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A Channel Apart: Why the United Kingdom has Departed from the European Commission's Recommendation on Class Actions

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Abstract

Over the course of 2013–15, there have been significant developments in the reform of class actions in Europe. The European Commission published its Recommendation of common principles concerning collective redress in June 2013, whilst the Consumer Rights Act 2015 – which was introduced into the United Kingdom Parliament in January 2014 and obtained Royal Assent on 26 March 2015 – contains a class action for competition law infringements. Although there is some 'common ground' between these legislative instruments, their divergences are far more legally significant, and comprise the focus of analysis in this article. Regarding the two topics of standing to sue, and the opt-in versus opt-out approach to forming the class, the approaches of the European Commission and the UK Parliament differ markedly, reflecting the deep policy, political and judicial divisions which have manifested in this area of reform for over a decade. The legislators have also ultimately chosen different scopes of application, with the European Commission preferring a 'horizontal' approach to reform, whilst the UK Parliament has pursued a sector-specific reform agenda. In respect of standing to sue and the opt-in versus opt-out debate, there are numerous sound legal and political reasons that manifestly support the UK law-makers' decision to depart from the 2013 Recommendation. However, in respect of the horizontal-versus-sectoral debate, the topsy-turvy history of reform at both European and domestic levels has resulted, ironically, in both the Commission and UK policy-makers reversing the views which each had initially adopted within the past decade. Undoubtedly, as these reform measures demonstrate, the collective redress landscape is both evolving and controversial.

Keywords: Class actions, collective redress, competition law, consumer law, opt-in versus opt-out, certification, standing to sue, ideological claimant

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I. INTRODUCTION

On 26 March 2015, a seismic shift occurred in English civil procedure, with the implementation of a collective proceedings regime, pursuant to which an action may proceed on opt-out principles, if the relevant court so directs. This collective proceedings regime, enacted by virtue of Schedule 8 of the Consumer Rights Act 2015,[1] pertains solely to competition law grievances (the 'UK Competition Class Action').[2] Entitled *Private Actions in Competition Law*, this regime followed the Government's comprehensive 2012 consultation on the subject.[3] Relevant draft Rules of Court have been prepared in readiness for its implementation,[4] and the regime is expected to come into force on 1 October 2015.

The UK Competition Class Action, whilst sectoral in design, is the first time in English legal history that the UK Parliament has implemented an opt-out class action, and its ramifications are likely to be far-reaching. This landmark legislative initiative follows more than a decade of concerted reform activity at domestic level, much of which arose from the concern that competition law was one province of activity in which there was a limited ability, by either aggrieved individuals or businesses, to institute actions by which to test their claims in English courts.

These concerns were by no means limited to the UK. Similar misgivings were espoused by the European Commission which, on 11 June 2013, published a series of common and non-binding principles for collective actions, via its *Recommendation on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted under Union Law* (hereinafter '2013 Recommendation').[5] The purpose of this Recommendation was to 'ensure a coherent horizontal approach to collective redress in the European Union without harmonising Member States' systems',[6] as a means of promoting the private enforcement of rights granted under Union law.[7] Since publication of the 2013 Recommendation, not only has the UK Competition Class

[1] Consumer Rights Act 2015, c 15 (with Royal Assent proclaimed at: http://www.publications.parliament.uk/pa/ld201415/ldhansrd/text/150326-0002.htm#15032625000607) [last accessed 17 April 2015].

[2] The text of the Act is available at: http://www.legislation.gov.uk/ukpga/2015/15/contents/enacted/data.htm [last accessed 17 April 2015]. Sch 8 inserts new relevant provisions into Pt 1 of the Competition Act 1998 and into the Enterprise Act 2002.

[3] The reform was promulgated by the Dept of Business, Innovation and Skills (BIS), via the consultation, *Private Actions in Competition Law: A Consultation on Options for Reform* (April 2012). The *Government Response* on this important consultation was published on 29 January 2013.

[4] Prepared pursuant to s 15B(1) of the Enterprise Act 2002, as inserted by Sch 8 of the Consumer Rights Act 2015, and available for perusal at http://www.catribunal.org.uk/247-8406/Draft-Tribunal-Rules-on-Collective-Actions.html [last accessed 19 April 2015]. The rules have been the subject of a formal consultation, as part of the *Competition Appeal Tribunal Rules of Procedure: Review by the Rt Hon Sir John Mummery*, which closed on 3 April 2015. At the time of writing, the feedback to that consultation is being analysed. The rule numbering in this article adopts the numbering in the originally-published draft CAT rules (and not the rules re-numbering adopted in that consultation).

[5] Commission Recommendation (EC) 2013/396/EU [2013] OJ L201/60.

[6] To quote the summary of the 2013 Recommendation by the Commission at: http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm#comrec [last accessed 17 April 2015].

[7] See note 5 above, Recital 6, p L201/60.

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Action been enacted,[8] but the legislatures of the Member States of Belgium[9] and France[10] have also promulgated, and enacted, proposals for class, or collective, actions of differing scope and design.

The focus of this article is upon the recently-enacted UK regime, and in particular, upon the significant divergences which exist between the 2013 Recommendation and the legislative drafting choices which the UK has adopted for its class action — and, in addition, the *reasons* for those divergences. English law-makers have not been prepared to countenance the European Commission's vision of collective redress in its entirety. Given that the 2013 Recommendation requires that one such departure be 'duly justified by reasons of sound administration of justice', the purpose of this article is to examine, and to justify, three important areas of jurisprudential divergence which characterise the UK Competition Class Action. There are, of course, many legislative design points and policy choices regarding that class action upon which the European Commission, and the UK Parliament, concur. The three points of divergence are, however, central to the operation of the UK Competition Class Action, and are worthy of some detailed critical analysis.

The first disparity concerns the Commission's Recommendation[11] that its principles governing compensatory collective redress should be 'applied horizontally and equally' in any areas where collective claims for violations of the rights granted under EU law are relevant. In other words, the intention was that each Member State should implement collective redress mechanisms which were *generic* in nature, in that they could deal with a range of legal disputes, provided that the procedural requirements for commencing the action were met. Although the jurisdiction of England and Wales does have generic collective redress regimes 'on its

[8] During its passage through Parliament, the relevant provisions of Sch 8 were not the subject of disagreement between the House of Commons and the House of Lords during debate. However, other provisions of the Consumer Rights Bill 2013–14, especially to do with ticket touting, became subject to the 'ping-pong' procedure, 12 January – 9 March 2015. During the Commons debate, Sch 8 was passed with minor amendments which are not relevant for the purposes of this article.

[9] Per Book XVII of the Code of Economic Law, 'Specific jurisdictional procedures', Title 2, 'The collective redress action', Act of 28 March 2014, and in force 1 September 2014. For an excellent detailed analysis, see, eg S Voet, 'Belgium's New Consumer Class Action' in V Harsagi and C van Rhee (eds), *Multi-Party Redress Mechanisms in Europe: Squeaking Mouses?* (Intersentia, Antwerp, 2014). For an English translation of the regime, see http://news.whitecase.com/57/3281/downloads/collective-action---english-free-translation---march-2014.pdf [last accessed 17 April 2015], to which the author has referred for the purpose of this article.

[10] Inserted in Book IV of the Consumer Code, 14th Parliament (session of 13 February 2014), and available at http://www.assemblee-nationale.fr/14/ta/ta0295.asp [last accessed 17 April 2015]. The French Constitutional Council approved the constitutionality of the new law on 13 March 2014. It is known as the 'Hamon Law', and was promulgated in the Official Journal ((2014) 65 *Journal Officiel* 5400) on 18 March 2014. For further detail, see: Norton Rose Fulbright, 'The new "Hamon Law" introducing French class actions and its effects on competition and distribution law' (March 2014), available at http://www.nortonrosefulbright.com/knowledge/publications/114016/the-new-hamon-law-introducing-french-class-actions-and-its-effects-on-competition-and-distribution-law [last accessed 17 April 2015]. For further discussion, see, eg R Mulheron, 'Recent United Kingdom and French Reforms of Class Actions: An Unfinished Journey' in E Lein et al (eds), *Collective Redress in Europe: Why and How?* (BIICL, 2015), pp 97–115.

[11] See note 5 above, Recital 7, p L201/60, and Articles 1–2, 'Purpose and Subject Matter', p L201/62.

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statute books',[12] the UK Competition Class Action is clearly only sectoral. Interestingly, so are the recently-enacted Belgian[13] and French[14] collective redress regimes. In the UK's case, the 'die was cast' for sectoral reform some five years ago. As discussed in Part II, the 2013 Recommendation must realistically be tempered by the political environment which exists in a particular Member State — albeit that the 2013 Recommendation for horizontal reform is, in this author's view, distinctly preferable.

The second disparity concerns that of standing to sue. The 2013 Recommendation[15] only sanctions a form of *representative* action, in that the sole party with the requisite standing to sue is the so-called 'ideological claimant'[16] (ie an entity which does not have a cause of action against the defendant itself, but which is authorised to bring the action on behalf of directly-affected class members). Specifically, the European Commission recommends that standing only be vested in a statutorily-stipulated representative entity, or an ad hoc certified entity which meets certain authorisation criteria, or a nationally-recognised public authority. On the other hand, the UK Competition Class Action is framed far more broadly. It confers standing upon both an ideological claimant and *a directly-affected class member*.[17] The Commission's very restrictive approach towards the issue of standing to sue is critiqued in Part III. As explained in that Part, exclusive reliance upon the 'ideological claimant' has neither history nor policy to recommend it.

The third divergence concerns the all-important question of how the class is to be formed. The 2013 Recommendation embodies the traditional and longstanding European conservatism regarding the formation of an aggrieved class on '*opt-in* principles', ie requiring the express consent or mandate of each group member, for his or her claim to be included within the group of persons who are entitled to claim compensation. Article 21 provides that:

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

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[12] *Viz*, the Group Litigation Order, contained in part 19.III of the Civil Procedure Rules 1998; and the representative rule, contained in Rule 19.6 of the Civil Procedure Rules (CPR).

[13] An Act Introducing a Consumer Collective Redress Action in the Code of Economic Law, dated 28 March 2014, and in force 1 September 2014.

[14] Book IV of the Consumer Code, 14th Parliament (session of 13 February 2014).

[15] See note 5 above, Articles 4–7, 'Standing to bring a representative action', pp L201/62–3.

[16] For a comparative perspective in the common law jurisdictions, see, eg V Morabito, 'Ideological Plaintiffs and Class Actions: An Australian Perspective' (2001) 34 *University of British Columbia Law Review* 459; R Mulheron, *The Class Action in Common Law Legal Systems* (Hart Publishing, 2004), pp 303–9.

[17] Sch 8, s 47B(8), as amended slightly by the Public Bills Committee (Commons), dated 6 March 2014.

