compensation. The second section will take a closer look at the Commission's role as a public enforcer in the architecture envisioned and its capacity to induce collective ADR, while highlighting the changes that would have to be made to the current architecture in order to successfully integrate collective ADR.

5.1 Impact on the public-private interplay and the goals of enforcement

Introducing a regulatory enforcement architecture that facilitates and induces collective ADR as the first choice compensatory avenue, would undoubtedly have an impact on the current state of public and private enforcement on the EU and national level. The following discussions will attempt to shed light on its impact from two angles, namely by addressing the possible repercussions for the public-private interplay and the ability of collective ADR to meet the declared goals of competition enforcement.

Public-private transformations

Despite the ease of classifying collective ADR as a 'particularly private' device of 'private enforcement', the integration of collective ADR could contribute to transformations that extend far beyond dispute resolution. The transformative power of collective ADR stems from public-private tensions between: (1) the public and private enforcement of competition law, and (2) the public and private devices of private enforcement.

Within the first tension, the public and private enforcement of EU competition law have traditionally been viewed as serving different regulatory goals, whereby the public enforcer produces deterrence through fines and private actors deliver compensation through litigation. While it has been commonly recognized that private enforcement is also capable of producing

deterrent effects, it has been less accepted that public enforcement should be producing compensation. The successful integration of collective ADR into the competition enforcement architecture would entail some degree of fusion between public and private enforcement in order to ensure compensation for all victims. While the public enforcer would not be directly in charge of ordering or dispensing compensation, it would induce voluntary compensation efforts by taking them into account when determining the size of the fine.²⁵⁸ As a carrot, it would consider compensation as a mitigating factor, and as a stick, it could consider abusive or intentionally misleading use of collective ADR as an aggravating factor. Involving the public enforcer in this manner would not constitute a stark departure from the traditional distinction between public and private enforcement, however, it could signal the emergence of a hybrid model of enforcement, which begins to expand the role of competition authorities beyond policing anti-competitive conduct towards rectifying the broader societal impact of the infringements. It could also lead to a gradual reassessment of the public enforcement toolbox. In particular, the facilitation of responsive, behaviourally-informed and compliance-oriented strategies for private enforcement could influence the strategies deployed for public enforcement, possibly leading to a fuller understanding of the reasons behind infringements and to the promotion of additional enforcement devices, such as self-regulatory compliance programmes and criminal penalties.

Within the second tension, the public device of private enforcement is traditionally litigation through state-powered courts, whereas the private device could constitute various out-of-court dispute resolution processes and non-judicial entities. Introducing collective ADR to the private enforcement toolbox would reflect the increasing popularity of out-of-court dispute resolution and the continued exploration of collective devices in the EU. Importantly, these changes to private enforcement come at a cost, which could affect the prevailing understanding of how and to what extent justice (or more narrowly, compensation) ought to be delivered. For instance, with any form of collective proceedings, there are likely to be significant tradeoffs between individual and collective rights. Similarly, with consensual proceedings, the agreed outcome is likely to require some concessions from all parties. Ultimately, the careful integration of collective ADR into a regulatory enforcement architecture would provide the opportunity to shape these tradeoffs *ex ante*, ensure minimum

²⁵⁸ For a fuller spectrum of possible public enforcer involvement, see C. Hodges, 'Mass Collective Redress: Consumer ADR and Regulatory Techniques' (2015) *European Review of Private Law* Vol. 23(5), 829, p. 841-845.

safeguards and regulate the competition between different devices, entities and jurisdictional venues.

Building on the transformative themes explored above, an attempt will be made to conceptualize the contribution of collective ADR towards the goals of competition enforcement. The two enforcement goals that have been highlighted repeatedly in this thesis are compensation and deterrence. Firstly, compensation has been viewed as the main goal of the private enforcement of competition law in Europe.²⁵⁹ The emphasis on an individual right to full compensation reflects the concept of corrective justice, whereby the aim of the tort damages claim is for the infringer to remedy the individual harm suffered by the victim. Secondly, deterrence has been viewed as the main goal of public enforcement and it has also been accepted as an additional goal, or at least as a possible side-effect, of private enforcement. In the EU competition law context, the acknowledgement of the regulatory dimension of private claims has largely been influenced by the significant deterrent role assigned to private enforcement in the US. However, with both public and private enforcement, the concept of ‘optimal deterrence’ is likely to remain elusive for a variety of reasons, including the lack of direct coordination between the two. With these considerations in mind, the following sections will take a closer look at the impact of collective ADR on achieving deterrence and compensation.

