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Private enforcement of Competition Law through collective redress: a comparison between the Brazilian and the Portuguese models

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Private enforcement of Competition Law through collective redress: a comparison between the Brazilian and the Portuguese models

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Abstract: The master thesis focuses on small and widespread overcharges resulting from anticompetitive behavior that harm consumers, resulting in minor damages that do not justify individual lawsuits. The aim is to investigate collective redress mechanisms for private enforcement of Competition Law in both Brazilian and Portuguese contexts using comparative research methodology. The European framework enabling Portuguese collective redress for Competition Law was examined. Empirical research involved analyzing lawsuits discussing the research topic, revealing that Brazilian test cases serve as binding precedents to prevent conflicting rulings on already filed cases. However, they do not address the issue of consumer inertia in seeking antitrust damages.

Keywords: Competition Law; Private Enforcement; Collective redress; Comparative research.

Abstract auf Deutsch: Die Masterarbeit befasst sich mit kleinen und weitverbreiteten überhöhten Preisen infolge wettbewerbswidrigen Verhaltens, das Verbraucher schädigt und zu geringen Schäden führt, die keine Individualklagen rechtfertigen. Ziel ist es, kollektive Rechtsschutzmechanismen zur privaten Durchsetzung des Wettbewerbsrechts im brasilianischen und portugiesischen Kontext mit Hilfe einer vergleichenden Forschungsmethodik zu untersuchen. Der europäische Rahmen, der den portugiesischen kollektiven Rechtsschutz im Wettbewerbsrecht ermöglicht, wurde untersucht. Die empirische Untersuchung umfasste die Analyse von Gerichtsverfahren, in denen das Forschungsthema behandelt wurde. Dabei zeigte sich, dass die brasilianischen Musterverfahren als verbindliche Präzedenzfälle dienen, um widersprüchliche Entscheidungen in bereits anhängigen Fällen zu vermeiden. Sie adressieren jedoch nicht das Problem der Trägheit der Verbraucher bei der Geltendmachung kartellrechtlicher Schadensersatzansprüche.

Keywords: Wettbewerbsrecht; private Rechtsdurchsetzung; kollektive Rechtsdurchsetzung; vergleichende Forschung.

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List of Abbreviations

ACI - Assumption of Competence Incident
ADR - Alternative Dispute Resolution
BC - Brazilian Constitution
BCPA or CPA - Brazilian Consumers' Protection Act - Law n. 8.078/1990
BCLA or CLA - Brazilian Competition Law Act - Law n. 12.529/2011
BPAA - Law n. 4.717/1965
BPCLA or PCLA - Brazilian Public Civil Lawsuit Act - Law n. 7.347/1985
CADE - Brazilian National Competition Authority
CADE-Res - Resolution n. 21/2018, regulating access to documents and evidence - leniency programs
CPC - Brazilian Code of Civil Procedure - Law n. 13.105/2015
ECJ - European Court of Justice
NCA - National Competition Authority
PAA - Popular Action Act in Portugal - Law n. 83/1995
PEA - Private Enforcement Act in Portugal - Law n. 23/2018
RRII - Resolution of Repetitive Issues Incident
TFEU - Treaty on the Functioning of the European Union
TJSP - São Paulo State Court of Appeals
TRF3 - Federal District Court

1. CHAPTER I - INTRODUCTION

1.1 Subject Matter of the Master Thesis and the Topic in general

Competition law is applied in two spheres: (1) the public one, by national authorities and occasionally in the criminal field, (2) and through the private sphere, when individuals or companies, perceiving possible harm to themselves due to violations of substantive norms, seek the appropriate redress, and that this can occur through various methods of dispute resolution[1], such as conciliation or arbitration[2], for instance, or also through the Judiciary, which is the more customary approach. Equally important is understanding that there is not only a single path to litigate over damages caused by Competition Law violations. There is the possibility of other means than the courts to claim these damages, including arbitration and mediation. They are the so-called Alternative Dispute Resolution (ADR),[3] and they are not the object of this study for, among different reasons, the consideration that they will probably not be used by consumers, small or medium businesses to claim small-scale amounts related to Competition Law violations. Therefore, they will be excluded from this analysis from now on. The present research focuses on a specific aspect of post-anti-competitive conduct:[4] small and widespread overcharges which harm both direct and indirect final consumers,[5] leading to a dead-end in antitrust violation discussion. These consumers bear the overcharge, and the situation is considered a dead-end once they usually acquire irrelevant quantities and, therefore small amounts of damages are involved not justifying the filing of an individual lawsuit.

[1] In this sense, the Directive 2014/104/EU, in its consideration n. 5.

[2] Micaela Barros Barcelos Fernandes, 'O uso da Arbitragem nas Ações de Reparação de Danos Concorrencias' (2023) 5 Mulheres no Antitruste, 221, 221-226. According to Eda Şahin, these methods do not fit in this field: Eda Şahin, *Collective Redress and EU Competition Law* (Routledge 2019), p. 8, "*One can infer from this, inter alia, that alternative mechanisms work well in cases where it is easy to prove the infringement/damage or the infringement/damage is already proven. This does not fit in with the particular complexities of competition claims where the proof of infringement and damage is already difficult. Indeed, the success rate of competition cases are low. When this is the case, one can question why an infringer wishes to agree to pay damages knowing that victims encounter difficulties in proving the infringement as well as their loss*.".

[3] Check the considerations of Leonard L. Riskin, James E. Westbrook, Chris Guthrie, Richard C. Reuben, Jennifer K. Robbennolt and Nancy A Welsh in the Casebook Series "Dispute Resolution and Lawyers: case and materials" about the terminology, stating that "Dispute Resolution" or "Appropriate Dispute Resolution" would be more precise, in: Leonard L. Riskin, James E. Westbrook, Chris Guthrie, Richard C. Reuben, Jennifer K. Robbennolt & Nancy A Welsh, *Dispute Resolution and Lawyers: cases and materials* (5th edn, West Academic Publishing, 2014).

[4] For an overview of the many possible perspectives of the post-anti-competitive conduct: Eda Şahin, *Collective Redress and EU Competition Law* (Routledge 2019), p. 81-111.

[5] As set out by Directive 2014/104, in its article 12.

Nevertheless, considering the scale of the mass economy, the sums involved are substantial when considering the conduct and undertakings engaging in antitrust violations.

Intermediate sellers (indirect purchasers) who are also damaged from the conducts listed on Articles 101 and 102, TFEU, in the European context, or listed on Article 36, CLA, in the Brazilian scenario, for instance, have specific characteristics considering levels of overcharge and passing-on[6] and, most of the time, they are dealing with higher amounts of damages, justifying an individual lawsuit or the decision not to sue at all considering market strategies and ongoing contracts. That said, the research object is properly defined, excluding (1) deadweight loss consumers, who are the ones who did not purchase due to the price increase,[7] (2) intermediate sellers, and (3) companies/competitors excluded from some markets due to exclusionary practices.[8]

Within the judicial process, two avenues could be at the disposal of the harmed consumers by an overcharge: the individual and the collective redress.[9] I will focus on the latter when scattered losses are considered[10], since it is perceived to bring better results in the event of many injuries with low amounts of damages involved.[11] Nevertheless, the individual path can become collective throughout non-representative proceedings such as test cases, which have a growing importance as a foundation for weakening the Brazilian representative collective redress system, which will be properly discussed further on.

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[6] Eda Şahin, *Collective Redress and EU Competition Law* (Routledge 2019), p. 88, "*The damages claim of any intermediate seller would have individual characteristics. Each likely suffers different levels of overcharge damages. The amount of overcharge passed downwards could vary in each layer of the supply chain*.".

[7] Eda Şahin, *Collective Redress and EU Competition Law* (Routledge 2019), p. 105, "*In reducing output and raising prices, competition infringements generate a deadweight loss, an economic term referring to inefficiency, i.e. welfare not produced due to the infringement.*".

[8] About this topic: Luigi Prosperetti, 'Estimating Damages to Competitors from Exclusionary Practices in Europe: A Review of the Main Issues in the Light of National Courts' Experience' (2009) Available at SSRN: <https://ssrn.com/abstract=1551276> or <http://dx.doi.org/10.2139/ssrn.1551276>, p. 3, "*The foreclosed competitor will suffer, in general, a* damnum emergens*, a loss of profits, a loss of chance, and may suffer a loss of reputation*.".

[9] There is significant political discussion on the terminology: "collective redress mechanisms", "collective litigation", "group litigation", "collective actions", "group actions" and, "class actions". For a broad view on the topic: Eda Şahin, *Collective Redress and EU Competition Law* (Routledge 2019), p. 4-6. Also: Astrid Stadler, 'Are Class Actions Finally (Re)Conquering Europe? Some Remarks on Directive 2020/1828' (2021) 30 Juridica Int'l 14. The many political nuances are not considered in this paper.

[10] Gerhard Wagner, 'Collective Redress – Categories of Loss and Legislative Options' (2011) 127 Law Quarterly Review, 55, 55-82, Available at SSRN: <https://ssrn.com/abstract=1960904>, p. 61, "*The term "collective redress" comprises different types of cases. Therefore, the problems posed by collective redress cannot be resolved through a single, "one size fits all" remedy. Rather, three types of case must be distinguished, namely, damage to common goods, mass torts and scattered loss*.".

[11] Maria José Capelo, Carolina Cunha, *Práticas Anticoncorrenciais - Entre o public enforcement e a ação popular indemnizatória* (GestLegal 2023), p. 20. Also: Eda Şahin, *Collective Redress and EU Competition Law* (Routledge 2019), p. 110.

1.2 Objective of the Master Thesis, Research Limitations and Methodology

The research aims to reveal the representative and non-representative collective mechanisms for private enforcement of Competition Law in Brazil compared to the Portuguese experience as a Member State in the European Union, leading to the necessary assessment of the European framework enabling the Portuguese collective redress for Competition Law. The intent is to assess the situation in Brazil from a comparative and empirical perspective. To fulfill this objective, the first research question, which is: "*What are the mechanisms structured to facilitate the collective redress of Competition Law violations in both jurisdictions and how can they be compared?*", is answered starting from this moment, considering the adequate development of this work.

In Brazil, the answer involves representative collective mechanisms and legal precedents based on non-representative models, such as test cases. All these mechanisms will be further explored, after explaining the reasons for joinder not being an option as a feasible means to protect harmed consumers. On the other hand, in Portugal, popular action and a collective system incorporated after the Directive 2020/1828, must be addressed, after the proper European legal framework to contextualize them. The comparison among these instruments are developed throughout a theoretical legal frame, considering the main substantive and procedural aspects presented, but also through cases. Considering the publicity governing most of the court proceedings in Brazil, accessing case law data is facilitated. In Portugal, there is not such an open source of research material based on case law in the courts' data basis, but there is relevant and significant information on Competition Law cases provided by some associations.[12]

Yet, in Brazil, private enforcement has not well developed legal responses concerning antitrust violations[13], even with recent legislative reforms on the subject,[14] justifying the comparison of the state of the art in Brazil with what has been happening in the European context, in which there are few lawsuits seeking private redress in most Member States, but a strong involvement of the European Commission in encouraging the use of these mechanisms[15] that can act as a deterrent instrument for future anticompetitive practices, in addition to bringing

[12] Ius Omnibus: <https://iusomnibus.eu/pt/casos/>, for instance.
[13] Beatriz Kenchian, '*Enforcement* privado e ação coletiva para reparação de danos concorrenciais' (2023) 5 Mulheres no Antitruste, 245, 245-246.
[14] Law n. 14.470 de 2022, for instance.
[15] Isabela Monteiro de Oliveira, 'Efeitos guarda-chuva e Direito da Concorrência no Brasil: os possíveis impactos nas ações de responsabilidade por danos concorrenciais' (2019) 2 Mulheres no Antitruste, 205, 205-210.

an important sense of integration and responsibility to the individuals within society who are compensated for the suffered damages, since public enforcement of Competition Law mainly centers itself in the cessation of the illegal practice. The European Union has recognized the importance of private enforcement in Competition Law[16], issuing guidelines and directives on antitrust damages lawsuits and damage quantification[17].

In 2013, the European Commission published a Recommendation encouraging Member States to implement a collective redress system for private enforcement of Competition Law. Most of the Member States established an opt-in system or a partially opt-out option,[18] which is ineffective by its own nature, requiring citizens to be aware of the lawsuit and decide to join it. On the other hand, Portugal, among some other Member States, has adopted an exclusive opt-out system.

According to the Organization for Economic Cooperation and Development (OECD), despite significant recent advancements, the Brazilian competition legislation still grapples with sensitive issues such as obtaining evidence, judicial costs, and a short period considering the statute of limitations[19]. Additionally, there are considerable challenges in the Brazilian context for the widespread implementation of private enforcement of Competition Law. These include the economic complexity of the discussions and the lack of expertise within the judiciary to handle intricate economic issues that impact the seemingly straightforward quantification of damages, for example.

Apart from the (i) first question regarding the mechanisms to deal with collective redress in the chosen jurisdictions and their comparison, the aim involves also to address the following research questions: (ii) Considering the few collective lawsuits filed in the São Paulo State Court of Appeals to discuss issues related to Competition Law, what are the main issues faced by the Court considering both Competition Law and Civil Procedure? (iii) Considering the Brazilian legal precedents, which are called the 'non-representative collective redress', approved by the legislative branch to bring efficiency in numbers to the Brazilian courts, would it be feasible to consider treating the follow-on damages through those mechanisms? (iv) Is

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[16] In the opposite direction: Wouter P. J. Wils, Should Private Antitrust Enforcement Be Encouraged in Europe? (March 28, 2003). World Competition: Law and Economics Review, Vol. 26, No. 3, 2003, Available at SSRN: https://ssrn.com/abstract=1540006.

[17] Isabela Monteiro de Oliveira, 'Efeitos guarda-chuva e Direito da Concorrência no Brasil: os possíveis impactos nas ações de responsabilidade por danos concorrenciais' (2019) 2 Mulheres no Antitruste, 205, 205-210.

[18] Csongor István Nagy, *Collective Actions in Europe - A Comparative, Economic and Transsystemic Analysis* (SpringerOpen, 2019), p. 119.

[19] Beatriz Kenchian, '*Enforcement* privado e ação coletiva para reparação de danos concorrenciais' (2023) 5 Mulheres no Antitruste, 245, 245-248.

there anything that could be learned from the European and Portuguese experience in the area to improve what has been done in Brazil?

The research focuses on comparing methods of private enforcement of Competition Law through collective redress in the European Union - specifically in the Portuguese law - and Brazil, aiming to provide suggestions *lege ferenda* (future law) and *lege lata* (existing law) based on the identified norms and empirical realities in Brazil. This examination considers the São Paulo State Court of Appeals and the Federal Court in São Paulo due to their status as the world's largest courts (the state one) and its significant concentration of businesses within the Brazilian context, considering the state itself.

The master thesis is structured as follows:

(i) Chapter I is the Introduction.

(ii) Chapter II describes the theoretical, sociological, and political framework for Competition Law and private enforcement through collective redress, establishing the research premises.

(iii) Chapter III investigates the European framework enabling the Portuguese legal framework for collective redress of Competition Law.

(iv) Chapter IV deals with the Brazilian legal framework and presents the empirical research conducted in two state and federal courts in São Paulo.

(v) Chapter V deals with the concluding remarks and gives general recommendations in terms of improving collective redress of Competition Law in Brazil, considering the Portuguese experience based on the European legal framework.

2 CHAPTER II: COMPETITION LAW AND PRIVATE ENFORCEMENT THROUGH COLLECTIVE REDRESS - A FRAMEWORK

2.1 1 A brief theoretical framework and premises

To properly answer the research questions surrounding private enforcement, some theoretical assumptions must be drafted to build solid academic foundations into the specific proposed research framework. The first one is that *private enforcement is relevant and must be facilitated by legislators*[20]. Private enforcement is related to the situation "*[...] where litigants take their disputes to a domestic court or, quite often, to arbitration*.".[21] On the other hand, public enforcement is related to an authority investigating possible Competition Law violations, determining fines and conducting leniency programs[22], for instance, to stop these undesired situations and to prevent new ones from taking place.[23] They are properly balanced[24] through political and economic choices surrounding public policies[25] that exceeds the research topic. Therefore, the academic assumption is that private enforcement must reach its peak to properly benefit consumers, small and medium businesses, and the general economic welfare, considering its deterrence effect.[26]

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[20] This assertive is aligned with the EU Commission position: Richard Whish, David Bailey, *Competition Law* (7th edn, Oxford University Press 2012), p. 295-296, "*The Commission has for a long time been eager that Articles 101 and 102 should be applied more frequently in national courts, thereby relieving it of some of the burden of enforcement. Statements to this effect can be found more than 20 years ago. Commissioner Monti reaffirmed the Commission's desire for more private enforcement in a speech to the Sixth EU Competition Law and Policy Workshop in Florence in June 2001. One of the driving forces behind Regulation 1/2003 was the Commission's desire that national courts and NCAs should share with it the task of enforcing the competition rules, thereby enabling the Commission to concentrate its resources on pursuing the most serious infringements of the law*.".