[18] Under the heading, 'Constitution of the claimant party by "opt-in" principle', as a 'specific principle relating to compensatory collective redress'.

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By contrast, the UK Competition Class Action adopts an opt-in or opt-out approach for the formation of the class, depending upon judicial choice.[19] In competition law infringement claims, it is anticipated that an opt-out class action will be the norm, given the relatively low-value-claim-per-class-member, and the numerous consumers or businesses amongst whom that loss is typically spread. The opt-out model entails defining the class (eg 'those who purchased widgets between x date and y date') without requiring an individual mandate to sue on the part of those class members — so that any class member who falls within the definition, and who wishes to disassociate from the litigation, must take a proactive step to opt-out of the class, otherwise s/he is bound. It is argued, in Part IV, that the exceptional scenario of opt-out which the European Commission grudgingly permits — and only when 'duly justified by reasons of sound administration of justice' — is entirely defensible for the UK Competition Class Action. Indeed, the opt-out model warrants fuller consideration by Member States than has ever been endorsed by the European Commission itself. The only circumstance in which the UK Parliament is ad idem with the European Commission on class formation concerns sub-classes of foreign class members — for those must opt-in, no matter how the UK Competition Class Action is formed,[20] to ensure, inter alia, that those foreign class members have acceded to the jurisdiction of the UK court (an entirely correct drafting decision, in this author's view).[21]

Of course, it would be misleading to suggest that the European Commission and the UK Parliament differ across the spectrum of class actions design. Quite the reverse. There are, in fact, several points of commonality between them. Under both regimes, the class members can be natural or corporate persons, without restriction. Recovery of full compensatory damages is advocated for class members under both (in contrast to the recent French group action, in which only pecuniary damages are permitted).[22] Certification, or authorisation, is mandatory, by way of upfront judicial verification that the collective action is indeed appropriate to go forward in that form. Exemplary damages are expressly prohibited, on the basis that they would lead to over-compensation. Third party funding of collective actions is permitted under both (albeit that there is a notable divergence about lawyers' contingency fees, with the 2013 Recommendation permitting that method of funding where there is

[19] Consumer Rights Act 2015, inserting a new s 47B(7)(c), and s 47B(11) in the Competition Act 1998.

[20] Per Sch 8, s 47B(11)(b) (re 'opt-out collective proceedings' which involve non-domiciled class members); and s 49A(10)(b) (re collective settlements which involve non-domiciled class members). See too, the *Explanatory Note* to the Consumer Rights Bill, [421], http://www.publications.parliament.uk/pa/bills/cbill/2013-2014/0161/en/14161en.htm [last accessed 26 April 2014].

[21] For the numerous reasons and justification underpinning the differing treatment of foreign class members, see, eg R Mulheron, 'In Defence of the Requirement for Foreign Class Members to Opt In to an English Class Action' in D Fairgrieve and E Lein (eds), *Extraterritoriality and Collective Redress* (Oxford University Press, 2012), ch 14; and R Mulheron, 'The Recognition, and *Res Judicata* Effect, of a United States Class Actions Judgment in England: A Rebuttal of *Vivendi*' (2012) 75 *Modern Law Review* 180.

[22] Book IV of the Consumer Code, Article 423-1 (ie no damages for personal, physical or psychiatric injury permitted).

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'appropriate national regulation of those fees in collective redress cases',[23] whereas the UK Parliament has expressly prohibited percentage contingency fees for opt-out collective proceedings.)[24] Costs-shifting, or the 'loser-pays' principle, is preserved under each instrument, ostensibly as a deterrent to vexatious, or 'blackmail'-type, litigation.

However, it is the previously-mentioned discord between the 2013 Recommendation and the legislative drafting in the 2015 UK Competition Class Action — concerning horizontal (generic) implementation, standing to sue, and class formation — which is of most interest. Essentially, it reflects the deeply-divisive policy issues which pervade the class actions landscape across Europe. Moreover, it also demonstrates a deliberate, and carefully-considered, departure by the UK legislature from the European Commission's non-binding principles. These disparities have manifested due to both political preference and legal pragmatism.

II. HORIZONTAL VERSUS SECTOR-SPECIFIC REFORM

The irony is that, several years ago, the European Commission initially promoted a *sectoral* approach to collective actions reform, borne of independent studies commissioned by separate Directorates, whilst UK policy-makers have long advocated the introduction of a *generic* class action that would be able to cope with any type of grievance in any sector of the market. How odd it is, then, that precisely the *opposite* position from where each jurisdiction started has manifested during the course of 2013–15.

At European level, a rather tortuous path has been trodden since the issue of collective redress began to feature prominently on the Commission's agenda. At the very outset, the reform was sectorally-oriented. Each of the Competition Directorate-General (in the context of anti-trust infringements)[25] and the SANCO Directorate-General (in the context of consumer collective redress)[26] considered the topic for almost a decade, from 2005, with a variety of options being canvassed.[27] A number

[23] See note 5 above, Article 30.

[24] Sch 8, s 47C(8), and critiqued by the author as being an inappropriate bar on funding in: 'Damages-Based Agreements', in R Pirozzolo (ed), *Litigation Funding Handbook* (The Law Society, 2014), ch 7.

[25] Key documents include: *Green Paper on Damages Actions for Breach of the EC Antitrust Rules*, COM (2005) 672 (19 December 2005); *European Commission Staff Working Paper Accompanying the Green Paper*, SEC (2005) 1732; *White Paper on Damages Actions for Breach of the EC Antitrust Rules*, COM (2008) 165 (2 April 2008); *European Commission Staff Working Paper Accompanying the White Paper*, SEC (2008) 404 (2 April 2008); European Parliament, *Resolution on the White Paper on Damages Actions for Breach of the EC Antitrust Rules*, 2008/2154(INI) (26 March 2009). All documents are to be found at http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html [last accessed 18 April 2015].

[26] Key documents include: *Green Paper on Consumer Collective Redress*, COM (2008) 794 (27 November 2008); and a Consultation Paper for the purposes of a stakeholder's meeting in Brussels on 29 May 2009. These are to be found at: http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm [last accessed 18 April 2015].

[27] In the *Green Paper on Consumer Collective Redress*, ibid, five alternative options were explained: (1) no immediate action; (2) co-operation between Member States extending national collective redress systems to consumers from other Member States without a collective redress mechanism; (3) a mix of

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of studies were separately commissioned by the European Commission,[28] and influential reports published.[29] The starting point for reform was fairly low, as the Competition Directorate admitted in 2005: '[w]hile Community law... demands an effective system for damages claims for infringements of antitrust rules, this area of the law of the 25 Member States presents a picture of "total underdevelopment".'[30]

However, a more unified approach toward collective redress implementation was gradually demonstrated. In 2007, via the Commission's *EU Consumer Policy Strategy* 2007–13,[31] the Commission suggested a unification of the separate initiatives. One major motivation for that more cohesive direction was that '[c]onsumer and competition policymakers and enforcers at EU and national level should cooperate more closely to further their common goal of consumer welfare', so as to achieve more 'citizen-focused outcomes'.[32] That common drive became even more evident among three separate Directorates (the aforementioned two, plus that of Justice), via the publication, in 2010, of the joint information note, *Towards a Coherent European Approach to Collective Redress: Next Steps*.[33] That led to an important horizontal public consultation (of the same name) in 2011.[34] It was recommended therein that all Member States introduce generic collective redress mechanisms to facilitate the enforcement of rights that EU citizens enjoy under EU law. In 2012, the European Parliament's Resolution[35] on *Towards a Coherent European Approach to Collective Redress* concurred with the view that generic (horizontal) reform was the correct approach, so as to provide, 'uniform access to

(F'note continued)
policy instruments to strengthen consumer redress (including collective consumer ADR, and extending small claims to deal with mass claims); (4) binding or non-binding measures for a collective redress judicial procedure to exist in all Member States; or (5) a combination of different elements from these options.

[28] European Commission, *Consumer Redress in the European Union: Consumer Experiences, Perceptions and Choices: Qualitative Study* (2009); Civic Consulting (Lead) and Oxford Economics, *Evaluation of the Effectiveness and Efficiency of Collective Redress Mechanisms in the European Union* (2008).

[29] The European Consumers' Assn (BEUC), *Private Group Actions — Taking Europe Forward* (2007); European Economic and Social Committee, *Defining the Collective Actions System and its Roles in the Context of Community Consumer Law* (INT/348, 14 February 2008); Economist Intelligence Unit, *Collective Litigation in Europe: A Survey* (2007).

[30] *Green Paper on Damages Actions for Breach of the EC Antitrust Rules*, COM (2005) 672 final, p 2, 1.2.

[31] *Communication from the Commission to the Council, the European Parliament, and the European Economic and Social Committee*, COM (2007) 99 final, p 11.

[32] Ibid, pp 7 and 11, respectively.

[33] European Commission Joint Information Note, *Towards a Coherent European Approach to Collective Redress: Next Steps*, SEC (2010) 1192 (5 Oct 2010), issued by Vice-President Reding, Vice-President Almunia, and Commissioner Dalli (EU Commissioners for Justice, Competition and Consumer Policy, respectively). Earlier foreshadowed in a keynote speech by Vice-President Joaquin Almunia (responsible for EU Competition Policy), 'Common Standards for Group Claims Across the EU' (Law School, University of Valladolid, 15 October 2010).

[34] European Commission, *Towards a Coherent Approach to Collective Redress*, SEC (2011) 173.

[35] European Parliament Resolution No (2011/2089) (INI) (2 February 2012), p 15.

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justice via collective redress within the EU, and specifically but not exclusively dealing with the infringement of consumer rights'.

Further controversy lay ahead, however. In June 2013, a draft Directive on actions for damages in competition cases was proposed,[36] but which deliberately excluded collective redress.[37] The influential Committee on Economic and Monetary Affairs subsequently confirmed that the Directive 'should not require Member States to introduce collective redress mechanisms for the enforcement of Articles 101 and 102 of the Treaty',[38] whilst reiterating that collective actions for competition law should be 'encouraged, even if not made obligatory for the Member States'.[39] Given this reticence on the part of the Directive to *insist* upon collective redress, the importance of the 2013 Recommendation, which proposes the horizontal implementation of collective redress regimes in each Member State to aid the enforcement of rights granted under Union Law, is all the more apparent. Indeed, in justifying the fact that the Directive left it to the Member States as to whether to introduce collective redress as a means of private enforcement of competition law, the Commission viewed its horizontal Recommendation on collective redress (which necessarily applies to competition law), and its Directive on competition law which contains specific rules pertinent to the specialist area of competition law, as 'a "package" that, seen as a whole, reflects a balanced approach deliberately chosen by the Commission'.[40]

The Commission proposed, in its 2013 Recommendation, that national collective action regimes would be valuable, for example, in areas of personal data protection, financial services, consumer protection, competition, environment protection, and investor protection,[41] but endorsed a *generic* regime for Member States, which

[36] European Commission, *Proposal for a Directive of the European Parliament and of the Council 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*, COM (2013) 404 (11 June 2013); European Commission Staff Working Document, *Practical Guide on Quantifying Harm in Actions for Damages Based on Breaches of Art 101 or 102 of the Treaty on the Functioning of the European Union*, SWD (2013) 205 (11 June 2013). The European Parliament adopted the text of the Directive on 17 April 2014, and the text was approved by the Council of Ministers on 10 November 2014 – EP and Council Directive 2014/104/EU [2014] OJ L349/1.

