

**COLLECTIVE REDRESS IN THE AREA OF EU COMPETITION LAW IN THE
CZECH REPUBLIC**

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Abstract

During the past months, EU Member States have been dealing with an issue of implementation of the Damages Directive and with an associated issue of establishing an effective collective redress framework, as has been strongly recommended by the Commission. As a result, several Member States have created or amended their collective redress system in order to allow injured parties who suffered infringement of the EU law to effectively bring their claims together in courts. In the case of the Czech Republic, there has been no collective redress framework implemented yet. In consequence, the aim of this master thesis is to offer suggestions and solutions to the question of how an ideal collective redress framework in the area of competition law should look like in the Czech Republic. In order to present the respective solutions, the master thesis firstly focuses on the origins of collective redress mechanism, the institute of the U.S. class action, then elaborates upon the European debate on this topic and also covers the current status of collective redress in the Czech Republic. The core of the master thesis, and its main outcomes, are contained in the fifth chapter which deals with the main issues that Czech legislator will need to resolve with respect to Czech collective redress framework.

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List of Abbreviations

Belgian Collective Redress Act	Collective Redress Act 2014 (BE)
CAT	The Competition Appeal Tribunal (U.K.)
CAT Rules	The Competition Appeal Tribunal Rules 2015 (U.K.)
Commission	The European Commission
Communication	European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Towards a European Horizontal Framework for Collective Redress' COM (2013)
Czech Code of Civil Procedure	Act No. 99/1963 Coll., the Code of Civil Procedure, as amended (CZ)
Damages Directive	Directive of the European Parliament and the Council 2014/104/EU of 26 November 2014, on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349
Draft of the Czech Act on Collective Civil Proceedings	A draft of the Czech Act on Collective Civil Proceedings drafted by Czech authors Jan Balarin and Luboš Tichý
Dutch Bill on Collective Damages Claims	Bill on Collective Damages Claims 2014 (NL)
Federal Rules	Federal Rules of Civil Procedure (U.S.)
French Act Reforming Consumer Law	French Act Reforming Consumer Law 2014 (FRA)

Green Paper	European Commission, 'Green Paper Damages actions for breach of the EC antitrust rules' COM (2005) 672 final
Office	Czech Office for the Protection of Competition
Recommendation	European Commission, 'Commission Recommendation of 11 June 2013 on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States concerning Violations of Rights Granted under Union Law' COM (2013)
Swedish Group Proceedings Act	Swedish Group Proceedings Act (SWE)
UK Consumer Rights Act	Consumer Rights Act 2015 (U.K.)
White Paper	European Commission, 'White Paper Damages actions for breach of the EC antitrust rules' COM (2008) 165

1. Introduction

Collective redress phenomenon is nowadays a highly discussed topic in the EU Member States. This discussion is directly linked to the area of private enforcement of EU competition law and to the recently adopted and now implemented Damages Directive.¹ In the debate that preceded the adoption of the Damages Directive, it has been discovered that the differences in collective redress systems in Member States or even the entire absence of such a system represent a major hurdle to effective private enforcement of EU competition law. An urgent call for an action in this field has thus been made. Alongside with the Damages Directive, the Commission issued its Recommendation² in which it laid down the basic principles for representative and collective actions. In light of the Damages Directive and the Recommendation, there have been various discussions in Member States on how the ideal model of collective redress should look like and whether the principles set forth by the Recommendation should be followed or not.

The core of this master thesis is the issue of collective redress and how the legal framework for collective redress should be construed in the Czech Republic. Collective redress can be defined as a mechanism which enables many legal claims arising out of the same infringement to be integrated into a single legal action.³ There are several reasons why it is important to have some sort of collective redress system implemented under national law and why this issue is pressing also in the Czech Republic. Most importantly, collective actions help to overcome a syndrome called a “rational apathy” which frequently occurs in cases of mass harms, typically in competition law matters. Rational apathy arises when those who have been harmed by infringement of competition law are not willing to initiate legal proceedings against infringers since the cost of such proceedings would be higher than the amount of the claimed damages.⁴ In another words, it is more rational for a victim to stay passive and not to pursue his or hers claim in court proceedings. This problem exists also within the EU. In the survey which

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

² European Commission, 'Commission Recommendation Of 11 June 2013 On Common Principles For Injunctive And Compensatory Collective Redress Mechanisms In The Member States Concerning Violations Of Rights Granted Under Union Law' COM (2013).

³ European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Towards a European Horizontal Framework for Collective Redress' COM (2013).

⁴ Roger Van Den Bergh, 'Private Enforcement of European Competition Law and the Persisting Collective Action Problem' (2013) 12 Maastricht Journal <http://www.maastrichtjournal.eu/pdf_file/ITS/MJ_20_01_0012.pdf> accessed 3 January 2016.

has been conducted by the Commission in 2004, it was discovered that 1 out of 5 EU consumers would not be willing to initiate legal proceedings in front of a court for an amount which is less than EUR 1.000.⁵ This then leads to a situation when a wrongdoer is not sanctioned for breach of consumer rights and may thus benefit from his own illegal conduct. Collective redress overcomes the rational apathy syndrome since it allows consumers with minor claims to integrate their claims, obtain monetary compensation and save legal costs. Other reasons for collective redress mechanism are that there will be no contradictory judgments which would relate to the same breach of competition law and also there will be a lesser number of disputes in front of a court since several disputes would be integrated into a single collective action.⁶

Although the positive aspects of collective redress cannot be denied, the Czech Republic still does not have any general legal framework for collective or representative actions,⁷ not even in the area of competition law. Nevertheless, since the Czech Republic is obliged to guarantee an effective enforcement of EU competition law, it should follow the Commission's Recommendation and introduce a viable system of collective redress. This task might be nonetheless quite problematic as there are several issues which need to be resolved. These issues include in particular questions relating to the adoption of opt-in or opt-out model, legal standing of representatives in representative actions and to the funding of collective proceedings.

The aim of this thesis is to answer a question of how an ideal collective redress framework should look like in the Czech Republic. In order to provide solutions and suggestions for the Czech Republic in the area of collective redress, this master thesis will be divided into six chapters. After the introduction which forms the first chapter of the thesis, the second chapter will focus on the origins of collective redress mechanism in the institute of the U.S. class action. The third chapter of this thesis will examine the history of debate on collective redress within the EU, with the emphasis on the analysis of the Commission's Recommendation. In the fourth chapter, the current state of affairs in relation to Czech collective redress will be examined. The fifth chapter will tackle the issues which need to be resolved under Czech legal framework for collective redress. The fifth chapter will form the

⁵ European Commission, 'Green Paper on Consumer Collective Redress' COM (2008). Para 9.

⁶ Jan Balarin and Luboš Tichý, 'Kolektivní ochrana procesních práv v ČR: sen či skutečnost? (návrh právní úpravy a jeho odůvodnění)' [2013] Bulletin Advokacie <<http://www.bulletin-advokacie.cz/kolektivni-ochrana-procesnich-prav-v-cr-sen-ci-skutecnost-navrh-pravni-upravy-a-jeho-oduvodneni>> accessed 6 January 2016.

⁷ Alena Winterová and Alena Macková, *Civilní právo procesní. Část první: řízení nalézací.* (7th edn, Linde Praha). P. 221.

core of this thesis and its outcomes will be essential for the conclusions and recommendations contained in the last sixth chapter of this master thesis.

It should be also pointed out that an effective collective redress mechanism may be beneficial not only in the area of competition law. Collective redress mechanism can be used for areas such as protection of consumers' rights, protection of environment, financial services and protection of data.⁸ Nevertheless, this master thesis will restrict its scope only to collective redress in competition law matters.

As indicated above, the focus of this thesis shall be on the Czech jurisdiction. There are two reasons for selecting this jurisdiction. Firstly, the Czech Republic is one of 28 Member States of the EU and thus the Recommendation, which seeks implementation of an effective collective redress mechanism, is applicable also to the Czech Republic. Secondly, the Czech Republic is a country of my origin and it is the Czech Republic where I will practice law after my master studies and might come across competition-law and procedural issues.

Analytical, descriptive and comparative methods shall be used in the thesis. Since the area of collective redress has been widely discussed both in the U.S. and within the EU, opinions of both international and Czech scholars shall be taken into account. Special emphasis will be put on the opinions of the Commission and the Czech Office for the Protection of Competition as these two bodies are the major policy makers for the area competition law in the Czech Republic.

⁸ European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Towards a European Horizontal Framework for Collective Redress' COM (2013).

2. Origin of Collective Redress - the institute of the U.S. class action

In order to understand how European systems of collective redress are developing, one needs to look at the origin of collective redress. The foundations of the modern collective redress framework can be found in the United States in the second half of the 20th century in an institute called a “class action”⁹ which is defined as a “lawsuit in which the court authorizes a single person or a small group of people to represent the interests of a larger group.”¹⁰

To fully understand the European debate on proper system of collective redress, analysis of the characteristics of the U.S. litigation system [Section 2.1] and the features of class actions [Section 2.2] shall be made. Then, the perception of the U.S. class action in the EU shall be described [Section 2.3].

2.1 Brief overview of the U.S. litigation system

Before the peculiarities of the U.S. class action will be elaborated upon, a word should be said about the nature of U.S. litigation in general. This is quite an important exercise since general framework for U.S. litigation system determines the nature and characteristics of the institute of the U.S. class action.

In comparison to European countries, the United States are quite a plaintiff-friendly country. Firstly, American legal framework enables a plaintiff to have broad discovery powers with respect to obtaining information from the opposing party and also from those who are not parties to proceedings. Secondly, the U.S. system is a jury system in which a group of non-professionals decides upon the issues of fault and the amount of damages. The amount of damages may be quite substantial since juries may be led by their emotions when assessing the appropriate amount. Thirdly, U.S. law recognizes the institute of punitive damages. Punitive damages are a special form of compensation for the plaintiff whereas the primary goal of these kind of damages is to punish and deter the defendant. Punitive damages are awarded in case of specific circumstances on the side of the defendant, such as his or hers malice, recklessness or deceit.¹¹ The amount of punitive damages might be quite high, but generally should not exceed the nine times of the awarded compensatory damages.¹² Fourthly, U.S. litigation funding is

⁹ Jan Balarin and Luboš Tichý, 'Kolektivní ochrana procesních práv v ČR: sen či skutečnost? (návrh právní úpravy a jeho odůvodnění)' [2013] Bulletin Advokacie <<http://www.bulletin-advokacie.cz/kolektivni-ochrana-procesnich-prav-v-cr-sen-ci-skutecnost-navrh-pravni-upravy-a-jeho-oduvodneni>> accessed 6 January 2016.

¹⁰ Bryan Garner, *Black's Law Dictionary* (10th edn, Thomson Reuters 2014). P. 304.

¹¹ Madeleine Tolani, 'U.S. Punitive Damages Before German Courts: A Comparative Analysis With Respect To The Ordre Public' (2011) 17 Annual Survey of International and Comparative Law. P. 188.

¹² *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003).

based primarily on the contingency fee arrangements which may excessively motivate attorneys in initiation of legal proceedings.¹³

Contingency fee agreement between a client and his attorney means that an attorney will get his remuneration only if he or she wins the case. The contingency fee consists of a percentage of damages awarded to the client. There are several justifications for the use of the contingency fees, such as that plaintiffs would not be able to initiate legal actions without this form of financing or that contingency fees lead to alignment of interests of an attorney and his client.¹⁴ Contingency fees are much debated in the U.S. and are often criticized for their amount. For instance, the largest contingency fee award in the U.S. history which has been approved by a court was USD 1.3 billion whereas the fee included interest in the amount of more than USD 350 million.¹⁵

The U.S. litigation system also differs from European ones with respect to conduct of civil proceedings. In the U.S., it is primarily the parties to the dispute and their attorneys who control the proceedings, as opposed to a judge in a continental system. The parties decide on the extent of discovery, how many witnesses should be heard or what motions are to be submitted. The role of the judge is thus one of a passive observer who rules on issues when he is asked to do so by the parties.¹⁶ This feature may lead to very time consuming and costly proceedings controlled only by lawyers, since individual members of the class would not be quite familiar with technical and legal aspects of the case.

Another important aspect of U.S. litigation is the American rule on attorney's fees. According to this rule, each party to proceedings bears its own costs, without any regard to who prevails in the dispute. This rule is quite peculiar for the American litigation system since European countries recognize so called "loser pays principle" according to which a losing party is obliged to pay not only its costs, but also the costs of the prevailing party. It has been argued that the American rule on attorney's fees is better suited for class actions because in case of the loser pays principle, a plaintiff usually might not afford to become a class representative if he has to face the possibility that he might be obliged to pay for the attorney's fees and other expenses of the other party.¹⁷

¹³ Viktória Harsági and C. H. van Rhee, *Multi-Party Redress Mechanisms in Europe* (Intersentia 2014).