[21] Richard Whish, David Bailey, *Competition Law* (7th edn, Oxford University Press 2012), p. 295.

[22] About leniency: Damian Chalmers, Gareth Davies, Giorgio Monti, *European Union Law: cases and materials* (4th edn, Cambridge, 2019), p. 891-892, "*Pursuant to the Commission's leniency policy, the first undertaking that informs the Commission of the existence of an anti-competitive practice of which it is a member, and whose information allows the Commission to carry out an inspection or find an infringement under Article 101 TFEU, obtains immunity from any fine. If an undertaking collaborates with the Commission during the investigation by providing important evidence that strengthens the Commission's case, this may result in a reduction in the fine of between 20 and 50 per cent, the reduction being more significant for those who collaborate first*.".

[23] Maria José Capelo, Carolina Cunha, *Práticas Anticoncorrenciais - Entre o public enforcement e a ação popular indemnizatória* (GestLegal 2023), p. 16. It is relevant to this work the remark of leniency policies not affecting the undertakings' liability for damages.

[24] Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 19, stating that private and public enforcements are only properly balanced if private enforcement can guarantee consumers' and businesses' protection once damages are adequately compensated in the event of competition law rules' violations.

[25] About Competition Law objectives: Damian Chalmers, Gareth Davies, Giorgio Monti, *European Union Law: cases and materials* (4th edn, Cambridge, 2019), p. 867.

[26]Antonio Davola, 'Empowering consumers through competition: a study on the creation of a European Antitrust claims market' (2015) 22 Revista da Concorrência e Regulação, 197, 197-211, p. 201, "*[...] it must be kept in*

The second one is that *collective redress is essential to guarantee the adequate protection to victims of Competition Law violations causing small-scale, scattered and widespread harm both in the repressive and preventive contexts*[27], since there are several reasons to explain why individuals and small and medium-sized businesses do not pursue such damages, such as: (i) lack of knowledge about Competition Law and its violations causing harm on them;[28] (ii) costs, not only the initial ones[29] to file a lawsuit, but the lawyers' fees, specialists' opinions, etc;[30] (iii) the timeframe necessary to wait for a judicial response;[31] and, (iv) the usual low values related to one person's or small company's damages.[32]

At the Court stage, there are the individual and the collective path as redress mechanisms to be considered. The former involves one company or individual claiming damages against an undertaking which allegedly violated Competition Law rules (if we

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mind that any potential remedy must address the interests of both the individual and the market, since these two elements are equally important in the development of consumer and competition law.". Also: Maria José Capelo, Carolina Cunha, *Práticas Anticoncorrenciais - Entre o public enforcement e a ação popular indemnizatória* (GestLegal 2023), p. 16. Also: Damian Chalmers, Gareth Davies, Giorgio Monti, *European Union Law: cases and materials* (4th edn, Cambridge, 2019), p. 909-910, "*It has been argued that private litigation in competition law should be welcomed for two reasons: first, victims of competition law infringements are compensated (public law enforcement merely prevents further harm); secondly, private litigants increase the number of enforcement actions, widening the application of competition law*.".

[27] Csongor István Nagy, *Collective Actions in Europe - A Comparative, Economic and Transsystemic Analysis* (SpringerOpen, 2019), p. 9, "*Small claims face hurdles that may prevent individual enforcement and lead to sub-optimal litigation*.". Also: Eda Şahin, *Collective Redress and EU Competition Law* (Routledge 2019), p. 78-80.

[28] Eda Şahin, *Collective Redress and EU Competition Law* (Routledge 2019), p. 30.

[29] According to the authors, the initial ones are the most significant, especially because they cannot be transferred to the other party even in the case of a positive award: Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 145.

[30] About the economic disincentives: Miguel Sousa Ferro, Leonor Rossi, 'Private Enforcement of Competition Law in Portugal (II): actio popularis - facts, fictions and dreams' (2013) 13 Revista da Concorrência e Regulação, 35, 67-80, p. 67. Also, Csongor István Nagy, *Collective Actions in Europe - A Comparative, Economic and Transsystemic Analysis* (SpringerOpen, 2019), p. 10, "*In case of small-value claims it may be economically unreasonable to litigate (the expected costs may be higher than the expected value) even in well-founded cases of merit. First, non-recoverable legal costs may deter litigation. Although in Europe legal costs are, in principle and with some restrictions, borne by the losing party, the winning party cannot shift the legal costs in full. Second, the costs of the preliminary legal assessment may also dissuade the plaintiff. Third, in the context of small claims, the value at stake is small and legal costs are, in comparison to the claim's value, very high—here, a relatively trivial probability of failure may make the balance of litigation negative. The higher the legal costs are in relation to the claim's value, the better this risk crops out.*".

[31] Maria José Capelo, Carolina Cunha, *Práticas Anticoncorrenciais - Entre o public enforcement e a ação popular indemnizatória* (GestLegal 2023), p. 19. Miguel Sousa Ferro and Leonor Rossi put this as "*length of judicial proceedings (which becomes more and more dissuasive the smaller the claim*", p. 75, Miguel Sousa Ferro, Leonor Rossi, 'Private Enforcement of Competition Law in Portugal (II): actio popularis - facts, fictions and dreams' (2013) 13 Revista da Concorrência e Regulação, 35, 67-80.

[32] Miguel Sousa Ferro and Leonor Rossi point out the value of 3.000 euros, citing some studies indicating 2.000 euros as the threshold, however: "*It has been suggested that EUR 2.000 could function as an upper limit for the dividing line between the two groups, but that, particularly for antitrust private enforcement, a lower figure may be appropriate. Crucially, however, the vast majority of imaginable consumer antitrust private enforcement cases would involve damages far below that figure, not exceeding a few hundred Euros.*", p. 73, Miguel Sousa Ferro, Leonor Rossi, 'Private Enforcement of Competition Law in Portugal (II): actio popularis - facts, fictions and dreams' (2013) 13 Revista da Concorrência e Regulação, 35, 67-80.

consider follow-on damages, which are most claims in this context[33], there is an administrative decision about this violation). When there are more than one of these claims, they might have some connections related to the cause of action, evidence or repeated question that could be possibly decided together. For this reason, joinder as a mechanism to group individual claims will be briefly analyzed when discussing the possibilities of bringing claims together in courts. However, the premise about being the collective redress essential to guarantee access to justice to legal and natural persons once there is a Competition Law violation spread in smaller amounts is not defeated, considering that these other legal instruments, such as joinder, are not tailored for this kind of substantive and repeated violations,[34] because it only addresses the individuals who already moved a claim, not tackling the silent harmed body of individuals who did not manage to overcome all the identified obstacles for filing an individual follow-on or stand-alone lawsuit once there is an anti-competitive behavior in the market.[35]

The third premise is that *there are economic disincentives for individuals, small and medium-sized businesses to pursue their damages individually*.[36] Once the damage is caused, the collective redress is the best, if not the only, way to compensate for it, since it can overcome this state of inertia of the general public,[37] by gathering the sum of various individuals' damages, generating the benefits of economies of scale and tackling externalities[38].

[33] Damian Chalmers, Gareth Davies, Giorgio Monti, *European Union Law: cases and materials* (4th edn, Cambridge, 2019), p. 912.

[34] Csongor István Nagy, *Collective Actions in Europe - A Comparative, Economic and Transsystemic Analysis* (SpringerOpen, 2019), p. 11, "*Although group members could avail themselves of various traditional legal tools (joinder of parties, assignment of claims to an entity founded by group members) to organize the group, these are, at least in case of small claims, not effective substitutes of collective actions owing to the costs of group organization. These costs may be very high, in some cases even prohibitive, and traditional legal tools are not tailored to the needs of collective litigation, thus increasing the costs of group management*.". Also: Eda Şahin, *Collective Redress and EU Competition Law* (Routledge 2019), p. 22.

[35] Eda Şahin, *Collective Redress and EU Competition Law* (Routledge 2019), p. 31.

[36] It is relevant to underline that discussing "small amounts" of damages can lead to very different numbers depending on the jurisdiction, but this specific research diving exceeds our research framework. The main factor to be considered here is the comparison between the litigation expected award and the litigation costs. About this parameter, check: Csongor István Nagy, *Collective Actions in Europe - A Comparative, Economic and Transsystemic Analysis* (SpringerOpen, 2019), p. 11. Also: Gerhard Wagner, 'Collective Redress – Categories of Loss and Legislative Options' (2011) 127 Law Quarterly Review, 55, 55-82, Available at SSRN: https://ssrn.com/abstract=1960904, p. 58, pointing out the threshold of 1.000 euros.

[37] Antonio Davola, 'Empowering consumers through competition: a study on the creation of a European Antitrust claims market' (2015) 22 Revista da Concorrência e Regulação, 197, 197-211, p. 199. Maria José Capelo, Carolina Cunha, *Práticas Anticoncorrenciais - Entre o public enforcement e a ação popular indemnizatória* (GestLegal 2023), p. 20. Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 33.

[38] Csongor István Nagy, *Collective Actions in Europe - A Comparative, Economic and Transsystemic Analysis* (SpringerOpen, 2019), p. 10-11, "*These are due to the fact that the enforcement of individual small claims may have significant common costs and individual litigation may entail positive external effects (externalities), conferring advantages on other class members they did not pay for*.", p. 11. Agreeing to it: Andrea Piletta Massaro, 'The new Directive on an EU-wide representative action and third-party litigation funding: an opportunity for European consumers?' (2021) 1 Revija Kopaoničke Škole Prirodnog Prava, 95, 95-117, p. 96.

Consequently, if the collective system is properly operating, it will have a dissuasive effect to be considered once a company intends to violate competition law rules, generating a cycle effect to diminish violations in general in an ideal scenario.[39] If one collective redress option does not exist, numerous victims will keep their damages undetected from the system, since no aspect of public enforcement - neither administrative nor criminal - covers private recovery.[40] To reach this ideal point, one must bear in mind that the dissuasive effect sought by public policies will not suffice potential claimants' motivation to initiate a collective lawsuit,[41] leading the discussion to another important ground: *there are economic disincentives for claimants that must be overcome to initiate a collective lawsuit*, considering competition law specificities, general costs related to the proceedings itself and, with the incentives to the group's organization.[42] Discussing disincentives, the topic about costs and funding needs to be properly addressed since the traditional rule 'the loser pays' will not be enough in the collective logic, where "*an appropriate risk premium*"[43] must be involved.[44]

One important measure to reduce organizational costs is choosing the opt-out system over the opt-in. An opt-in system refers to a collective redress system depending on each class member giving consent to have its interests therein represented,[45] or to be treated as a joinder and not deviating much from the two-party litigation.[46] The individuals' drawbacks are easily observed, considering the small-scale amounts involved to justify opting-in and possible costs and risks related with the litigation.[47] On the other hand, an opt-out system is the one allowing a representative of the group to conduct a lawsuit without express authorization of each and

[39]Maria José Capelo, Carolina Cunha, *Práticas Anticoncorrenciais - Entre o public enforcement e a ação popular indemnizatória* (GestLegal 2023), p. 17. Also: Csongor István Nagy, *Collective Actions in Europe - A Comparative, Economic and Transsystemic Analysis* (SpringerOpen, 2019), p. 35.

[40] Csongor István Nagy, *Collective Actions in Europe - A Comparative, Economic and Transsystemic Analysis* (SpringerOpen, 2019), p. 13.

[41] Miguel Sousa Ferro, Leonor Rossi, 'Private Enforcement of Competition Law in Portugal (II): actio popularis - facts, fictions and dreams' (2013) 13 Revista da Concorrência e Regulação, 35, 67-80, p. 72.

[42] Csongor István Nagy, *Collective Actions in Europe - A Comparative, Economic and Transsystemic Analysis* (SpringerOpen, 2019), p. 16-17.

[43] Csongor István Nagy, *Collective Actions in Europe - A Comparative, Economic and Transsystemic Analysis* (SpringerOpen, 2019), p. 19.

[44] Eda Şahin, *Collective Redress and EU Competition Law* (Routledge 2019), p. 156-157.

[45] Andrea Piletta Massaro, 'The new Directive on an EU-wide representative action and third-party litigation funding: an opportunity for European consumers?' (2021) 1 Revija Kopaoničke Škole Prirodnog Prava, 95, 95-117, p. 109.

[46] Eda Şahin, *Collective Redress and EU Competition Law* (Routledge 2019), p. 113, "*Claimants have thus control over litigation. To this end, some opt-in systems make the group members party to the litigation and divert from representation. As a result, an opt-in action has been found to be easily fit within the legal systems of Member States, with a modest change of rules, because it respects the right of access to the courts and it is similar to traditional two-party litigation*.".

[47] Eda Şahin, *Collective Redress and EU Competition Law* (Routledge 2019), p. 114-115, "*In fact, the participation rate of opt-in actions is, although variable, less than 1% in cases brought on behalf of consumers*.".

every group member, who may opt-out by express declaring it.[48] If the choice to leave the group is not expressed, it is implied that consent was given to the class representative. In this sense, the group does not need to be organized, since the representation is authorized by law.[49] The collective redress facilitates access to justice in its most efficient manner if the opt-out system is to be considered, since it mitigates organizational costs[50] and it conciliates significant concerns regarding constitutional principles, such as due process and access to justice,[51] which comes along with the 'only benefits' principle, establishing that the presumed consent does not cause any harm, but only potential good to each group member.[52] Therefore, the topic about opting-in/out needs to be examined alongside the issue of *res judicata*. There is still a third path beyond opt-in or out, which is the mandatory action, establishing no right to opt-out and no right to individually discuss one's rights, but in reality, it is comparable to the opt-out system with its low opt-out rates.[53]

Besides this important classification, there is also the follow-on and stand-alone claims duality that must be briefly addressed at this moment. A follow-on claim derives from an administrative decision, either national or European,[54] if that is the context, which might have binding effect, supporting with enough evidence the individual or collective claim for damages once an anti-competitive conduct has been administratively identified.[55] According to Article

[48] Csongor István Nagy, *Collective Actions in Europe - A Comparative, Economic and Transsystemic Analysis* (SpringerOpen, 2019), p. 6.

[49] Csongor István Nagy, *Collective Actions in Europe - A Comparative, Economic and Transsystemic Analysis* (SpringerOpen, 2019), p. 17, "*Organizational costs may be reduced significantly through providing that group members do not have to join the group explicitly to become part of the collective action; it is sufficient if they do not leave the group (opt-out). In this case, essentially, the group does not need to be organized, since power of attorney is conferred on group representatives by the law, albeit some organizational costs may emerge. Empirical evidence shows that, not surprisingly, the rate of participation is much higher in opt-out collective proceedings than in opt-in actions*.".

[50] Csongor István Nagy, *Collective Actions in Europe - A Comparative, Economic and Transsystemic Analysis* (SpringerOpen, 2019), p. 4.

[51] Csongor István Nagy, *Collective Actions in Europe - A Comparative, Economic and Transsystemic Analysis* (SpringerOpen, 2019), p. 25.

[52] Eda Şahin, *Collective Redress and EU Competition Law* (Routledge 2019), p. 123, "*If group members stay passive throughout, they receive compensation in the case the action succeeds; and in the case it does not, they endure no cost. If members opt out of the action, they gain nothing, irrespective of success.*". Csongor István Nagy, *Collective Actions in Europe - A Comparative, Economic and Transsystemic Analysis* (SpringerOpen, 2019), p. 64.

[53] Eda Şahin, *Collective Redress and EU Competition Law* (Routledge 2019), p. 116.

[54] Eda Şahin, *Collective Redress and EU Competition Law* (Routledge 2019), p. 1, "*European Union (EU) competition law enforcement comprises elements both of a public and private nature. With regard to public enforcement, both national competition authorities and the European Commission (Commission) enforce Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).*".