[37] According to the European Commission's press release (MEMO/13/531, 11 June 2013), the Directive 'will apply to actions for damages available in Member States, whether individual (available in all Member States) or collective (currently available only in some Member States). However, the Directive does not oblige Member States to introduce collective actions if they are not available' (see Recital 13 of Directive 2014/104/EU). See too: Law Societies Joint Brussels Office, Brussels Agenda, *Parliament Excludes Collective Redress from Actions for Damages Proposal* (February 2014), p 5.

[38] European Commission, *Proposal for a Directive 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*, COM(2013) 404 final, p 23.

[39] Committee on Economic and Monetary Affairs, Report, A7-0089/2014 (4 February 2014), p 33.

[40] European Commission, *Towards a European Horizontal Framework for Collective Redress*, COM (2013) 401/2, p 4, note 10.

[41] See note 5 above, Recital 7.

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would apply to any so-called 'mass harm situation' where two persons (legal or corporate) allegedly suffered damage from the same unlawful behaviour.[42]

The shift at EU policy level, from sectoral to generic collective redress reform, undoubtedly reflects political conflicts and renewed co-operations, both within and beyond the Commission. Three significant reasons for the movement to generic reform were articulated. First, the Commission was concerned about 'the issue of inconsistencies between the different Commission initiatives on collective redress' and the risk of an 'uncoordinated' series of sectoral regimes. Secondly, collective redress was relevant to areas far wider than in those consumer and competition sectors in which the reform activity commenced in earnest in 2005. Thirdly, a horizontal approach to reform was considered more likely to achieve 'the smoothest interface with national procedural rules'.[43] Hence, the Commission concluded, in its 2013 report, that it was 'deem[ed] necessary to increase policy coherence and to take a horizontal approach on collective redress'.[44]

The shift in reverse, from generic to sectoral collective redress reform in the UK — to the point where the UK Parliament has not adhered to the Commission's Recommendation of horizontal reform in the now-enacted UK Competition Law Class Action — has been no less remarkable over the relative short period in which that change of policy has occurred. In fact, the enacted regime in Schedule 8 of the Consumer Rights Act 2015 is the second time in four years that a sectoral opt-out class action has been considered by the UK Parliament. The previous attempt — which concerned a collective action for 'financial services claims'[45] — was a casualty of the legislative 'wash-up' which followed the announcement of the General Election in 2010.[46] That was the first occasion upon which there was a clear political intent in the UK to enact an opt-out class action (under that proposal, as with the UK Competition Class Action, the collective proceeding would have proceeded on an opt-in or an opt-out basis, depending upon judicial choice).[47] In fact, the UK Competition Class Action will be limited in some crucial respects. First, jurisdiction to hear such claims will be vested exclusively in the Competition Appeal Tribunal (CAT); and secondly, the collective action only concerns a claim in respect of an infringement decision (ie a follow-on action) or an alleged infringement (ie a stand-alone action) of the relevant prohibitions of the Competition Act 1998 or of Articles 101(1) or 102 of the Treaty on the Functioning of the European Union.[48]

Given the horizontal (generic) reform recommended by the Commission in its 2013 Recommendation for 'mass harm situations', it is ironic that neither of the

[42] Ibid, Article 3(b).

[43] See note 40 above, p 16.

[44] See note 40 above, p 5.

[45] Contained in cll 18–25 of the Financial Services Bill 2010 (Bill 51 09–10) ('FSB'). The rest of the Bill progressed through wash-up, and achieved Royal Assent on 8 April 2010: Financial Services Act 2010, c 28.

[46] See further, R Mulheron, 'Recent Milestones in Class Actions Reform in England: A Critique and a Proposal' (2011) 127 *Law Quarterly Review* 288.

[47] FSB, cl 19(2).

[48] Sch 8, s 47A.

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recently-enacted French and Belgian regimes implement horizontal reform either. The French regime relates only to breaches by a defendant of its legal or contractual obligations pertaining to 'the sale of goods or provision of services',[49] or 'injuries result[ing] from anti-competitive conduct' (the latter as a follow-on action, where the unlawful conduct has been formerly adjudicated on by the national or European competition authorities).[50] The Belgian regime only applies to violations of contractual obligation by a defendant, or must be based on one of the particular European or Belgian consumer statutes which are identified in the group action legislation.[51]

Importantly, the *sectoral* nature of the UK's recent history of collective actions reform proposals — evidenced by both the ultimately-enacted UK Competition Class Action and the ultimately-unenacted financial services regime — is directly contrary to the recommendations of the UK's civil advisory body which preceded both of these proposals. In 2008, the Civil Justice Council of England and Wales (CJC) recommended the introduction of a *generic* regime of opt-out collective redress.[52] That preference for generic over sectoral reform was based upon four separate factors. First, there was evidence of the need for better redress measures across a range of sectors.[53] Secondly, the CJC acknowledged that, in appropriate cases, sectoral-specific regimes may need to sit alongside generic regimes, if their rules were so different that a separate regime was warranted (hence, sectoral regimes were not ruled out).[54] Thirdly, a majority of stakeholders who provided views to the CJC during its consultation preferred the generic, rather than sectoral, approach.[55] Fourthly, a generic regime would fit well with existing procedural regimes in England (*viz*, the Group Litigation Order had coped with grievances from wide-ranging areas, as had the representative action well before it).[56] The CJC concluded that opt-out reform was desirable, albeit with a strong system of 'checks and balances' in place, given that there was 'overwhelming evidence that meritorious claims, which could be brought, are currently not being pursued.'[57]

However, in 2009, the Ministry of Justice (MOJ) rejected that CJC recommendation for generic reform, although allowing that 'the Government considers that the

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[49] Book IV of the Consumer Code, Article 423-1.

[50] Ibid, Article 423-17. The action must be brought within five years of that decision: Article 423-18.

[51] Per Article XVII.36 of the Code of Economic Law. See further: S Voet, 'Belgium's New Consumer Class Action' in V Harsagi and C van Rhee (eds), *Multi-Party Redress Mechanisms in Europe: Squeaking Mouses?* (Intersentia, Antwerp, 2014), p 3.

[52] J Sorabji et al (eds), *Improving Access to Justice through Collective Actions: Developing a More Efficient and Effective Procedure for Collective Actions* (CJC Report, 2008). The author was one of the contributing authors to that report.

[53] R Mulheron, *Reform of Collective Redress in England and Wales: A Perspective of Need* (Research Paper for submission to the CJC, February 2008).

[54] See note 52 above, recommendation 1, pp 137–140.

[55] Ibid, pp 138–139, and Appendix A, 'Stakeholder Consultation', p 285.

[56] See note 53 above, pp 9–14.

[57] See note 52 above, p 17.

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only practical way forward is on a sector by sector basis'.[58] Hence, sectoral reform would be permissible where a need was demonstrated in that particular sector. A sector was described as a 'discrete area of economic or social activity, within which particular issues, including specific types of legal claim, may arise', and competition law was identified as one such example.[59] Two reasons were given by the Government for the rejection of any generic regime. First, there were 'potential structural differences between the sectors which will require different consideration' (eg different degrees of regulation, or suitable representative claimants, existed; and 'the balance of the issues concerning the merits of opt-in and opt-out' could vary). Secondly, there were economic considerations, in that 'defendants in some economic sectors might be particularly vulnerable to the risk of disproportionate "blackmail suits"'.[60]

For reasons explained elsewhere,[61] the author strongly disagrees with the MOJ's arguments for sectoral reform, and considers that reasoning to be flawed. Not only would a generic regime have dealt adequately and fairly with the two issues identified by the MOJ, but some serious potential inconsistencies in legislative drafting and policy-making may foreseeably arise with sectoral-based reform (a point which the European Commission also identified as being significant in its 2013 Recommendation, insofar as the European landscape was concerned). In addition, there are practical considerations that could easily arise from sectoral reform in the UK. For example, any appeal to the highest court on an interpretational point might not apply to another sectoral regime; satellite litigation as to whether a grievance is covered by a sectoral regime could arise; it could affect public confidence in the law if one sector had available methods of seeking redress via an opt-out regime and other sectors lacked any such measure at all, or might have one which was more stringently-worded; and the political complexities of achieving legislative reform, sector-by-sector, can never be under-estimated, as the 'wash-up' of the financial services regime aptly demonstrated.[62]

Hence, on this first point of departure between the 2013 Recommendation and the UK Competition Class Action, the author firmly believes that the UK policy-makers have taken a wrong turn, and should have endorsed the CJC's recommendation for generic reform, instead of favouring the sectoral path which is currently being pursued. As the European Commission has correctly identified, full coherence in policy and in legislative drafting is only possible with horizontal reform. However, regarding the other two notable divergences, the position is put, in Parts III and IV of this article, that the Commission's views are not to be favoured.

III. STANDING TO SUE: RESTRICTIVE VERSUS 'OPEN' STANDING

The political choice by the European Commission to vest standing in an ideological claimant, as the exclusive entity capable of instituting a class action, raises two

[58] MOJ, *Improving Access to Justice: Government Response* (July 2009), p 6 [12].

[59] Ibid, p 21.

[60] Ibid, p 6 [12]–[13].

[61] See R Mulheron, 'Recent Milestones' (2011) 127 *Law Quarterly Review* 288, pp 297–315.

[62] Ibid, pp 312–13.

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important legal conundrums. First, the inability of directly-affected class members to institute their own collective action for compensatory damages may cause serious detriment for those class members. Secondly, if an ideological claimant is to be the sole vehicle for commencing a collective action, the criteria by which to determine the adequacy of that claimant must be specified very carefully. Each dilemma will be considered in turn.

A. *Vesting Standing Exclusively in a Representative Entity: A Critique*

1. *A refusal or unwillingness to act*

The first problem with vesting exclusive standing in an ideological claimant is that it may not wish to act. That will leave directly-affected class members without any means of redress, if either a unitary action or some other means of collective redress, are not viable avenues.