The impact on deterrence

In the EU, deterrence is predominantly produced through imposing financial penalties on the infringers, which can be derived from both public and private enforcement. From a behavioural perspective, the precise deterrent effects of enforcement are difficult to measure, since it would require some insight into the subjective perceptions of the infringing undertakings. Nevertheless, the fundamental deterrence capacity of financial penalties has

²⁵⁹ For instance, the Commission’s press release accompanying the Damages Directive stated the following: “Contrary to the US system, the proposal does not seek to leave the punishment and deterrence to private litigation. Rather, its *main objective* is to facilitate full and fair compensation for victims once a public authority has found and sanctioned an infringement.” The emphasis on follow-on claims is notable. More broadly, this view was also presented in the 2008 White Paper on Damages Actions, p. 3: “The *primary objective* of this White Paper is to improve the legal conditions for victims to exercise their right under the Treaty to reparation of all damage suffered as a result of a breach of the EC antitrust rules. Full compensation is, therefore, the *first and foremost guiding principle*.” [emphasis added]

been subject to criticism.²⁶⁰ To illustrate, the combination of capping the size of the financial penalty at 10% of the annual turnover, the 13% estimated detection rate for cartels and the 25% estimated average overcharge would generally make infringements the economically rational choice for undertakings.²⁶¹ The low likelihood of subsequent private damages claims, combined with the existence of legal insurance, would not increase the financial penalty significantly. Moreover, in order to achieve ‘optimal deterrence’, the combined financial penalty would often have to be enormous. Even if such an outcome would be achieved, it could result in insolvency for many infringing undertakings, which could in turn have several undesirable effects. Moreover, financial penalties would rarely have an effect on the individuals that were directly responsible for the infringements.²⁶² Understanding the limits of financial penalties enables a more informed assessment of collective ADR’s impact on deterrence. The list of negative and positive effects compiled below is not exhaustive.

Negative effects: (i) In case collective ADR results in a fine reduction, the level of deterrence derived from the financial penalty would seemingly be reduced, since a portion would be subtracted from the financial penalty. A fine reduction would essentially convert some deterrence into compensation by redistributing some of the illegal profits directly among the victims of the violation. However, since the exact size of the anticipated fine reduction might not always be known in advance and it might also be uncertain whether all of the relevant victims end up claiming their share of the compensation, then the total sum paid by the infringer would not necessarily be foreseeable. In sum, deterrence would only be reduced in case the compensation amount is indeed smaller than the fine reduction received. (ii) If collective ADR produces fewer costs for the infringing undertaking than litigation, then its use would directly limit the size of the financial penalty. This reduction of deterrence is inevitable in cases where the threat of litigation is used to induce collective ADR, since such savings would be one of the key reasons why the infringers agreed to it. However, an exceptional scenario could be envisioned if the infringer engaged in collective ADR under the mistaken belief that the litigation claim would succeed, when in practice it would have not.

²⁶⁰ W. Wils, *The Optimal Enforcement of EC Antitrust Law* (Kluwer Law International 2002), ch. 8; D.A. Crane, ‘Optimizing Private Antitrust Enforcement’ (2010) *Vanderbilt Law Review* Vol. 63(3), 673.

²⁶¹ A. Renda, ‘Private Antitrust Damages Actions in the EU’ in H.-W. Micklitz & A. Wechsler (eds), *The Transformation of Enforcement: European Economic Law in Global Perspective* (Hart Publishing 2016), p. 275-276.

²⁶² Wils 2002 (n 260).

Positive effects: (i) If collective ADR took the form of voluntary compensation in return for fine reductions, then such ‘negotiated’ infringement decisions might be less likely to be appealed.²⁶³ In addition, competitors that are reputationally sensitive might be less likely to challenge an infringement decision that involved compensating victims. This, in turn, would save resources for the public enforcer, who could invest more in other investigations and thereby the overall deterrence effect of public enforcement could be increased. (ii) If collective ADR leads to an increase in compensatory outcomes, then competition law would become more visible to the general public. This could make future victims more aware of their rights and more likely to engage in private enforcement or report infringements to the public enforcer.²⁶⁴ At first sight, the confidentiality of certain ADR proceedings would limit such publicity, however, the extensive notification requirements for collective proceedings that include a large number of non-participating victims could nevertheless make the existence of compensatory activities sufficiently public. Moreover, once infringers have agreed to compensate, they could additionally reap reputational benefits by ‘advertising’ their corporate responsibility and voluntary compensation efforts. As a side effect, the increased publicity for competition law among other market participants could have a positive effect on the deterrence of infringements.

The impact on compensation

Subject to the principles of effectiveness and equivalence, *Courage* and *Manfredi* established that ‘full compensation’ should be made available to everyone who suffered a loss resulting from a competition infringement.²⁶⁵ Full compensation includes the actual loss as well as lost profits and interest, which would accrue from the time the harm occurred until the compensation is paid.²⁶⁶ Full compensation is meant to represent the optimal level and any form of overcompensation through punitive or multiple damages has been expressly rejected.²⁶⁷ However, at the premise of this thesis lies the concern that the current state of private enforcement is rather producing undercompensation, particularly for victims suffering from large-scale low-value harm. Moreover, the precise concept of full compensation is

²⁶³ J.H.J. Bourgeois & S. Strievi, ‘EU Competition Remedies in Consumer Cases: Thinking Out of the Shopping Bag’ (2010) *World Competition* Vol. 33(2), 241, p. 254.