¹⁴ Charlotte Leskinen, 'Collective Actions: Rethinking Funding and National Cost Rules' (2011) 8 *The Competition Law Review*.

¹⁵ 'Contingency Fees As An Incentive To Excessive Litigation' (*International Bar Association*) <[http://file:///C:/Users/john_2/Downloads/EUPrivLitig_Fees%20\(1\).pdf](http://file:///C:/Users/john_2/Downloads/EUPrivLitig_Fees%20(1).pdf)> accessed 16 March 2016.

¹⁶ Janet Cooper Alexander, 'An Introduction To Class Action Procedure In The United States', *Debates over Group Litigation in Comparative Perspective* (2000) <<http://www.classactionslab.ca/library/an-introduction-to-class-action-procedure-in-the-united-states/>> accessed 14 March 2016.

¹⁷ *Ibid.*

The peculiarities of the U.S. litigation, as described above, determine the basis for class proceedings and thus should be born in mind when the framework of the U.S. class action is analyzed.

2.2 Overview of the U.S. class action

In the U.S., legal framework for class actions may vary from state to state. Nevertheless, the most developed and known system is the federal class action system. This system is governed by the Federal Rules of Civil Procedure¹⁸ and their Rule 23.

According to the Rule 23(a) of the Federal Rules, four conditions must be fulfilled in order to bring a class action - conditions of “numerosity”, “commonality”, “typicality” and “adequacy of representation”. These conditions mean that firstly, a class must be so numerous that joinder of all members is impracticable; secondly, there must be questions of law or fact which are common to the class; thirdly, one or more persons of the group may sue as representatives if their claims are typical for the class; and fourthly, if the representatives will fairly and adequately protect the interests of the class.¹⁹

Rule 23(b) of the Federal Rules sets forth other conditions which need to be fulfilled in order to maintain the suit as a class action whereas at least one of these conditions must be fulfilled. The first condition is generally the risk of inconsistent judgments in case that disputes are adjudicated separately.²⁰ The second condition is that the defendant refuses to act on grounds which apply to the whole class.²¹ The third, and the most interesting one – so called predominance test – covers a situation in which “the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to the available methods for fairly and efficiently adjudicating the controversy.”²² In practice, the predominance test is fulfilled if there is generalized evidence which proves existence of a class-wide element. Class action is viewed as a superior method of dispute resolution if members of the class are able to reduce their costs by aggregation of their claims.²³

¹⁸ Federal Rules of Civil Procedure (U.S.)

¹⁹ Janet Cooper Alexander, 'An Introduction To Class Action Procedure In The United States', *Debates over Group Litigation in Comparative Perspective* (2000) <<http://www.classactionslab.ca/library/an-introduction-to-class-action-procedure-in-the-united-states/>> accessed 14 March 2016.

²⁰ Rule 23(b)(1) of the Federal Rules of Civil Procedure (U.S.)

²¹ Rule 23(b)(2) of the Federal Rules of Civil Procedure (U.S.)

²² Rule 23(b)(3) of the Federal Rules of Civil Procedure (U.S.)

²³ Fabio Polverino, 'A Class Action Model For Antitrust Damages Litigation In The European Union' [2006] SSRN Electronic Journal <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=927001> accessed 19 March 2016.

After the class action is filed, a certification stage takes place. In the certification stage, fulfilment of the conditions of the Rule 23 of the Federal Rules is analyzed. This is one of the most important stages of class proceedings since it is decided who will be bound by the final judgment of the court. American system is based on an opt-out model in which members of the group have a right to opt out of the class proceedings. In case that they do not opt out of the proceedings, they are bound by the final judgment. In case that members indeed opt out of the proceedings, they can still file their claims individually. Only after the class is certified, the case can proceed to discovery and to adjudication of the merits of the case. The class action may end up in a court's decision or in a settlement. A settlement always needs to be approved by the court which must determine whether the settlement is fair and adequate.²⁴

Practically, for initiation and continuation of the class proceedings, sufficient financial resources are needed. One of the most used forms of financing in class actions is financing by attorneys. Generally, there are two methods for calculating fees of an attorney – a common fund method and a fee shifting method. According to the common fund method, attorney's fee is calculated as a percentage of a fund which is created for the class. In the case the fee shifting method is used, a defendant is ordered to pay the costs and fees of the plaintiff's attorney.²⁵ The fee shifting method thus resembles the European loser pays principle.

With respect to the award of damages to the class, it is possible to make recovery in cash or in coupons. Coupon settlements mean that consumers are entitled to exchange their coupons for free goods or discounts on goods from the defendant. This method has been criticized as being contrary to the best interests of the consumers. It is so because the experts which are appointed by attorneys for the estimation of the value of the coupons and the damages award (and thus the value of the attorney's remuneration) often inflate the value of the damages award. Since coupon settlements are beneficial also for the defendant, as he or she does not have to pay to the class in cash, there can be a collusion between the attorneys of the plaintiffs and the defendant.²⁶

²⁴ Janet Cooper Alexander, 'An Introduction To Class Action Procedure In The United States', *Debates over Group Litigation in Comparative Perspective* (2000) <<http://www.classactionslab.ca/library/an-introduction-to-class-action-procedure-in-the-united-states/>> accessed 14 March 2016.

²⁵ Charlotte Leskinen, 'Collective Actions: Rethinking Funding And National Cost Rules' (2011) 8 *The Competition Law Review*.

²⁶ Janet Cooper Alexander, 'An Introduction To Class Action Procedure In The United States', *Debates over Group Litigation in Comparative Perspective* (2000) <<http://www.classactionslab.ca/library/an-introduction-to-class-action-procedure-in-the-united-states/>> accessed 14 March 2016.

2.3 Perception of the U.S. class action in Europe

Traditionally, European legislators have had quite a negative approach when it comes to the U.S. class actions. Starting with the position of the EU, it is quite obvious from the rhetoric of the Commission that it has sought to avoid adoption of the U.S.-style collective redress mechanism. For instance, the Commission stated in its Communication that “Several features of the US legal system have made class actions a particularly powerful instrument that is, however, feared by those on the defending side, namely trade and industry as it can be used as a forceful tool to compel them to settle a case, which may not necessarily be well-founded.”²⁷

It is not only the Commission, but also the Member States themselves who are against the U.S. class actions. As Bergh aptly observes, “the aversion towards American class actions in Europe is so great that it has become politically incorrect to use this term. Instead, policy makers have proposed to rely on ‘collective actions’ and ‘representative actions’ brought by consumer associations.”²⁸ Consequently, the Commission in its Recommendation does not operate with the American term “class action”, but uses the terms “collective action” and “representative action”. This change in legal terms is thus more of psychological nature and may not have a valid practical reason.

There are several arguments as to the advantages and disadvantages of the U.S. class actions. Speaking about the advantages, one cannot deny that the use of class actions can help to avoid the rational apathy problem mentioned in the introduction of this thesis. It is so because when victims integrate their claims, the costs of collective proceedings might be lower and it is thus rational for a victim to pursue his claim instead of being inactive. Moreover, the fear of class actions may serve for deterrence purposes since it is less likely that the defendants would engage themselves in breaching competition law rules if they knew that several plaintiffs can integrate their claims and bring a collective action.²⁹ The U.S. Supreme Court, when speaking in favor of class actions, has frequently pointed out that compensation and deterrence are crucial when it comes to effective enforcement of competition law and thus the institute of class action

²⁷ European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Towards a European Horizontal Framework for Collective Redress' COM (2013).

²⁸ Roger Van Den Bergh, 'Private Enforcement Of European Competition Law And The Persisting Collective Action Problem' (2013) 12 Maastricht Journal
<http://www.maastrichtjournal.eu/pdf_file/ITS/MJ_20_01_0012.pdf> accessed 3 January 2016.

²⁹ Damien Geradin, 'Collective Redress For Antitrust Damages In The European Union: Is This A Reality Now?' [2015] SSRN Electronic Journal <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2593746> accessed 3 January 2016.

is needed and justified.³⁰ Other advantage of a class action is the one-stop shop principle. According to this principle, in case of a damages award or settlement, an injured party which has not opted out of the class proceedings cannot bring further claims against the defendant. Consequently, the defendant does not have to worry about further litigation.³¹

There are nevertheless also arguments against the American class actions regime. Opponents of the U.S. class actions argue that in the collective proceedings US juries grant excessively high amounts of damages to plaintiffs.³² Nevertheless, one has to agree with Wardhaugh that these excessively high damages are awarded due to the possibility to grant punitive damages.³³ The issue here is thus not of collective redress, but of punitive damages themselves. It can be argued that if the institute of punitive damages is not introduced in EU Member States, then the amount of damages awarded in collective or representative proceedings will not be disproportionately high as is often feared. As one can see from the Article 3(3) of the Damages Directive, overcompensation, and thus punitive damages, are explicitly prohibited with respect to private enforcement of EU competition law. Consequently, there is no reason to fear that large awards of damages will be granted in “EU class actions”.

According to another argument against the U.S. class actions, the principal-agent problem arises in the course of class proceedings. The essence of this problem lies in the fact that an attorney might not always represent his clients in their best interests and might seek his own interest in class action proceedings.³⁴ Nevertheless, it needs to be pointed out that the agency issues are already quite frequent in relationships between a client and his attorney and thus are not specific to class action matters.³⁵ There might be sufficient mechanisms how to avoid this issue, such as judicial approval of lawyer’s fees or judicial approval of the reached settlement. The existence of this agency problem may thus be quite exaggerated.

It can be concluded that the main advantages of the U.S. class actions are the whole or partial elimination of the rational apathy problem and the deterrence effect upon the infringers. Nevertheless, there are several disadvantages of the U.S. class actions which are feared by the Commission and by the Member States. These disadvantages include excessive amount of

³⁰ Clifford A. Jones, *Private Enforcement Of Antitrust Law In The EU, UK And USA* (Oxford University Press 1999). P. 80.

³¹ Fabio Polverino, 'A Class Action Model For Antitrust Damages Litigation In The European Union' [2006] SSRN Electronic Journal <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=927001> accessed 19 March 2016.

³² Bruce Wardhaugh, 'Bogeymen, Lunatics And Fanatics: Collective Actions And The Private Enforcement Of European Competition Law' (2014) 34 Legal Studies <<http://archive.legalscholars.ac.uk/edinburgh/restricted/download.cfm?id=128>> accessed 3 January 2016.

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*

damages granted in collective proceedings and the principal-agent problem. It is important to remember the pros and cons of the U.S. class actions because these have been in minds of the EU legislators when the process for setting up of legal framework for European collective redress was initiated.

3. History of Debate on Collective Redress in EU Competition Law

The history of debate on collective redress in EU competition law is directly linked to a more general debate on private enforcement of EU competition law. The issue of private enforcement of EU competition has been put into the spotlight after the Court of Justice of the EU rendered its decisions in *Courage v. Crehan*³⁶ and in *Manfredi*³⁷. These decisions established a principle that victims of competition law infringements have a right to claim compensation for such infringements and that Member States are obliged to set forth legal framework which enables effective enforcement of the victims' right to claim compensation.³⁸ The question of effectivity with respect to exercising the right to claim damages gave rise to debate upon whether an option to file collective or representative actions should be introduced in the Member States.

In the following, the three most important legal documents of the Commission concerning the areas of EU competition law and collective redress shall be introduced. Firstly, the Green Paper shall be examined [Section 3.1]. Secondly, the White Paper shall be elaborated upon [Section 3.2]. Lastly, the Recommendation which is the most important instrument in the area of EU collective redress shall be analyzed [Section 3.3].

3.1 Green Paper on Damages actions for breach of the EC antitrust rules

The issue of collective redress with respect to EU competition rules has been touched upon in the Commission's Green Paper issued in 2005.³⁹ The Green Paper discovered that damages actions for breach of EU competition law are of "astonishing diversity and total underdevelopment."⁴⁰ Consequently, the purpose of the Green Paper has been to find obstacles which impede effective private enforcement of competition law and, more importantly, to find solutions for these obstacles.⁴¹

One these main obstacles has been the access to judicial proceedings by consumers and purchasers with small amounts of claims. According to the Commission, due to the rational

³⁶ Case C 453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2001] ECR I-06297.

³⁷ Case C 295/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA, Antonio Cannito v Fondiaria Sai SpA and Nicolò Tricarico and Pasqualina Murgolo v Assitalia SpA* [2006] ECR I-06619.