[55] Damian Chalmers, Gareth Davies, Giorgio Monti, *European Union Law: cases and materials* (4th edn, Cambridge, 2019), p. 912, "*This is because, as we saw above, the competition authorities have awesome powers to obtain evidence which no individuals can equal*.". Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 152. According to the authors, a follow-on claim comes with a reasonable presumption of success.

9 (1), Directive 2014/104, "*Member States shall ensure that an infringement of competition law found by a final decision of a national competition authority or by a review court is deemed to be irrefutably established for the purposes of an action for damages brought before their national courts under Article 101 or 102 TFEU or under national competition law*", whilst the decision taken by another Member State will be considered merely as *prima facie* evidence.[56]

This relationship between administrative decisions and the courts is justified by the need for uniformity to ensure Competition Law effectiveness in a level playing field. Evidence in these cases can be so burdensome that it would hinder compensation if individuals had to go through it all over again, disregarding the administrative effort already deployed. Arguments against this approach emphasize judicial independence and due process violations, which should not be upheld since the right to go to courts is respected throughout the proceedings.[57] On the other hand, stand-alone actions refer to infringements not yet prosecuted by the public enforcers.[58]

2.1.1 *Sociological and political framework premises*

Considering that legal provisions do not exist in isolation from the social environment, where political[59], economic, and social influences coexist, studying a technical-legal topic that traverses both procedural and Competition Law without taking into account these potential influences could lead to erroneous conclusions,[60] when contemplating possible solutions comparing legal systems, like it was proposed in question (iv): "*Is there anything that could be*

[56] If the administrative decision came from another Member State, Article 9 (2), Directive 2014/104, establishes that: "*Member States shall ensure that where a final decision referred to in paragraph 1 is taken in another Member State, that final decision may, in accordance with national law, be presented before their national courts as at least prima facie evidence that an infringement of competition law has occurred and, as appropriate, may be assessed along with any other evidence adduced by the parties*.".

[57] Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 196-200. The authors point out that this perception comes from the necessary combined work between public and private enforcement.

[58] Eda Şahin, *Collective Redress and EU Competition Law* (Routledge 2019), p. 1.

[59] About the politics of competition law: Damian Chalmers, Gareth Davies, Giorgio Monti, *European Union Law: cases and materials* (4th edn, Cambridge, 2019), p. 873-875.

[60] About Marc Galanter's work, check Carrie Menkel-Meadow, 'Do the "haves" come out ahead in alternative judicial systems? Repeat players in ADR' (1999-2000) 15 Ohio St. J. on Disp. Resol., 19, 19-61: "*A seminal work in the socio-legal studies canon, Galanter's article demonstrates the complex patterns of how law and legal institutions actually work, beyond descriptions of legal doctrines and assumed efficacy and "penetration" of law. In some senses, it is a continuation of legal realism, reminding us of the importance of studying the legal institutions in which the law is embedded and suggesting, at its end, how we might reform or "adjust" those institutions to produce optimal social change (in this case, redistribution of resources and delivery of justice*).", p. 19.

learned from the European and Portuguese experience in the area to improve what has been done in Brazil?".

As a result of this perception, it is sought to draw a brief social and political framework for the subject based on the theory of repeat players and one-shooters of Marc Galanter's work.[61] Thus, Marc Galanter's work is taken as a theoretical reference, in which he establishes ideal models of habitual litigants (repeat players) and occasional litigants (one-shooters), with the former accruing advantages within the judicial system.

According to Marc Galanter, the repeat players can be understood as a unit that has already experienced and can anticipate repetitive litigation, facing the risk with the outcome of cases, since it has resources to pursue its long-term interests, typically being corporations and government entities.[62]

Among many advantages experienced by these players, it is possible to briefly list some in the attempt of determining if such factors could be present in the scenarios drafted when comparing legal systems, such as: (i) developing effectively as legal actors due to their prior knowledge of litigation; (ii) profiting from judicial advantages due to the notion that corporate actors are individuals with their own rights, rather than mere tools serving natural persons; (iii) having facilitated access to specialists, reducing the cost of cases; (iv) developing informal relationships with court personnel that clear the way for the workflow; (v) handling probabilities, trading off losses for winning in certain cases; (vi) engaging in lobbying by spending resources to influence the drafting of rules that favor them; among many others pointed out by the author.[63]

According to Carrie Menkel-Meadow, Marc Galanter criticizes the political dysfunction of a system that allows certain participants, the repeat players, to maximize their long-term gains over occasional litigants, the one-shooters, who despite seeking justice, participate in the process with fewer resources.[64]

Under those theoretical circumstances, which evidently have exceptions, overlaps and was thought in the United States context, the private enforcement through collective redress is analyzed comparatively,[65] and some important remarks can be traced already at this initial

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[61] Marc Galanter, 'Why the haves come out ahead? Speculations on the limits of legal change' (1974) 9:1 Law and Society Review, 95, 95-160.
[62] Marc Galanter, 'Why the haves come out ahead? Speculations on the limits of legal change' (1974) 9:1 Law and Society Review, 95, 95-160.
[63] I chose the ones having a higher chance of influencing the selected realities.
[64] Carrie Menkel-Meadow, 'Do the "haves" come out ahead in alternative judicial systems? Repeat players in ADR' (1999-2000) 15 Ohio St. J. on Disp. Resol., 19, 19-61, p. 20.
[65] There is recognition of these influences in Europe: Csongor István Nagy, *Collective Actions in Europe - A Comparative, Economic and Transsystemic Analysis* (SpringerOpen, 2019), p. 3-4, "Both traditionalist

moment: (i) considering the great odds of the defendant being a repeat player and some individual claims being filed by one-shooters, winning for the defendant at the first lawsuits presented in court may have a negative impact on subsequent cases considering precedents working, at least, persuasively.[66]

Also, (ii) information asymmetry is an issue requiring better balance of power in competition cases, as key evidence is often held by the defendants. Additionally, political shifts can influence legislative and judicial changes, either broadening or restricting access to courts in Competition Law damage cases. For instance,

> In Bell Atlantic Corp. v. Twombly, an antitrust conspiracy case, the Supreme Court held that the complaint must set out "enough factual matter" to demonstrate "plausible grounds to infer an argument" among the defendants to restrain trade – "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement".[67]

Due to this shift, many antitrust cases have been dismissed in Federal Courts.[68] In addition, it is relevant to consider (iii) the parties' financial asymmetry leading the discussion to feasible financing mechanisms. Therefore, once many claims are treated as one through representative collective redress, balancing forces may be facilitated[69] and, this can only be performed once "*[...] the assumption that the parties to the action are equal both in terms of money and capacity, have unlimited free time and resources to present their case.*"[70] is abandoned.

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conservatism and furious economic lobbying are claimed to have accounted for the foregoing developments. The coalition of these two elements often proved to be unsurmountable. It has not been exceptional to see progressive proposals elaborated in the scholarly laboratories torpedoed by intensive economic lobbying and fail to get through the political filter. In some cases they were fully rejected (for example, in England and Wales in 2009, though, as noted above, recently the opt-out scheme was made available in competition law, subject to the Competition Appeal Tribunal's discretion). In other cases, the initially progressive and effective proposal was emasculated, and the version that was finally adopted was deprived of all the virtues that could make the system workable and widespread (see Finland and France).".

[66] Csongor István Nagy, *Collective Actions in Europe - A Comparative, Economic and Transsystemic Analysis* (SpringerOpen, 2019), p. 16, "*Although the judgment given in the case of one of the group members has no res judicata effect in actions brought by other group members, the judgment in the first case may have precedential value or at least persuasive authority. Hence, the defendant may find it rational to invest much more in winning the early cases, because winning in these proceedings may discourage subsequent litigation*.".

[67] William Burnham, Stephen F. Reed, *Introduction to the Law and Legal System of the United States* (7th edn, West Academic Publishing 2021), p. 366.

[68] William Burnham, Stephen F. Reed, *Introduction to the Law and Legal System of the United States* (7th edn, West Academic Publishing 2021), p. 367, "*The holdings in Twombly and Iqbal appear have had a practical impact on both the number and types of cases dismissed in federal court*.".

[69] This kind of concern is a constant: Eda Şahin, *Collective Redress and EU Competition Law* (Routledge 2019), p. 18, "*With the arrival of a mass-production economy, of the industrial age, an individualised system of litigation had little role to play in reducing the discrepancy between the individuals and infringers*.".

[70] Csongor István Nagy, *Collective Actions in Europe - A Comparative, Economic and Transsystemic Analysis* (SpringerOpen, 2019), p. 33.

2.2 European Union

The right to Competition Law damages is a matter of European law and it is expressed in Article 1 of the Directive 2014/104, but its exercise is related to national law. Considering the principle of effectiveness, national proceedings rules cannot make the exercise of a right impossible nor difficult. Bearing in mind all the previously mentioned barriers faced by individuals when considering anti-competitive behaviors and their deserved compensation, they rarely file lawsuits.[71] Nevertheless, when criticism arises around any aspects of Competition Law in Europe or any other system based on the argument that Europe has a further developed Competition Law culture, it is important to not forget that this development in the continent is rather recent. Some Member States only passed national competition law in the 1990s, "*[...] and even today in some countries enforcement is emerging or unstable*."[72] and, the EU competition policy took its shape only in the late 1980s[73]. Therefore, the European context involves a tremendous community effort to guarantee the market and consumers' welfare, passing directives and communications, for instance, and most of the Member States reacting to it somehow.

From the European Court of Justice's (ECJ) side, "*[...] until 2001 there had not been a judgment of the Court of Justice dealing specifically with the question of whether Member States have an obligation, as a matter of EU law, to provide a remedy in damages where harm has been inflicted as a result of an infringement of the competition rules*.".[74] Despite the many efforts, the situation was highly fragmented and ineffective according to a study published in

[71] Eda Şahin, *Collective Redress and EU Competition Law* (Routledge 2019), p. 1-2.
[72] Damian Chalmers, Gareth Davies, Giorgio Monti, *European Union Law: cases and materials* (4th edn, Cambridge, 2019), p. 866.
[73] About the reasons for it: Damian Chalmers, Gareth Davies, Giorgio Monti, *European Union Law: cases and materials* (4th edn, Cambridge, 2019), p. 875-876.
[74] Richard Whish, David Bailey, *Competition Law* (7th edn, Oxford University Press 2012), p. 297. This was only properly clarified by the ECJ in Courage Ltd v Crehan: "*The full effectiveness of Article 85 of the Treaty and, in particular, the practical effect of the prohibition laid down in Article 85(1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition. Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community.", Judgment of the* Court of 20 September 2001. Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others. Reference for a preliminary ruling: Court of Appeal (England and Wales) (Civil Division) - United Kingdom. Article 85 of the EC Treaty (now Article 81 EC) - Beer tie - Leasing of public houses - Restrictive agreement - Right to damages of a party to the contract. Case C-453/99. European Court Reports 2001 I-06297. ECLI identifier: ECLI:EU:C:2001:465

2004[75] and, according to the following case that was judged by the ECJ after *Courage*, which was crucial to recognize the Competition Law damages compensation by individuals as an effective tool to the EU Treaty provisions[76] (Manfredi Joined cases C-295/04 to C-298/04, recognizing the highly fragmented scenario).[77]

The need for a collective redress system in the EU can go beyond a mere premise by the plain assessment of the following data: "*Of the fifty-four prohibition decisions issued by the Commission between 2006 and 2012, fifteen have led to follow-on actions: most in three Member States (United Kingdom, Germany and the Netherlands) and almost none were brought by consumers or small or medium-sized firms*.".[78] Therefore, if the aim is to guarantee anti-competitive conducts to be deterred and the individuals compensated by their damages,[79] collective redress is to be stimulated in the EU, but there are significant concerns in the European context against the litigation culture, leading this discussion mainly to the national level,[80] and concerning important "*[...] taboos of civil law - representation without authorization (opt-out rule) - and one of the central principles of societal organization: public policy should be done exclusively by the state and its enforcement cannot be privatized (no "private attorney general")*.".[81] Many forth-and-backs were faced nationally and at the

[75] Eda Şahin, *Collective Redress and EU Competition Law* (Routledge 2019), p. 25. Also: Richard Whish, David Bailey, *Competition Law* (7th edn, Oxford University Press 2012), p. 296, "*A study published in August 2004, usually referred to as the Ashurst Report, was carried out for the Commission to identify and analyse the obstacles to successful damages actions in the Member States based on infringements of competition law. The Report concluded that the picture was one of 'astonishing diversity and total underdevelopment'; on the latter point the Report found only 60 or so cases leading to a judgment on damages, 28 of which had actually led to an award of damages*.".

[76] About Courage case and its importance, check: Gerhard Wagner, 'Collective Redress – Categories of Loss and Legislative Options' (2011) 127 Law Quarterly Review, 55, 55-82, Available at SSRN: https://ssrn.com/abstract=1960904, p. 55-56.

[77] Richard Whish, David Bailey, *Competition Law* (7th edn, Oxford University Press 2012), p. 299-300, "*What the Manfredi judgment did was to reveal that, despite the Court of Justice's enthusiasm for damages actions, there remains the 'problem' that Member States retain autonomy in relation to the procedural rules of their domestic judicial systems, as well as the substantive rules of recovery in tort, delict, restitutionary and other actions, and that these rules might inhibit successful damages claims.".*

[78] Damian Chalmers, Gareth Davies, Giorgio Monti, *European Union Law: cases and materials* (4th edn, Cambridge, 2019), p. 914.

[79] About this balance between compensation and deterrence, and its changes, check: Gerhard Wagner, 'Collective Redress – Categories of Loss and Legislative Options' (2011) 127 Law Quarterly Review, 55, 55-82, Available at SSRN: <https://ssrn.com/abstract=1960904>, p. 59-61.

[80] Damian Chalmers, Gareth Davies, Giorgio Monti, *European Union Law: cases and materials* (4th edn, Cambridge, 2019), p. 914. Also: Csongor István Nagy, *Collective Actions in Europe - A Comparative, Economic and Transsystemic Analysis* (SpringerOpen, 2019), p. 1, "*[...] albeit that the class action is certainly not the only legal transplant whose reception divides a legal community, it proved to be one of the most controversial*.".

[81] Csongor István Nagy, *Collective Actions in Europe - A Comparative, Economic and Transsystemic Analysis* (SpringerOpen, 2019), p. 2.