²⁶⁴ Bourgeois & Strievi 2010 (n 263), p. 253-254.

²⁶⁵ *Courage Ltd v Crehan* (n 26); *Manfredi and others* (n 26). These principles are now enshrined in Art. 3 and 4 of the Damages Directive (n 2).

²⁶⁶ Damages Directive (n 2), Recital 12.

²⁶⁷ Damages Directive (n 2), Art. 3 (3).

difficult to achieve in practice, since the quantification of harm and the determination of the final compensatory amount are likely to be difficult and require approximations. In addition, the actual compensatory sum received by the victims is likely to be smaller than the full compensation amount once the costs of bringing the claim are taken into account. Understanding the limits of traditional damages claims enables a more informed assessment of collective ADR's impact on compensation. The list of negative and positive effects compiled below is not exhaustive.

Negative effects: (i) If the victims could have received a higher amount of compensation through litigation, then collective ADR would directly lessen the amount of compensation paid. This tradeoff would occur in most cases, where the threat of litigation is used to induce collective ADR, since such savings would be one of the key reasons why the infringers agreed to it. (ii) The scope of the compensation achieved through collective ADR might not cover the precise losses prescribed by the concept of full compensation. However, it is questionable whether collective litigation could achieve that standard either, considering the level of approximation involved, for instance, with the quantification of harm. (iii) Similarly, the scope of the compensation achieved through collective ADR might limit the categories of victims that are eligible for compensation. Selective compensating could result in weakening the position of those victims that would like to continue with collective litigation.

Positive effects: (i) The total costs of collective ADR could be lower than the total costs of litigation, even if litigation would have provided a larger compensatory sum. The total cost of the claim includes the compensation amount, but also the legal fees and other costs associated with prolonged representation of the claim. Moreover, the total costs for society are likely to be even greater if the costs of using the court system are considered. In addition, the total costs would be even higher if the costs borne by the infringing undertaking would ultimately be passed down to other parties like consumers. (ii) A consensual agreement reached by the parties through collective ADR is less likely to pose problems in the enforcement stage, since it would generally be self-enforcing due to consensus. An adversarial outcome reached through litigation could entail additional costs in case of appeal or other forms of contestation. Furthermore, with collective ADR, the infringing undertaking would agree to a compensation amount that it could actually deliver, while litigation could result in a sum that might lead to insolvency, which could leave the victims without any compensation. (iii) The flexibility of collective ADR could help overcome procedural restrictions that could make collective

litigation problematic, for instance, the determination of a ‘common interest’ among victims with conflicting claims (direct and indirect purchasers), the quantification of harm and the evidence that must be provided for victims to claim their share. These procedural restrictions would have a direct impact on whether full compensation would be achieved.

Deterrence, compensation and ‘resolution’

As demonstrated by the analysis above, the integration of collective ADR into the regulatory enforcement architecture would certainly have an impact on achieving deterrence and compensation. The particular outcome reached through collective ADR is unlikely to constitute ‘optimal deterrence’ or ‘full compensation’. However, instead of understanding that outcome as suboptimal deterrence and incomplete compensation, it could be defined as a distinct concept. In many cases, collective ADR would result in the most just and efficient outcome that can be achieved, while taking into account all relevant circumstances and the interests of all affected parties - the goal achieved in this manner could be conceptualized as ‘resolution’.

In essence, resolution represents a combination of what is just and efficient, while taking into account the substantive, procedural and social context and balancing the interest of all parties involved - not just the victims and infringers, but also the competition authorities, courts and society as a whole. Ultimately, by following these principles, resolution attempts to remedy the negative consequences of an infringement insofar as possible. Since one of the negative consequences of an infringement is the economic harm suffered by individual victims, then compensation could itself be viewed as one facet of achieving resolution. However, resolution should be understood as going further and encompassing broader restorative effects for all parties that were affected by the infringement. Put differently, resolution goes beyond corrective justice and places more emphasis on distributional justice, market balance and notions of collective fairness. Resolution is not confined to remedying the visible consequences of past infringements - it could also introduce a future-oriented dimension, whereby genuine attempts to proactively resolve both the consequences as well as the causes of infringements, would become more rewarding for the infringers. Finally, since no single enforcement strategy has been proven to be perfectly optimal or capable of addressing all of the negative consequences of competition infringements, then resolution could signify a third

strategy that not only fills the gaps left by deterrence and compensation, but also provides for coordination between the combined effects of all enforcement actions taken.