³⁸ Katarina Zajc and Jaka Cepec, 'Collective Redress in EU: Can Pitfalls of US Class Actions Be Avoided? At What Cost?' [2015] SSRN Electronic Journal <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2675050> accessed 7 March 2016.

³⁹ European Commission, 'Green Paper Damages actions for breach of the EC antitrust rules' COM (2005) 672 final.

⁴⁰ Denis Waelbroeck, Donald Slater and Gil Evan-Shoshan, 'Comparative Report - Study On The Conditions Of Claims For Damages In Case Of Infringement Of EC Competition Rules' (*Ec.europa.eu*, 2004) <http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf> accessed 22 January 2016.

⁴¹ European Commission, 'Green Paper Damages actions for breach of the EC antitrust rules' COM (2005) 672 final. Para 1.3.

apathy problem, it is not very likely that consumers would bring their legal claims in cases where the amount of claims is minimal.⁴² Instead, they would remain passive and not pursue their claims. In response to this, the Green Paper introduced two options on how to avoid the rational apathy situation. In the first scenario, certain consumer associations could bring legal actions in collective matters. Nevertheless, it has been pointed out that several issues would need to be considered in case this option is implemented - the issue of legal standing, how the damages shall be distributed and how the damages shall be calculated.⁴³ In the second scenario, it has been proposed that groups of purchasers themselves could bring legal proceedings against the defendants.⁴⁴

In sum, the Green Paper initiated the debate on what the issues relating to collective redress in EU competition law need to be tackled. This debate then led to a more concrete solutions introduced in the Commission's White Paper issued in 2008.

3.2 White Paper on Damages Actions for Breach of the EC Antitrust Rules

In the White Paper⁴⁵, the Commission acknowledged that a certain system of collective redress mechanism should be adopted and that "individual consumers, but also small businesses, especially those who have suffered scattered and relatively low-value damage, are often deterred from bringing an individual action for damages by the costs, delays, uncertainties, risks and burdens involved."⁴⁶ In another words, the Commission once again pointed to the rational apathy problem.

Taking into account the importance of collective redress, the Commission recommended to adopt two mechanisms of collective redress – a representative action and a collective action.⁴⁷ The idea of the representative action was that certain entities certified in advance or on an ad hoc basis would be authorized to bring a legal action against the infringer. Collective actions could be initiated in case that the victims would themselves decide to combine their claims.⁴⁸

After the issuance of the White Paper, the public has been invited to comment on the content and proposals contained in the White Paper. The Czech Office for the Protection of Competition took this option and issued its Position of the Office for the Protection of Competition of the Czech Republic to the White Paper on Damages actions for breach of the

⁴² European Commission, 'Green Paper Damages actions for breach of the EC antitrust rules' COM (2005) 672 final. Para 2.5.

⁴³ *Ibid*, para 2.5, Option 25.

⁴⁴ *Ibid*, para 2.5, Option 26.

⁴⁵ European Commission, 'White Paper Damages actions for breach of the EC antitrust rules' COM (2008) 165.

⁴⁶ *Ibid*, para 2.1.

⁴⁷ *Ibid*, para 2.1.

⁴⁸ *Ibid*, para 2.1.

EC antitrust rules. Even though the Czech Office basically welcomed the Commission's initiative to establish collective redress mechanism, it has raised several issues relating to representative actions.

Firstly, the Czech Office stated that it would welcome an opt-out model instead of an opt-in model with respect to representative actions.⁴⁹ Secondly, the Czech Office asked for detailed rules on the question of how the damages should be calculated and distributed since these rules would be crucial for the practical application of collective redress rules by Czech courts.⁵⁰ With respect to collective actions, the Czech Office once again recommended to adopt the opt-out mechanism. The Czech Office reasoned that there is almost zero experience with collective or representative actions in the Czech Republic and victims would not be willing to opt into collective actions.⁵¹ Nevertheless, despite this suggestion of the Czech Office, the opt-in model was victorious over the opt-out model both with respect to representative and collective actions.

Alongside with the White Paper, the Green Paper on consumer collective redress has been also issued by the Commission. The purpose of the Green Paper was to evaluate the pressing issues in collective redress systems of EU Member States and to propose its respective changes.⁵² The Green Paper, alongside with its other Commission's initiatives then led to the adoption of the most important instrument in the field of collective redress these days – adoption of the Recommendation. It is this Recommendation which is now being subject to debate and to implementation in Member States and thus reflects the current position of the Commission towards EU collective redress. Consequently, this Recommendation shall be analyzed in further detail.

3.3 Recommendation on Collective Redress Mechanisms

The aim of the Recommendation is “to recommend that all Member States should have collective redress systems at national level that follow the same basic principles throughout the Union, taking into account the legal traditions of the Member States and safeguarding against abuse.”⁵³

⁴⁹ Czech Office for the Protection of Competition, 'The Position of the Office for the Protection of Competition of the Czech Republic to the White Paper on Damages Actions for Breach of the EC Antitrust Rules' <<https://www.uohs.cz/cs/uvodni-stranka.html>>. accessed 3 January 2016. Para 11.

⁵⁰ *Ibid*, para 12.

⁵¹ *Ibid*, para 14.

⁵² European Commission, 'Green Paper On Consumer Collective Redress' (2008). <http://ec.europa.eu/consumers/archive/redress_cons/greenpaper_en.pdf>. accessed 3 January 2016. Para 4.

⁵³ European Commission, 'Commission Recommendation Of 11 June 2013 On Common Principles For Injunctive And Compensatory Collective Redress Mechanisms In The Member States Concerning Violations Of Rights Granted Under Union Law' COM (2013). Para 10.

As the Commission indicated in the White Paper, it distinguishes between two mechanisms of collective redress – a representative action and a collective action. With respect to the collective action, the Recommendation explicitly defines this action as “a collective redress action that is brought after a public authority has adopted a final decision finding that there has been a violation of Union law.”⁵⁴ This means that a collective action always needs to be a follow-on action and might not represent so called stand-alone action (i.e. an action brought before any decision of a public authority on the competition law infringement has been issued). The Commission thus limited the applicability of the collective actions only to situations in which an infringement of competition law is undoubtedly proven and adjudicated. Even though one can understand that the Commission limited the applicability of collective actions due to difficulties that victims would face in case they would need to establish the breach of EU competition law in stand-alone actions, there are also drawbacks to this solution. The major drawback is the fact that public authorities do not always have time and resources to detect every breach of competition law. Consequently, a gap is created and cannot be filled by private enforcement of competition law because victims need to wait for the decision of the respective public authority before they can initiate any collective legal action.

Turning back to the content of the Recommendation, the focus is primarily on the mechanism of a representative action, rather than of a collective action. According to the Recommendation, Member States should designate certain entities which would be authorized to bring representative actions.⁵⁵ These entities would nevertheless have to comply with several conditions, e.g. they must be established as non-profit making entities whose goal is to protect certain rights and they should have sufficient funds for the initiation and conduct of collective legal proceedings.⁵⁶ These entities must be designated in advance or must be certified on an ad hoc basis.⁵⁷

With respect to representative actions, the Commission also sets forth principles relating to funding. In general, a claimant has a disclosure obligation when it comes to the origin of the funds and he must avoid any conflict of interest or influence between him and a funding party.⁵⁸ Important section of the Recommendation deals with legal representation and lawyers’ fees, one of the most feared issues of collective redress. According to the Recommendation, “The

⁵⁴ European Commission, 'Commission Recommendation Of 11 June 2013 On Common Principles For Injunctive And Compensatory Collective Redress Mechanisms In The Member States Concerning Violations Of Rights Granted Under Union Law' COM (2013). Section II(3)(e).

⁵⁵ *Ibid*, section III(4).

⁵⁶ *Ibid*, section III(4)(a)-(c).

⁵⁷ *Ibid*, section III(6).

⁵⁸ *Ibid*, sections III(14)-(16).

Member States should ensure that lawyers' remuneration and the method by which it is calculated do not create any incentive to litigation that is unnecessary (...) The Member States should not permit contingency fees (...)."⁵⁹ The abolition of the contingency fees is a result of a negative view towards the U.S. class action regime, as has been already described in this master thesis. Basically, the EU fears that there will be a flood of litigation if one can initiate representative or collective proceedings with funding provided by an attorney on the basis of a contingency fee arrangement.

The Recommendation has not been adopted without criticism. Authors point out that "by opting for an 'opt in' regime and the 'loser pays' principle, while not authorizing contingency fees and punitive damages, the Recommendation may have made it harder for victims with small claims (i.e. individual consumers that have been overcharged for goods) to obtain compensation for the harm suffered."⁶⁰ This might be the weakest point of the Recommendation since there would be no party interested in initiating collective proceedings in case there is no monetary incentive to do so. The rational apathy problem would thus still remain in existence and consumers associations might not be interested in bringing representative actions if they do not have enough funds.

The impact of the Recommendation seems to be questionable also due to the very nature of the Recommendation, i.e. its non-binding character, which makes the implementation of collective redress mechanisms into legal framework of Member States problematic. Even though the Commission expects that the Member States will adhere to the Recommendation and its basic principles,⁶¹ acts governing collective redress which have been recently adopted in some Member States, deviate from principles contained in the Recommendation. For instance, the UK has not followed the opt-in model since the judge is authorized to decide whether proceedings are to be based on an opt-in model or on an opt-out model.⁶² Also, Belgium has not followed the Recommendation's horizontal approach with respect to fields in which representative or collective actions can be filed. According to the Belgian Collective Redress Act, the injured parties are authorized to bring collective claims only for types of infringements enumerated by the Act, i.e. in cases of infringement of Belgian competition law, contractual

⁵⁹ European Commission, 'Commission Recommendation Of 11 June 2013 On Common Principles For Injunctive And Compensatory Collective Redress Mechanisms In The Member States Concerning Violations Of Rights Granted Under Union Law' COM (2013). Sections V(29)-(30).

⁶⁰ Damien Geradin, 'Collective Redress for Antitrust Damages in the European Union: Is this a Reality Now?' [2015] SSRN Electronic Journal <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2593746> accessed 3 January 2016.

⁶¹ *Ibid.*

⁶² Section 47B(7)(c) Consumer Rights Act 2015 (U.K.)

infringements, infringements of rules on safety of products or unfair market practices.⁶³ This means that also the Czech Republic may deviate from the propositions made by the Commission and can introduce such system of collective redress that is the most suitable for Czech legal framework.

⁶³ Valérie Lefever and Johan Van Acker, 'The Belgian Council of Ministers Approves Draft Bills that Introduce a Collective Redress System in Belgian Competition Law Cases' (*Concurrences*, 2013) <<http://www.concurrences.com/Bulletin/News-Issues/December-2013-1528/The-Belgian-Council-of-Ministers-63578?lang=en>> accessed 14 March 2016.

4. Current state of affairs of Czech collective redress

As two Czech authors have put it, Czech legal system represents a European rarity or curiosity in the sense that it does not have any conception regarding collective redress or a proper legal framework in this area.⁶⁴ Nevertheless, even though Czech collective redress framework is missing, several Czech legal practitioners and academics have already called for implementation of collective (or representative) actions into Czech law.⁶⁵ Consequently, there has been some debate on collective redress in the Czech Republic, but this debate has not led into any legislative solutions. Nonetheless, due to the issuance of the Recommendation, it seems that Czech law will now finally get the needed impulse leading to setting up of a viable legal framework for collective redress.

In this chapter, the areas of Czech law in which one can observe some indications of collective redress shall be analyzed – these are the areas of consumer protection and unfair competition [Section 4.1] and certain institutes contained in the Czech Code of Civil Procedure [Section 4.2].

4.1 Collective Redress in Consumer Protection and Unfair Competition

Some fragments of collective redress framework can be found in Czech law in the areas of consumer protection and unfair competition. In consumer protection area, certain aspects of representative actions occur since consumer associations are authorized to file injunctions in case that consumer rights are infringed. According to the Czech Consumer Protection Act, an action for injunction concerning protection of consumer rights may be filed by (i) an association which has a legitimate interest in protecting consumers, or by (ii) an entity set out in the list of persons qualified to bring an injunction action with respect to the protection of consumer rights.⁶⁶ In another words, an organization must be either listed as a qualified person or it must have a legitimate interest in protecting consumers. Nevertheless, the law is silent on the authorization of such organization to bring damages actions. This means that a consumer organization is not authorized to bring damages actions if consumer rights are infringed.