This situation has been painfully demonstrated in English law. A follow-on representative action was contained in s 47B of the Competition Act 1998 (the 's 47B regime').[63] That regime has now been abolished, as a result of the recent reforms brought about by the implementation of Schedule 8.[64] Implemented in 2003,[65] the s 47B regime operated on opt-in principles, and permitted a specified body to institute an action for 'consumer claims made or continued on behalf of at least two individuals', for damages in respect of proven anti-competitive breaches.[66] The only 'specified body' ever statutorily-authorised was Which? (the English Consumers' Association), whose designation occurred on 1 October 2005.[67] There was only ever one representative action instituted by Which? under the s 47B regime — in respect of the price-fixing of replica England and Manchester United football shirts during 2000–01.[68] The Office of Fair Trading (OFT) found JJB Sports PLC and its co-defendants guilty of price-fixing, and imposed substantial fines on all defendants. At least 800,000 consumers overpaid; however, about 130 were identified in Which?'s claim form.[69] The s 47B claim was ultimately settled on confidential terms.[70]

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[63] No representative claim is possible under s 47B until an infringement (as defined in s 47A(5)) has been established. That decision, which paves the way for a potential follow-on action, may be made by the Office of Fair Trading (OFT), by the Competition Appeal Tribunal (CAT), or by the European Commission, per s 47A(6).

[64] The previous s 47B has been substituted, by virtue of the Consumer Rights Act 2015, per s 5 of Sch 8.

[65] The action has been available since 20 June 2003 (inserted by the Enterprise Act 2002, c 40, s 19).

[66] Pursuant to s 47B(1).

[67] Pursuant to: Specified Body (Consumer Claims) Order 2005, SI 2005/2365.

[68] The *Consumers Association v JJB Sports PLC* 1078/7/9/07. http://catribunal.org/239-640/1078-7-9-07-The-Consumers-Association.html [last accessed 18 April 2015]

[69] 'Which? action to settle' (*The Lawyer*, 10 December 2007) ('[a]n intense media campaign in early 2007 by Which? promised redress for hundreds of thousands of customers, but the time-lag between the price-fixing and the action meant that many people no longer possessed vital evidence such as receipts. Ultimately, the action named just 144 customers aiming to secure compensation of £20 each').

[70] As discussed in note 53 above, ch 8.

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Which? itself heavily-criticised the s 47B regime, remarking that, '[t]he single biggest hurdle … is the requirement to name claimants on the claim form. We believe that there should be a high degree of flexibility in this area. … Currently the claim form [used] in s 47B damages claims [is] front loaded, [it] must contain a concise statement of the relevant facts, legal issues, and amount claimed in damages. All essential documents must be annexed to the form. In practice, settling the claim form and supporting documents is a substantial amount of work.'[71] Which? concluded that '[t]he only real, practical way to get over this is to introduce an opt-out system.'[72] (The opt-in nature of the s 47B regime has elicited significant concern from other quarters too.)[73] Legal counsel for Which? opined that, in light of the experience in the 'football shirts' case, the '[c]osts and complexity of litigation process are likely to deter' Which? from instituting further actions.[74] True to this prediction, Which? brought no further s 47B actions, despite being the only designated body which could do so.

Of course, there may also be very serious resource implications for ideological claimants. A consumer organisation, or any other ideological claimant, does not exist solely to prosecute collective actions. The entity will have numerous other obligations (eg consumer education, advocating for legislative reform). Indeed, many will have charitable status, and as Which?'s Head of Legal Affairs realistically remarked, in the wake of the 'football shirts' case, '[a]s most representative bodies will be charities, there will always be concerns about proportionality if an opt-in system prevails — both from a cost and time perspective'.[75] The representative entity may not even be particularly well-resourced, compared with the defendant/s which it is pursuing on behalf of the class,[76] and may itself prefer a wider statutory designation of representative claimants with which to share the burdens of instituting and conducting such expensive and time-consuming litigation.[77] These concerns about instituting collective actions, given the resource limitations imposed upon consumer organisations, have not been a problem unique to England. The French consumer organisation, Que Choisir, shared similar experiences when

[71] See *Submission by Which? to the OFT's Discussion Paper of April 2007* (2 July 2007) [5.1]–[5.2], prepared by Ms Ingrid Gubbay, former Principal Campaigns Lawyer for Which?, in light of Which?'s experiences under the JJB Sports case, and cited in note 53 above, p 40.

[72] Per the former Head of Legal Affairs, Dr Deborah Prince, and cited in note 53 above, p 41.

[73] *Private Actions in Competition Law: Effective Redress for Consumers and Business: Recommendations from the OFT* (OFT916, 26 November 2007) [7.12], citing, in note 28 above, the JJB Sports case.

[74] P Ruttley (Clyde & Co LLP), 'The Lessons of the UK Consumers' Association case (2007)' (EU Civil Justice Day, Law Society, 25 October 2007), cited in note 53 above, pp 40–41.

[75] Dr Deborah Prince, former Head of Legal Affairs, Which?, personal communication (6 December 2007), and cited in note 53 above, p 41.

[76] See note 74 above, slide 28; and cited in note 53 above, p 44.

[77] As did Which?, as evidenced by the comments by former Principal Campaigns Lawyer for Which?, Ms Ingrid Gubbay, in the *Submission by Which? to the OFT's Discussion Paper* ('[w]e have always supported the proposal that the private enforcement regime should be opened up to other bodies for designation. The current system simply offers little real threat to would-be cartelists') (and cited in note 53 above, p 44).

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instituting an opt-in representative action[78] against mobile phone operators in respect of excessive phone charges in that jurisdiction.[79]

There were other publicly-acknowledged deficiencies with the s 47B regime too (eg the claim had to be concerned with goods or services received as *a consumer* and not in a business context;[80] and stand-alone actions were not permitted either).[81] Nevertheless, the fact that Which? remained the only 'specified body' permitted to bring representative actions under s 47B — and that this legislative model removed any ability for other ideological claimants (or, indeed, any well-financed individual who had a direct claim) to pursue an action on behalf of aggrieved consumers — was highly problematical for this follow-on collective action. The s 47B regime represented an important lesson against the vesting of exclusive standing to sue in an ideological claimant.

2. *Proving commonality and adequacy: conflicts of interest*

Ideological claimants also raise a legally difficult point to do with the degree of commonality and adequacy of representation necessary to certify a collective action. What if the class members have a conflict of interest among themselves, relating to the common issues in the dispute? How can an ideological claimant adequately represent them all?

Jurisprudence in longstanding class action regimes[82] demonstrates that conflicts among class members can also arise, say: where some class members are suing for one remedy (eg damages for breach of contract) and other class members are seeking another (eg a statutory recompense); where the damages claimed by one set of class members requires proof of the opportunities foregone, whereas the damages for other class members requires proof of overpayments; or where one set of class members is keen to maximise the damages that a defendant would need to pay, while other class members have a continuing business relationship with the defendant which depends upon that defendant's long-term financial fluidity and prosperity.

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[78] *UFC Que Choisir v Orange France, SFR and Bouygues Telecom* (2007).

[79] See BEUC, *Private Group Actions—Taking Europe Forward* (X/049/2007, 8 October 2007); and also derived from presentations given by UFC Que Choisir at various conferences: 'Stakeholder Workshop on Collective Redress' (DG-SANCO, Brussels, 6 June 2008); 'Conference on Collective Redress' (DG-SANCO, Lisbon, 9–10 November 2007); 'Collective Redress Brainstorming Event (DG-SANCO, Leuven, 29 June 2007), and discussed further in R Mulheron, 'The Case for an Opt-out Class Action for European Member States: A Legal and Empirical Analysis' (2009) 15 *Columbia Journal of European Law* 409, 433–434.

[80] Pursuant to s 47B(7).

[81] OFT, *Private Actions in Competition Law* (OFT916, 26 November 2007) at [4.6], [4.13].

[82] The numerous challenges to the adequacy of the representative claimant, on the basis of an alleged conflict of interest, across the common law class action regimes of Australia's federal regime, Canada's provincial regimes, and the United States' federal regime, are discussed in R Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, 2004), pp 276–287. The potential conflicts in distribution chains, and the problematic status of the passing-on defence, are also briefly discussed in R Mulheron, 'Competition Law Cases under the Opt-Out Regimes of Australia, Canada and Portugal' (2008) *Research Paper for Department of Business, Enterprise and Regulatory Reform*, pp 29–39.

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In the context of competition law claims, the problems of potential conflicts can be particularly acute, given the potential for dispute as to where the damage (ie the price-fixed component of the widgets) actually fell. It may be alleged that the direct purchasers of price-fixed widgets suffered no damage because they passed on the amount of any overcharge to their customers. Alternatively, it may be alleged that the end-consumers in the distribution chain suffered no damage because the first-line (direct) purchasers absorbed the overcharge themselves and then sold on to the end-consumers at normal prices. Inevitably, this raises intra-class conflict regarding where the damage rests, the methods (if any) by which class-wide damages can be proven, and the status of the passing-on defence. The potential conflicts between class members in different stages of the distribution chain was a key problem in proving the requisite 'same interest' among class members in the English representative action in *Emerald Supplies Ltd v British Airways PLC*,[83] discussed shortly.

Typically (but not always),[84] conflicts of interest among class members may be handled by the use of sub-classing, whereby separate representative claimants are appointed to adequately represent the interests of that sub-class.[85] This technique is permitted by the Draft CAT Rules which underpin the UK Competition Class Action.[86]

However, a key difficulty with the 2013 Recommendation is that, if a regime only confers standing to sue on an ideological claimant, then that one claimant cannot represent *conflicted* class members (which would bar the UK Competition Class Action, as discussed in the following section); no sub-class representative can be drawn from the class; and hence, some class members may not be included in the class action, even if they were to share common issues of fact or law with the claim being brought by the representative claimant. If other Member States follow the 2013 Recommendation and endorse an ideological claimant exclusively, then those regimes will inevitably suffer from a lack of capacity to cope with conflicts of interest that may arise. This point also strongly militates against the 2013 Recommendation's legislative policy which vests standing solely in the ideological claimant. A wider standing, encompassing directly-affected class members as representatives (as enacted in the UK Competition Class Action),[87] is the preferable choice.

B. *The Criteria Governing the Representative Entity*

From a legislative drafting point of view, an 'ideological claimant' can be one of three types: (i) at its widest, any entity or natural person which fits the general requirements of an 'adequate representative' for the class (the 'ad hoc ideological

[83] [2010] EWCA Civ 1284 (Mummery LJ, with Toulson and Rimer LJJ agreeing).

[84] Other methods of resolving conflicts of interest include: re-defining the common issues; redefining the class; or by excluding some class members from the class action altogether.

[85] R Mulheron, *The Class Action* (Hart Publishing, 2004), pp 184–8 and pp 287–9.

[86] CAT Draft Rules, r 6(4) and 8(1)(a).