European level when collective redress was at discussion until the Commission proposed a collective action scheme in April 2018 in the consumer protection law field.[82]

The discussions in Europe do not surround if collective redress in Competition Law should exist, but rather how it should be regulated in four relevant matters regarding grouping victims (opt-in *vs.* opt-out, for instance), the choice of the class representative, funding mechanisms and calculating damages.[83] The aim here is not to carefully discuss all the design framework options for such a collective redress action, but to point out the state of the art in the European context to better understand what has been done in the Portuguese legal system.[84]

Aware of the individuals and small-sized businesses inertia to file a lawsuit to claim for small-scale amounts of damages[85] regarding Competition Law violations, much has been said about the advantages of an opt-out system,[86] among many other possible ways to tackle it.[87]

In the discourse opposing the adoption of a unified opt-out system at the European framework for collective redress, the predominant argument often centers on the absence of an established legal tradition dealing with opting-out. This perspective suggests that it is incongruous to dismiss an effective and relatively recent model solely on the basis of its lack of historical precedent within the community context.[88] Another constant argument is the risk

[82] Csongor István Nagy, *Collective Actions in Europe - A Comparative, Economic and Transsystemic Analysis* (SpringerOpen, 2019), p. 3.
[83] Eda Şahin, *Collective Redress and EU Competition Law* (Routledge 2019), p. 9-10.
[84] Eda Şahin, *Collective Redress and EU Competition Law* (Routledge 2019), p. 3. The author states the need for a collective redress action and discusses the proper design framework for such an action. Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 22. The United Kingdom adopted an opt-out model, not influenced by the United States, but by other Member States, such as the Netherlands, Denmark, Sweden and Portugal.
[85] Since the research is focused on compensatory damages originated from anticompetitive behavior, the Injuction Directive will not be the object of this thesis. For more detailed information about it, check: Csongor István Nagy, *Collective Actions in Europe - A Comparative, Economic and Transsystemic Analysis* (SpringerOpen, 2019), p. 30-31.
[86] Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 33.
[87] Facing consumers' inertia to claim damages for anti-competitive behavior, there have been some propositions to drastically change the European Law to create a framework to enforce an antitrust claims market, as it has been done in Belgium through case law. About it: Antonio Davola, 'Empowering consumers through competition: a study on the creation of a European Antitrust claims market' (2015) 22 Revista da Concorrência e Regulação, 197, 197-211, p. 202-203. In Belgium, this happened under case law: "*CDC [the company] operates in the field of the private enforcement of competition law, by acquiring the right to pursue claims in court by follow on victims of antitrust infringements by enterprises, and then exercising these rights on behalf of the victims before the national court*.".
[88] Csongor István Nagy, *Collective Actions in Europe - A Comparative, Economic and Transsystemic Analysis* (SpringerOpen, 2019), p. 32, "*The innovation of today is the tradition of tomorrow. Although its roots can be traced back to equity, the institution of class action was inserted into US federal procedural law only in 1938. This regime was profoundly revised in 1966 and subjected to some minor changes in 2003. It can be established that the US system of class action was finalized in 1966, since it was the 1966 reform that made the wide-spread use of class actions possible. Today, this regulation is regarded as the "American tradition", contrary to the continental tradition*.", p. 33.

of stimulating the litigation culture, and the United States model is used as a reference,[89] disconsidering the countless legal, economic and cultural aspects to justify litigation, such as contingency fees, punitive and treble damages.[90]

In 2015, Antonio Davola stated that European Competition Law collective redress presented itself as an ineffective system, causing heterogeneity and forum shopping.[91] Directive 2014/104 was already approved but it refers solely to individual claims, making considerable advances at this front, but leaving the collective path empty.[92] In 2020, Directive 2020/1828 came into force bringing the collective redress to protect consumers as an important tool, but having a sectoral approach[93], since it excluded Competition Law from its Annex I. Considering this gap, some Member States have been approving National legislation based on the 2020 Directive to create a Competition Law collective system based on the later EU legislation. This situation maintains the heterogeneity in the internal market, considering some Member States will take this step, but others will not.[94]

Hence, Member States have been adapting its own legal basis to enable individual and collective redress mechanisms, accordingly to Directives 2014/104 and 2020/1828, which will be further assessed below, but private funding as an economic incentive remains in the European limbo, except from a brief mention in the latter mentioned Directive.[95]

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[89] About this scenario, check: Gerhard Wagner, 'Collective Redress – Categories of Loss and Legislative Options' (2011) 127 Law Quarterly Review, 55, 55-82, Available at SSRN: <https://ssrn.com/abstract=1960904>.

[90] Csongor István Nagy, 'The European Collective Redress debate after the European Commission's Recommendation: one step forward, two steps back?' (2015) 22 MJ 4, 530, 530-552, p. 49-50.

[91] Antonio Davola, 'Empowering consumers through competition: a study on the creation of a European Antitrust claims market' (2015) 22 Revista da Concorrência e Regulação, 197, 197-211, p. 199, "*Collective claims seem to be equally unsatisfying. Under EU legislation, collective actions - and, in particular, class actions - are devoid of a uniform European regulation, and the enactment of mere recommendations does not seem sufficient to achieve the consumer protection that is intended, operating - on the contrary - as a source of normative heterogeneity and "forum shopping" phenomenon.*".

[92] Antonio Davola, 'Empowering consumers through competition: a study on the creation of a European Antitrust claims market' (2015) 22 Revista da Concorrência e Regulação, 197, 197-211, p. 200. Also: Eda Şahin, *Collective Redress and EU Competition Law* (Routledge 2019), p. 3.

[93] Csongor István Nagy, *Collective Actions in Europe - A Comparative, Economic and Transsystemic Analysis* (SpringerOpen, 2019), p. 120.

[94] Antonio Davola, 'Empowering consumers through competition: a study on the creation of a European Antitrust claims market' (2015) 22 Revista da Concorrência e Regulação, 197, 197-211, p. 200, "*The overall picture seems, as a consequence, extremely blurred, and the heterogeneity of remedies obstructs the realization of the desired uniform protection in the Common Market.*".

[95] Csongor István Nagy, 'The European Collective Redress debate after the European Commission's Recommendation: one step forward, two steps back?' (2015) 22 MJ 4, 530, 530-552, p. 59, "*This circumstance calls for a regulatory consideration, given that financing is the oil in the engine of collective actions.*".

2.2.1 Portugal

In the European context, Portugal is usually mentioned as a successful case of adopting an opt-out system in theory, except from 2021 on when the scene radically changed. In this scenario, the rationale behind choosing a comparison study between the Portuguese and the Brazilian legal orders starts to reveal itself and, opening a specific topic to Portugal in this first chapter is aimed to develop this reasoning. Besides, the study of comparative law proves to be useful insofar as it allows (a) understanding the motives for a particular legal institution being present in a legal system and, (b) envisioning the resolution of intricate situations by other countries and whether it could be applied elsewhere; and, (c) understanding certain foreign experiences within their social, economic, and legal contexts, as adequately analyzed comparative law requires the interconnected study of themes within the cultural context that surrounds them.[96]

The first obstacle to overcome when proposing a comparative study is selecting the legal system. Such a choice should be guided by four vectors, namely: (1) similarities in legal culture; (2) common problems that justify comparison; (3) the extensive and profound doctrine on the subject in the selected country, and finally (4) the subject itself, which may warrant comparison with a particular legal system over other.

Regarding the first vector, namely similarities in legal culture, these can stem from shared historical roots or from the exchange of doctrine and academics. Hence, the choice of Portugal is justified with little further explanation when shared historical roots are considered. As for the other vectors, namely common problems, the comparison can also be socio-political in nature, aiming to identify the origin of these same problems and ultimately, what solutions have been found by other legal systems. In the EU, Portugal is one of the few Member States to address private enforcement of Competition Law through an opt-out model of collective redress since 1995, however until the end of 2020 the system had almost never been used. Today, there are numerous pending cases, making it "*[...] an important case study to*

[96] Cândido Rangel Dinamarco, 'Processo civil comparado' (1998) 90 Revista de Processo, 46, 46-56. For the author, this quest for solutions in other legal systems is driven by four factors, namely: (i) the pursuit of the collectivization of judicial protection in a society with increasingly mass demands; (ii) the crisis of legitimacy faced by the Judiciary; (iii) the desire to assimilate new legal institutions, and; (iv) the approximation among countries, such as Mercosur. It should be noted that the text was written in 1998, but its considerations deserve analysis and relevance throughout the course of comparative law study. Also: Csongor István Nagy, 'The European Collective Redress debate after the European Commission's Recommendation: one step forward, two steps back?' (2015) 22 MJ 4, 530, 530-552, p. 45-46, "*One of the commonplaces of comparative law is that the transplantation of legal concepts is not like organ transplantation: legal institutions are deeply rooted in the legal system that gave life to them and are a coherent part of their legal, social and cultural environment.*".

understand the factors that can facilitate or stand in the way of the effective use of a class action regime.".[97] This turning-point provides an interesting aspect for a comparison study, especially considering the extensive doctrinal development needed to understand the changes in this scenario.

Once the choice is made, it is essential to outline the methodology of comparative research,[98] considering *"[w]hat the other comparative sciences realize, and what they can teach us, is that knowledge of these phenomena develops by comparison. Only through comparison do we become aware of certain features of whatever we are studying"*.[99]

Lawsuits are not publicly available in Portugal, but some associations have been sharing information about their cases online. This has made it possible to analyze data on the status of some popular actions in Portugal. The *Ius Omnibus* association to protect consumers in Portugal was established in 2020 and it uses exclusively third-party funding, according to its website.[100] There is no finished case by ruling, but only on-going litigation and one settlement.[101] There are 17 listed cases, but 6 of them are not directly related to Competition Law issues, considering the broader scope of the association to protect consumers in general, one case reached a settlement and the other ten cases are on-going pieces of litigation directed related to Competition Law violations.

The on-going Competition Law related litigation counts on 8 cases[102] and involves at least 1.2 billion euros. Most of these cases (5 out of 8) are either based on Commission decisions or on National Competition Authorities (NCA) decisions from Portugal and Italy, being considered as follow-on damages. The other 3 are stand-alone cases (Sony/PlayStation, Apple - App store, Google - Play store). There are 2 popular actions meant to obtain pre-filing discovery from potential defendants, so as to determine whether antitrust practices identified by the European Commission affected Portuguese consumers and to what extent, in preparation of a potential action for damages: (a) Ius Omnibus *v.* Melia, filed in July 2021, based on a

[97]Miguel Sousa Ferro, 'Class Actions in Portugal: the little regime that could' (2021) 2 Mass Claims, 115, 115-124, p. 115.
[98] Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)' (1991) 39 The American Journal of Comparative Law, 1, 1-34, "*Comparative law is like other sciences in that its aim must be the acquisition of knowledge*.", p. 4.
[99] Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)' (1991) 39 The American Journal of Comparative Law, 1, 1-34, p. 5.
[100] Available at: <https://iusomnibus.eu/pt/missao-e-valores/>. Access in Apr. 11th 2024. All the information used to bring this data can be found on this website.
[101] The settlement was obtained in the ANT case (ANT - Associação Nacional de Topógrafos - Land Surveyors Association). Available at: https://iusomnibus.eu/pt/ius-omnibus-v-ant-pt/. Access in Apr. 11th 2024.
[102] Superbock, Mastercard, EDP, Apple, MEO/Nowo, Sony/PlayStation, Apple/App store and Google/Play store, which can all be accessed on its website.

Commission decision from 2020;[103] and, (b) Ius Omnibus *v.* Comcast/Universal Studios, also filed in July 2021 to obtain evidence based on a Commission decision from 2020 regarding anti-competitive behavior to divide the market and overcharging consumers.[104] The last one to integrate 17 mentioned cases is the settled one regarding the ANT case. There is also the Competition Observatory Association which sued SportTV based on a NCA decision.[105] In conclusion, the general scene for private enforcement through collective redress in Portugal changed radically since 2020 and the main reasons for it are investigated herein.

2.3 Brazil

The Brazilian Constitution (BC) established the framework for Competition Law by stipulating that the economic order should uphold the freedom of competition (Art. 170, IV, BC) and mandate laws to regulate and sanction abusive market behavior (Art. 173, § 4º, BC). This framework has been implemented through Law n. 12.529/2011, which structures the Brazilian economic defense system, and further refined by Law n. 14.470/2022, which specifically mentions collective redress as a viable means to protect individuals harmed by anti-competitive behavior.[106]

Given this legislative backdrop, it should be evident that Brazil offers sufficient protection for compensating individuals for their losses in this context. However, a cursory review of the São Paulo State Court of Appeals[107] reveals a starkly different picture. When searching for cases using terms such as “collective redress,” “cartel,” and “damages,” only four cases were found. This indicates a significant gap between the legal framework and its practical application.

On one hand, it can be assumed that there is a lack of interest among repeat players in the inefficacy of private enforcement of Competition Law through collective redress mechanisms. On the other hand, it is easier to identify the economic disincentives for such collective lawsuits and the political choices that have led, and continue to lead, to the

[103] Notes about this case available at: https://iusomnibus.eu/pt/ius-omnibus-v-melia-pt/. Access on April 11th 2024.
[104] Notes about this case available at: <https://iusomnibus.eu/ius-omnibus-v-comcast-universal-studios/>. Access on April 11th 2024.
[105] Notes about this case available at: <https://observatorioconcor.wixsite.com/observatorio>. Access on April 11th 2024.
[106] For further details about the Brazilian legal framework, check: Vicente Bagnoli, *Direito Econômico e Concorrencial* (9th edn, Revista dos Tribunais 2022).
[107] Which can be done by anyone at this link: < https://esaj.tjsp.jus.br/cjsg/consultaCompleta.do?f=1 >. Access on July 1st 2024.

progressive abandonment of collective redress mechanisms, as evidenced by the veto of Article 333 of the Brazilian Code of Civil Procedure (CPC)[108]. This abandonment is justified, among other reasons, by the strengthening of non-representative instruments for establishing binding precedents through test cases, raising the question of whether such instruments would be effective for Competition Law, which will be further assessed in chapter 3.

2.4 Concluding remarks

The focus of this first part of the research is the foundational premises drafting to effectively compare the Brazilian and the Portuguese models of private enforcement of Competition Law through collective redress.

These premises are:

(1) Significance and legislative support since private enforcement is crucial and must be promoted by legislators.

(2) Essential role of collective redress, which is vital to ensure adequate protection for victims of Competition Law violations, addressing minor and widespread harm in both repressive and preventive contexts.

(3) Existence of economic disincentives for individuals and small to medium-sized enterprises, once individuals and small to medium-sized businesses face economic disincentives that discourage them from pursuing damages individually; and

(4) The need to overcome economic disincentives for collective lawsuits since they hinder claimants from initiating collective lawsuits.

On the sociological and political scenario, Marc Galanter's theory surrounding repeat players and one-shooters has been taken into account to better address issues like information and financial asymmetry between the parties in a collective lawsuit conducting the research to some important remarks, such as the need to choose an opt-out system over the opt-in to reduce organizational costs and that this recourse by itself does not create a litigation boom alone[109] considering the many economic disincentives to individuals and small to medium-sized businesses.

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[108] The reasoning for the veto can be found in the following link: < https://www.conjur.com.br/2015-mar-17/leia-razoes-sete-vetos-dilma-rousseff-cpc/>. Access on July 12th 2024.

[109] Csongor István Nagy, *Collective Actions in Europe - A Comparative, Economic and Transsystemic Analysis* (SpringerOpen, 2019), p. 122.

The comparison of Competition Law collective redress in Brazil and Portugal is grounded in recent European legislative developments and notable changes in the Portuguese legal and judicial landscapes. In Portugal, there has been a surge in popular actions aimed at protecting consumers from anti-competitive market behaviors, largely facilitated by third-party financing over the past few years. This Portuguese experience could provide valuable insights for the practical development of the existing legal framework in Brazil and for the theoretical suggestions for new legal frameworks if that would be the case.

3 CHAPTER III: PRIVATE ENFORCEMENT OF COMPETITION LAW THROUGH COLLECTIVE REDRESS IN THE EUROPEAN UNION: THE PORTUGUESE EXPERIENCE IN PERSPECTIVE

This chapter provides information about the normative regulation of private enforcement of Competition Law through collective redress in the European context, and then in the Portuguese law. The idea is to discuss the 2013 Recommendation and Directive 2020/1828 as well, since the latter does not cover Competition Law at first, but some member states, *i.e.* Germany, have expanded its scope to embrace Competition Law disputes as well.[110]

3.1 The European Framework

There is no European collective redress system designed to work for private enforcement of Competition Law. In this paper, I will not address the reasoning behind it nor propose a framework. The aim is to draft the current state of art from the passed directives to better understand how Portugal internalized them as a Member State regarding the main aspects of it: grouping victims (opt-in vs. opt-out, for instance), the choice of the class representative, funding mechanisms and calculating damages.

Eda Şahin points out that until 2011, "*[...] collective redress proposals came under two distinct initiatives for competition and consumer law in the EU. After that point, a horizontal approach merging these initiatives has become prevalent in order to avoid fragmentation of the law.*".[111] However, the current state of the art in this matter shows two main and different directives: one for Competition Law (Directive 2014/104) and one for consumers' collective redress (Directive 2020/1828), leading the matter to different paths again.

3.1.1 Treaty on the Functioning of the European Union (TFEU) - articles 101 and 102

The objective is to briefly present the substantive law theoretical framework justifying the creation of appropriate procedural instruments for the judicial protection of natural and legal persons who have suffered damages due to violations of substantial norms protecting the competition surrounding the economic order. The two main directly enforceable[112]

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[110]Available at: <https://commission.europa.eu/law/law-topic/consumer-protection-law/representative-actions-directive_en>. Access on April 18th 2024.
[111] Eda Şahin, *Collective Redress and EU Competition Law* (Routledge 2019), p. 38.
[112] Richard Whish, David Bailey, *Competition Law* (7th edn, Oxford University Press 2012), p. 297.