In the area of unfair competition, the collective redress is tackled by the respective provisions of the Czech Civil Code. According to the Czech Civil Code, a legal person which is entitled to defend rights of competitors or customers may be authorized to file an injunction

⁶⁴ Jan Balarin and Luboš Tichý, 'Kolektivní ochrana procesních práv v ČR: sen či skutečnost? (návrh právní úpravy a jeho odůvodnění)' [2013] Bulletin Advokacie <<http://www.bulletin-advokacie.cz/kolektivni-ochrana-procesnich-prav-v-cr-sen-ci-skutecnost-navrh-pravni-upravy-a-jeho-oduvodneni>> accessed 6 January 2016.

⁶⁵ Karel Eliáš, *Kurs obchodního práva: obecná část, soutěžní právo* (5th edn, CHBeck 2007). P. 522.

⁶⁶ Section 25 of the Act No. 634/1992 Coll., Consumer Protection Act, as amended (CZ)

against the wrongdoer.⁶⁷ Nevertheless, authorization of an association to defend competitors or consumers is again limited since only injunction actions may be filed. Consequently, an association cannot bring a damages claim on behalf of injured competitors or customers. This leads to a situation where representative injunctions do not have considerable impact on law enforcement and thus do not help the injured competitors and consumers.⁶⁸

4.2 Collective Redress in the Code of Civil Procedure

There has been some debate that the Sections 83(2) and 159a(2) of the Code of Civil Procedure can be seen as a foundation for Czech collective actions. In the following text, these provisions shall be introduced and it shall be analyzed whether these can be seen as a basis for Czech collective redress.

According to the Section 83(2) of the Code of Civil Procedure, commencement of judicial proceedings precludes initiation of another judicial proceedings which would relate to the same claim.⁶⁹ Similarly, according to the Section 159(2) of the Code of Civil Procedure, a judgment is binding not only to the parties to the dispute, but also to other persons with the same claims against the same defendant.⁷⁰ Even though on the first sight it may seem that these rules might be associated with collective redress mechanism, several differences from the concept of a collective action can be observed.

Firstly, a plaintiff who has filed a lawsuit as a first injured party is not obliged to take into account other prospective litigants to whom the respective judgment shall become final and binding. Such plaintiff does not have any specific legal obligations to properly conduct legal proceedings as well. Secondly, Czech law does not set forth any protective measures against a situation in which there is a settlement agreement concluded between a plaintiff who has filed a lawsuit as a first one and the defendant. Thirdly, there are no rules relating to dishonest behavior of the first plaintiff against other prospective litigants, e.g. no specific rules relating to withdrawal of the lawsuit. Moreover, there are no special rules on initiation of collective proceedings (e.g. a rule that a court shall proclaim that a class for the purposes of a collective action has been formed) or rules relating to information obligation of the court to notify third parties about the commencement of collective proceedings.⁷¹

⁶⁷ Section 2989 of the Act No. 89/2012 Coll., the Civil Code (CZ)

⁶⁸ Jan Balarin and Luboš Tichý, 'Kolektivní ochrana procesních práv v ČR: sen či skutečnost? (návrh právní úpravy a jeho odůvodnění)' [2013] Bulletin Advokacie <<http://www.bulletin-advokacie.cz/kolektivni-ochrana-procesnich-prav-v-cr-sen-ci-skutecnost-navrh-pravni-upravy-a-jeho-oduvodneni>> accessed 6 January 2016.

⁶⁹ Section 83(2) of the Act No. 99/1963 Coll., the Code of Civil Procedure, as amended (CZ)

⁷⁰ Section 159(2) of the Act No. 99/1963 Coll., the Code of Civil Procedure, as amended (CZ)

⁷¹ David Ludvík, František Ištváněk and Naděžda Javůrková, *Občanský soudní řád. Komentář I. díl.* (Wolters Kluwer 2009). P. 393.

In sum, based on several differences between the Section 83(2) and the Section 159(2) of the Czech Code of Civil Procedure on one hand and the standard collective redress procedures on the other hand, it can be concluded that the respective sections of the Czech Code of Civil Procedure do not provide for a general framework for collective actions.

5. Issues to be resolved by Czech legal framework for collective redress

There are several issues which Czech legislator needs to decide in order to set up an effective framework for collective redress in the area of competition law. In order to recognize such issues, it is helpful to take a look into the Commission's Communication. The Communication identifies several areas of interest. These include questions as whether to adopt an opt-in or an opt-out model [Section 5.1], how the funding of collective actions should look like [Section 5.2], what is the most viable structure of the collective proceedings [Section 5.3], who would be the most competent authority to decide the collective redress matters [Section 5.4], what legal standing should the representatives in representative actions have [Section 5.5], what should be the role of amicable dispute resolution [Section 5.6], how the proceeds should be distributed [Section 5.7] and what scope should be covered by collective redress framework [Section 5.8].⁷² In the following text, these issues shall be addressed and the solutions for the Czech Republic with respect to these issues shall be proposed.

5.1 Opt-in model vs. opt-out model

The question of whether to adopt an opt-in or an opt-out model in Czech collective redress framework is one of the most fundamental ones. As has been previously stated, the European Union strongly favors the adoption of the opt-in model. In the following text, the concept and the advantages and disadvantages of both models shall be introduced. In the end, it shall be concluded which model is the most suitable for the Czech Republic.

5.1.1 The concept of the opt-in model

The opt-in model can be defined as a mechanism in which a judgment in collective proceedings binds only group members which have expressed their will to join the proceedings and to be bound by a collective decision.⁷³ It means that the injured parties must be active in order to become a part of collective proceedings. In case that they will not actively join the proceedings, the judgment will not be binding upon them and they might initiate their own proceedings.

On the first sight, it is clear that the major advantage of the opt-in model is legal certainty for the injured party. Injured parties become parties to the collective proceedings only in case that they express their will to do so. This corresponds to the basic principle of private law which

⁷² European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Towards a European Horizontal Framework for Collective Redress' COM (2013).

⁷³ David McFadden, *The Private Enforcement Of Competition Law In Ireland* (Hart 2013). P. 104.

is party autonomy. An injured party might need time to think about whether it should be party to collective proceedings – factors such as costs, time and energy devoted to collective proceedings are something that every injured party should have time to think about. Nevertheless, there are also disadvantages to the opt-in model.

One of the disadvantages, as is pointed by Geradin, is the fact that opt-in proceedings often lack a substantial number of injured parties acting as a claimant because injured parties with minor claims are less likely to join the collective proceedings.⁷⁴ Since the amount of their claims is small, the injured parties do not have incentive to bother themselves with joining a collective action – the fact that they would need to take certain steps in order to join and then monitor the case might deter them from joining the proceedings. As a consequence of this situation, even if collective proceedings are successful, the amount of damages claimed will not be that substantial and an infringer might benefit from his own illegal conduct. Disadvantages of the opt-in model have been experienced by the UK which prior to the adoption of the UK Consumer Rights Act allowed only for follow-on damages actions based on the opt-in model. The opt-in procedure was used only once and in this case only 130 consumers chose to opt into the collective action against a defendant participating in a price cartel.⁷⁵

The strict opt-in model (i.e. without the possibility to have an opt-out model) is used in the majority of European countries who have collective redress framework, i.a. in Austria, Italy, Lithuania, Poland or Sweden.⁷⁶ Nevertheless, except for France, the new collective redress legislation in EU Member States, such as in the UK and Belgium, allows for the opt-out model.⁷⁷ Consequently, one can observe a shift in the assessment of which model is the most suitable in European collective redress frameworks.

5.1.2 The concept of the opt-out model

In case of opt-out proceedings, all injured parties are automatically parties to collective proceedings initiated as a consequence of mass harm. In case that a party does not want to be a

⁷⁴ Damien Geradin, 'Collective Redress For Antitrust Damages In The European Union: Is This A Reality Now?' [2015] SSRN Electronic Journal <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2593746> accessed 3 January 2016.

⁷⁵ Josef Drexler, 'Consumer Actions After The Adoption Of The EU Directive On Damage Claims For Competition Law Infringements' [2015] SSRN Electronic Journal <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2689521> accessed 8 March 2016.

⁷⁶ 'Report II On Collective Redress' (*British Institute of International and Comparative Law*, 2014) <http://www.collectiveredress.org/documents/171_report_ii_on_collective_redress_final.pdf> accessed 16 March 2016.

⁷⁷ Simon Fawell, Frances Macduff and James Russell Stoneham, 'Class Actions 2016. England & Wales.' (*Getting the Deal Through*, 2016) <<https://gettingthedealthrough.com/area/82/class-actions-2016>> accessed 16 March 2016; Joost Verlinden and Pieter Van Mulders, 'Class Actions 2016. Belgium.' (*Getting the Deal Through*, 2016) <<https://gettingthedealthrough.com/area/82/class-actions-2016>> accessed 16 March 2016.

party to such proceedings and does not want to be bound by a collective decision, that party must express its will to leave the proceedings.⁷⁸ In another words, in case of the opt-out model, a party can be passive and still be part of collective proceedings. If that party does not want to participate anymore, the party just expresses its will and is no longer bound by the future collective decision.

Basically, the disadvantages of the opt-in model can be viewed as advantages of opt-out model. It can be thus concluded that opt-out proceedings usually have a substantial number of injured parties on the claimant side, even the injured parties with minor claims which would otherwise not join collective proceedings. Consequently, in case that collective proceedings are successful, the amount of awarded damages might be substantial and thus might deter the infringer from any future misconduct. The infringer would not benefit from his own illegal conduct.

Nevertheless, also the opt-out model has its drawbacks. Legal uncertainty for the injured parties might be the most relevant one. It may happen that one of the injured parties is not aware of the collective proceedings until their very end. After the rendering of the collective decision, the injured party is bound by this decision even though it could not have influenced the proceedings in any way. Since the collective decision would have the *res judicata* effect, the injured party could not bring its individual claim against the infringer, even though it would have been more convenient for it to have individual proceedings.

Opt-out model has not been widely used by European countries in the past, but is currently gaining more popularity in the last two years. For instance, the new UK Consumer Rights Act and the Belgian Collective Redress Act allow the judge to adopt the opt-out model if its adoption is more convenient compared to the opt-in model. Portugal is also traditionally a country with the opt-out model. In Denmark, there is a possibility to bring a collective action with the opt-out model in case when the claims of the injured parties do not exceed 2.000 DKK. In such a case, public authorities are empowered to bring these claims.⁷⁹

5.1.3 Recommendation for the Czech Republic

As has been already pointed out in this thesis, the Czech Office for the Protection of Competition favors the adoption of the opt-out model. The Office argues that due to the lack of experience with collective redress mechanism, Czech consumers and other injured parties

⁷⁸ David McFadden, *The Private Enforcement Of Competition Law In Ireland* (Hart 2013). P. 104.

⁷⁹ Charlotte Leskinen, 'Collective Actions: Rethinking Funding and National Cost Rules' (2011) 8 *The Competition Law Review*.

might not be willing to join collective actions in case of mass harm.⁸⁰ I agree with this position of the Czech Office since in cases of minority claims, Czech consumers are still hesitant to bring their claims in court. This may be caused by lack of knowledge of their legal rights on one hand, and by the costs for filing and maintaining legal proceedings on the other hand. Therefore, the adoption of the opt-out model might be a viable solution for the Czech Republic.

If Czech legislators come to a conclusion that adoption of the strict opt-out model might not be suitable for the Czech Republic, they could follow the approach adopted by the new UK Consumer Rights Act and the Belgian Collective Redress Act under which a judge can choose between the opt-in and the opt-out model.⁸¹ Consequently, provisions on collective redress could stipulate that in case that a collective action is initiated, the respective judge is authorized to decide whether the collective proceedings are to be conducted on the basis of the opt-in or the opt-out model. This would mean that every case would be decided on a case-by-case basis and thus particularities of a certain mass tort could be taken into account. Moreover, this mixed model is also envisaged by the Draft of the Czech Act on Collective Civil Proceedings made by Czech authors Balarin and Tichý.

In the UK, when determining whether the opt-in or opt-out model should be adopted, a judge looks at the strength of the claims, whether it is practicable to conduct proceedings in the opt-in model and takes into account the estimated amount of damages which are to be recovered by the members of the group.⁸² In Belgium, the opt-in model is compulsory only in cases of physical injury or non-pecuniary damages and in cases when injured consumers are not residing in Belgium. Otherwise, a Belgian judge is authorized to decide in each case whether opt-in or opt-out solution is suitable in the case at hand.⁸³

In conclusion, it is advisable to stipulate under Czech law that in collective or representative proceedings, a judge is authorized to decide whether it is the more practicable to adopt an opt-in or an opt-out model.

⁸⁰ Czech Office for the Protection of Competition, 'The Position Of The Office For The Protection Of Competition Of The Czech Republic To The White Paper On Damages Actions For Breach Of The EC Antitrust Rules' <<https://www.uohs.cz/cs/uvodni-stranka.html>>. accessed 3 January 2016.