[87] Per Sch 8, s 47B(8)(a).

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Table 1. The criteria (actual or proposed) governing the representative claimant in a UK Competition Class Action

The criterion	UK Competition Class Action
General adequacy	The representative would 'fairly and adequately act in the interests of the class members': r 6(2)(a); and that it is 'just and reasonable for that person to act as a class representative': r 6(1)(b), and Sch 8, s 47B(8)(b)
Financial adequacy	The representative 'will be able to pay the defendant's recoverable costs if ordered to do so' (r 6(2)(d)); and will be able to satisfy any undertaking as to damages, required by the CAT, where an interim injunction is sought: r 6(2)(e); and must also give an 'estimate of and/or details of arrangements as to costs, fees and disbursements' which the CAT orders that the representative must provide: r 6(3)(d)
No conflicts of interest	The representative 'does not have, in relation to the common issues for the class members, a material interest that is in conflict with the interests of class members': r 6(2)(b)
Veracity	The collective proceedings claim form 'shall be verified by a statement of truth signed and dated by the proposed class representative or ... his legal representative': r 3(3)
Pre-existence	CAT will consider whether the representative is 'a pre-existing body, and the nature and functions of that body': r 6(3)(b)
A plan	The representative must have 'a plan for the collective proceedings', including a method for notifying the class members of their progress, and 'a procedure for governance and consultation which takes into account the size and nature of the class': r 6(3)(c)

claimant'); (ii) at the mid-spectrum, any entity which is legislatively-nominated as an appropriate body to bring the class action (the 'designated ideological claimant'); or (iii) at its narrowest, a prescribed public authority (eg a national competition authority).

Interestingly, all three types are envisaged in the 2013 Recommendation,[88] whilst the UK Competition Class Action allows for just the ad hoc representative as ideological claimant.[89] Hence, both instruments permit the widest form of representative claimant. The inevitable caveat on this drafting choice in the 2013 Recommendation is that a Member State must carefully set the criteria which apply to that representative claimant at the certification of the class action. In that regard, the drafters of the UK Competition Class Action have rightly been careful to specify numerous criteria governing the representative claimant (the provisions in the Draft CAT Rules are also included in Table 1,[90] for the sake of completeness).

[88] See the definition of 'representative action' in Article 3(d), and the further provision in Articles 6 and 7.

[89] Per the inserted provision in the Enterprise Act 2002, s 15B(1)(c).

[90] This table was originally produced in R Mulheron, 'Recent United Kingdom and French Reforms of Class Actions: An Unfinished Journey' in E Lein et al (eds), *Collective Redress in Europe: Why and How?* (BIICL, 2015), p 113.

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Notably, the European Commission recommended that national collective redress regimes should provide for a representative entity which has 'a non-profit making character', and that there should be a 'direct relationship between the main objectives of the entity and the [EU] rights... claimed to have been violated in respect of which the action is brought'.[91] Coalescing with this, the UK Parliament's view is that law firms, third party funders, and special purpose vehicles (ie those entities which are formed specifically to act as representative claimant in a class action), should **not** be allowed to act as representative claimants.[92] Although this is not presently provided for in either the Consumer Rights Act 2015 or in the supporting Draft CAT Rules, the certification criteria above, as drafted, would surely properly exclude any such entity from consideration. On this particular point, the parallel viewpoint between the 2013 Recommendation and the UK Competition Class Action represents an important and welcome safeguard for the integrity of the regime.

IV. OPT-IN VERSUS OPT-OUT AND THE 'SOUND ADMINISTRATION OF JUSTICE'

The third and final point of divergence between the 2013 Recommendation and the UK Competition Class Action concerns the opt-in versus opt-out approach to class formation. To clarify, the opt-in approach, favoured by the Commission, requires aggrieved persons to mandate their intention to join the class, by express consent, prior to the levying of judgment or judicially-approved settlement order. It requires those identified class members to claim their individual compensation, if liability is proven or settled thereafter. The binding effect of the judgment or settlement applies only to those who opt-in to the action. The opt-out model, on the other hand, does not require an individual mandate to sue on the part of the class members. Rather, any class member who falls within the class definition but who wishes to remove himself or herself from the litigation (and from its binding effect) must take a proactive step to opt-out of the class. The damages may be assessed on a class-wide aggregate basis and without reference to the individual assessment of damages per class member; with an opportunity then for individual class members to come forward to claim their compensation; and with the destination of any residual unclaimed damages to be managed by statutorily- or judicially-approved methods.

Most opt-out actions need to convert to opt-in at some point. As the author has noted elsewhere,[93] at some stage, class members will have to 'put their feet on the sticky paper' and actively seek to establish individual entitlement to monetary relief, in the event that the common issues are decided in the class's favour, or the action is settled — unless certain specific scenarios apply (ie a direct refund can be made to class members in accordance with records held by the defendant, or a *cy-près* distribution of the entire damages sum is made).

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[91] See note 5 above, Article 4(a) and (b).

[92] *Private Actions in Competition Law: Government Response* (January 2013), [5.32].

[93] R Mulheron, 'Opting in, Opting Out, and Closing the Class: Some Dilemmas for England's Class Action Lawmakers' (2010) 50 *Canadian Business Law Journal* 376, p 384.

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A. *The Traditional European Endorsement of Opt-in*

The 2013 Recommendation's preference for an opt-in class formation reflects a long-favoured approach — not only at European level, but in many civil law European jurisdictions.[94] There is certainly nothing in any European Member State which resembles the generic longstanding opt-out class actions to be found in the United States,[95] Australia[96] and Canada.[97] However, some versions of opt-out regimes have been implemented in Member States, consisting of:[98] the representative opt-out model (eg the 'popular action' in Portugal,[99] which is still 'not very common');[100] the representative opt-out model, only used when the opt-in model is an inappropriate method of dispute resolution (eg as in Denmark);[101] and the settlement-only opt-out model (implemented in the Netherlands).[102]

Several reasons have been espoused for the general reluctance on the part of the majority of Member States to implement any, or any widely-available, opt-out class action regime. The European Parliament has endorsed the opt-in approach 'in order to avoid potential abuses', and as a safeguard 'in order to avoid unmeritorious claims and misuse of collective redress'.[103] The frequent European exhortations against 'US-style class actions', and the perceived excesses arising thereunder, are also oft-repeated[104]

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[94] Eg Sweden's Group Proceedings Act 2002; Poland's Act Asserting Claims in Class Proceedings 2009; Italy's Art 140 *bis* of the Consumer Code, amended by Law no 99 of 23 July 2009, and by Law no 27 of 24 March 2012; Switzerland's group action in its Civil Procedure Code, Article 71.

[95] As contained in Rule 23 of the US Federal Rules of Civil Procedure, in effect since 1966.

[96] As contained in Pt IVA of the Federal Court of Australia Act 1976, in effect 4 March 1992.

[97] The first common law provincial action was Ontario's Class Proceedings Act 1992, in effect 1 January 1993.

[98] Discussed in more detail in R Mulheron, 'The Case for an Opt-out Class Action for European Member States: A Legal and Empirical Analysis' (2009) 15 *Columbia Journal of European Law* 409, 415–25.

[99] Right of Proceeding, Participation and Popular Action, L No 83/95 (31 August 1995); and Establishing the Legal System Applicable to Consumer Protection, L No 24/96 (31 July 1996).

[100] JM Pimentel and JM Judice, 'Portugal' in I Dodds-Smith and A Brown (eds), *Class and Group Action*, 7th ed (ICLG, 2015), [1.9]. http://www.iclg.co.uk/practice-areas/class-and-group-actions/class-and-group-actions-2015/portugal [last accessed 26 April 2015]

[101] Administration of Justice Act, Act No 181 (28 February 2007), ch 23, §§ 254a–254k.

[102] Act on Collective Settlement of Mass Damages (27 July 2005) (the 'WCAM Act'). There were seven court-approved settlements reached under the Act between 2006 and March 2014, according to a presentation by Prof. Anne Keirse, 'Collective Redress: Dutch Experiences', at 'Collective Redress: Experiences and Prospects' (University of Zurich, 3–4 October 2014). A proposal to introduce into Dutch law a collective damages action, instituted by a representative entity, is presently under consultation, for scenarios where the defendant does not wish to settle a collective claim.

[103] European Parliament, Resolution of 2 February 2012*, 'Towards a Coherent Approach to Collective Redress',* 2011/2089(INI), [20] ('the European approach to collective redress must be founded on the opt-in principle, whereby victims are clearly identified and take part in the procedure only if they have expressly indicated their wish to do so').

[104] Eg European Parliament, *Resolution of 26 March 2009 on the White Paper on Damages Actions for Breach of the EC Antitrust Rules*, 2008/2154 (INI), Recital I ('it is essential that procedures and safeguards are put in place to ensure that all parties receive fair treatment and that, at the same time,

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(most recently by the European Commission itself).[105] Moreover, a collective redress system which embraces victims unidentified before judgment 'is contrary to many Member States' legal orders, and violates the rights of victims who might participate in the procedure unknowingly, and yet be bound by judicial decision'.[106] For example, the Swiss Parliament, when introducing a new Civil Procedure Code in 2011, expressly rejected a US-style class action for Swiss civil procedure, partly because of the 'central principle' that the parties must exercise sole control over the object of the dispute[107] (albeit that a proposal to introduce an opt-out settlement-only regime for financial services claims is presently under consultation).[108] Similarly, French law contends that the claimant must have a legitimate interest in the success or dismissal of his claim, which requires that s/he has a direct and personal interest. This ethos mandates that litigants should be identified and represented,[109] and indeed, forms the basis of the recently-enacted French opt-in group action.[110]

Furthermore, it has been said that the practicalities of *res judicata* and judicial process favour opt-in. The Danish Ministry of Justice explained that opt-in benefits the *court*, because it 'knows exactly on whom the judgment will have a binding effect (legal force) and that the right of the individual to dispose of his or her own contractual relations is not restricted'; it benefits the *defendant*, because it 'safeguard[s] the defendant's need for predictability, seeing that the defendant will have an overview of the members of the class from a certain time in the proceedings (the expiry of the opt-in time limit) and will thereby be able to predict the consequences of a judgment'; and it benefits *claimants*, because it 'provides a clear

(F'note continued)

there is no abuse of that system, such as has occurred in other legal systems, in particular in the United States'); European Economic and Social Committee, *Opinion on the White Paper on Damages Actions for Breach of the EC Antitrust Rules*, 2009/C, 24–25 March 2009, [4.4.2] ('The EESC supports the broad consensus among European politicians and stakeholders that the EU must avoid the risk of US-style abuses'); Commr Neelie Kroes, Competition Policy, 'Making Consumers' Right to Damage a Reality: The Case for Collective Redress Mechanisms in Antitrust Claims' (Speech/07/698) ('I am well aware of the concerns about importing a system which, in combination with other features, have led to excesses in non-European jurisdictions. … We have learned from these foreign experiences, their strengths and their weaknesses. We are not in favour of introducing wholesale a system which would be alien to our European traditions and cultures, or which would encourage unmerited claims. I am confident that we, in Europe, are able to design solutions firmly embedded in our European cultures and traditions').