Competition Law provisions are articles 101 and 102 TFEU.[113] While Art. 101 TFEU regulates agreements[114] between undertakings restricting competition by object and by effect and, therefore, being void[115], Art. 102 TFEU relates to dominant undertakings in the market abusing their position[116] through exclusionary or exploitative abuses.[117]

Many expressions used in these provisions are highly debated and surrounded by case law specifications. Since the aim is not to get far from the proposed research topic, some references are found in the footnotes, but the central idea is that any violation of these provisions can lead to legal and natural persons being damaged in different aspects of their lives, such as "*[...] overcharge, loss of profits and reduction of choice, quality or innovation.*".[118] Since the latter are almost impossible to be measured, "*[...] competition damages primarily concentrates on the overcharge harm and/or lost profits of those harmed*."[119] (Art. 1, Directive 2014/104). Therefore, once there is a breach of these provisions, leading to damages that could be determined even through difficult paths, any injured person should find a feasible proceeding for claiming compensation for damages (private enforcement)[120].

The European Commission has long been concerned about rendering the recovery of losses feasible for victims, having to tackle the difficult issue of damage quantification, and strengthening Competition Law enforcement.[121] Before the Directive 2014/104, there have been the 2005 Green Paper on damages actions, where the difficulty of quantifying harm in such cases were recognized as challenging, the 2008 White Paper[122], when the Commission rejected an opt-out lawsuit and stated its objective of creating a pragmatic and non-binding

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[113] According to Eda Şahin, Article 101, TFEU, cases are more frequent: Eda Şahin, *Collective Redress and EU Competition Law* (Routledge 2019), p. 97.

[114] Richard Whish, David Bailey, *Competition Law* (7th edn, Oxford University Press 2012), p. 99, *"The concept centres around the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention.".*

[115] Richard Whish, David Bailey, *Competition Law* (7th edn, Oxford University Press 2012), p. 82, "*An agreement which is prohibited by Article 101(1) and which does not satisfy Article 101(3) is stated to be automatically void by virtue of Article 101(2)*.".

[116] Damian Chalmers, Gareth Davies, Giorgio Monti, *European Union Law: cases and materials* (4th edn, Cambridge, 2019), p. 919.

[117] Luigi Prosperetti, 'Estimating Damages to Competitors from Exclusionary Practices in Europe: A Review of the Main Issues in the Light of National Courts' Experience' (2009) Available at SSRN: https://ssrn.com/abstract=1551276 or http://dx.doi.org/10.2139/ssrn.1551276. Also: Eda Şahin, *Collective Redress and EU Competition Law* (Routledge 2019), p. 83.

[118] Eda Şahin, *Collective Redress and EU Competition Law* (Routledge 2019), p. 84.

[119] Eda Şahin, *Collective Redress and EU Competition Law* (Routledge 2019), p. 86.

[120] Richard Whish, David Bailey, *Competition Law* (7th edn, Oxford University Press 2012), p. 295-296, "*The Commission has for a long time been eager that Articles 101 and 102 should be applied more frequently in national courts, thereby relieving it of some of the burden of enforcement*.".

[121] Eda Şahin, *Collective Redress and EU Competition Law* (Routledge 2019), p. 39.

[122] Eda Şahin, *Collective Redress and EU Competition Law* (Routledge 2019), p. 40-41.

guidance on how to quantify antitrust damages, and in June 2011 the Commission published a draft guidance paper with this purpose[123], resulting in the Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 TFEU (2013/C 167/07), concluded in 2013.

Considering a major obstacle faced by courts and parties when dealing with damages in Competition Law infringements, this communication was issued by the European Commission, guiding the quantification on the basis of comparing "*[...] the actual position of claimants with the position they would find themselves in had the infringement not occurred.*"[124] ('but-for analysis'[125]) in different possible methods varying on the evidence and the data available.[126] Although comparing these two scenarios might seem straightforward, complex economic and Competition Law issues must be studied and analyzed together, so parties injured can have their losses (actual loss and loss of profit[127]) compensated. The goal is to increase legal certainty by making damage calculation more predictable. It is crucial to abandon the idea of reaching the exact scenario had the infringement not occurred, leading to an exact amount of damages. Such hypothetical situation will not happen and the whole

[123] András Osztovits, 'Quantifying harm in action for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union - some remarks on the draft guidance paper of the European Commission' (2012) Recent Developments in European and Hungarian Competition Law 41, 41-54, p. 41.

[124] Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union (2013/C 167/07) - Consideration 1(3). Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52013XC0613(04) >.

[125] András Osztovits, 'Quantifying harm in action for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union - some remarks on the draft guidance paper of the European Commission' (2012) Recent Developments in European and Hungarian Competition Law 41, 41-54, p. 43. Also: Wen-Jen Tsay, 'Estimating cartel damages with model averaging approaches' (2021) 68 International Review of Law and Economics, available at: <https://www.sciencedirect.com/science/article/abs/pii/S0144818821000430 >.

[126] Luigi Prosperetti, 'Estimating Damages to Competitors from Exclusionary Practices in Europe: A Review of the Main Issues in the Light of National Courts' Experience' (2009) Available at SSRN: <https://ssrn.com/abstract=1551276 > or <http://dx.doi.org/10.2139/ssrn.1551276 >, p. 11, "*The analysis of the available European case-law shows, however, how courts very often do not accept the mechanical application of one method or the other, but rather tend to construct the hypothetical scenario using a variety of information sources. These may include what happened before the infringement, and what is happening elsewhere, but are always based upon a detailed analysis of the facts of the case, in the light of evidence supplied by witnesses and experts. In doing so, they apply to antitrust damages the approach they have been following for a long time when assessing commercial damages, arising both from breach of contract and tort.*".

[127] About these concepts: András Osztovits, 'Quantifying harm in action for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union - some remarks on the draft guidance paper of the European Commission' (2012) Recent Developments in European and Hungarian Competition Law 41, 41-54, p. 42, "*Compensation means placing the injured party in the position it would have been in had there been no infringement. Therefore, compensation includes reparation not only for actual loss suffered (damnum emergens), but also for loss of profit (lucrum cessans) and the payment of interest. Actual loss means a reduction in a person's assets; loss of profit means that an increase in those assets, which would have occurred without the infringement, did not happen*.".

designed system is based on assumptions,[128] considerations of alternative causes to decrease to some level the amount of uncertainty,[129] and comparison within the same or similar markets, depending on the case.[130] Nonetheless, the system inherently involved many assumptions, which is a fundamental aspect of compensating antitrust damages.[131]

Until 2013, year of the mentioned communication, there was no EU rules governing this issue, leaving it entirely up to each Member State, who could not render it "*[...] excessively difficult or practically impossible the exercise of rights conferred on individuals by EU law (principle of effectiveness), [...].*".[132]

3.1.2 Directive 2014/104/EU - The Damages Directive

As a result of the above-mentioned papers and the said Communication from 2013, this Directive was published under severe critics "*[...] for being too aggressive and creating the risk of US-style over-litigation*"[133], explaining its modest title as Directive on 'certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and the European Union'[134]. Nevertheless, the Directive is

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[128] András Osztovits, 'Quantifying harm in action for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union - some remarks on the draft guidance paper of the European Commission' (2012) Recent Developments in European and Hungarian Competition Law 41, 41-54, p. 43, *"It is impossible to know with certainty how a market would have exactly evolved in the absence of the infringement of Article 101 or 102 TFEU."*.

[129] This is called the regression analysis, which is a way to account for alternative causes for the difference between data. András Osztovits, 'Quantifying harm in action for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union - some remarks on the draft guidance paper of the European Commission' (2012) Recent Developments in European and Hungarian Competition Law 41, 41-54, p. 49.

[130] András Osztovits, 'Quantifying harm in action for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union - some remarks on the draft guidance paper of the European Commission' (2012) Recent Developments in European and Hungarian Competition Law 41, 41-54, p. 45-47.

[131] There is a method of combining different methodologies to minimize the abstraction when quantifying damages and enough data is available. Nevertheless, there is still a degree of abstraction and distancing from reality to be considered: András Osztovits, 'Quantifying harm in action for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union - some remarks on the draft guidance paper of the European Commission' (2012) Recent Developments in European and Hungarian Competition Law 41, 41-54, p. 47, "*Where sufficient data are available, it may be possible to combine comparisons over time and comparisons across markets. This approach is sometimes called the 'difference in differences' method because it looks at the development of the relevant economic variable (e.g. the price for flour) in the infringement market during a certain period (difference over time on the infringement market) and compares it to the development of the same variable during the same time period on an unaffected comparator market (difference over time on the non-infringement market). The comparison shows the difference between these two differences over time*.".

[132] András Osztovits, 'Quantifying harm in action for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union - some remarks on the draft guidance paper of the European Commission' (2012) Recent Developments in European and Hungarian Competition Law 41, 41-54, p.42.

[133] Damian Chalmers, Gareth Davies, Giorgio Monti, *European Union Law: cases and materials* (4th edn, Cambridge, 2019), p. 912.

[134] About the reasons not to rely on this fear of U.S. litigation culture, check: Csongor István Nagy, *Collective Actions in Europe - A Comparative, Economic and Transsystemic Analysis* (SpringerOpen, 2019), p. 35-36. Also:

relevant for accomplishing a reasonable legal frame for follow-on damages[135], which are the majority of this kind of claims, because it has significant provisions on evidence, passing-on,[136] quantification of damages,[137] by allowing the NCA to assist national courts,[138] limitation periods, ADR methods and, the *binding* effect of the NCA decisions.[139] This Directive does not oblige the Member States to draft a collective redress system for private enforcement. The only mention of it is in its Art. 2(4)[140], stating that someone may act on behalf of another person or persons when it comes to damages,[141] but the isolated mention does not provide for a collective redress system necessary to build enough certainty regarding central aspects like opt-out, *res judicata*, standing, and so on.[142]

It was expected from this Directive a better integrated private enforcement system dealing with anti-competitiveness in the market and resulting in greater benefits to individual consumers. Nevertheless, this piece of legal text had the advantage of encouraging the debate about competition and consumer law interfaces.[143] According to Damian Chalmers, Gareth Davies and Giorgio Monti, the European Parliament had three concerns with collective redress for antitrust damages at that time: (i) abusive litigation; (ii) opt-out infringing individuals' autonomy; (iii) a broader collective regime to embrace consumer claims in general.[144] As a result, the Commission Recommendation of 11 June 2013 (2013/396/EU) on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law was published, embracing

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Astrid Stadler, 'Are Class Actions Finally (Re)Conquering Europe? Some Remarks on Directive 2020/1828' (2021) 30 Juridica Int'l 14, p. 15.

[135] Art. 9, Directive 2014/104.

[136] Direct and indirect purchasers can claim compensation of harm, according to article 12, Directive 2014/104.

[137] Eda Şahin, *Collective Redress and EU Competition Law* (Routledge 2019), p. 90, "*In order to assist victims in quantifying and claiming damages, the Directive provides for a rebuttable presumption that cartels cause harm through price increases by, inter alia, stating that it is very exceptional that a cartel does not have this effect.*".

[138] Art. 17, Directive 2014/104.

[139] Attention must be brought to the wording of the Directive, in its Article 9, that does not employ the word "binding" itself, but the expression "deemed to be irrefutably established", since there was a concern with some "*[...] States where, from a constitutional perspective, decisions of the administrations cannot bind courts and where judges must remain independent*.", p. 912, Damian Chalmers, Gareth Davies, Giorgio Monti, *European Union Law: cases and materials* (4th edn, Cambridge, 2019).

[140] Article 2(4), Directive 2014/104, 'action for damages' means an action under national law by which a claim for damages is brought before a national court by an alleged injured party, or by someone acting on behalf of one or more alleged injured parties where Union or national law provides for that possibility, or by a natural or legal person that succeeded in the right of the alleged injured party, including the person that acquired the claim;

[141] Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 20.

[142] Eda Şahin, *Collective Redress and EU Competition Law* (Routledge 2019), p. 47, "*It is applicable to damages actions if they are available in Member States either individual or collective without requiring the introduction of the latter*.".

[143] Antonio Davola, 'Empowering consumers through competition: a study on the creation of a European Antitrust claims market' (2015) 22 Revista da Concorrência e Regulação, 197, 197-211, p. 197-198.

[144] Damian Chalmers, Gareth Davies, Giorgio Monti, *European Union Law: cases and materials* (4th edn, Cambridge, 2019), p. 914.

Competition Law as a field where collective redress is of value to supplement private enforcement.[145]

3.1.3 Directive 2020/1828/EU - The Consumers' Collective Redress Directive

This Directive focuses on collective redress to protect consumers, not mentioning Competition Law in its core (Annex I) and, therefore, not directly applicable to its private enforcement. Additionally, the associations' standing established therein is limited to cross-border collective actions, and not necessarily also to national collective lawsuits (Directive 2020/1828, Article 4 (5)).[146] Hence, this Directive represents an effort by the EU to create a parallel collective redress system to protect consumers, adding an extra layer of protection to its already existing mechanisms.[147]

Nevertheless, it is worthy-mentioning this Directive in this master thesis once the many impacts it has already had in the Competition Law field are considered, such as: (i) third-party financing, and, (ii) its use as a Competition Law collective redress framework for some Member States, like Germany, but also to scrutinize how this Directive deals with central collective redress mechanisms like (iii) grouping victims, (iv) calculating damages and, (v) the choice of the class representative.

Regarding (i) third-party financing, which "*[...] refers to financing of litigation for profit by private-sector companies.*",[148] it is regulated as to ascertain no economic interest gets involved in the outcome of the lawsuit, abandoning consumers' protection to a secondary or non-existent level (Art. 10 of the Directive). More about this issue will be discussed further on when addressing funding for popular actions in Portugal, since this is the only mention of litigation funding in this specific European context and, still timid.[149]

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[145] Available at:< https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013H0396&from=en >. Access on June 27th 2024.
[146] Andrea Piletta Massaro, 'The new Directive on an EU-wide representative action and third-party litigation funding: an opportunity for European consumers?' (2021) 1 Revija Kopaoničke Škole Prirodnog Prava, 95, 95-117. Also: Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 61.
[147] Andrea Piletta Massaro, 'The new Directive on an EU-wide representative action and third-party litigation funding: an opportunity for European consumers?' (2021) 1 Revija Kopaoničke Škole Prirodnog Prava, 95, 95-117, p. 98.
[148] Eda Şahin, *Collective Redress and EU Competition Law* (Routledge 2019), p. 161.
[149] Astrid Stadler, 'Are Class Actions Finally (Re)Conquering Europe? Some Remarks on Directive 2020/1828' (2021) 30 Juridica Int'l 14, p. 19.