The concept could be expanded even further and applied more broadly in the context of public enforcement, but for the purposes of the present inquiry, the emphasis will be on collective ADR's ability to achieve 'resolution'. From the outset, adding a speedier, cheaper and more consensual private enforcement avenue that is capable of covering as many victims as possible is very likely to be welfare-enhancing and restorative. In most cases, the outcome reached through collective ADR would be the most efficient way achieving compensation, as far as private enforcement devices are concerned. Moreover, with collective ADR, an immediate and adversarial interaction between the infringers and victims would be replaced with a more mediated interaction that involves consensus-building and distributive considerations. The lack of vindication could have a positive impact on the emergence of cooperative and compliance-oriented attitudes in the infringing undertaking. The achievement of a just outcome for the affected parties is further legitimized by consent and emerges from the consideration of all alternative avenues that are available. In case the outcome binds non-participating victims, then their consent deficiencies could be remedied by a public fairness review. It is submitted that perfect procedural justice is unlikely to be obtained in a world of incomplete information, interpretable legal norms and private interests, neither by collective ADR nor collective litigation. However, collective ADR ultimately satisfies the notion of access to justice that is built on a contextual understanding of the needs, solutions and impacts of the legal response, taking into account the cultural, economic and psychological realities of individual and organizational behaviour.²⁶⁸ Furthermore, collective ADR can advance interests that go beyond the restoration of individual or aggregated rights. Put differently, the consensual resolution of the dispute could produce positive externalities that transcend the damages claim. For instance, the courts would be less burdened and the taxpayers would be spared from funding litigation that could be resolved out of court. Moreover, the leftover funds could be directed to a *cy-près* outlet that serves broader societal interests. Leftover funds from compensation received in exchange for a fine reduction would be particularly well-suited for serving such interests, since it was deducted from a financial penalty that would have otherwise been directed to a public source.²⁶⁹ The use of collective ADR in return

²⁶⁸ This multifaceted understanding of 'access to justice' was acknowledged by Cappelletti 1993 (n 128), p. 283.

²⁶⁹ For instance, the compensation could be viewed as serving both past and future consumers, Bourgeois & Strievi 2010 (n 263), p. 244.

for fine reductions would also ensure some coordination between the effects of public and private enforcement, since a reassessment of the fine would occur in light of the compensatory sum paid. In addition, collective ADR could serve a gap-filling purpose, not only in terms of providing compensation for the victims that would otherwise be left without a remedy, but also by creating an outlet for compliance behaviour. When compensation efforts are taken into account by the public enforcer or the courts, a connection is created between liability and self-regulation, which could make the infringing undertakings reflect internally on the causes for infringements and ensure that adequate prevention and mitigation structures are in place.²⁷⁰ The compliance-oriented rationale behind inducing the use of collective ADR is not always easy to reconcile with the deterrence-oriented rationale that is dominant in competition enforcement. However, when regulating behaviour, perhaps the underlying insights should in fact come from behavioural research, not from economic theory. If the current strategies fall short of achieving optimal outcomes, then the exploration of new and increasingly behaviourally-informed public and private enforcement strategies should be encouraged. Ultimately, the introduction of collective ADR into the regulatory enforcement architecture serves as just one example of how the ‘resolution’ approach could work, but it can nevertheless be viewed as an important first step in the right direction.

5.2 Collective ADR in the Commission’s public enforcement policy

In the regulatory enforcement architecture envisioned, the public enforcer would have an important role in inducing collective ADR. Although the initiation of collective ADR would not always be contingent on the participation of the public enforcer, their early involvement would lead to the speediest form of ‘resolution’ in many cases. The European Commission’s broader policy stance on collective redress, ADR and private enforcement has been discussed in the first chapter and will not be recapitulated here at length. As suggested by the research question in this thesis, collective ADR has not yet been integrated into the competition enforcement architecture on the EU level. This section will now go into more depth about the Commission’s current approach to collective ADR as the public enforcer of EU competition law. The first part will address the subject of inducing collective ADR through fine reductions, after which the focus will shift to other elements that can indicate the Commission’s capacity to integrate collective ADR and facilitate a more compliance-oriented enforcement strategy, namely the availability of special negotiation procedures and the

²⁷⁰ Parker 2002 (n 36), p. 253.

treatment of self-regulatory compliance efforts. Each part will conclude with an assessment on whether any changes need to be introduced in order to successfully integrate collective ADR.