⁸¹ Damien Geradin, 'Collective Redress For Antitrust Damages In The European Union: Is This A Reality Now?' [2015] SSRN Electronic Journal <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2593746> accessed 3 January 2016.

⁸² Barry J. Rodger, 'The Consumer Rights Act 2015 and Collective Redress for Competition Law Infringements in the UK: A Class Act?' (2015) 3 Journal of Antitrust Enforcement

⁸³ Valérie Lefever and Johan Van Acker, 'The Belgian Council of Ministers Approves Draft Bills that Introduce a Collective Redress System in Belgian Competition Law Cases' (*Concurrences*, 2013) <<http://www.concurrences.com/Bulletin/News-Issues/December-2013-1528/The-Belgian-Council-of-Ministers-63578?lang=en>> accessed 14 March 2016.

5.2 Funding of collective actions

Funding of collective actions is one of the most pressing issues in the area of collective redress. Since collective proceedings usually involve a huge number of injured parties acting as a claimant, costs and legal expenses incurred in such proceedings might be of a considerable amount. Therefore, a question arises – who should be the one who finances collective actions? In the following text, it shall be analyzed what the most effective way of financing of collective actions is.

5.2.1 Funding provided by an attorney

One of the reasons why the Commission sought to avoid adoption of collective redress mechanism known in the United States is the institute of contingency fee. In its Recommendation, the Commission stated that as a rule, contingency fees should not be permitted as these would allegedly serve as an incentive to litigation. Nevertheless, Member States may exceptionally provide for contingency fees in cases of collective redress, while taking into account the right to full compensation of the injured parties.⁸⁴ In the following, it shall be analyzed whether the Czech Republic should have such an exception to the general rule and should allow for the use of contingency fees in collective redress cases.

As has been already indicated in this master thesis, contingency fees are special kind of fees for legal services which are charged by an attorney only if a lawsuit is successful or settled. Contingency fees are usually calculated as a percentage of the damages awarded in a judgment.⁸⁵ The system of contingency fees provides a good incentive for attorneys to do their best work in order to win the case since their reward is dependent on the amount of awarded damages. Moreover, clients do not need to pay any legal fees in case that the case is not successful. Clients will thus be more likely to initiate actions in cases where they would not have financial resources to commence legal proceedings. On the first sight, it can be concluded that contingency fee arrangement provides for a win-win scenario between a client and his attorney. Nevertheless, there may be certain drawbacks to contingency fee arrangement, especially the fact that attorneys could easily manipulate their clients into joining a collective action. Also, attorneys could threaten business enterprises with bringing legal suits against them.

⁸⁴ European Commission, 'Commission Recommendation Of 11 June 2013 On Common Principles For Injunctive And Compensatory Collective Redress Mechanisms In The Member States Concerning Violations Of Rights Granted Under Union Law' COM (2013). Para. 30

⁸⁵ Bryan Garner, *Black's Law Dictionary* (10th edn, Thomson Reuters 2014). P. 387.

The majority of Member States does not allow for use of contingency fees. For instance, in the Netherlands, contingency fees are not permitted since attorney's fees cannot be entirely dependent upon the attorney's success in judicial proceedings. Nevertheless, an attorney can agree with his client that he or she will receive a certain fixed fee and then also a percentage of awarded damages. In Sweden, contingency fees are not permitted with the reasoning that these lead to a conclusion of a risk sharing agreement which is dependent upon the success in judicial proceedings. Risk sharing agreements may be permitted only in cases where particular reasons make it necessary. Germany also generally prohibits the use of contingency fees, subject to very limited exceptions. Such an exception might be the case in which a client due to his financial situation cannot bring his claim unless an attorney provides him with funding through a contingency fee arrangement.⁸⁶ In another words, a client is discouraged from safeguarding and enforcing his legal rights in case that no contingency fee arrangement is available.

Nonetheless, it is important to note that Czech law does not prohibit contingency fees. According to the Section 10(5) of the Czech Attorneys' Code of Ethics, an attorney is authorized to conclude a fee arrangement with his client stipulating that the attorney will obtain his fee depending on the success in the judicial proceedings, in case that the fee does not amount to more than 25 % of the claim.⁸⁷ The only restriction to the contingency fee arrangement under Czech law is thus the threshold of 25 % of the claim which cannot be exceeded. Also, the arrangement is not dependent upon the fact that the client due to his financial situation could not initiate legal proceedings, as is the case in Germany, nor there any other limitations.⁸⁸

Given the fact that contingency fees are already allowed under Czech law, I would suggest not to exclude the possibility to have contingency fee arrangements when it comes to collective redress. Since collective redress is alien to Czech legal framework, contingency fees could help with development of collective actions in the Czech Republic as these would provide the necessary financial resources. Also, the risk of abuse of contingency fees is limited because the threshold of 25 % of the claim is stipulated in the Attorneys' Code of Ethics. In conclusion, I would recommend to keep the possibility to conclude contingency fees agreement also for cases of collective redress.

⁸⁶ Albert A. Foer and others, *The International Handbook on Private Enforcement of Competition Law* (Edward Elgar 2010). Pp. 377, 396 and 343-344.

⁸⁷ Section 10(5) of the Resolution of the Board of Directors of the Czech Bar Association No. 1/1997 of the Bulletin from October 31, 1996, which stipulates the rules of professional ethics and rules of competition between attorneys in the Czech Republic (Code of Ethics) (CZ)

⁸⁸ Lenka Řehulová, 'Smluvní odměna advokáta z pohledu čl. 10 Etického kodexu' (2012) 7 *Právní rozhledy* <<http://www.beck-online.cz>> accessed 30 January 2016

5.2.2 Funding provided by representative organizations

In case of representative actions, a representative would be the one to bear the costs of initiation of collective proceedings. Such a representative would most likely be a consumer organization. Nevertheless, in the case of Czech Republic it is questionable of how many resources Czech organizations on protection of consumers actually have.

Since the organizations for protection of consumers are non-profit making organizations, usually they would not have enough resources to pay all costs related to collective actions. It could be argued that members of such organizations would need to pay a membership fee and thus would be entitled to be represented in a potential representative action. Nevertheless, there is a danger that even this membership fee would deter consumers from defending their rights and, at the same time, the costs of legal proceedings would be much higher than the aggregate of the membership fees. Thus, a consumer organization might not be able to conduct legal proceedings even if its members pay the membership fee.

In the light of the above said, besides the membership fee, additional sources of funds would be needed. For instance, there could be financial help from the government. The government could on a yearly basis devote certain financial funds to all consumer associations engaging in collective proceedings. These funds would need to be used specifically for reimbursement of legal costs. As additional financial help to consumer organizations, these could be freed from an obligation to pay court fees when initiating collective proceedings. Lastly, there could be a rule that a court could have discretionary power to award the representative with a special reward in case that this representative substantially helped the group to win the collective proceedings.⁸⁹ Balarin and Tichý in their Draft of the Czech Act on Collective Civil Proceedings propose that a judge should be authorized to award a representative (which would most likely be a consumer association) special remuneration based on the amount of the awarded damages, up to the maximum of 25 % of these damages. The judge would award such remuneration in cases of very complicated disputes and in cases when the gain which the members of the group obtained could not be accomplished without the help of the representative.⁹⁰

In conclusion, taking into account non-profit character of consumer associations, funding provided by these associations might not be of such importance in collective redress

⁸⁹ Jan Balarin and Luboš Tichý, 'Kolektivní ochrana procesních práv v ČR: sen či skutečnost? (návrh právní úpravy a jeho odůvodnění)' [2013] Bulletin Advokacie <<http://www.bulletin-advokacie.cz/kolektivni-ochrana-procesnich-prav-v-cr-sen-ci-skutecnost-navrh-pravni-upravy-a-jeho-oduvodneni>> accessed 6 January 2016.

⁹⁰ Section 56 of the Draft of the Czech Act on Collective Civil Proceedings (CZ)

cases. Consequently, additional funds should be provided to Czech consumer organizations. This could be done by membership fees, financial help from the government, or by awarding the representative consumer association with special remuneration in case it substantially helped consumers to win a collective redress case. If no special form of funding is provided to consumer organizations, these might not be willing, or even able, to initiate representative proceedings in the first place.

5.2.3 Funding provided by a third party

Funding provided by a third party represents a third option of how to provide funds to collective and representative actions, especially in case that there is no representative and it is a group itself who brings legal proceedings.

In case of third party funding, a company, a bank or a hedge fund provides resources for the payment of some or all costs relating to bringing of a collective or a representative action. In exchange for the provision of funds, a third party obtains a share of awarded damages.⁹¹ This form of financing of collective and representative actions has recently gained popularity and may be thus the most important financing tool for collective redress. For instance, organizations such IMF Bentham, Claims Funding International, Harbour Litigation Funding and Caprica provide funding for collective litigation within the European area.⁹² Third party funding is allowed (i.e. expressly permitted or not regulated as prohibited) e.g. in the UK, Italy, Portugal, Denmark and Belgium.⁹³ Nevertheless, in some Member States third party funding is not possible. For instance, French Act Reforming Consumer Law does not contain provisions relating to the possibility of third party funding. In France, an agreement between a third party and injured parties according to which the funding third party would have a right to obtain a

⁹¹ Charlotte Leskinen, 'Collective Actions: Rethinking Funding And National Cost Rules' (2011) 8 The Competition Law Review.

⁹² Damien Geradin, 'Collective Redress For Antitrust Damages In The European Union: Is This A Reality Now?' [2015] SSRN Electronic Journal <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2593746> accessed 3 January 2016.

⁹³ Martin Christian Kruhl and Henrik Puggaard, 'Class Actions 2016. Denmark.' (*Getting the Deal Through*, 2016) <<https://gettingthedealthrough.com/area/82/class-actions-2016>> accessed 16 March 2016; Nuno Libáno Monteiro and António Pedro Pinto Monteiro, 'Class Actions 2016. Portugal.' (*Getting the Deal Through*, 2016) <<https://gettingthedealthrough.com/area/82/class-actions-2016>> accessed 16 March 2016; Michaela Turra and Alessandra Chimienti, 'Class Actions 2016. Italy.' (*Getting the Deal Through*, 2016) <<https://gettingthedealthrough.com/area/82/class-actions-2016>> accessed 16 March 2016; Joost Verlinden and Pieter Van Mulders, 'Class Actions 2016. Belgium.' (*Getting the Deal Through*, 2016) <<https://gettingthedealthrough.com/area/82/class-actions-2016>> accessed 16 March 2016; Simon Fawell, Frances Macduff and James Russell Stoneham, 'Class Actions 2016. England & Wales.' (*Getting the Deal Through*, 2016) <<https://gettingthedealthrough.com/area/82/class-actions-2016>> accessed 16 March 2016.

share in the awarded compensation, would amount to financial speculation on the judicial risk. Such financial speculation on the judicial risk would be contrary to the French public policy.⁹⁴

The Commission's Recommendation stipulates several restrictions upon this type of financing. According to the Section 32 of the Recommendation, "it is prohibited to base remuneration given to or interest charged by the fund provider on the amount of the settlement reached or the compensation awarded unless that funding agreement is regulated by a public authority to ensure the interest of the parties."⁹⁵ In another words, the Commission seeks to avoid a situation in which a third party provides funds for initiation of a representative or a collective action in exchange for a share in the damages award. Nevertheless, the Recommendation provides for an exception to this rule, this being a consent of public authority with such an arrangement with a third party.

In practice, a court assigned to a collective redress case would also need to decide upon the permissibility of the funding scheme with a third party. Yet, a question arises when the court should decide on the permissibility of the fee arrangement. For third parties, such as banks or private funds, it is most viable if such a decision is done as soon as possible. Otherwise, a bank would be at risk because it would provide some initial funds without knowing whether a court will allow it to get a share of awarded damages. At least a court fee would always need to be paid before the court could decide on the permissibility of the funding arrangement. Most likely, the court should decide on the funding arrangement in the first stage, i.e. in the certification stage of the collective proceedings. In case the court does not allow for the funding arrangement, it would most likely also not certify the representative, as the representative would not have enough resources to maintain the proceedings and to reimburse the defendant's legal and other expenses.

The Recommendation lays down other rules relating to the third party funding. The recipients of the funds needs to prove that a third party does not have a conflict of interest with the defendant. The reason for this rule lies in the fact that most likely competitors of the defendant would be the most willing to provide financial resources to a potential claimant. This could then lead to over-litigation and frivolous litigation sponsored by competitors. Consequently, it is important to stipulate the disclosure obligation and the abolition of conflict of interest with respect to third parties.