For (ii) its use as a framework for Competition Law collective redress, Germany has extended its scope by passing internal legislation to apply this Directive framework to deal with tort in general, privacy law, antitrust violations, etc.[150]

Concerning (iii) grouping victims, it is noteworthy that this Directive grants Members States the freedom to choose between an opt-in or an opt-model,[151] which some would see as an advantage, considering the long aversion against the opt-out model Europe has shown.[152] However, if the collective suit is brought across Member States, the opt-in model is necessary to citizens residing in other Member States,[153] and there is no mandatory opt-out rule when small amounts of damages are under debate, leading this mechanism to keep this post-anti-competitive consequence to its current dead-end status, if this Directive is to be used to safeguard antitrust harmed individuals.[154]

The matter related to the (iv) damages calculation can be technical and burdensome, but the Directive simplifies it by stating the method of quantification of harm is relevant, if applicable, and that no consumer should be obliged to bring separate proceedings for the quantification of harm.[155]

When the analysis comes down to (v) the choice of the class representative, there has been a considerable reduction of the possible claimants.[156] For this Directive, the claimant will be a 'qualified entity', meaning "*any organisation or public body representing consumers' interests which has been designated by a Member State as qualified to bring representative actions in accordance with this Directive*" (Art. 3 (4) of the Directive)[157]. To be classified as

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[150] On the political scenario justifying it, check: Astrid Stadler, 'Are Class Actions Finally (Re)Conquering Europe? Some Remarks on Directive 2020/1828' (2021) 30 Juridica Int'l 14, p. 14-16. About this extension to its scope, also check: <https://www.noerr.com/en/insights/update-new-class-action-bundestag-passes-representative-action-for-redress >, access on May 27th 2024.
[151] Directive 2020/1828, Considerations n. 34 and 43. Astrid Stadler, 'Are Class Actions Finally (Re)Conquering Europe? Some Remarks on Directive 2020/1828' (2021) 30 Juridica Int'l 14.
[152] The political reasons for this choice are explained by Eda Şahin, *Collective Redress and EU Competition Law* (Routledge 2019), p. 149.
[153] Directive 2020/1828, Consideration 45. Andrea Piletta Massaro, 'The new Directive on an EU-wide representative action and third-party litigation funding: an opportunity for European consumers?' (2021) 1 Revija Kopaoničke Škole Prirodnog Prava, 95, 95-117, p. 101-102.
[154] Astrid Stadler, 'Are Class Actions Finally (Re)Conquering Europe? Some Remarks on Directive 2020/1828' (2021) 30 Juridica Int'l 14, p. 17.
[155] Consideration n. 50, Directive 2020/1828.
[156] Astrid Stadler, 'Are Class Actions Finally (Re)Conquering Europe? Some Remarks on Directive 2020/1828' (2021) 30 Juridica Int'l 14, p. 17.
[157] Directive 2020/1828, Art. 4, (3). "*Member States shall designate an entity as referred to in paragraph 2 that has made a request for designation as a qualified entity for the purpose of bringing cross-border representative actions if that entity complies with all of the following criteria: (a) it is a legal person that is constituted in accordance with the national law of the Member State of its designation and can demonstrate 12 months of actual public activity in the protection of consumer interests prior to its request for designation; (b) its statutory purpose demonstrates that it has a legitimate interest in protecting consumer interests as provided for in the provisions of Union law referred to in Annex I; (c) it has a non-profit-making character; (d) it is not the subject of insolvency*

"qualified", there are several requirements listed in Art. 4 (3) of the Directive. This option is more efficient on the matter related to the client-attorney relationship, since ideological claimants "*[...] have a genuine interest in litigation [...]*",[158] but also on the access to information and financing options, minimizing the downsides of one-shotters when litigating in collective lawsuits. On the other hand, critics can be drawn up to this option once "*[...] ad-hoc-founded interest groups or entities that would represent only the victims of a particular mass-harm event are not within the scope of application of the directive*.".[159]

One might think that the Member States could choose to draft an exclusive individual redress system for Competition Law damages or even a collective one restricted to a homogeneous amount of damages, for instance, considering Competition Law was not included in the most recent directive from 2020 addressing collective redress.[160] However, other European documents are to be considered before reaching this conclusion, such as Recommendation from June 11th 2013, the Green Book from 2005 and the White Book from 2008 stimulating the Member States to create effective mechanisms to Competition Law collective redress.[161] Despite the many European efforts, *"[...] the current framework of remedies enjoyed by consumers still appears to be insufficient, since it is unable to produce appropriate results in three main areas: adequacy of compensation, accessibility to justice and welfare consequences."*.[162]

proceedings and is not declared insolvent; (e) it is independent and not influenced by persons other than consumers, in particular by traders, who have an economic interest in the bringing of any representative action, including in the event of funding by third parties, and, to that end, has established procedures to prevent such influence as well as to prevent conflicts of interest between itself, its funding providers and the interests of consumers; (f) it makes publicly available in plain and intelligible language by any appropriate means, in particular on its website, information that demonstrates that the entity complies with the criteria listed in points (a) to (e) and information about the sources of its funding in general, its organisational, management and membership structure, its statutory purpose and its activities.".

[158] Eda Şahin, *Collective Redress and EU Competition Law* (Routledge 2019), p. 153, "*Ideological claimants are not one of those harmed but are instead interested in the subject matter of the litigation. In other words, they do not have a cause of action against the defendant, their aim is to defend the interests of the group members they represent*.".

[159] Astrid Stadler, 'Are Class Actions Finally (Re)Conquering Europe? Some Remarks on Directive 2020/1828' (2021) 30 Juridica Int'l 14, p. 18.

[160] These examples are given by Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 20-21.

[161] Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 21.

[162] Antonio Davola, 'Empowering consumers through competition: a study on the creation of a European Antitrust claims market' (2015) 22 Revista da Concorrência e Regulação, 197, 197-211, p. 199.

3.2 The Portuguese Framework

In the Portuguese context, claiming damages after a Competition Law violation is possible throughout the individual and the collective paths. Individual claims can be brought together entirely (through joinder, "*litisconsórcio*") or travel their own way as an individual proceeding. Joinder constitutes a non-representative group litigation possibility and that is the reason it is to be mentioned when discussing collective redress. However, it is not broadly used (if ever) to claim small-scale, scattered, and widespread Competition Law damages, since there are economic disincentives for a consumer, a small or a medium-sized business to file an individual lawsuit in this scenario, as previously addressed. For these reasons, it will be superficially presented only to the aspects relevant to understand its irrelevance as a feasible mechanism to protect serial violations to market competition. In contrast to this, the popular action as a representative group litigation mechanism is occupying more space since 2021 and, for this reason, will get most of the detailed attention in this study.

What is important to mention from the beginning of this analysis, since it is applicable to both representative and non-representative group litigation mechanisms, is the legal provisions brought into light in 2018 by the Private Enforcement Act (PEA) assuring the public and the private enforcements are to work together by: (i) determining the binding effect of the administrative decision taken by the National Authority,[163] and (ii) the suspension of stand-by lawsuits to avoid conflicting decisions between the National Authority and the courts, making most of the lawsuits in that area to be considered follow-on damages. This is one possible reason to bring effectiveness to the Portuguese scenario when debating private enforcement.[164]

3.2.1 Non-representative group litigation mechanisms

When discussing collective redress, much of the general thought in Portugal is directed to the popular action, which will be further analyzed. Nevertheless, there is one non-representative group litigation mechanism that needs some attention too, which is the joinder. Joinder can be used as an instrument to put together different claims at once in just one lawsuit that would otherwise be filed separately. Some requirements need to be fulfilled, such as having

[163] PEA, Art. 7.
[164] Maria José Capelo, Carolina Cunha, *Práticas Anticoncorrenciais - Entre o public enforcement e a ação popular indemnizatória* (GestLegal 2023), p. 18.

the same cause of action.[165] The joinder establishes a decentralized group, allowing each individual to make their own submission, motion, appeal, etc.[166] Therefore, each individual keeps its autonomy related to the claim.[167]

This system shall work properly for managing two or a few more similar cases, but not buckets of similar cases causing disorder in the regular proceeding,[168] since the judge must treat each party autonomously.[169] Thus, there is no practicality in discussing joinder as an effective source of collective redress in Competition Law when small and scattered damages are into place.[170] On top of that, there are few individual lawsuits filed to discuss competition damages, considering its economic disincentives.[171]

3.2.2 Representative group litigation mechanisms - the Popular Action

Representative group litigation involves one person or entity assuming the position of plaintiff in a lawsuit on its own name but to discuss interests and rights of others who are not present directly in it.[172] This is only possible due to legal provisions authorizing specific individuals or entities to do so.[173] In Portugal, it happens through '*ação popular*', or popular action. The central idea is to have only one lawsuit to discuss the interests of many, avoiding

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[165] Miguel Sousa Ferro, Leonor Rossi, 'Private Enforcement of Competition Law in Portugal – Virtues and Shortcomings of the Actio Popularis' (April 19, 2014). BENACCHIO, G. A., CARPAGNANO, M. (eds.), L'applicazione delle regole di concorrenza in Italia e nell'Unione Europea – Atti del IV Convegno biennale Antitrust (Trento, 18-19 aprile 2013), Editoriale Scientifica, 2014, p. 263, Available at SSRN: < https://ssrn.com/abstract=3077421 >, p. 272.

[166] Csongor István Nagy, *Collective Actions in Europe - A Comparative, Economic and Transsystemic Analysis* (SpringerOpen, 2019), p. 63.

[167] Gerhard Wagner, 'Collective Redress – Categories of Loss and Legislative Options' (2011) 127 Law Quarterly Review, 55, 55-82, Available at SSRN: <https://ssrn.com/abstract=1960904 >, p. 66, "*Joinder rules do not consolidate the multiplicity of claims into one single action. Rather, the several claims remain separate and distinct from one another. Each individual claimant remains a party to the proceedings, fully protected by the applicable procedural guarantees, such as the right to be heard and the right to an oral hearing. The claimant also retains the power to decide autonomously on the further course of action, i.e. whether to settle the claim, to continue the proceedings, to lodge appeals or to withdraw altogether*.".

[168] Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 15.

[169] Eda Şahin, *Collective Redress and EU Competition Law* (Routledge 2019), p. 31, "*However, both procedures resemble the traditional two-party litigation, because the judges must apply all the procedures on an individual basis for each plaintiff. The plaintiffs' claims and damages awards are determined separately*.".

[170] In that sense: "*If it is true that the system is familiar with certain forms of collective actions and among others, joinder, it is undeniable that litisconsortium was not designed to manage thousands or even millions of connected claims.", p. 274,* Miguel Sousa Ferro, Leonor Rossi, 'Private Enforcement of Competition Law in Portugal – Virtues and Shortcomings of the Actio Popularis' (April 19, 2014). BENACCHIO, G. A., CARPAGNANO, M. (eds.), L'applicazione delle regole di concorrenza in Italia e nell'Unione Europea – Atti del IV Convegno biennale Antitrust (Trento, 18-19 aprile 2013), Editoriale Scientifica, 2014, p. 263, Available at SSRN: <https://ssrn.com/abstract=3077421>.

[171] Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 21.

[172] Maria José Capelo, Carolina Cunha, *Práticas Anticoncorrenciais - Entre o public enforcement e a ação popular indemnizatória* (GestLegal 2023), p. 32.

[173] Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 29.

conflicting decisions[174], over-flooding the courts and unpaid damages in the frequent situation that the damages involve a small quantity of money to many individuals not justifying hiring a lawyer and paying courts' fees for one individual lawsuit, for instance.[175]

Despite this theoretical explanation and the existence of popular actions in Portugal for many years (the applicable law dates from 1995), the year was 2014, before the Directive 2014/104/EU,[176] and it was being said that not much attention was being paid to Competition Law and its effectiveness through popular action in the Portuguese doctrine,[177] and on top of that, no popular action and almost none lawsuit had been filed until that date to ask for compensation considering the many competition infringements recognised by the European Commission and the NCA,[178] leading Miguel Sousa Ferro and Leonor Rossi to point out "*[...] a rather substantial gap between the theoretical possibilities presented by the Portuguese popular action mechanism, often singled out as an exceptionally pragmatic system within the EU, and its use in practice*.",[179] leaving approximately 270 million euro unrecovered per year in Portugal.[180]

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[174] Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 34-35. The authors also mention the cost economies once only one technical proof needs to be addressed instead of thousands. I think this pointed advantage is merely utopic since there is no record of so many individual claims to present the situation of conducting many technical proofs as a problem.

[175] Autoridade da Concorrência (National Portuguese Authority), 'Enquadramento da consulta pública da proposta de anteprojeto de transposição da diretiva private enforcement' (2016) 26 Revista de Concorrência e Regulação, 69, 84.

[176] Great expectations was set on the Directive 2014/104/EU, according to Alexandre Libório Dias Pereira, 'Aplicação privada do direito antitruste: novas perspectivas' (2017) 1 Estudos Comemorativos dos 20 anos da FDUP, 41, 41-59.

[177] Miguel Sousa Ferro, Leonor Rossi, 'Private Enforcement of Competition Law in Portugal – Virtues and Shortcomings of the Actio Popularis' (April 19, 2014). BENACCHIO, G. A., CARPAGNANO, M. (eds.), L'applicazione delle regole di concorrenza in Italia e nell'Unione Europea – Atti del IV Convegno biennale Antitrust (Trento, 18-19 aprile 2013), Editoriale Scientifica, 2014, p. 263, Available at SSRN: <https://ssrn.com/abstract=3077421>, p. 264. Also, Alexandre Libório Dias Pereira, 'Aplicação privada do direito antitruste: novas perspectivas' (2017) 1 Estudos Comemorativos dos 20 anos da FDUP, 41, 41-59.

[178] Miguel Sousa Ferro, Leonor Rossi, 'Private Enforcement of Competition Law in Portugal – Virtues and Shortcomings of the Actio Popularis' (April 19, 2014). BENACCHIO, G. A., CARPAGNANO, M. (eds.), L'applicazione delle regole di concorrenza in Italia e nell'Unione Europea – Atti del IV Convegno biennale Antitrust (Trento, 18-19 aprile 2013), Editoriale Scientifica, 2014, p. 263, Available at SSRN: <https://ssrn.com/abstract=3077421>, p. 264. On the same paper, but on page 274, the authors stated that 1.3 cases per year were filed between Dec. 1983 and May 2012 discussing Competition Law. Out of the 37 cases, only 7 discussed damages as a result of competition law infringements and no plaintiff at all had success.

[179] Miguel Sousa Ferro, Leonor Rossi, 'Private Enforcement of Competition Law in Portugal – Virtues and Shortcomings of the Actio Popularis' (April 19, 2014). BENACCHIO, G. A., CARPAGNANO, M. (eds.), L'applicazione delle regole di concorrenza in Italia e nell'Unione Europea – Atti del IV Convegno biennale Antitrust (Trento, 18-19 aprile 2013), Editoriale Scientifica, 2014, p. 263, Available at SSRN: <https://ssrn.com/abstract=3077421>, p. 265.

[180] The authors explained how they reached this number: Miguel Sousa Ferro, Leonor Rossi, 'Private Enforcement of Competition Law in Portugal – Virtues and Shortcomings of the Actio Popularis' (April 19, 2014). BENACCHIO, G. A., CARPAGNANO, M. (eds.), L'applicazione delle regole di concorrenza in Italia e nell'Unione Europea – Atti del IV Convegno biennale Antitrust (Trento, 18-19 aprile 2013), Editoriale Scientifica, 2014, p. 263, Available at SSRN: <https://ssrn.com/abstract=3077421> , p. 265.

It is noteworthy that the opt-out system was already in use in 2014 in Portugal, but - despite that - it had not served as a force to implement the robust use of the collective redress mechanism so far.[181] A workshop was conducted to discuss the implementation of the Directive 2014/104/EU in Portugal and it was stated that this situation was caused by the economic disincentives present for someone to file a popular action in a Portuguese Court.[182] Therefore, the Directive 2014/104/EU was made concrete internally in Portugal through the Law n. 23/2018, which combines forces with the PAA by reassuring the popular action as a feasible means to claim Competition Law damages, by adding essential elements to the ruling and by regulating the appropriate means to pay the individual damages, but still it did not stimulate the popular action use in practice as an effective instrument to claim competition damages.[183]

The year was 2021 and not much had changed.[184] Yet the Portuguese legal framework for private enforcement of Competition Law through collective redress was being ranked as "extensive" and "liberal".[185] Nowadays, the use of the popular action in Portugal regarding the private enforcement of Competition Law has increased substantially and one possible cause is the third-party litigation funding, since there are high costs involved in conducting such a lawsuit and there is little (if none) public finance to it,[186] and a new consumer protection association's presence (*Ius Omnibus*[187]) testing "*[...] the possibility of using third party funding in popular actions in Portugal. This has allowed very costly cases which would never have been brought with the limited resources of individual consumers or of a consumer association to be put before the courts*."[188].

[181] Miguel Sousa Ferro, Leonor Rossi, 'Private Enforcement of Competition Law in Portugal – Virtues and Shortcomings of the Actio Popularis' (April 19, 2014). BENACCHIO, G. A., CARPAGNANO, M. (eds.), L'applicazione delle regole di concorrenza in Italia e nell'Unione Europea – Atti del IV Convegno biennale Antitrust (Trento, 18-19 aprile 2013), Editoriale Scientifica, 2014, p. 263, Available at SSRN: <https://ssrn.com/abstract=3077421>, p. 266.
[182] Miguel Sousa Ferro, 'Workshop consultivo sobre o anteprojeto de transposição da Diretiva 2014/104/UE - Relatório Síntese' (2016) 26 Revista de Concorrência e Regulação, 51, 64, p. 64.
[183] Maria José Capelo, Carolina Cunha, *Práticas Anticoncorrenciais - Entre o public enforcement e a ação popular indemnizatória* (GestLegal 2023), p. 8.
[184] Miguel Sousa Ferro, 'Class Actions in Portugal: the little regime that could' (2021) 2 Mass Claims, 115, 115-124.
[185] Miguel Sousa Ferro, Leonor Rossi, 'Private Enforcement of Competition Law in Portugal – Virtues and Shortcomings of the Actio Popularis' (April 19, 2014). BENACCHIO, G. A., CARPAGNANO, M. (eds.), L'applicazione delle regole di concorrenza in Italia e nell'Unione Europea – Atti del IV Convegno biennale Antitrust (Trento, 18-19 aprile 2013), Editoriale Scientifica, 2014, p. 263, Available at SSRN: <https://ssrn.com/abstract=3077421>, p. 277.
[186] Maria José Capelo, Carolina Cunha, *Práticas Anticoncorrenciais - Entre o public enforcement e a ação popular indemnizatória* (GestLegal 2023), p. 8.
[187] According to its webpage, there are 17 Popular actions pending regarding private enforcement of Competition Law. - Available at: <https://iusomnibus.eu/pt/casos/>.
[188] Miguel Sousa Ferro, 'Class Actions in Portugal: the little regime that could' (2021) 2 Mass Claims, 115, 115-124, p. 124.