Treatment of voluntary compensation

As discussed earlier, the Commission has predominantly viewed public and private enforcement as separate disciplines, serving the different goals of deterrence and compensation. It is therefore unsurprising that the official position holds that no form of compensation provided to the victims of competition infringements would affect the public enforcement process and the Commission's Fining Guidelines do not list compensation as a mitigating circumstance.²⁷¹ However, at least two objections could be made in this regard:

Firstly, the Damages Directive offers a different perspective on whether compensation should affect public enforcement. To begin with, recital 5 lists 'public enforcement decisions that give parties an incentive to provide compensation' as an example of an 'alternative' private enforcement mechanism. The concept of 'public enforcement decisions' is only mentioned in this particular recital and not elaborated upon elsewhere in the Directive using that terminology. However, this fusion of public and private enforcement becomes most evident in Art. 18 (3), which explicitly allows competition authorities to take compensation into account as a 'mitigating factor' when setting the fine. This provision strengthens the legitimacy of inducing collective ADR through fine reductions, even if the Commission's own guidelines do not yet provide for this possibility. The Commission's proposal that the NCAs should consider offering fine reductions in exchange for compensation is, at the very least, illustrative of the fact that it does not hold any fundamental objections to the idea.

Secondly, the Commission's own case law includes several instances of taking voluntary compensation into account when determining the size of the financial penalty.²⁷² The earliest instance occurred in *General Motors Continental*, where the Commission considered compensation as one of several mitigating circumstances. There were five cases of excessive charging that amounted to an abuse of dominance and GMC offered to voluntarily reimburse

²⁷¹ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ C 210.

²⁷² Ioannidou 2015 (n 4), p. 172-174.

the overcharge in three cases and also paid a compensation amount that exceeded the overcharge in two cases.²⁷³ In *Pre-Insulated Pipe Cartel*, the Commission expressly considered compensation as the only mitigating circumstance for one member of the cartel. The cartelist ABB reached an agreement for a 'substantial sum' with Powerpipe, who was a victim and a direct competitor, and copy of the confidential settlement was sent to the Commission.²⁷⁴ In *Nintendo*, the Commission expressly considered compensation as a mitigating circumstance and calculated a fine reduction of 300 000 euros in light of the compensatory amount. Nintendo offered 'substantial' financial compensation to 11 victims, 9 of which accepted the offer.²⁷⁵ When assessing these three cases, it is notable that they all involve out-of-court consensual compensation, but not all of them feature a significant collective dimension. The compensation was offered to direct purchasers and competitors, who are less likely to suffer the type of large-scale low-value harm that indirect purchasers and consumers experience. Nevertheless, it is clear that the Commission has in fact encouraged voluntary compensation and offered fine reductions, subject to its discretion. The discretionary nature was confirmed in *Archer Daniels Midland*, where the General Court stated that the Commission is not obligated to take compensation into account as a mitigating circumstance just because it has chosen to do so in previous cases.²⁷⁶

Against this background and the experience of the two national systems analysed in chapter 4, in order to integrate collective ADR into the regulatory enforcement architecture on the EU level, the Fining Guidelines should be amended to include compensation as a mitigating circumstance. When assessing whether the compensation offered qualifies for a fine reduction, the Commission could make use of the benchmarks of the fairness review envisioned in chapter 3, which included scrutinizing the compensation achieved, the notification and participation rights of non-participating victims, the role of the representative entity and the plans for unclaimed funds. If compensation is considered as a mitigating circumstance, then the substantive assessment and the fine reduction amount would largely be subject to the Commission's discretion and work on a case-by-case basis. The issuance of guidelines or best practices for the infringing undertakings could help improve the

²⁷³ Commission Decision of 19 December 1974 *General Motors Continental* (IV/28.851) [1975] OJ L29/14, para. 18.

²⁷⁴ Commission Decision of 21 October 1998 *Pre-Insulated Pipe Cartel* (IV/35.691/E-4) [1999] OJ L24/1, para. 127.

²⁷⁵ Commission Decision of 30 October 2002 *PO Video Games* (COMP/35.587), *PO Nintendo Distribution* (COMP/35.706), *Omega - Nintendo* (COMP/36.321) [2003] OJ L 255, para. 440-441.

²⁷⁶ Case T-59/02 *Archer Daniels Midland Co v Commission* [2006] ECR II-3627, para. 353-355.