⁹⁴ Céline Lustin-Le Core, 'Class Actions 2016. France.' (*Getting the Deal Through*, 2016) <<https://gettingthedealthrough.com/area/82/class-actions-2016>> accessed 16 March 2016.

⁹⁵ European Commission, 'Commission Recommendation Of 11 June 2013 On Common Principles For Injunctive And Compensatory Collective Redress Mechanisms In The Member States Concerning Violations Of Rights Granted Under Union Law' COM (2013). Section 32.

Czech Republic could partly follow the principles contained in the Recommendation and stipulate that a third party providing a plaintiff with financial resources must not have any conflict of interest with a defendant. In practice, plaintiffs would have a disclosure obligation with respect to third party funding. Nevertheless, it is not advisable to restrict third party funding any further, as funding of collective redress cases might be quite difficult in the Czech Republic. Restricting third parties from obtaining a share from the damages award or making the funding arrangement subject to a court's approval would have a negative effect upon willingness of third parties with provision of such funds. Consequently, it is recommended to stipulate that conflict of interest rules are the only limitation with respect to third party funding.

5.2.4 Loser pays principle

The question of which party bears the costs of procedure is directly linked to the issue of funding. Whereas in the United States each party bears its own costs of procedure, in the continental systems it is the losing party who pays the costs not only for itself but also for the winning party⁹⁶ (i.e. the loser pays principle). It is thus a question which solution might be the best for the collective redress system in the Czech Republic.

The Commission's Recommendation advises Member States to stick to the loser pays principle also in cases of collective redress.⁹⁷ As in other Member States, the loser pays principle is a standard procedural rule under Czech law. The rule is contained in the Section 142(1) of the Czech Code of Civil Procedure according to which a court shall grant reimbursement of the costs to participants who had full success in the dispute against a party who had been unsuccessful.⁹⁸ Since this has been a standard principle under Czech law so far, it should be also adopted in cases of collective actions.

Nevertheless, there might be a problem with application of the loser pays principle to collective redress. In 2013, the Dusseldorf District Court dismissed a damage claim which was brought by a special purpose vehicle Cartel Damage Claims. One of the reasons why the District Court dismissed the claim was the fact that assignment of damages claims from victims to a special purpose vehicle violated public policy. The reason for violation of public policy was the application of the loser pays principle – the SPV did not have enough funds to cover legal costs

⁹⁶ Theodore Eisenberg and Geoffrey Miller, 'The English Versus The American Rule On Attorney Fees: An Empirical Study Of Public Company Contracts' (2013) 98 Cornell Law Review <<http://scholarship.law.cornell.edu/clr/vol98/iss2/2>> accessed 30 January 2016

⁹⁷ European Commission, 'Commission Recommendation Of 11 June 2013 On Common Principles For Injunctive And Compensatory Collective Redress Mechanisms In The Member States Concerning Violations Of Rights Granted Under Union Law' COM (2013). Para 13.

⁹⁸ Section 142(1) of the Act No. 99/1963 Coll., the Code of Civil Procedure, as amended (CZ)

of the opposing party in case the SPV loses the case.⁹⁹ In another words, an association bringing a representative claim would need to have sufficient funds which would cover not only its own legal costs and other expenses but also legal costs and expenses of the other party.

It could be also hard to estimate the amount of fees of the opposing counsel since these might be higher than fees paid to the plaintiff's counsel. Nevertheless, this problem could be avoided by a rule that a representative must be prepared to pay a reasonable amount of expenses of the opposing party in case that the representative loses the case. This could be proven to a court when a representative action is brought.

All-in-all, it is important to realize that the loser pays principle will lead to a situation in which more funding will be needed before legal proceedings are initiated since a representative organization will need to be prepared for potential payment of the costs of the opposing party.

5.2.5 Recommendation for the Czech Republic

In the light of what has been analyzed above, one needs to conclude that the most effective way of how to efficiently fund collective or representative proceedings is to combine all possible options of funding. Consequently, the options of (i) contingency fees, (ii) funding by representative organizations and (iii) funding by a third party should be available under Czech law.

With respect to contingency fees, these are already quite frequent in attorney-client relationship in the Czech Republic and thus there is no need to abolish them after the introduction of Czech collective redress scheme. As with the funding by representative organizations, help from the government, membership fees and a special reward for the representative might be needed in order for the organization to be able to commence and conduct collective proceedings. Funding by third parties should be allowed with no unnecessary limitations. The only restriction relating to third party funding should be prohibition of conflict of interest between a party providing the funds and a defendant. Accordingly, a party receiving the funds should have a disclosure obligation. With respect to the loser pays principle, as this principle is already recognized under Czech law, it should be also kept in Czech collective redress framework.

⁹⁹ Damien Geradin, 'Collective Redress For Antitrust Damages In The European Union: Is This A Reality Now?' [2015] SSRN Electronic Journal <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2593746> accessed 3 January 2016.

5.3 Structure of collective proceedings

5.3.1 Possibilities with respect to structuring of collective proceedings

The structure of collective proceedings is a quite technical, but a very important issue to be resolved by Czech legislators. Within the European framework, one can observe various approaches towards the question of how collective proceedings should be structured. Typically, there are two stages of collective proceedings. In the first stage, a court assesses admissibility of a claim. This means that a judge looks at whether the respective infringement is covered by collective redress legislation and whether a suitable representative has filed the claim. In some jurisdictions, e.g. in Belgium, in the first stage of proceedings, a judge is also obliged to decide whether an opt-in or opt-out model is to be adopted in the case at hand.¹⁰⁰ Sometimes, the first stage also covers negotiation between the parties in order to reach a settlement. The second stage is then concerned with the merits of the case, i.e. with the question of liability of the defendant and the amount of damages.

Nevertheless, an interesting approach has been adopted by France in its new French Act Reforming Consumer Law, effective from October 1, 2014. According to the French Act Reforming Consumer Law, there are three stages in collective proceedings. In the first stage, so called liability stage, a court decides whether a defendant is liable for the alleged infringement or not. If the court finds the defendant liable, it then defines the membership criteria, the recoverable losses and the available remedies. In the second stage, a group is constituted through an opt-in model on the basis on the membership criteria which have been stipulated by the court in the first stage. In the final stage, the court decides on the damages.¹⁰¹ In contrast to the typical structure of collective proceedings, French legislation is quite different because the court is firstly concerned with the liability of a defendant. The question whether the formed group is authorized to bring a collective action is thus decided at a later stage, after the liability of the wrongdoer has been established.

The Dutch approach towards the stages of collective proceedings, which is contained in the Dutch Bill on Collective Damages Claims, is also worth mentioning. According to the Dutch Bill on Collective Damages Claims, there may be up to five stages of proceedings. The first

¹⁰⁰ Valérie Lefever and Johan Van Acker, 'The Belgian Council Of Ministers Approves Draft Bills That Introduce A Collective Redress System In Belgian Competition Law Cases' (*Concurrences*, 2013) <<http://www.concurrences.com/Bulletin/News-Issues/December-2013-1528/The-Belgian-Council-of-Ministers-63578?lang=en>> accessed 14 March 2016.

¹⁰¹ Duncan Fairgrieve and Alexandre Biard, 'Focus On Collective Redress. France.' (*British Institute of International and Comparative Law*) <<http://www.collectiveredress.org/collective-redress/?ItemID=6&ItemType=report&loadtype=pagename&report=france>> accessed 5 February 2016.

stage comprises of an analysis of whether a representative fulfils the specific requirements contained in the bill and also whether a case has a close connection to Dutch jurisdiction. The second stage is concerned with the question of liability of the defendant. Already in this stage, parties are obliged to try to reach a settlement in case that the defendant is found liable. The third and the fourth stage are both concerned with settlements and mediation. Only if all attempts to settle a case fail, the court may rule on damages.¹⁰² One can observe that the Dutch legal framework for collective redress is focusing heavily on the prospective settlement of the claims. This may be due to the fact that it is quite problematic and time-consuming for the court to assess the exact amount of damages and thus reaching a settlement might be seen as more efficient method of dispute resolution.

5.3.2 Recommendation for the Czech Republic

With respect to Czech collective redress framework, Czech authors Tichý and Balarin recommend to divide collective proceedings into two stages – pre-certification stage and after-certification stage. In the first stage of the proceedings, the court would analyse whether it is possible to conduct collective proceedings in the first place, i.e. whether there exists a group with sufficiently homogenous claims and whether there is a suitable representative who will represent the group. In another words, the first stage would be concerned with procedural conditions and their compliance. The result of the first stage would be the issuance of a certification decision by the court. After the certification takes place, the court would deal with the issues of liability and damages.¹⁰³

Nevertheless, the best solution for Czech legal framework might be the combination of the French and the Dutch approach. The proceedings would consist of three stages. In the first stage, liability of the alleged infringer would be determined by the court, as has been seen in the French model. This approach is very practicable since it does not allow the representative or collective action to proceed if the claim is meritless. It is thus very efficient that liability of the wrongdoer is decided before time and costs are spent on the identification of the potential members of the group. The second stage would be divided into two parts. Firstly, the court would decide whether the representative fulfils all the statutory criteria and would also decide

¹⁰² 'Radical Changes Proposed To Dutch Class Action System' (Allen & Overy, 2014) <<http://www.allenoverly.com/publications/en-gb/european-finance-litigation-review/northern-europe/Pages/Radical-cahnges-proposed-to-Dutch-class-action-system.aspx>> accessed 15 March 2016.

¹⁰³ Jan Balarin and Luboš Tichý, 'Kolektivní ochrana procesních práv v ČR: sen či skutečnost? (návrh právní úpravy a jeho odůvodnění)' [2013] Bulletin Advokacie <<http://www.bulletin-advokacie.cz/kolektivni-ochrana-procesnich-prav-v-cr-sen-ci-skutecnost-navrh-pravni-upravy-a-jeho-oduvodneni>> accessed 6 January 2016.

whether proceedings shall be conducted in an opt-in or an opt-out model. After this procedural part is finished, the court would order the parties to an obligatory meeting with a registered mediator for minimum of three hours. Only after this meeting takes place and in case that the parties do not reach a settlement, the court decides upon the amount of damages which are to be adjudicated. Obligatory meeting with a mediator reflects to a certain extent Dutch approach and its emphasis on the amicable settlement of disputes. This is also in line with Czech tendency towards mediation, as is described further in this thesis. In the third stage of collective proceedings, the court would decide on the amount of damages to be awarded.

5.4 Competent authority deciding a collective action

A question of which court or courts should have the competence to decide collective actions is associated with the issue of structure of collective proceedings. In order for the Czech Republic to adopt the most viable option, it may be useful to analyse who decides collective action cases in other Member States.

5.4.1 Decision-making authorities in other Member States

Generally, there may be two solutions to the issue of which public authority or authorities should be given the decision making power with respect to collective actions. According to the first solution, only one specialized court or specialized courts would have exclusive competence to hear such disputes. For instance, in the UK it is only the CAT which has exclusive jurisdiction to hear disputes concerning infringement of competition law which has been already sanctioned by the decision of the national competition law authority or by the Commission.¹⁰⁴ Similarly, in Belgium only the Brussels courts have exclusive competence to hear and decide collective actions.¹⁰⁵ Similar solution is also adopted in France, where only the high courts of the first instance have the jurisdiction to hear the collective disputes.¹⁰⁶

According to the second solution, all the courts would have competence to hear collective redress disputes. In the case of the adoption of the second model in the Czech Republic, it would still be advisable to create specialized tribunals within the court which would deal only with collective action matters. It would be also practical if one member of the tribunal

¹⁰⁴ Arianna Andreangeli, *Private Enforcement of Antitrust: Regulating Corporate Behaviour Through Collective Claims in the EU and US* (Edward Elgar Pub 2014). P. 205.

¹⁰⁵ Valérie Lefever and Johan Van Acker, 'The Belgian Council Of Ministers Approves Draft Bills That Introduce A Collective Redress System In Belgian Competition Law Cases' (*Concurrences*, 2013) <<http://www.concurrences.com/Bulletin/News-Issues/December-2013-1528/The-Belgian-Council-of-Ministers-63578?lang=en>> accessed 14 March 2016.

¹⁰⁶ Stefaan Voet, 'European Collective Redress: A Status Quaestionis' (2014) 4 International Journal of Procedural Law <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2318809> accessed 13 March 2016.

has an academic degree in economy or in a field related to the subject-matter of the dispute. Since competition law infringements are usually very complex disputes where there is a need for economic experts, such specialized tribunals would undoubtedly create more effective legal proceedings. Of course, the best solution would be if a judge has a law degree and an economic degree at the same time. However, it is doubtful whether a sufficient number of such judges is now available in the Czech Republic.