The intent is to analyze the institute and its development into the Portuguese reality to understand what has changed to revive its role in society as an important mechanism to guarantee the private enforcement of Competition Law through collective redress. To do so, it is crucial to be aware of its constitutional provisions and legal framework in a more detailed manner.

3.2.2.1 Constitutional and legal framework

There is an extra layer of protection towards the collective redress mechanism in Portugal, since the popular action has constitutional status,[189] in its article 52(3)(a) stating that:

> Everyone shall be granted the right of *actio popularis*, to include the right to apply for the appropriate compensation for an aggrieved party or parties, in such cases and under such terms as the law may determine, either personally or via associations that purport to defend the interests in question. The said right shall particularly be exercised in order to: a) Promote the prevention, cessation or judicial prosecution of offences against public health, consumer rights, the quality of life or the preservation of the environment and the cultural heritage; [...].[190]

Its constitutional provision guarantees the working balance between the diffuse and the individual interests related to the environmental and consumers' welfare protection, for instance.[191] Even though there is no mention of Competition Law situations in the constitutional writing, its protection through the popular action instrument is possible considering the legal framework passed recently,[192] making it necessary for a combined reading between the constitutional and the legal texts to fully comprehend the collective redress in private enforcement in Portuguese Competition Law.

In that sense, there are two main legal pieces to be understood: the Popular Action Act from 1995 (PAA - Law 83/95 of 31st August) and the Private Enforcement Act from 2018 (PEA - Law 23/18 of 5th June). Chronologically reading these pieces of law, no mention to Competition Law is found in the list[193] presented in the PAA (1995) with subject matters that

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[189] In that sense: Miguel Sousa Ferro, 'Class Actions in Portugal: the little regime that could' (2021) 2 Mass Claims, 115, 115-124, p. 116.

[190] In the original: *"Art. 52. 3. É conferido a todos, pessoalmente ou através de associações de defesa dos interesses em causa, o direito de ação popular nos casos e termos previstos na lei, incluindo o direito de requerer para o lesado ou lesados a correspondente indemnização, nomeadamente para:*
a) Promover a prevenção, a cessação ou a perseguição judicial das infrações contra a saúde pública, os direitos dos consumidores, a qualidade de vida, a preservação do ambiente e do património cultural; b) Assegurar a defesa dos bens do Estado, das regiões autónomas e das autarquias locais."

[191] Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 15.

[192] Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p.16.

[193] Article 1(2) PAA.

could be discussed in collective redress, only containing topics such as consumer protection and environment, but "*[...] the Supreme Court has already implicitly confirmed that* actio popularis *may also be used to seek compensation for damages arising from infringements of competition law, at least when consumer protection is at stake*.",[194] leading to the common affirmative about this list being non-exhaustive.[195]

Conversely, the Portuguese Law n. 23/2018, regulating the Directive 2014/104/EU, the Private Enforcement Act (PEA) internally has expressly determined in its article 19 that Competition Law can be privately enforced through popular actions, eliminating any possible discussion about it. Therefore, the popular action is a feasible means to "*[...] seek declarations that the law was infringed, injunctions and damages*."[196] related to Competition Law violations.

The PEA was extremely relevant to the effectiveness of Competition Law collective redress in Portugal because, among other reasons, it also included important provisions to the working of Competition Law popular actions, such as: (a) essential elements to the ruling; (b) ways to identify the individuals; (c) ways to quantify damages; (d) deadline for claiming damages once the popular action is finished; (e) the determination of the entity responsible for receiving and managing the payments; and (f) the destination of unclaimed money,[197] which will be further analyzed.

3.2.2.2 Standing, adequacy of representation and *res judicata*

According to the Art. 2, PAA, (i) any citizen in full possession of political and civil rights, regardless of having a direct interest in the cause of action, (ii) associations and foundations whose statutory aim is to protect public health, the environment, the quality of life, cultural heritage, public domain and consumers, and (iii) municipalities regarding the interests of its residents can file a popular action in the Portuguese Courts. The latter can hardly apply

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[194] Miguel Sousa Ferro, Leonor Rossi, 'Private Enforcement of Competition Law in Portugal – Virtues and Shortcomings of the Actio Popularis' (April 19, 2014). BENACCHIO, G. A., CARPAGNANO, M. (eds.), L'applicazione delle regole di concorrenza in Italia e nell'Unione Europea – Atti del IV Convegno biennale Antitrust (Trento, 18-19 aprile 2013), Editoriale Scientifica, 2014, p. 263, Available at SSRN: <https://ssrn.com/abstract=3077421>, p. 281, mentioning Judgment of 2003/10/07, DECO v. Portugal Telecom (case n. 03A1243).

[195] Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 24-25. These authors underline the popular action as a feasible means to protect competition law violations even before the PEA em 2018. Also, Miguel Sousa Ferro, 'Class Actions in Portugal: the little regime that could' (2021) 2 Mass Claims, 115, 115-124, p. 117.

[196] Miguel Sousa Ferro, 'Class Actions in Portugal: the little regime that could' (2021) 2 Mass Claims, 115, 115-124, p. 118.

[197] Maria José Capelo, Carolina Cunha, *Práticas Anticoncorrenciais - Entre o public enforcement e a ação popular indemnizatória* (GestLegal 2023), p. 21.

in Competition Law, since these are related to the administrative popular action in opposition to the civil popular action, which will be object of this analysis[198].

The PEA - Law n. 23/2018 -, regulating the private enforcement in Portugal, reassured the consumers' associations as possible plaintiffs for popular actions concerning Competition Law damages in general and, it made an important addition to the list of entities who can stand such a lawsuit by including companies' associations regardless of its statutory aims as having standing for a popular action in this matter since Competition Law infringements often affect small and medium businesses[199]. However, it is fundamental that they do not pursue professional activities competing with undertakings.[200]

Deepening the discussion of each entity or individual listed, which is a matter of legislative policy and only secondarily a technical issue, according to Vincenzo Vigoriti,[201] there are some important remarks to be made regarding the possibility of (i) *any citizen* to file a popular action, having direct interest in the situation or not. There is almost no concern about the plaintiff being the adequate representative of the group[202] in the way it is discussed in the United States[203] or in Brazil about the adequacy of representation of the one person who is representing the whole class.[204] Among many aspects of concern, there is one related to bad faith conduct[205]. Considering the few lines spent discussing it in the Portuguese doctrine, one

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[198] Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 11. According to the authors, the popular action was originally designed only to address its administrative version and the civil one was further incorporated, causing some theoretical challenges to be studied. About no differentiation between these two types: Miguel Sousa Ferro, 'Class Actions in Portugal: the little regime that could' (2021) 2 Mass Claims, 115, 115-124, p. 115.

[199] Miguel Sousa Ferro, 'Class Actions in Portugal: the little regime that could' (2021) 2 Mass Claims, 115, 115-124, p. 117.

[200] Miguel Sousa Ferro, Leonor Rossi, 'Private Enforcement of Competition Law in Portugal – Virtues and Shortcomings of the Actio Popularis' (April 19, 2014). BENACCHIO, G. A., CARPAGNANO, M. (eds.), L'applicazione delle regole di concorrenza in Italia e nell'Unione Europea – Atti del IV Convegno biennale Antitrust (Trento, 18-19 aprile 2013), Editoriale Scientifica, 2014, p. 263, Available at SSRN: <https://ssrn.com/abstract=3077421>, p. 283.

[201] Vincenzo Vigoriti, *Interessi collettivi e processo: la legittimazione ad agire* (Giuffrè 1979), p. 66.

[202] In this sense: Miguel Sousa Ferro, 'Class Actions in Portugal: the little regime that could' (2021) 2 Mass Claims, 115, 115-124, p. 115.

[203] Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 43. The authors point out that this discussion relies on other aspects in the Portuguese doctrine. Eda Şahin, *Collective Redress and EU Competition Law* (Routledge 2019), p. 22.

[204] Bianca Mendes Pereira Richter, 'Adequacy of representation: a comparison between class actions in the North American and Brazilian models' (2022) 5 Macau Journal of Brazilian Studies, 15, 15-27, p. 25. I previously wrote about this topic, comparing the subject's situation in Brazil and in the United States. So many papers, books and case law can be found in the Brazilian legal literature about this topic, causing a significant impression when the situation is different in Portugal.

[205] Miguel Sousa Ferro, 'Class Actions in Portugal: the little regime that could' (2021) 2 Mass Claims, 115, 115-124, p. 120, "*These favourable rules cease to apply in the case of bad faith litigation. In such cases, under the general rules of civil procedure, inter alia, the claimant may be ordered to pay a fine and all the (reasonable) costs of the defendants (rather than simply the limited adverse costs which would be owed under the general rules on costs), and the attorneys of the claimants may also be held liable.*".

might consider this aspect seen as almost unfeasible of happening when a popular action is filed. According to Eurico Ferraresi, civil law countries do not integrate judicial control of adequate representation, which is done previously by the legislator.[206]

In like manner, it is considered that any such case could be controlled by the judge in the beginning of the procedure,[207] and if the case is not properly conducted by the popular action's plaintiff, the appointed outcome is the Public Prosecutor's Office to take over as the secondary plaintiff.[208] The Public Prosecutor's Office may decide to take the place of the claimant in the case the person withdraws from the lawsuit, proposes a settlement[209] or adopts any behavior damaging the interests at stake,[210] such as allowing unduly influence on the lawsuit by the funder.[211] Even though there is no namely adequacy of representation control in the initial phase of the popular action, it is possible to consider the existence of it throughout the proceeding because of this provision on Article 16, PAA[212], along with others such as (i) the preliminary assessment of the case conducted by the judge, if the claim is considered not to have great chances of success,[213] which takes place before the defendant's and the members of the class' notification. On top of that, if the popular action is used to damage a competitor, for instance, as some would consider, there are important control layers to this kind of conduct: (a) the already mentioned preliminary assessment of the case by the judge; (b) the need to pay costs if the lawsuit is unsuccessful (Art. 20 (3), PAA); (c) the sanctions to bad-faith litigation (Art. 20 (4), PAA); and (d) the suspension if the right to access courts is managed abusively.[214]

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[206] Eurico Ferraresi, *Ação popular, ação civil pública e mandado de segurança coletivo: instrumentos processuais coletivos*, (Forense 2009), p. 118.
[207] Maria José Capelo, Carolina Cunha, *Práticas Anticoncorrenciais - Entre o public enforcement e a ação popular indemnizatória* (GestLegal 2023), p. 37. According to Miguel S. Ferro, this situation happens often based on the lack of active legitimacy, but the ruling tends to be overcome by the Appeal Court: Miguel Sousa Ferro, 'Class Actions in Portugal: the little regime that could' (2021) 2 Mass Claims, 115, 115-124, p. 121.
[208] Maria José Capelo, Carolina Cunha, *Práticas Anticoncorrenciais - Entre o public enforcement e a ação popular indemnizatória* (GestLegal 2023), p. 38.
[209] Miguel Sousa Ferro, 'Class Actions in Portugal: the little regime that could' (2021) 2 Mass Claims, 115, 115-124, p. 120, "*The general rules of civil procedure, together with those of the popular action regime, mean that no settlement can be reached without the Court's approval, after consulting the Public Prosecutor.*".
[210] Miguel Sousa Ferro, Leonor Rossi, 'Private Enforcement of Competition Law in Portugal – Virtues and Shortcomings of the Actio Popularis' (April 19, 2014). BENACCHIO, G. A., CARPAGNANO, M. (eds.), L'applicazione delle regole di concorrenza in Italia e nell'Unione Europea – Atti del IV Convegno biennale Antitrust (Trento, 18-19 aprile 2013), Editoriale Scientifica, 2014, p. 263, Available at SSRN: <https://ssrn.com/abstract=3077421 >, p. 286.
[211] Maria José Capelo, Carolina Cunha, *Práticas Anticoncorrenciais - Entre o public enforcement e a ação popular indemnizatória* (GestLegal 2023), p. 58.
[212] Miguel Sousa Ferro, 'Class Actions in Portugal: the little regime that could' (2021) 2 Mass Claims, 115, 115-124, p. 119, "As this has never occurred, as far as could be determined, there is significant uncertainty around how this would take place.".
[213] Miguel Sousa Ferro, 'Class Actions in Portugal: the little regime that could' (2021) 2 Mass Claims, 115, 115-124, p. 119, "The Court is required to carry out a preliminary assessment of the likelihood of success of the claim (analogous to *fumus boni juris* approach).".
[214] Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 152.

Also, the majority - if not all - of the popular actions concerning Competition Law damages in Portugal were filed by associations, considering the general public inertia when costs and specialized knowledge is involved.[215] Since the associations' adequacy of representation is presumed based on its statutory aims, that is the threshold of the theoretical debate found in Portuguese doctrine.

To what it concerns (ii) *the associations,* its role in society as an independent collective entity fulfilling its mission[216] can be strengthened through appropriate collective redress mechanisms and in order to accomplish it and still defend a plurality of individuals, they must fulfill three requirements to properly stand before a court bringing a popular action, which are: a) to be properly constituted, which is rather simple and do not involve administrative recognition[217], b) statutory provisions, with an exception for companies' associations[218], and c) not to involve itself into professional activities related to companies or liberal professions.

From the requirements' list, one can conclude that they do not need to demonstrate a minimum timeframe of its foundation[219], number of members,[220] or funds to cover the pursuit of the claim. There is a presumption that non-profit entities, such associations, will not be influenced by selfish incentives.[221] Consequently, the front door for popular action is broad enough to allow access to justice in terms of discussing the subject matters listed before.[222]

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[215] Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 33.
[216] Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 36.
[217] For further details about this requirement, check, Maria José Capelo, Carolina Cunha, *Práticas Anticoncorrenciais - Entre o public enforcement e a ação popular indemnizatória* (GestLegal 2023), p. 28.
[218] PEA, Art. 19(2).
[219] The Directive 2020/1828, regulating European class actions in general, demands the timeframe requirement of 12 months. However, competition law is not included in it and Portugal has its own regulation for private enforcement of antitrust violations (PEA and PAA). In this direction: Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 46.
[220] Miguel Sousa Ferro, 'Class Actions in Portugal: the little regime that could' (2021) 2 Mass Claims, 115, 115-124, p. 117, "*It would be illogical if any individual member of the association could bring a popular action, but the association were required to have a minimum number of members in order to have the same right*.".
[221] Csongor István Nagy, *Collective Actions in Europe - A Comparative, Economic and Transsystemic Analysis* (SpringerOpen, 2019), p. 63.
[222] It is worth-citing this piece of example from Miguel Sousa Ferro: "In the OdC v. Sport TV case, the Lisbon Appeal Court ruled that an association of academics, created shortly before filing the popular action, with a small number of members and having made no demonstration of financial capacity, was entitled to bring a popular action seeking damages for all injured consumers, given that these goals and powers were foreseen in its statutes.", p. 117, Miguel Sousa Ferro, 'Class Actions in Portugal: the little regime that could' (2021) 2 Mass Claims, 115, 115-124. Also, Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 52-54. The authors point out that demanding several members to the association would violate a constitutional right and if the discussion would serve to stimulate the adequacy of representation debate, that would be a demeanor, since a simple number does not indicate appropriate activities towards representing its members.

The list of possible plaintiffs seems plain and simple.[223] Nevertheless, there was an open discussion regarding the Public Prosecutor's Office right of standing in a popular action, since it is not listed in this piece of law, but it can replace plaintiffs in some cases (Art. 16, PAA), carrying on the lawsuit. It would have seemed contradictory that the Public Prosecutor's Office could not initiate a lawsuit, bringing together solid and strong arguments and even evidence, but it could continue with any lawsuit regardless of the quality it brings to discuss collective rights.[224] Therefore, "*There are various precedents of Public Prosecutors initiating popular actions and their legitimacy being confirmed by the courts*."[225].