predictability of the process and increase the attractiveness of collective ADR. It should be noted that the inclusion of compensation in exchange for fine reductions could have implications that go beyond inducing collective ADR. With a general power to consider compensation as a mitigating circumstance, the public enforcer could take any form of compensation into account, including the sums paid in the context of adversarial collective litigation. While the encouragement of voluntary and consensual compensation is the desired outcome, fine reductions should not necessarily be exclusively limited to ADR outcomes. In addition to the general inclusion of compensation as a mitigating circumstance, a more regulated framework could be considered. As seen in the UK architecture, the CMA was tasked with the approval of voluntary redress schemes, which would have to be designed in accordance with specific guidelines and could result in up to a 20% fine reduction. In contrast to the mitigating circumstance scenario highlighted above, the fine reduction would be directly contingent on the voluntary and consensual nature of the compensation, among other requirements. A more regulated framework could include requirements that go beyond the basic considerations in the fairness review and provide increased predictability concerning the steps that would have to be taken in order to receive a fine reduction. The regulated framework could also envision a role for external experts. For instance, the voluntary redress schemes in the UK prescribed the appointment of neutral third parties, who would largely be in charge of devising the schemes. Some of the public enforcer's assessment tasks could thereby be delegated to third parties. On the one hand, this would save public resources and allow the enforcer to focus on the ongoing investigation, on the other, the diminished public review and the involvement of third parties could readily create some risks, which would have to be addressed. Ultimately, the integration of collective ADR into the regulatory enforcement architecture in exchange for fine reductions requires the acceptance of compensation as a mitigating circumstance and if, in addition, a particular collective ADR process is deemed to be desirable, then it could be promoted with specific guidelines.

Availability of negotiation procedures

Special negotiation procedures could serve as an additional venue for voluntary compensation incentives to emerge. The Commission's toolbox includes two procedures that can be relevant in this regard: cartel case settlements and commitment decisions.

Firstly, Art. 10a of Regulation 773/2004 and the Settlements Notice established a negotiated settlement procedure in cartel cases, which offers the cartelists a chance to admit liability, cooperate and receive a 10% fine reduction, subject to the Commission's discretion. Cartel case settlements are essentially procedural efficiency devices that are used to speed up cartel investigations, which will result in an infringement decision. The connection to inducing collective ADR is not immediately visible, since the settlement submission itself does not include any direct considerations for compensation. However, as demonstrated by the cases that emerged in the Netherlands and the UK, the settlement procedure and the early admittance of the infringement could make the cartelists consider the consequences of subsequent private enforcement sooner and take proactive compensatory action to mitigate risks.

Secondly, Art. 9 of Regulation 1/2003 established the commitment decision procedure, which follows a preliminary assessment and offers the infringing undertakings a chance to accept legally binding commitments in order to have the investigation terminated, subject to the Commission's discretion. The commitment decision is silent on whether there was an infringement, which would allow the NCAs and national courts to nevertheless find an infringement and award damages. The procedure is not used in hardcore cartel cases, where the only appropriate remedy would be a financial penalty,²⁷⁷ and since large-scale low-value harm often occurs as a result of such infringements, then this procedure would have limited relevance in such instances. The Commission has explicitly approved of a compensatory commitment in *Deutsche Bahn*, which concerned the pricing practices that DB Energie applied to German railway undertakings that bought electricity for powering locomotives.²⁷⁸ DB Energie offered to pay a one-time compensatory sum to all German railway undertakings that did not belong to the DB Group. The sum consisted of 4% from their yearly invoice, based on the latest annual pricing conditions that were in place, and the Commission deemed it to be an adequate means for countering margin squeeze effects.²⁷⁹ Interestingly, in response to comments that the compensatory sum should have been even greater, the Commission stated that this compensatory payment should not be equated with 'compensation for harm suffered through possible anti-competitive behaviour' because commitment decisions do not result in a finding of infringement and therefore this compensatory payment is not 'aimed to

²⁷⁷ R. Whish & D. Bailey, *Competition Law* (8th edn, Oxford University Press, 2015), p. 274.

²⁷⁸ Commission Decision of 18 December 2013 *Deutsche Bahn* (COMP/AT.39678/*Deutsche Bahn* I, COMP/AT.39731/*Deutsche Bahn* II).

²⁷⁹ *Deutsche Bahn* (n 278), para. 91-92.

directly compensate harm suffered' as a result of an infringement.²⁸⁰ It is questionable whether this is in fact the case, especially with regards to any subsequent damages claims following a possible finding of infringement by the NCAs or national courts. If the infringer offers voluntary compensation, then the victim, by explicitly accepting the sum, would have at least a part of their harm restored for tort law purposes. Moreover, the extent of the coverage could be subject to the terms of any agreement reached between the infringer and the victim. Therefore, the compensation achieved through commitments could have an effect on the compensation achievable for the harm resulting from an infringement.

Finally, outside of the formal framework of the two negotiation procedures discussed above, the Commission has informally facilitated voluntary compensation in several cases, although the connection between the incentives provided and the voluntary compensation was less direct.²⁸¹ To conclude, special negotiation procedures can be a relevant venue for inducing collective ADR, however, the effects of the procedure's outcome should be taken into account when encouraging compensation at that stage, particularly if the outcome is the closing of the investigation. For scenarios that involve large-scale low-value harm, fine reductions would generally be a more appropriate venue for inducing collective ADR. Ultimately, the decision whether to take voluntary compensation into account in the context of such negotiation procedures could remain at the discretion of the Commission and be decided on a case-by-case basis.