[105] See note 5 above, Recital 2 ('Europe must refrain from introducing a US-style class action system or any system which does not respect European legal traditions').

[106] European Parliament, *Resolution of 2 February 2012* (2011/2089 (INI)), [20].

[107] Noted in P Haas, 'Switzerland' in *Class and Group Actions 2014*, 6th ed (ICLG, 2014), [1.1].

[108] The so-called Group Settlement Procedure will, if enacted, be contained in the Federal Financial Services Act, Section 2, Articles 105–116 (discussed at the conference, 'Collective Redress: Experiences and Prospects' (University of Zurich, 3–4 October 2014)).

[109] P Karlsgodt (ed), *World Class Actions: A Guide to Group and Representative Actions Around the Globe* (Oxford University Press, 2012), [4.5.2.4.2].

[110] See Book IV of the Consumer Code, Article 423-5.

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overview of who will be covered by the binding effect of the judgment, which will facilitate the execution of the judgment'.[111]

However, the 2013 Recommendation allows that an opt-out class action be permitted in individual Member States, 'by law or by court order', provided that it be 'duly justified by reasons of sound administration of justice'.[112] This acknowledgement is important, and reflects the reality that the arguments in favour of either opt-in or opt-out are quite divided, and not at all one-sided.[113] However, it will clearly be for any Member State which favours the opt-out approach to justify that choice, in the face of the recent 2013 Recommendation. Hence, the following section argues that the disappointing and/or difficult legal treatment of English class members to date has provided a clear mandate for the UK Government's decision to endorse opt-out, by virtue of the forthcoming UK Competition Class Action.

Interestingly, there had been a number of reform proposals in the UK, dating back to 1994, but all had recommended an *opt-in* model.[114] Hence, the Financial Services Bill 2010 (in proposing an opt-out approach) represented a remarkable departure from previous policy (and legislative enactments)[115] — and the current competition law reform continues that more liberal trend.

B. *The Exceptional Scenario, When 'Duly Justified'*

This section seeks to justify, explicitly, the 'why' of this article's title, ie why the UK Parliament was correct to depart from the general opt-in recommendation of the Commission, and permit the judicial choice of opt-in or opt-out under the UK Competition Class Action. There are, in the author's view, ten separate justifications as to why the 'sound administration of justice' dictates that an opt-out class action has properly been provided-for, by the UK legislature and the CAT rules-making body.[116]

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[111] New Rules on Class Actions under Danish Law' (Procedural Law Division, 26 June 2007), pp 4–5 [copy on file with the author].

[112] See note 5 above, European Commission, Article 21.

[113] See the dual-sided arguments articulated in note 85 above, pp 37–38, and the law reform reports and sources cited therein.

[114] *Viz*, Scottish LC, *Multi-Party Actions: Court Proceedings and Funding* (DP 98, 1994); and later, *Multi-Party Actions* (Final Report, 1996); Law Society Civil Litigation Committee, *Group Actions Made Easier* (1995), which proposed an opt-in rule of 14 parts; Lord Chancellor's Dept (LCD), *Proposed New Procedures for Multi-Party Situations: Consultation Paper* (1997); and the subsequent *Draft Rules and Practice Direction* (1999); LCD, *Representative Claims: Proposed New Procedures: Consultation Paper* (2001), and *Consultation Response* (2002), all discussed in note 85 above, pp 94–97.

[115] To reiterate, the opt-in model was implemented via the Group Litigation Order in CPR Pt 19.III, was always a feature of the representative rule in CPR 19.6, and was implemented in the previous s 47B of the Competition Act 1998.

[116] This section of the article draws upon the author's previous conference presentations: 'Increasing Access to Justice through EU Class Actions' (European Parliament, Brussels, 12 November 2012) (presentation: 'Access to Justice as a Human Right: An English Perspective'); and 'European Competition and Consumer Day' (Dublin Castle, Dublin, 24 May 2013) (presentation: 'Class actions for Competition Law Grievances in England: Is Reform (Finally) in the Offing?'). Some of these ten points are drawn from and expanded upon in the author's earlier works, *Reform of Collective Redress* (see note

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Essentially, these justifications fall into three groupings: the inadequacy of presently-available domestic procedural devices; the successful — or sometimes fruitless — attempts to use opt-out regimes elsewhere; and evidence of lengthy dissatisfaction by domestic policy-makers and judiciary alike. These reasons pertain specifically to the competition law context, although some of them are reflected more widely in the general consumer sphere, as discussed by the author elsewhere.[117] It is further submitted that the lessons conveyed by these factors are (or should be) instructive for other Member States and for the European Commission. Dealing with each in turn:

1. *Inadequacies of existing domestic regimes*

The unsuccessful attempt by the victims of an international air cargo cartel to use the long-standing English representative rule[118] in *Emerald Supplies Ltd v British Airways PLC*[119] — when that particular cartel *has* been the subject of opt-out class actions litigation in Canada,[120] the United States,[121] and Australia[122] — has only served to highlight how totally inadequate that representative rule is, for any grievance where class members have allegedly suffered different amounts of damages.

The Court of Appeal called *Emerald* 'fatally flawed',[123] because the class members did not have the requisite 'same interest' which the rule required. The class members did not know, at the outset of the action, whether they were class members, given that, if the passing-on defence could be successfully raised such that some class members suffered no loss, that would mean that 'the criteria for inclusion in the class depend[ed] on the outcome of the action itself', which was impermissible under the rule.[124] The relief claimed by *Emerald* was not 'in its nature beneficial to all'[125] whom it purported to represent,

(F'note continued)

53 above), 'The Case for an Opt-Out Class Action for European Member States' (2009) 15 *Columbia Journal of European Law* 409, and, 'The Impetus for Class Actions Reform in the Competition Law Sector from a Judicial and Litigant Perspective' in S Wrbka et al (eds), *Collective Actions: Enhancing Access to Justice and Reconciling Multilayer Interests?* (Cambridge University Press, 2012), ch 15.

[117] See note 53 above.

[118] Per CPR 19.6.

[119] [2010] EWCA Civ 1284, [2011] 2 WLR 203 ('*Emerald*').

[120] See, eg formerly *Nutech Brands Inc v Air Canada* [2009] CanLII 7095 (Ont SCJ), and now litigated under the title, *Airia Brands Inc v Air Canada* [2011] ONSC 6286. The author was one of the expert witnesses in this case, on behalf of one of the defendant airlines, Cathay Pacific Airways Ltd.

[121] See *In Re Air Cargo Shipping Services Antitrust Litig*, 2008 US Dist LEXIS 107882 (EDNY, 26 September 2008).

[122] See the website of Maurice Blackburn, 'Air Cargo Class Action', and settlement proceedings reached on 13 Sep 2013, including the Court Notice to Group Members: http://www.mauriceblackburn.com.au/areas-of-practice/class-actions/current-class-actions/air-cargo-class-action.aspx [last accessed 18 April 2015].

[123] [2010] EWCA Civ 1284, [62].

[124] [2009] EWHC 741 (Ch) [34]–[37] (Chancellor Morritt), and aff'd on appeal, ibid.

[125] Drawing from the oft-cited meaning of 'same interest' in *Duke of Bedford v Ellis* [1901] AC 1 (HL) 8, and cited in *Emerald* [2010] EWCA Civ 1284, [46].

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because the class was potentially beset with conflicts of interest in proving a constituent element of the cause of action, *viz*, damage (because of the aforementioned question of which class members absorbed the price-fixed overcharge, and which class members successfully passed it on).[126] Indeed, the Court of Appeal showed no willingness to fit the claim within the auspices of the representative rule. It did not explore the notion that the class members shared 'common ingredients' among their claims sufficient to support declaratory relief;[127] the possibility of sub-classing (previously endorsed under the English representative rule)[128] was not considered; and the technique of class redefinition, so as to narrow the class and exclude from the representative action those whose loss had been passed on to others down the supply chain,[129] was not used either.

As the author has described elsewhere,[130] the decision in *Emerald* occurred exactly a century after the leading representative rule case of *Markt & Co Ltd v Knight Steamship Co Ltd*, and '[b]oth decisions demonstrate a judicial shackling of the rule, to the point where it lacks any degree of reasonable utility at all, except in the most limited of cases.'[131] Unfortunately, the procedural skirmishing which ultimately doomed *Emerald* also compares unfavourably with the realities of collective redress in other major common law jurisdictions, whose law-makers have proactively 'moved on' from versions of the English representative rule, so as to provide litigants in those jurisdictions with a feasible procedural alternative, *viz*, an opt-out class action.[132]

Similarly, the opt-in s 47B representative follow-on action was of spectacularly-limited utility (as previously discussed in this article). The overall outcome in the solitary 'football shirts' case of *Consumers' Association v JJB Sports PLC*[133] was less-than-praised too. Without any possibility of aggregate assessment of damages under the s 47B regime, the damages payable were entirely dependent upon the number of people who opted in. As one commentator remarked at the time, 'for [defendant] JJB, they must also be smiling. Yes, they will have to pay £20,000 upfront, and that amount could rise substantially — but it probably won't'.[134]

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126 Ibid, [64].

127 Per *Prudential Ass Co Ltd v Newman Industries Ltd* [1981] Ch 229 (Vinelott J).

128 See, eg *The Kyriaki* [1992] 1 Lloyd's Rep 484; *Haarhaus v Law Debenture Trust Corp* [1988] BCLC 640, and discussed further in R Mulheron, 'From Representative Rule to Class Action: Steps Rather Than Leaps' (2005) 24 *Civil Justice Quarterly* 424, 441–442.

129 [2009] EWHC 741 (Ch), [37].

130 R Mulheron, 'A Missed Gem of an Opportunity for the Representative Rule' [2012] *European Business L Rev* 49 (re the appeal decision); and '*Emerald Supplies Ltd v British Airways PLC*: A Century Later, the Ghost of *Markt* Lives On' [2009] *Competition Law* 159 (re the first instance decision).

131 R Mulheron, 'The Ghost of *Markt* Lives On', ibid, p 159.

132 R Mulheron, 'A Missed Gem', note 130 above, p 49.

133 Case 1078/7/9/07. Discussed further in note 53 above, ch 8.

134 M Herman, 'Everyone's a winner in football shirts settlement' (*The Times*, 9 January 2008). The terms and result of the settlement remained confidential.