5.4.2 Recommendation for the Czech Republic

Looking at the reality of the Czech Republic, it can be concluded that an establishment of a specialized court for the purposes of hearing collective disputes might be the best solution. Since there is no experience with collective proceedings, a specialized court would be better prepared for potential disputes than judges at already existing courts dealing with other matters. It is also advisable that a panel of judges at this specialized court is composed not only from judges with a law degree, but also with judges with an economic degree.

5.5 Legal standing of representatives in representative actions

In case of representative actions, it is important to stipulate who is eligible to bring a representative action on behalf of the group. Thus, a question of which criteria should a representative entity fulfil comes into play. Also, it needs to be resolved whether such a representative entity should be determined in advance, i.e. before a potential infringement, or on an ad hoc basis.

5.5.1 Consumer associations as representatives

There are several Member States, in which only consumer associations are authorized to be a representative in representative actions. For instance, in France only consumer associations have legal standing in case that they represent consumers with identical or similar claims which stem from actions of the same infringer.¹⁰⁷ Nevertheless, the number of such associations is still quite limited as there are only 15 consumer associations in France.¹⁰⁸

In general, European consumer associations have not been much active as representatives in Member States where they were authorized to bring representative actions. The number of cases reported in Member States allowing for representation by consumer

¹⁰⁷ Stefaan Voet, 'European Collective Redress: A Status Quaestionis' (2014) 4 International Journal of Procedural Law <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2318809> accessed 13 March 2016.

¹⁰⁸ Marc Shelley, 'Towards A Uniform European Approach To Collective Redress?' (*International Bar Association*, 2015) <<http://www.ibanet.org/Article/Detail.aspx?ArticleUid=9F8161E7-ED39-4F6C-B765-4D6C59E862C5>> accessed 16 March 2016.

associations is quite low and also the participation of harmed consumers is not very high.¹⁰⁹ Consequently, to have consumer associations as the only entities which would have legal standing to bring collective actions may not be in the best interests of harmed consumers. This may be caused by the fact that consumer associations might not have enough personal and financial resources needed for the initiation of collective proceedings.

On the other hand, in Italy and Bulgaria, entities other than registered consumer associations and members of the group are eligible to act as a group's representative.¹¹⁰ Interestingly enough, in Denmark, a consumer ombudsman is also authorized to be a representative in collective proceedings.¹¹¹ The new UK Consumer Rights Act stipulates that the CAT may authorize anyone as a representative if "*it is just and reasonable for that person to act as a representative in those proceedings.*"¹¹² Although from the preparatory works to the UK Consumer Rights Act one can observe that the UK government had the intention to exclude law firms and special purpose vehicles from qualifying as representatives, there is no express prohibition in the UK Consumer Rights Act for these entities to become representatives.¹¹³ It can be thus concluded that theoretically anyone can become a representative in the UK.

5.5.2 Recommendation for the Czech Republic

Czech authors Balarin and Tichý in their Draft of the Czech Act on Collective Civil Proceedings suggest that upon fulfilment of certain requirements (such as knowledge of a representative, his or hers professional background or financial resources), any person who is a part of the group, any non-profit organization, prosecutor's office or the Office for the Representation of State in Property Matters can become a group representative.¹¹⁴ In another words, the Draft of the Czech Act on Collective Civil Proceedings does not restrict the possibility to become a representative only to consumer organizations. On the other hand, it restricts the possibility only on the non-profit organizations, and consequently law firms would be excluded as representatives.

Since Czech consumers do not have any experience with collective actions, it would be recommendable not to impose more restrictions than necessary. The best solution would be to

¹⁰⁹ Roger Van Den Bergh, 'Private Enforcement of European Competition Law and the Persisting Collective Action Problem' (2013) 12 Maastricht Journal <http://www.maastrichtjournal.eu/pdf_file/ITS/MJ_20_01_0012.pdf> accessed 3 January 2016.

¹¹⁰ Marc Shelley, 'Towards a Uniform European Approach to Collective Redress?' (*International Bar Association*, 2015) <<http://www.ibanet.org/Article/Detail.aspx?ArticleUid=9F8161E7-ED39-4F6C-B765-4D6C59E862C5>> accessed 16 March 2016.

¹¹¹ *Ibid.*

¹¹² Section 47B(8)(b) of the Consumer Rights Act 2015 (U.K.)

¹¹³ Barry J. Rodger, 'The Consumer Rights Act 2015 And Collective Redress For Competition Law Infringements In The UK: A Class Act?' (2015) 3 Journal of Antitrust Enforcement

¹¹⁴ Sections 8 and 19 of the Draft of the Czech Act on Collective Civil Proceedings (CZ)

follow the approach adopted in the UK Consumer Rights Act and stipulate that anyone can be a representative if it is just and reasonable for him or her to act as one. The condition of sufficient financial resources could be mentioned with respect to eligibility of an entity to become a representative. This would mean that not only non-profit organizations, but also law firms could act as representatives in representative actions. This can be justified since even if only the consumer organizations are able to file collective actions, in practice it will be the third party funders and law firms who will provide the necessary funding to them. Thus, limiting the scope of representation only to consumer associations would not be practicable since entities other than consumer organizations are most likely to provide the funding.

5.6 Role of amicable dispute resolution

5.6.1 Mandatory or voluntary negotiations and mediation

With respect to the role of amicable dispute resolution in collective redress cases, Czech legislators need to decide whether some form of negotiation or mediation procedures is to be mandatory or not.

According to the Commission, the majority of stakeholders speak against the mandatory negotiation or mediation procedures in collective proceedings and call only for voluntary procedures.¹¹⁵ However, one can observe a tendency in some Member States to make negotiation and mediation procedures mandatory for the parties in the first stages of collective proceedings. For instance, the Belgian Collective Redress Act establishes mandatory negotiation between a representative of a group and a defendant. In case that negotiation is successful, a settlement between the representative and the defendant still needs to be endorsed by the court. Only in case that no settlement is reached, a court is authorized to continue with proceedings on the merits of the case.¹¹⁶ Similarly, the Dutch Bill on Collective Damages Claims puts quite a strong emphasis on the negotiation and settlement procedures. In three out of five prospective stages of collective proceedings, a court is attempting to convince parties to settle and might issue collective settlement proposals or offer mediation.¹¹⁷

¹¹⁵ European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Towards a European Horizontal Framework for Collective Redress' COM (2013).

¹¹⁶ Valérie Lefever and Johan Van Acker, 'The Belgian Council Of Ministers Approves Draft Bills That Introduce A Collective Redress System In Belgian Competition Law Cases' (*Concurrences*, 2013) <<http://www.concurrences.com/Bulletin/News-Issues/December-2013-1528/The-Belgian-Council-of-Ministers-63578?lang=en>> accessed 14 March 2016.

¹¹⁷ 'Radical Changes Proposed To Dutch Class Action System' (*Allen & Overy*, 2014) <<http://www.allenoverly.com/publications/en-gb/european-finance-litigation-review/northern-europe/Pages/Radical-changes-proposed-to-Dutch-class-action-system.aspx>> accessed 15 March 2016.

5.6.2 Recommendation for the Czech Republic

Looking at the current state of affairs in the Czech Republic, one can conclude that there is a tendency towards mediation and amicable settlement of disputes in civil proceedings. According to the Sections 67, 68 and 69 of the Czech Code of Civil Procedure, parties to a potential dispute can ask a court to conduct settlement proceedings between them, without initiation of any substantive civil proceedings.¹¹⁸ Moreover, according to the Section 99 of the Czech Code of Civil Procedure, a court engages in persuading the parties to reach a settlement within already initiated civil proceedings. Furthermore, according to the Section 100(3) of the Czech Code on Civil Procedure, if a presiding judge finds it efficient and appropriate, he or she is authorized to order the parties to the proceedings to meet with a registered mediator for minimum of three hours and to suspend the proceedings.¹¹⁹

Taking this pro-settlement and pro-mediation approach into account, it may be a good solution to include obligatory meditation as a step in the collective proceedings. A provision similar to the Article 100(3) of the Czech Code of Civil Procedure could be adopted under the Czech legal framework on collective proceedings. As has been described in this master thesis, in the second stage of collective proceedings, a judge would be empowered to order the parties to attend an obligatory meeting with a registered mediator for the minimum of three hours. Only if the meeting with the registered mediator does not lead to a settlement, the proceedings could proceed to their third and final stage in which the judge decides on the amount of awarded damages.

5.7 Distribution of proceeds

Essentially, there are three issues which should be resolved by Czech legislator in relation to legal framework for distribution of proceeds.

Firstly, the question of who is to be authorized to distribute the proceeds must be answered. In Belgium, this task is performed by a collective claims settler appointed by a court.¹²⁰ After an award or a settlement is executed, the collective claims settler is obliged to prepare a final report and stipulate the amount of compensation paid to consumers and the amount of total costs and fees. Only after the court obtains this report, it can close collective proceedings.¹²¹ In France, a judge decides whether the proceeds are to be paid directly to

¹¹⁸ Section 67, 68 and 69 of the Act No. 99/1963 Coll., the Code of Civil Procedure, as amended (CZ)

¹¹⁹ Section 100(3) of the Act No. 99/1963 Coll., the Code of Civil Procedure, as amended (CZ)

¹²⁰ Viktória Harsági and C. H. van Rhee, *Multi-Party Redress Mechanisms In Europe* (Intersentia 2014). Pp. 103-104.

¹²¹ Joost Verlinden and Pieter Van Mulders, 'Class Actions 2016. Belgium.' (*Getting the Deal Through*, 2016) <<https://gettingthedealthrough.com/area/82/class-actions-2016>> accessed 16 March 2016.

individual victims or whether this should be done through a consumer association.¹²² In the UK, after the CAT makes a decision on damages, it makes an order according to which damages are paid on behalf of the group members to a class representative or to a person which the CAT considers as fit.¹²³ In Sweden, a representative of the group cannot be a recipient of damages and only members of the group can themselves enforce the judgment.¹²⁴ In Denmark, a defendant is obliged to pay compensation directly to banking accounts of injured parties.¹²⁵ Analysing the Belgian, French, UK, Swedish and Danish approach, it can be concluded that there are basically three options as to who can be authorized to distribute profits to the injured parties – a special entity appointed by a court, a class representative or injured consumers themselves.

Czech law would most likely benefit from adoption of the Belgian rule according to which a court appoints a collective claims settler whose task is to distribute proceeds to individual consumers. This solutions seems to be the most practical one, since the task of distribution of proceeds would be in the hands of an independent and impartial third party, who is not related to injured consumers. Consumer association representing consumers is by its definition dependent upon consumers. Consequently, third party, such as appointed collective claims settler, is more suitable for the task of distribution of proceeds. It is also possible that individual consumers would need representation from consumer association in the distribution stage of collective proceedings. Also for this reason, it is more practicable that the distributor will be a person different from the consumer association.

Secondly, it needs to be specified what shall be done with residual funds which have not been paid to individual consumers, e.g. because these consumers did not file requests to obtain monetary compensation in case of opt-out model. In the UK, the CAT has three options as to whom to direct undistributed damages. It can direct undistributed damages to a class representative, to itself or to a charity.¹²⁶ In Belgium, if there are some residual funds, the court is authorized to send those funds back to a defendant or to order the defendant to set up a cypres scheme.¹²⁷

¹²² Céline Lustin-Le Core, 'Class Actions 2016. France.' (*Getting the Deal Through*, 2016) <<https://gettingthedealthrough.com/area/82/class-actions-2016>> accessed 16 March 2016.

¹²³ The Competition Appeal Tribunal Rules 2015 (U.K.). Point 93(1).

¹²⁴ Viktória Harsági and C. H. van Rhee, *Multi-Party Redress Mechanisms In Europe* (Intersentia 2014). P. 254.

¹²⁵ Martin Christian Kruhl and Henrik Puggaard, 'Class Actions 2016. Denmark.' (*Getting the Deal Through*, 2016) <<https://gettingthedealthrough.com/area/82/class-actions-2016>> accessed 16 March 2016.

¹²⁶ The Competition Appeal Tribunal Rules 2015 (U.K.). Point 93(4)-(6).

¹²⁷ Viktória Harsági and C. H. van Rhee, *Multi-Party Redress Mechanisms In Europe* (Intersentia 2014). Pp. 103-104.

Under the prospective Czech collective redress framework for representative actions, residual funds could be paid to the representative who would most likely be a consumer association. This would create additional financial incentive for consumer associations to become representatives of consumers in collective redress cases. Residual funds could be used for other collective redress cases conducted in the future. This concept would complement the above mentioned rule that there is a third independent collective claims settler since in case that this settler would be a consumer organization, it would be problematic for the organization to award itself residual funds. In case of collective proceedings, residual funds could be also directed to certain consumer association which is active in defending collective consumer rights.