Treatment of self-regulatory compliance

The promotion of self-regulatory compliance efforts can be indicative of the openness to facilitate compliance-oriented enforcement strategies, not only for public, but also for private enforcement. Despite the Commission 'welcoming and supporting' all compliance efforts by undertakings, its policy stance has been rather categorical in excluding the direct relevance of

²⁸⁰ *Deutsche Bahn* (n 278), para. 93.

²⁸¹ For example, in *Macron*, the Commission closed the investigation after the dominant undertaking made informal commitments, which included paying a compensatory sum to a single complainant; in *Rover*, the Commission did not initiate an investigation, after Rover notified a revised discount scheme and offered a 1 000 000 GBP donation to Which?, the largest consumer association in the UK; in *Sony-Philips*, the Commission cleared a Standard Licensing Agreement, which included a commitment by Philips to pay each holder of a license 10 000 USD, amounting to a total of 800 000 USD; Ioannidou 2015 (n 4), p. 173; Bourgeois & Strievi 2010 (n 263), p. 248.

compliance programmes for the public enforcement²⁸² and the Fining Guidelines do not list such programmes or other compliance efforts as relevant mitigating circumstances. The Commission has been confronted with the existence of self-regulatory compliance programmes on several occasions, however, it has never granted a fine reduction as a result of a pre-existing compliance programme. In some early cases, the Commission did take compliance efforts into account, but only when the compliance programme was set up following the investigation.²⁸³ More recently in *Archer Daniels Midland*, in addition to offering voluntary compensation to the victims, ADM featured a 'rigorous and ongoing' self-regulatory compliance programme and its level of commitment indicated a genuine desire to avoid infringements, however, the Commission did not consider it to be relevant. In the appeal, the General Court ultimately established that the Commission is not obligated to take these efforts into account.²⁸⁴

It is therefore clear that compliance efforts are currently not integrated into the public enforcement process. However, it is submitted that the treatment of self-regulatory compliance programmes should be considered in the broader context of the limited deterrence effects that can be achieved through financial penalties. The encouragement of compliance could be relevant not only for public enforcement,²⁸⁵ but also for private enforcement and the inducement of collective ADR. On a more practical level, a well-functioning compliance programme could be utilized not only for the detection of infringements, but also for the mitigation of negative consequences, for instance, by tasking the same staff with the development and management of voluntary redress schemes. For the undertakings that are reputationally sensitive, both compliance and compensation would signal a similar willingness to accept responsibility and could be presented together as a complimentary package that mitigates past infringements and prevents future infringements. Moreover, including an *ex ante* commitment to mitigate harm within the self-regulatory compliance

²⁸² European Commission, Compliance matters: What companies can do better to respect EU competition rules, Luxembourg: Publications Office of the European Union, 2012, p. 21: "If a company which has put a compliance programme in place is nevertheless found to have committed an infringement of EU competition rules, the question of whether there is any positive impact on the level of fines frequently arises. The answer is: No."

²⁸³ W. Wils, 'Antitrust Compliance Programmes and Optimal Antitrust Enforcement' (2013) Journal of Antitrust Enforcement, Vol. 1(1), 52, p. 53; the fine reductions were granted in certain decisions taken between 1982-1992.

²⁸⁴ *Archer Daniels Midland* (n 276), para. 356-359.

²⁸⁵ For a discussion on the potential of compliance programmes for public enforcement, see Wils 2013 (n 283); Lachnit 2014 (n 171); Ottow 2015 (n 170), p. 183-185; D. Geradin, 'Antitrust Compliance Programmes and Optimal Antitrust Enforcement: a Reply to Wouter Wils' (2013) Journal of Antitrust Enforcement Vol. 1(2), 325.

programme could help the public enforcer in their assessment of the compliance efforts, since such a promise could be an indicator that the compliance programmes were not meant to be merely ‘window dressing’. In such cases, the undertakings would not necessarily have to be held accountable for a failure to keep their promise, however, their subsequent refusal to even accommodate collective ADR negotiations could be viewed as an aggravating circumstance and provide an opportunity to impose higher fines. Finally, and perhaps most importantly, the promotion of compliance behaviour might contribute to the creation of a genuine internal compliance culture that also involves compensating victims in case of failure. In sum, the treatment of self-regulatory compliance programmes could be viewed as one component of the broader exploration of untapped compliance-oriented strategies and it might have a positive impact on inducing voluntary compensation. However, collective ADR is not ultimately contingent on the facilitation of self-regulatory compliance programmes.