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The lack of any Group Litigation Order for a competition law infringement, since that (opt-in) regime's availability in May 2000, has been notable[135] (and noted).[136] Whilst GLOs have proven useful for environmental, nuisance, tax-related, and other grievances, competition law grievances have not troubled the regime at all.[137] This renders all the more curious Chancellor Morritt's observation, in *Emerald*, that the price-fixed victims' litigation against the airlines justly would be better served by instituting their actions under the GLO regime, because the 'existing 178 additional claimants, and any others who seek to join in [later] are more conveniently accommodated under that procedure'.[138] Although Chancellor Morritt remarked that the GLO achieves 'the avoidance of multiple actions based on the same or similar facts',[139] other judges have (accurately) noted quite the opposite, pointing out that every individual potential class member who wishes to join the GLO must make an individual claim and have their claim added to the group register.[140] At least the Court of Appeal in *Emerald* did not advocate the GLO regime, for those price-fixed victims who found the representative rule so entirely lacking in utility. Nevertheless, the irrelevance of the opt-in GLO regime has undoubtedly contributed to the enactment of the UK Competition Class Action.

The sparse private enforcement landscape was also enhanced, in England, by the relative paucity of follow-on actions for damages instituted by *a directly-affected victim* of anti-competitive conduct, pursuant to s 47A of the Competition Act 1998.[141] That regime (as the CAT has remarked) was specifically 'created by Parliament with a view to facilitating claims for damages or restitution',[142] and that follow-on actions provide undoubted advantages over stand-alone actions (especially given that evidence of unlawful conduct can be difficult for a stand-alone claimant to gather).[143] Hence, the political appetite to improve redress was genuinely-formed, but ultimately lacking in effectiveness. Some s 47A actions were instituted in respect of, for example, the supply of non-potable water,[144] educational services at independent senior schools,[145] predatory conduct against a bus company in South Wales,[146] the service of coal haulage by rail,[147] cremation

[135] The list of GLOs is available from the Ministry of Justice, at http://www.justice.gov.uk/courts/rcj-rolls-building/queens-bench/group-litigation-orders [last accessed 18 April 2015].

[136] The author has discussed this particular conundrum elsewhere, eg note 53 above, ch 3; and 'The Ghost of *Markt* Lives On', see note 130 above, pp 171–4.

[137] See the categorisation of GLOs in note 53 above, ch 3.

[138] [2009] EWHC 741 (Ch), [38].

[139] Ibid, [38].

[140] *Boake Allen Ltd v HMRC* [2007] UKHL 25, [2007] 1 WLR 1386, [32].

[141] As inserted by s 18 of the Enterprise Act 2002.

[142] *BCL Old Co Ltd v Aventis SA* [2005] CAT 2, [28].

[143] *Cityhook Ltd v OFT* [2007] CAT 18, [205]–[210].

[144] *Albion Water Ltd* (Notice of Claim for Damages dated 2 July 2010).

[145] *NJ and DM Wilson* (Notice of Claim for Damages dated 21 January 2009).

[146] *DB Fowles* (Notice of Claim for Damages dated 24 January 2011).

[147] *Freightliner Ltd* (Notice of Claim for Damages dated 28 August 2008).

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services,[148] the price-fixing of the amino acid methionine,[149] and the sale of electrical and mechanical carbon/graphite products.[150] However, it seems that these represent a small fraction of the overall proven anti-competitive infringements which could theoretically give rise to a follow-on action.[151]

At least the failure of s 47A to permit stand-alone actions (as criticised by the former CAT President,[152] and by the English Court of Appeal)[153] has been remedied by the UK Competition Class Action, for the CAT will acquire jurisdiction to hear stand-alone actions, and on an opt-out basis. As for the s 47A regime, it has been abolished under the recent reforms enacted in Schedule 8.[154]

2. *Looking elsewhere for solutions*

Ironically, English class members have sometimes had to look to the US class action regime for any hope of redress. Regarding the international fuel surcharge cartel involving air passengers of British Airways and Virgin on long-haul passenger flights between 2004–06, English class members joined the relevant US federal class action as 'add-on sub-classes', successfully. The settlement reached in the Californian District Court in *Intl Air Transport Surcharge Antitrust Litig*[155] was rightly regarded as a legal milestone,[156] in that it was the first time that a domestic US sub-class and an English sub-class had been treated *entirely equivalently* in respect of the compensation awarded in a US class action (albeit that the English 'add-on' class was an *opt-in* class; and any unclaimed damages in respect of its sub-classes reverted to the defendant, and was not awarded *cy-près* as for the US sub-class).[157] However, the fact that the UK-based class members were required to comprise an 'add-on' foreign class to a US class actions settlement was testament to the lack of remedial options available to those UK-based price-fixed victims.

The abovementioned fuel surcharge settlement was one of the fortunate 'add-on' foreign classes which were not subject to successful legal challenge. Not all add-on classes have received such a positive reception. Several legal difficulties have arisen,

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[148] *JJ Burgess & Sons* (Notice of Claim for Damages dated 23 August 2007).

[149] *Moy Park Ltd* (Notice of Claim for Damages dated 15 February 2010).

[150] *Emerson Electric Co* (Notice of Claim for Damages dated 28 February 2007).

[151] See note 53 above, ch 13.

[152] Sir Gerald Barling, 'Collective Redress for Breach of Competition Law—A Case for Reform?' [2011] *Competition LJ* 5, 7.

[153] *Enron Coal Services Ltd (In Liq) v English Welsh & Scottish Rwy Ltd* [2011] EWCA Civ 2, at [142]–[143].

[154] Sch 8, s 4, whereby s 47A has been substituted.

[155] 2008 US Dist LEXIS 50415 (ND Cal, 25 Apr 2008, Judge Breyer), referring to settlement agreements dated 15 Feb 2008, approved pursuant to r 23(e) of the US FRCP. See sub-class descriptions at order 3, pp 3–4.

[156] Cf earlier settlements which differed in their treatment of US and UK class members, eg *Kruman v Christie's Intl PLC*, 284 F 3d 384 (2d Cir 2003); *In re Auction Houses Antitrust Litig*, 2001 US Dist Lexis 1713 (SDNY 2001).

[157] See further R Mulheron, 'The Recognition, and *Res Judicata* Effect, of a United States Class Actions Judgment in England' (2012) 75 *Modern Law Review* 180, 186–190.

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regarding attempts to convince a United States' court that it was an appropriate forum in which to determine a UK class member's grievance.[158] To provide just a few examples, the US court may lack subject-matter jurisdiction over foreign (including UK) class members;[159] the UK class members may have their class actions suit dismissed because of *forum non conveniens*, if England is held to be the better forum (eg where all defendants consent to the English courts' jurisdiction, or the rules of causation were more favourable in English law);[160] the class constituted an 'f-cubed' class (ie foreign investors who purchased shares in foreign companies that traded on foreign exchanges) and was thus impossible to certify because the relevant US securities law[161] did not have extra-territorial effect;[162] or the inclusion of foreign class members may render the US class action more difficult to certify, in that commonality would be achieved more easily if they were excluded.[163] This variety of misfortunes in attempting to join US class actions would not have been necessary, if an opt-out regime had been available in the UK.

Additionally, there is the separate conundrum of whether absent UK class members, who do not opt out of a US class action, would be bound by the judgment or judicially-approved settlement issued by a US court. In *Vivendi Universal SA Securities Litig*,[164] the US District Court concluded that, whilst there was 'no clear authority addressing the *res judicata* effect of a US class action judgment in England', its view was that, 'English courts, when ultimately presented with the issue, are more likely than not to find that US courts are competent to adjudicate with finality the claims of absent class members and, therefore, would recognize a judgment or settlement in this action.' However, the author strongly disagrees with that view, for reasons expressed elsewhere.[165] The certainty (in this author's opinion) that a judgment or settlement reached in any 'global class action' issued by a North American court, which purported to bind absent English class members who had not opted out, would not be recognised by an English court nor be given *res judicata* (preclusive) effect in England, exacerbates the lack of redress available to those English class members.

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[158] As analysed in R Mulheron, 'The Case for an Opt-out Class Action for European Member States' (2009) 15 *Columbia Journal of European Law* 409, 441–48. Six separate legal problems are discussed therein.

[159] Per the vitamin price-fixing cartel in *F Hoffmann-La Roche Ltd v Empagran SA*, 542 US 155 (2004).

[160] For English class members who sued in respect of the HIV haemophiliac litigation, and Vioxx, see, respectively: *Factor VIII or IX Concentrate Blood Products Liab Litig*, 408 F Supp 2d 569 (ND Ill 2006), aff'd: 484 F 3d 951 (7th Cir 2007); *Vioxx Litig*, 395 NJ Super 358 (2007), aff'd: 936 A 2d 968 (2007).

[161] Securities Exchange Act, §§ 10(b), 20(a), 15 USC § 78a (1934).

[162] For English investors excluded on that basis, see: *Re Parmalat Sec Litig*, 479 F Supp 2d 526 (SDNY 2007).

[163] Per *Daimler Chrysler AG Securities Litig*, 216 FRD 291, 300–1 (D Del 2003).

[164] 242 FRD 76, 102–3 (SDNY 2007).

[165] R Mulheron, 'The Recognition, and *Res Judicata* Effect, of a United States Class Actions Judgment in England' (2012) 75 *Modern Law Review* 180.

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3. *Domestic policy-making, political and judicial dissatisfaction*

Empirical research has shown that very significant gaps exist in redress for consumers and small-and-medium-enterprises in the competition law sector in the UK. The authors of the 2007 Deloitte and Touche LLP survey[166] described their findings in depressing terms: respondents ranked private damages actions for anti-competitive conduct fifth (out of five), in terms of importance in deterring infringements, leading to the conclusion that 'the threat of private damages actions is seen as a relatively unimportant factor in creating a deterrent effect';[167] 22% of respondents considered that their company had been harmed by breach of a competition law by a third party, but more than half of these did not even consider bringing a private action for damages, principally because the expected costs outweighed the expected benefits of the litigation; and just over 2% of respondents had ever brought an action for perceived competition law infringements.[168] The author's own empirical study of collective redress demonstrated that, over the period of 2001–07, there were very few follow-on actions brought in England, in respect of either OFT or European Commission infringement penalty decisions (the study cited only eight).[169] At that time, England's private enforcement landscape lagged behind that of Canada's, in particular.[170]

An efficient and powerful UK economy depends (according to the Government) upon effective private enforcement of the substantive competition laws of the jurisdiction. This, in turn, has been said to depend (in part) upon the introduction of an opt-out regime. In that regard, the OFT frankly admitted, in 2007,[171] that 'private actions have not played the role that was envisaged for them ... there remain significant barriers to those who have suffered loss (consumers and small and medium-sized businesses, in particular) taking a private action, such that the likelihood of obtaining compensation remains remote, and the incentives for business to comply with competition law are more limited than was intended. This impedes the overall effectiveness of the competition regime in the UK, such that the regime is not yet delivering the productivity and competitiveness benefits to the UK economy that were originally contemplated.' Five years later, the Government conceded that it was important to implement an opt-out collective action, in order 'to help strengthen the competition framework, by empowering businesses to tackle anti-competitive behaviour that is stifling growth.'[172] Despite the responses to the proposal of an opt-out regime generating 'the most heated debate',[173] the Government concluded,

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[166] *The Deterrent Effect of Competition Enforcement by the OFT* (Nov 2007), with key findings at [5.84]–[5.96].