Thirdly, it needs to be resolved how content of a damages award should look like, specifically how the judge is to stipulate the rules relating to distribution of proceeds. In the UK, the CAT has the possibility to award individual damages or aggregate damages to the entire class. In the case of aggregate damages, a judge does not specify claims of each injured party. This option has been adopted in order to avoid time-consuming assessment of each individual claims made by CAT.¹²⁸ In the aggregate damages award, the CAT gives directions for assessment of the amount of damages which is to be claimed by individual consumers. This can be done by inserting a method of calculation of individual damages or by an appointment of a third party who shall determine the quantification of damages.

This UK rule could be also implemented under Czech law. One can imagine a scenario under which there are thousands of consumers with minority claims. To ask the court to enumerate in its decisions all the amounts of individual claims would unnecessarily prolong collective proceedings. Consequently, a rule under which a judge could award aggregate damages in which he would stipulate a formula for calculation of an individual claim could be implemented. Once again, a collective claims settler could be authorized to distribute individual proceeds to consumers while observing the methods stipulated in the aggregate award.

5.8 Scope of collective redress

Even though the focus of this master thesis is collective redress in the realm of competition law, the scope of collective redress might be enlarged also to other areas of law. According to the Commission's approach, collective redress should take the form of a horizontal framework. This horizontal approach means that collective or representative actions should be available in

¹²⁸ Alan Davis, Matt Evans and Nicholas Cotter, 'Antitrust Alert: New UK Regime for Competition Damages Actions Comes into Effect' (*Jones Day*, 2015) <<http://www.jonesday.com/Antitrust-Alert--New-UK-Regime-for-Competition-Damages-Actions-Comes-into-Effect-10-01-2015/?RSS=true>> accessed 19 March 2016.

the areas of consumer protection, environment protection, competition law, personal data protection and protection in relation to financial services and investments.¹²⁹ It is thus a question for the Czech legislator which areas of law should be covered by collective redress framework.

For instance, the Belgian Collective Redress Act enumerates specific areas in which a class action may be filed. These include particularly Belgian competition law, contractual infringements, infringements of rules on safety of products or unfair market practices.¹³⁰ Polish legal framework also provides for specific areas for the application of collective redress rules. These areas include consumer cases, product liability cases and tort liability cases (breaches of competition law are considered as tort liability cases).¹³¹ The French Act Reforming Consumer Law restricts collective proceedings only to consumer cases and to follow-on competition law cases. Nevertheless, there is a draft legislation relating to French health systems which proposes an extension of collective redress also to health-related disputes.¹³²

Another approach is offered by Czech authors Balarin and Tichý in their Draft of the Czech Act on Collective Civil Proceedings. In their draft, authors propose that collective or representative actions can be filed in any private-law proceedings.¹³³ Only matters relating to family law and status-based questions are excluded from the application of collective redress framework.¹³⁴ A similar approach is adopted by Swedish Group Proceedings Act, according to which collective proceedings may be initiated if collective claims relate to civil matters and specific environmental matters.¹³⁵

This another approach, according to which all civil matters can be litigated under collective redress framework, may be viewed as the best one for Czech Republic. Restricting the scope only to competition law cases and consumer cases would not be fair for injured parties in other sectors, e.g. in the area of environmental protection. Due to the lack of experience with collective redress framework in the Czech Republic, it is desirable not to restrict the scope of

¹²⁹ European Commission, 'Commission Recommendation Of 11 June 2013 On Common Principles For Injunctive And Compensatory Collective Redress Mechanisms In The Member States Concerning Violations Of Rights Granted Under Union Law' COM (2013). Para 7.

¹³⁰ Valérie Lefever and Johan Van Acker, 'The Belgian Council of Ministers Approves Draft Bills that Introduce a Collective Redress System in Belgian Competition Law Cases' (*Concurrences*, 2013) <<http://www.concurrences.com/Bulletin/News-Issues/December-2013-1528/The-Belgian-Council-of-Ministers-63578?lang=en>> accessed 14 March 2016.

¹³¹ Barry J. Rodger, 'Competition Law: Comparative Private Enforcement And Collective Redress Across The EU' (2014) 56 *International Competition Law Series*. P. 179.

¹³² Duncan Fairgrieve and Alexandre Biard, 'Focus On Collective Redress. France.' (*British Institute of International and Comparative Law*) <<http://www.collectiveredress.org/collective-redress/?ItemID=6&ItemType=report&loadtype=pagename&report=france>> accessed 5 February 2016.

¹³³ Section 1(2) of the Draft of the Czech Act on Collective Civil Proceedings (CZ)

¹³⁴ Section 3(2) of the Draft of the Czech Act on Collective Civil Proceedings (CZ)

¹³⁵ Section 2 of the Swedish Group Proceedings Act (SWE)

collective redress and allow it for every infringements of private law, except for family matters and status matters.

6. Conclusion

The aim of this master thesis was to offer suggestions and solutions to the question of how an ideal collective redress framework should look like in the Czech Republic. Before these suggestions and solutions were offered, this master thesis firstly focused on the origins of collective redress mechanism, the institute of the U.S. class action, then elaborated upon the European debate on this topic and also covered the current status of collective redress in the Czech Republic. The core of this thesis, and its main outcomes, were contained in the fifth chapter dealing with the issues that Czech legislator will need to resolve when Czech collective redress framework will be created. In the following, the individual outcomes of all the chapters will be summarized.

The *second chapter* focused on the origins of collective redress mechanism – the institute of the U.S. class action. Before the peculiarities of the U.S. class action have been introduced, a brief overview of U.S. litigation system has been made. Plaintiff-friendly approach of the system, institutes of punitive damages and contingency fees, parties-driven conduct of proceedings and the American rule on attorney's fees have been identified as the basic elements of U.S. litigation system. With respect to the institute of the U.S. class action, it has been concluded that in order to bring a class action, the conditions of numerosity, commonality, typicality and adequacy of representation must be fulfilled. The certification stage of class proceedings proved to be very important since the U.S. apply the opt-out model. Financing of class actions by law firms has been pointed out, as well as forms in which damages award may be distributed. The perception of the U.S. class action in Europe has been also elaborated upon.

In the *third chapter*, history of debate on collective redress in EU competition law has been analysed. Three major instruments issued by the Commission – the Green Paper, the White Paper and the Recommendation have been introduced. When assessing the existing obstacles to private enforcement of competition law, the Green Paper identified that one of these obstacles is insufficient access of consumers with small claims to judicial proceedings. In the White Paper, the Commission proposed to have two systems for collective redress, a representative action and a collective action. In 2013, the Recommendation was issued and proposed general framework for collective redress. Nevertheless, it has been concluded that recent laws of Member States do not strictly follow the content of the Recommendation and thus Czech legislators might adopt a different collective redress system.

The *fourth chapter* has dealt with the current state of affairs of Czech collective redress. It has been concluded that there is no general Czech collective redress framework. Some indications of collective redress have nevertheless been observed in the area of consumer protection and unfair competition. In consumer matters and unfair competition matters, certain consumer associations are authorized to file injunctions. Nevertheless, these are not allowed to file damages claims. With respect to the provisions of the Czech Code of Civil Procedure on *res judicata* and *litis pendens*, it has been established that these provisions do not provide a legal basis for collective redress in the Czech Republic.

The *fifth chapter* which formed the core of the master thesis identified the main issues to be resolved by Czech legislators with respect to collective redress framework and proposed solutions to these issues. *Firstly*, the question of whether an opt-in or an opt-out model should be adopted has been tackled. Both models have been analysed, including their advantages and disadvantages. It has been recommended that the Czech Republic should follow the new UK Consumer Rights Act and the Belgian Collective Redress Act and adopt a mixed model. According to this mixed model, a judge would be authorized to decide in each case whether an opt-in or an opt-out model is to be adopted, while taking into consideration specific nature of each dispute.

Secondly, prospective methods of funding have been elaborated upon. It has been concluded that since Czech Attorneys' Code of Ethics already allows for contingency fees in case that these do not exceed the threshold of 25 %, this option should be kept also for collective redress cases. With respect to funding provided by consumer associations, it has been pointed out that such funding might be quite limited due to non-profit character of these associations. It has been recommended that additional funds should be provided to Czech consumer associations, these being in the form of membership fees, financial help from the government or special remuneration granted to the consumer association which acted as a representative. Third party funding has been identified as a very important tool for providing resources to Czech collective redress cases. As a consequence, it has been recommended not to restrict third party funding arrangements. Only limitation with respect to third party funding should be the prohibition of conflict of interest between a party providing the funds and a defendant. Lastly, the issue of loser pays principles has been elaborated upon. A recommendation has been made that the loser pays principle should be applicable in collective redress cases since it is already a recognized principle under Czech law.

Thirdly, a question of how the structure of collective proceedings under Czech law should look like has been asked. It has been recommended to combine both the French and the

Dutch approach and set forth three stages of collective proceedings. In the first stage, a judge would assess whether a defendant is liable or not. This would lead to an effective dismissal of unmeritorious claims at an early stage. After the defendant would be found liable, a second stage would be initiated. In this second stage, a judge would consider the procedural requirements, i.e. whether the representative fulfils all the statutory criteria and whether an opt-in or an opt-out model should be adopted. Moreover, after the assessment of the procedural requirements, a judge would order the parties to attend a compulsory meeting with a registered mediator. In case that this meeting will not lead to an amicable settlement, a judge would decide the dispute in the third, compensation stage of collective proceedings.

Fourthly, it has been examined who should be the competent authority deciding collective redress cases. A proposition has been made that due to the lack of experience of Czech courts with collective and representative actions, a specialized court with exclusive competence to hear collective disputes should be created. Inclination towards specialized courts has been also visible in the EU, as is demonstrated by the UK and Belgium. It has been also suggested that there should be not only judges with a law degree, but also judges with an economic degree who would better understand the complexities of competition law collective redress cases.

Fifthly, an issue of legal standing of representatives has been analysed. It has been proposed to follow the UK Consumer Rights Act and to stipulate that any natural or legal person can become a representative if it is just and reasonable for that person to become one. A condition that such a representative needs to have sufficient monetary resources could also be adopted. This would mean that not only consumer associations, but also law firms and other entities could act as representatives. Such a rule would be practical because these entities would most likely have the necessary financial resources, as opposed to consumer associations.

Sixthly, a role of amicable dispute resolution in collective redress cases has been explored. Given the general pro-settlement approach of Czech law and the emphasis on negotiation and settlement proceedings as viewed in the recent Belgian Collective Redress Act and the Dutch Bill on Collective Damages Claims, it has been proposed to include mandatory mediation in collective proceedings. In the second stage of collective proceedings, a judge would be empowered to order parties to attend a meeting with a registered mediator for minimum of three hours. Collective proceedings could proceed to their last stage only if the meeting took place and no settlement was reached.

Seventhly, the issue of distribution of proceeds has been analysed. The question of who should be authorized to distribute the proceeds to injured parties has been asked. It has been

advised to adopt a Belgian rule according to which a court appoints an independent collective claims settler whose task is to distribute proceeds to individual consumers. With respect to what shall be done with non-distributed funds, it has been concluded that these should be directed to the representative which in most cases will be a consumer association. In case there is no representative, non-distributed funds could be directed to any consumer association active in defending collective consumer rights. Finally, it has been also advised that with respect to content of a damages award, a judge should be authorized to award aggregated damages if enumeration of every individual claim in the award would be time-consuming. In the case of aggregate damages, a judge would only stipulate a formula for calculation of individual claims.

Finally, it has been elaborated upon an issue of a scope of collective redress. It has been suggested that the Commission's horizontal approach towards the scope of collective redress should be followed. This approach is also stipulated in the Draft of the Czech Act on Collective Civil proceedings and in the Swedish Group Proceedings Act. In the case that this approach is adopted, all claims arising out of all civil law matters (except for family matters and status matters) would be capable to be litigated under collective redress scheme.

In the end, it can be concluded that it will not be easy for Czech legislators to create an effective collective redress framework. Nevertheless, since Czech legislators can compare already working collective redress schemes in Europe, Czech framework can benefit from such comparison and choose the most effective option. One can only hope that Czech legislators will indeed be active and will in the near future create at least some collective redress system. Such system is needed not only in the area of competition law, but also consumer law and environmental law. Nevertheless, a last question inevitable comes to my mind – even if a collective redress system is implemented in the Czech Republic, will passive Czech consumers make use of such a system? That is a question which someone else in the future will need to answer...

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