Conclusion

This thesis proposes that collective ADR has the potential to provide just and efficient resolution for all parties directly affected by a competition infringement. In order to achieve that goal, collective ADR should act as the first choice redress avenue in a regulatory enforcement architecture that assigns roles for both private and public actors. The successful inducement of collective ADR necessitates a responsive strategy that takes into account the intricacies of behavioural research and the multi-layered incentives that need to be provided for the infringers and their victims. The public enforcer should be assigned the role of inducing voluntary compensation efforts through fine reductions, which necessitates some level of fusion between public and private enforcement. The key concern with collective ADR was deemed to be the existence of genuine consent to the proceedings and its binding outcome, particularly in case a large amount of non-participating parties would be involved. The use of an opt-out model was found to be most desirable for ensuring the broadest possible coverage of victims and for increasing the attractiveness of a once-and-for-all global solution for the infringing undertakings. The increasing acceptance of opt-out models in European civil justice systems is illustrated by the architectures of both the UK and the Netherlands. The due process and fairness concerns should be scrutinized in an *ex post* fairness review that gives due consideration to the tradeoffs between individual and collective interests that made a consensual outcome possible in the first place. The extent to which collective ADR is ‘regulated’ would have a direct impact on its functioning. The fairness review could be conducted by courts, as seen with the settlement regimes in the Netherlands and the UK, or by the public enforcer with possible assistance from neutral third parties, as seen with the voluntary redress schemes in the UK.

Furthermore, it is submitted that introducing collective ADR would not be in conflict with existing legislation - to the contrary, it would build upon the private enforcement provisions that have already been introduced. The Damages Directive defined ‘consensual dispute resolution’ as ‘any mechanism enabling parties to reach the out-of-court resolution of a dispute concerning a claim for damages’,²⁸⁶ which would cover all forms of collective ADR envisioned in this thesis. The Directive explicitly encouraged and promoted consensual dispute resolution processes that would cover ‘as many injured parties and infringers as

²⁸⁶ Damages Directive (n 2), Art. 2 (21).

legally possible',²⁸⁷ which indicates a preference for collective forms of ADR with the broadest possible application. The Directive also explicitly encouraged the involvement of public enforcers and allowed them to take compensation into account as a mitigating circumstance.²⁸⁸ In addition, the Directive introduced specific procedural provisions that would also apply to any future models of collective ADR, namely the suspension of the limitation period and ongoing litigation proceedings for the duration of the consensual dispute resolution process, and the clarification of the 'joint and several liability' relationship between settling and non-settling infringers.²⁸⁹ In light of these existing provisions, the Damages Directive could serve as a suitable forum for introducing additional collective ADR provisions, such as the benchmarks of the fairness review. However, for reasons of consistency, it would be advisable to compile all collective redress provisions in a single instrument. Should a European collective litigation device apply horizontally across different sectors, then it would be advisable to include collective ADR provisions in the same instrument. A fuller assessment of such policy choices would go beyond the scope of this thesis, however, it is submitted that the lack of a competition-specific legislative instrument would not hinder the functioning of collective ADR in the regulatory enforcement architecture envisioned.

The following section will take stock of the changes that would have to be made to the current architecture in order to successfully integrate collective ADR. To begin with, the development of the regulatory enforcement architecture envisioned in this thesis would be illustrative of specific policy positions:

- The facilitation of atypical private enforcement structures in order to ensure compensation and close the enforcement gap for victims suffering from large-scale low-value damage.
- The exploration of behaviourally-informed and compliance-oriented enforcement strategies that promote voluntary compensation as the first choice private enforcement avenue.

²⁸⁷ Damages Directive (n 2), Recital 48.

²⁸⁸ Damages Directive (n 2), Art. 18 (3).

²⁸⁹ Damages Directive (n 2), Art. 18 & 19.

- The recognition of ‘resolution’ as a desirable goal of enforcement and ensuring that collective ADR achieves that goal by leading to just and efficient compensatory outcomes for all affected parties.
- The promotion of coordination and cooperation between public and private enforcement in order to induce collective ADR.
- The acceptance of possible tradeoffs that occur in collective and consensual processes that include a large number of non-participating parties.

Meeting the objectives above could require the following modifications:

- An amendment to the fining policy of competition infringements, which recognizes compensation as a mitigating circumstance and provides specific guidelines on the steps that would have to be taken in order to receive a fine reduction.
- The introduction of a collective redress device that introduces collective litigation and collective ADR. The device should permit opt-out applications, particularly when victims suffered from large-scale low-value damage.
- The introduction of a reasonable fairness review to be applied by public enforcers and courts for collective ADR outcomes, particularly for those involving a large number of non-participating parties.
- An amendment to the European private international law regime that clarifies and ensures the effective cross-border recognition and enforcement of collective ADR outcomes.

To conclude, collective ADR is capable of achieving the effective, efficient and fair private enforcement of competition law and should be explored further as a policy option on the European level. Ultimately, this thesis laid out the basic groundwork that could be used to develop a more detailed assessment of the multifaceted implications of integrating collective ADR into existing frameworks.

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