[167] Ibid, [5.84].

[168] See the summary of the report provided in note 53 above, pp 60–62.

[169] See note 53 above, pp 50–57.

[170] R Mulheron, 'Competition Law Cases under the Opt-out Regimes of Australia, Canada and Portugal' (2008) *Research Paper for BERR*. There were 35 separate class actions, instituted in respect of competition law infringements, across the various Canadian provincial regimes, up to 2008.

[171] OFT, *Private Actions in Competition Law* (OFT916, 26 November 2007), 73 [2.2].

[172] BIS, *Private Actions in Competition Law: Government Response* (January 2013), [3.2].

[173] Ibid, [3.8].

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in 2013, that anti-competitive conduct needed to be redressed, via the introduction of opt-out (and its ancillary design feature of aggregate damages), because the costs of such behaviour 'include costs to society as a whole, arising from productive inefficiency'.[174]

Finally, influential commentary by senior judiciary, regarding the unsatisfactory state of affairs, has served as a prelude to the introduction of the UK Competition Class Action. Sir Gerald Barling, former President of the CAT, remarked, extra-curially, that, '[i]n my view, there are a number of benefits that may flow from introducing an opt-out regime, at least in the UK. .... such a procedure would, of course, remove the often significant hurdle of enticing a sufficient number of consumers to sign up to a claim, where its value to each claimant may be no greater than a few pounds.... It is ironic that the underlying purpose of competition law is said to be to protect the consumer, yet... the ultimate consumer is normally unable or unlikely to seek recompense, even where an unlawful cartel somewhere in the chain of supply has been exposed and punished.'[175] Senior judges also noted the shortcomings of the s 47B regime: eg in *Enron Coal Services Ltd (in liq) v English Welsh & Scottish Rwy Ltd*,[176] Jacobs LJ criticised the s 47B regime as 'likely to be of little use in practice, after the very limited success of the one claim brought so far.' Significantly, this pattern of judicial requests for a more effective (opt-out) system by which to deliver meaningful justice to groups of aggrieved persons has previously been a hallmark of successful class actions reform in many common law jurisdictions.[177] The impact of judicial dissatisfaction, about the procedural regimes pursuant to which they are required to decide mass grievances, cannot be under-estimated.

Hence, to conclude, the 'sound administration of justice' has been served, in the UK, by the forthcoming implementation of a class actions regime which will be either opt-in or opt-out, depending upon judicial choice. The ten justifications outlined above demonstrate, in combination, that a further means of collective redress is required in that jurisdiction, as a 'last resort' measure, to address widespread and uncompensated grievances on the part of UK class members. Having said that, the authorisation of an opt-out regime will be governed by a restrictive certification matrix which will not permit any but the most suitable cases to go forth on an opt-out basis. A summary of the certification criteria which will apply under the UK Competition Class Action is contained in Table A1.[178]

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[174] Ibid, [3.11].

[175] Sir Gerald Barling, 'Collective Redress for Breach of Competition Law' [2011] *Competition Law Journal* 5, 19.

[176] [2011] EWCA Civ 2, [142].

[177] Noted in R Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, 2004), p 48.

[178] Table A1 is derived from the author's comparative table in R Mulheron, 'Recent United Kingdom and French Reforms of Class Actions: An Unfinished Journey' in E Lein et al (eds), *Collective Redress in Europe: Why and How?* (BIICL, 2015), pp 111–12. To reiterate, the CAT Rules referred to in this article are in draft only, and have recently been consulted upon (see note 4 above).

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V. CONCLUSION

The period of 2013–15 has been a time of significant development for class actions reform in Europe. The 2013 Recommendation was hallmarked by the same conservatism, and declared antipathy to the 'US-style class action', as has been evident for many years. Indeed, the perceived 'excesses' of the US regime have (unfortunately, in this author's opinion) always garnered far greater attention from EU policy-makers than the numerous advantages, *viz*, access to justice, judicial economy, and deterrent effect, which that regime has also delivered.[179]

By contrast, UK policy-makers have been prepared to acknowledge that, for the 'right case', particularly for one that entails low-value individual damages spread across a wide class of individuals or businesses, an opt-out collective redress regime has merit. The UK Competition Class Action demonstrates a measured and balanced approach to the opt-out debate — evidenced, for example, by the Government's remark that, 'opt-out regimes have been introduced into a range of countries [Canada and Australia being mentioned, among others] where they have not led to widespread abuses, [such] that an effective and proportionate opt-out regime can be of benefit for both UK businesses and consumers'.[180]

A number of safeguards, or 'brakes', upon the operation of the UK Competition Class Action have been incorporated within the certification matrix, in particular, which will have a substantive impact upon the type, and volume, of cases brought forth as opt-out class actions. This has been a deliberate and carefully-implemented policy decision by the law-makers. As with any landmark law reform, the interpretation and application of that new law to the particular cases at hand will largely determine the utility of the new regime, and in that regard, the Competition Appeal Tribunal is well-placed, as a specialist court, to develop a body of jurisprudence around that newly-promulgated law.

Importantly, the *exceptional* opt-out route to which the 2013 Recommendation refers will become a judicial choice under the UK Competition Class Action. As this article has argued, the UK Parliament was correct to depart from the general opt-in recommendation of the European Commission, and to permit the judicial choice of opt-in or opt-out under the UK Competition Class Action. That legislatively-authorised choice of opt-out has been 'duly justified' in this jurisdiction, for reasons of legal jurisprudence, historical frustration and longstanding political and judicial hopes for 'something better'. Of course, opt-in principles may be preferred by the CAT, for the case at hand — but it is anticipated that the low-value claims, and the numerous disperse class members affected by competition law infringements, will tend to attract an opt-out class formation. In that regard, the UK Competition Class Action rightly, and boldly, forges a different path from the general conservatism which has long been espoused by European Commission policy-makers (and by the legislatures of many other Member States).

However, insofar as the breadth of the reform is concerned, a generic (horizontal) regime which covers wide areas of activity was favoured in the 2013

[179] To cite this triumvirate of goals of class action jurisprudence put forward by the Ontario LRC, *Report on Class Actions* (1982), p 118, and many other sources, cited in Mulheron, ibid, ch 3.

[180] *Private Actions in Competition Law: Government Response* (January 2013), [5.13].

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Recommendation, a proposal which necessarily avoids the problems of sector-upon-sector differential reform. Nevertheless, the political realities in the UK are such that generic reform was ruled out in 2009 and, at the very least, the initial opt-out class action reform promulgated in this jurisdiction was, from that time forth, inevitably going to have to follow a sectoral path. Nevertheless, all reform initiatives must start somewhere — and undoubtedly much judicial, practitioner and academic learning will follow from the 'test regime' which the UK Competition Class Action represents. In time, this may yield greater momentum for generic reform.

In respect of standing to sue, the UK Competition Class Action has provided the widest possible basis, by permitting both a directly-affected class member and an ideological claimant to sue — provided that the strict certification criteria governing the class representative are satisfied. This is a far preferable course to the narrower standing which was recommended by the European Commission, by which responsibility is vested in an ideological claimant alone.

In summation, when the civil procedure of a jurisdiction does not enable its substantive law to be applied and adjudicated in the judicial forum, then that legal system has, in some measure, fallen into disrepute. As Lord Woolf, one of the great reformist English judges of the modern era remarked, 'the effective and economic handling of group actions necessarily requires a diminution, compromise or adjustment of the rights of individual litigants for the greater good of the action as a whole'.[181] Both the 2013 Recommendation (via its horizontal reform approach) and the UK Competition Class Action (via its implementation of opt-out class actions without an individual's mandate to sue) aptly demonstrate that spirit of compromise. Importantly, both legislative instruments seek to introduce compensatory regimes which will reduce the cynicism which arises whenever the doctrinal law which underpins the arrangements of individuals and businesses is perceived to be unenforceable. That is a 'greater good' which no jurisdiction's policy-makers and law-makers can afford to under-estimate.

[181] *Access to Justice Inquiry: Issues Paper (Multi-Party Actions)* (1996), [2], [2(a)].

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APPENDIX

Table A1. Summary of the certification criteria under the UK Competition Class Action

Commonality	Class members must have claims that 'raise common issues' (CAT, r 7(1)(b)), where 'common issues' means 'the same, similar or related issues of fact or law' (CAT, r 1(2)(j), and Sch 8, s 47B(6))
Superiority to other means of resolving the dispute	Two criteria are specified: • It must be 'an appropriate means for the fair and efficient resolution of the common issues' (CAT, r 7(2)(a)); **and** • The CAT must take into account 'the availability of ADR and any other means of resolving the dispute' (CAT, r 7(2)(g))
Minimum numerosity	None specified – but there must be 'an identifiable class of persons' (CAT, r 7(1)(a)); **and** The CAT is required to consider 'the size of the class' (CAT, r 7(2)(d))
Preliminary merits	The representative claimant 'believes that the claims ... have a real prospect of success' (CAT, r 3(2)(h)); **and** More indirectly: when deciding between opt-in and opt-out, the CAT shall consider 'the strength of the claims' (CAT, r 7(3)(a))
Cost–benefit criterion	The CAT will take into account 'the costs and the benefits of continuing the collective proceedings' (CAT, r 7(2)(b)
An **adequate class definition**	The CAT must be satisfied that the claims sought to be included in the collective proceedings 'are brought on behalf of an identifiable class of persons' (CAT, r 7(1)(a))
General suitability	Several criteria are specified: • Class members' claims must be 'suitable to be brought in collective proceedings' (Sch 8, s 47B(6)); • The CAT must consider 'whether it is possible to determine for any person whether he is or is not a member of the class' (CAT, r 7(2)(e)); • The CAT must take into account 'whether the claims are suitable for an aggregate award of damages' (CAT, r 7(2)(f)); and • When deciding between opt-in and opt-out, the CAT must consider 'the estimated amount of damages that individual class members may recover' (CAT, r 7(3)(b))
Need	The CAT must take into account 'whether any separate proceedings making claims of the same or a similar nature have already been commenced by members of the class' (CAT, r 7(2)(c))
An **adequate representative claimant**	As specified in Table 1

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