After the filing of the popular action, there are mainly four important judicial control layers of the plausibility of the case to protect the represented members of the group: (i) by dismissing the case after the filing of the lawsuit, if the lawsuit is found to be obviously unsuccessful, as previously pointed out, (ii) by scheduling a preliminary hearing after the first stage of the proceedings (after the defendant's answer) to decide on the reasons to possibly dismiss the case;[226] (iii) by tackling the misconduct of the plaintiff with the public prosecutor's office taking part in the proceedings; and, (iv) by limiting the *res judicata*.[227]

When this last layer is concerned, according to Article 19, PAA, the effects of a judgment depend on its results. If the award is not granted to the plaintiff representing the members of the group who did not opt out based on lack of evidence or another reasoning related to the case, there will be no binding effect to them (*res judicata "secundum eventum probationis"*). Therefore, there will be nothing (related to this topic) to hinder a new popular action or even individual claims to be filed.[228]

[223] In the case there is more than one popular action regarding the same cause of action, the solution is the 'lis pendens' legal framework in the Portuguese regime. About it: Maria José Capelo, Carolina Cunha, *Práticas Anticoncorrenciais - Entre o public enforcement e a ação popular indemnizatória* (GestLegal 2023), p. 30-38. Miguel Sousa Ferro, 'Class Actions in Portugal: the little regime that could' (2021) 2 Mass Claims, 115, 115-124, p. 119, "*Subsequent actions would have to be dismissed or, at best, suspended while waiting for confirmation of the legitimacy of the original claimant.*".

[224] Miguel Sousa Ferro, 'Class Actions in Portugal: the little regime that could' (2021) 2 Mass Claims, 115, 115-124, p. 117.

[225] Also including the Public Prosecutor's Office's right of standing: Alexandre Libório Dias Pereira, 'Aplicação privada do direito antitruste: novas perspectivas' (2017) 1 Estudos Comemorativos dos 20 anos da FDUP, 41, 41-59. Also check: Miguel Sousa Ferro, 'Class Actions in Portugal: the little regime that could' (2021) 2 Mass Claims, 115, 115-124, p. 117.

[226] Miguel Sousa Ferro, 'Class Actions in Portugal: the little regime that could' (2021) 2 Mass Claims, 115, 115-124, p. 118.

[227] Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 47-48.

[228] Miguel Sousa Ferro, 'Class Actions in Portugal: the little regime that could' (2021) 2 Mass Claims, 115, 115-124, p. 119. Other issues, such as limitation period, must be considered when filing another lawsuit.

Since there is no adequacy of representation control in the beginning of the lawsuit and any person is allowed to file a popular action, sharing the same interests or not, it is justifiable to control the outcome of this collective lawsuit.[229]

3.2.2.3 Opt-out model

The popular action plaintiff represents all the members of the class who do not intervene or opt out.[230] Before notifying the members of the group who could opt-out, the judge holds a preliminary assessment of the claim to check its viability.[231] If the claim survives this phase, there will be enough publicity to the group in order to make the opt-out option feasible until the evidence phase is finished.[232] By "enough publicity" it is understood the publication in newspapers, internet websites, and public edicts.[233] This aspect of the Portuguese popular action is seen as consumer-friendly, and extremely beneficial to the collective redress mechanisms efficiency,[234] considering the participation rate in Portugal is almost 100%.[235]

Nevertheless, it is noteworthy to mention that the Portuguese system works like this since 1995 and until the beginning of 2021, it was seen as an important aspect of the popular action that was not often used to protect consumers against anti-competitive behaviors in the market causing widespread damages. The scenario only changes when adding to the opt-out system a functioning third-party finance option.[236]

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[229] Miguel Sousa Ferro, Leonor Rossi, 'Private Enforcement of Competition Law in Portugal – Virtues and Shortcomings of the Actio Popularis' (April 19, 2014). BENACCHIO, G. A., CARPAGNANO, M. (eds.), L'applicazione delle regole di concorrenza in Italia e nell'Unione Europea – Atti del IV Convegno biennale Antitrust (Trento, 18-19 aprile 2013), Editoriale Scientifica, 2014, p. 263, Available at SSRN: <https://ssrn.com/abstract=3077421>, p. 285.
[230] PAA Art. 15.
[231] PAA Art. 13. Miguel Sousa Ferro, 'Class Actions in Portugal: the little regime that could' (2021) 2 Mass Claims, 115, 115-124, p. 118, "*The Portuguese popular action does not have a "class certification" stage as such. Once an action is filed, the judge takes a first look and decides whether it is manifestly inadmissible or doomed to failure, in which case it dismisses the case immediately*.".
[232] PAA, Art. 15 (4).
[233] PAA Art. 15(2). About this topic: Miguel Sousa Ferro, 'Class Actions in Portugal: the little regime that could' (2021) 2 Mass Claims, 115, 115-124, p. 118, "*Typically, courts choose the option of publishing an announcement in two widely circulated newspapers. So far, there is no publicly available online database of past or pending popular actions*.".
[234] In the original: Miguel Sousa Ferro, 'Ações populares cíveis em Portugal' (2022) 1 *Liber Amicorum* Pedro Pais de Vasconcelos 173, 173-220, p. 213, "*A ação popular cível portuguesa goza de um regime único e particularmente favorável à defesa dos consumidores. Apesar de pouco conhecido a nível internacional, o regime portugues destaca-se na União Europeia como um dos poucos regimes que permitem ações representativas opt-out. Ao mesmo tempo, apesar das suas virtudes, o regime tem sido pouco usado para reagir contra práticas ilícitas que causam danos em massa, e conhece poucos exemplos de sucesso. Portugal é, portanto, um bom caso de estudo para se compreender os fatores que podem facilitar ou dificultar a utilização efetiva de um regime deste tipo*.".
[235] Eda Şahin, *Collective Redress and EU Competition Law* (Routledge 2019), p. 123.
[236] Eda Şahin, *Collective Redress and EU Competition Law* (Routledge 2019), p. 159, "*Indeed, the limited funding to the consumer association has resulted in the limited application of the Portuguese opt-out actions*.".

3.2.2.4 Damages and evidence

If the parties have not reached an agreement by settling,[237] a ruling is to be published and once an award has been ruled in favor of the popular action's plaintiff, it begins a different sort of concerns regarding damages, its quantification, and compensation to members of a group who are not necessarily identified at this moment of the proceedings and issues like the management of the payments must be addressed. The target is to put the individuals, small or medium businesses back to the position where they would have been if no violation to Competition Law had been committed,[238] and "*[...] neither the burden nor the standard of proof required for the quantification of harm renders the exercise of the right to damages practically impossible or excessively difficult.*", according to Article 17 of the Directive 2014/104. The evidence barriers, if led to a strict sense, could be of such an amount as to prevent individuals from properly obtaining fair compensation or any compensation at all.[239] All following aspects are thought of to avoid this situation,[240] leading to the conclusion of leveling the standard of proof according to the moment: while the standards are high for the

[237] Analyzing settlement and its possibilities is not the focus of this paper. For this, check: Miguel Sousa Ferro, Leonor Rossi, 'Private Enforcement of Competition Law in Portugal – Virtues and Shortcomings of the Actio Popularis' (April 19, 2014). BENACCHIO, G. A., CARPAGNANO, M. (eds.), L'applicazione delle regole di concorrenza in Italia e nell'Unione Europea – Atti del IV Convegno biennale Antitrust (Trento, 18-19 aprile 2013), Editoriale Scientifica, 2014, p. 263, Available at SSRN: <https://ssrn.com/abstract=3077421>, p. 287, "*If the claimants in a popular action are successful, the next - rather complex - step is how to handle the issue of compensation. There are two options: (i) the claimant and the company found liable for the antitrust infringement reach an agreement; or (ii) the court issues a ruling on compensation. In the first case, the fact that the claimants represent all injured persons (who did not opt-out) may raise significant problems. These are, however, mitigated by two factors. First, as mentioned before, the Public Prosecutor's Office may step in and take over the case if it believes the proposed settlement is not equitable. Second, the court also has a role to play in assessing the fairness of a proposed settlement.*"

[238] Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 19.

[239] About it: András Osztovits, 'Quantifying harm in action for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union - some remarks on the draft guidance paper of the European Commission' (2012) Recent Developments in European and Hungarian Competition Law 41, 41-54, p. 43, *"There cannot be a single "true" value of the harm suffered that could be determined, but only best estimates relying on assumptions and approximations. Applicable national legal rules and their interpretation should reflect these inherent limits in the quantification of harm in damages actions for breaches of Articles 101 and 102 TFEU in accordance with the EU law principle of effectiveness so that the exercise of the right to damages guaranteed by the Treaty is not made practically impossible or excessively difficult.".* In the same direction of thoughts: Maria José Capelo, Carolina Cunha, *Práticas Anticoncorrenciais - Entre o public enforcement e a ação popular indemnizatória* (GestLegal 2023), p. 179.

[240] The same Directive still states in its Consideration n. 45: *"An injured party who has proven having suffered harm as a result of a competition law infringement still needs to prove the extent of the harm in order to obtain damages. Quantifying harm in competition law cases is a very fact-intensive process and may require the application of complex economic models. This is often very costly, and claimants have difficulties in obtaining the data necessary to substantiate their claims. The quantification of harm in competition law cases can thus constitute a substantial barrier preventing effective claims for compensation."*.

Competition Law infringement itself and the general caused harm, they are lower for quantifying the damages.[241]

The first important remark in this context is the lump-sum award based on estimated damages and determined criteria to identify individuals, quantifying their specific damages,[242] and forming a common fund.[243]

An important premise to the Portuguese compensation system is the infringer's obligation to pay the exact amount it was proven to have caused to legal and natural persons, not having the benefit of keeping the unclaimed amount[244] and not having to pay punitive damages[245]. The following question to these premises is the way to properly estimate the amount of these damages, considering the many factual obstacles to it and the so-called truth-centered evidence system.[246] The feasible way-out to this apparently no-exit road is to count on highly-technical and empirical economic analysis conducted in court proceedings trading-off accuracy and practicality,[247] as with some legal instruments, such as (i) damages presumption for cartels (Article 17, Directive 2014/104); (ii) popular actions meant to obtain pre-filing discovery from potential defendants in order to properly form an strategy to litigate over damages; and (iii) available assistance from the NCA (Article 17 (3), Directive 2014/104).

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[241] Hans W. Friederiszick, Lars-Hendrik Röller, 'Quantification of harm in damages actions for antitrust infringements: insights from German cartel cases' (2010) 10 ESMT Working Paper, p. 23.

[242] Miguel Sousa Ferro, Leonor Rossi, 'Private Enforcement of Competition Law in Portugal – Virtues and Shortcomings of the Actio Popularis' (April 19, 2014). BENACCHIO, G. A., CARPAGNANO, M. (eds.), L'applicazione delle regole di concorrenza in Italia e nell'Unione Europea – Atti del IV Convegno biennale Antitrust (Trento, 18-19 aprile 2013), Editoriale Scientifica, 2014, p. 263, Available at SSRN: <https://ssrn.com/abstract=3077421>, p. 274, "*Moreover if it is true that the system is familiar with the concept of tort liability, unjust enrichment looms up as an uncomfortable obstacle to the development of a clear definition of an autonomous framework to govern the lump sum award.*".

[243] Rule 238, ELI/UNIDROIT Model European Rules. Available at: <https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_UNIDROIT_Model_European_Rules.pdf>. According to Andrea Piletta Massaro, this is the best framework to make the different pieces work together: opt-out, common fund and third-party litigation financing: Andrea Piletta Massaro, 'The new Directive on an EU-wide representative action and third-party litigation funding: an opportunity for European consumers?' (2021) 1 Revija Kopaoničke Škole Prirodnog Prava, 95, 95-117, "*Contrariwise, in an opt-out scheme, the most appropriate means to address the reported concerns is the regulation of a proper common fund regime*.", p. 113.

[244] Miguel Sousa Ferro, 'Class Actions in Portugal: the little regime that could' (2021) 2 Mass Claims, 115, 115-124, p. 119.

[245] Miguel Sousa Ferro, Leonor Rossi, 'Private Enforcement of Competition Law in Portugal (II): actio popularis - facts, fictions and dreams' (2013) 13 Revista da Concorrência e Regulação, 35, 67-80, p. 72.

[246] Miguel Sousa Ferro, 'Class Actions in Portugal: the little regime that could' (2021) 2 Mass Claims, 115, 115-124, p. 120.

[247] Hans W. Friederiszick, Lars-Hendrik Röller, 'Quantification of harm in damages actions for antitrust infringements: insights from German cartel cases' (2010) 10 ESMT Working Paper. The authors list the following number of empirical approaches to quantifying damages caused by a cartel: a) before and after approaches, b) yardstick approaches comparing different geographic regions, c) cost-based approach, d) simulations (theoretical modeling): "*We argue that empirical economic analysis in court proceedings is subject to some important trade-offs. Those trade-offs have to be well understood, made transparent, and decisions on how to proceed in light of those trade-offs have to be taken upfront by the court*.", p. 14.

An important disclaimer to this discussion is that until 2021 there has been no popular action reaching this phase of the proceeding to demand a global compensation.[248] Not to mention that something has been said about different amounts of damages as not feasible in popular actions, since homogeneous situations could not withstand heterogeneous amounts of damages, but this reading of the system conflicts with Art. 22(3), PAA, that expressly states the damages will follow tort rules.[249]

Under those circumstances, the system tackles most of the evidence challenges with abstraction when considering the amount of damages as a general calculation[250] apart from what has been really experienced by each individual or small or medium business.[251] This solution is the one possible to enable compensating Competition Law damages to hundreds or even thousands of individuals who are not identified. And it is relevant to stress that this will not necessarily result in the outcome of paying the exact same amount of money to all individuals, since general parameters such as the contract timeframe and number of goods acquired may probably result in different amounts, but there are many assumptions made regarding the quantification of damages.[252]

Although the PEA's considerations state (n. 52) that (i) the estimated damages are not usual in the Portuguese system and (ii) the decision being based on pure equity, these propositions are not entirely accurate for the following reasoning. There is enough legal background for (i) estimated damages in the Portuguese Civil Code, making the provisions on the PEA as a more specialized diploma, but not entirely new to the judicial culture in the country;[253] and, (ii) based on the evidence gathered according to the Communication from the

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[248] Miguel Sousa Ferro, 'Class Actions in Portugal: the little regime that could' (2021) 2 Mass Claims, 115, 115-124, p. 121-122, "*There have been a number of successful popular actions, but aimed at achieving different outcomes, or which didn't arrive at the global compensation stage because, upon declaration of the illegality and duty to compensate by the Court, the parties settled before a ruling on the global compensation was required*.". About the settlement case, Miguel Sousa Ferro, *ibid.*, p. 122, "*The best-known example of this is the DECO v Portugal Telecom (II) case, which ended in a settlement giving consumers free national calls on the fixed network on 14 consecutive Sundays, after the Supreme Court seemed to exclude the possibility of global compensation except when protecting diffuse interests. By one estimate, that settlement implied potential total compensation of 120 million EUR.*".

[249] Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 17.

[250] PEA, Art. 9 (2).

[251] This is also what dictates Art. 17, Directive 2014/104. In that sense: Maria José Capelo, Carolina Cunha, *Práticas Anticoncorrenciais - Entre o public enforcement e a ação popular indemnizatória* (GestLegal 2023), p. 177. Also: Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 18.

[252] Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 18.

[253] Civil Code, Art. 566(3). Maria José Capelo, Carolina Cunha, *Práticas Anticoncorrenciais - Entre o public enforcement e a ação popular indemnizatória* (GestLegal 2023), p. 185-188.

Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 TFEU (2013/C 167/07), the judge will determine the values inside a specific range.[254]

From the total amount awarded in the ruling, there are concerns related to the payment of the plaintiff's costs and the third-party funding percentage. Since these are specific and important issues, they will be separately analyzed.

Therefore, this topic addresses exclusively the question of damages quantification, compensation to unidentified members of a group and the management of these payments. Most of the answers to these topics can be found in article 19, PEA, establishing: (i) the direct payment to identified persons (art. 19 (3), PEA; art. 22 (3), PAA);[255] (ii) a lump-sum amount to the unidentified persons who are represented in the claim (art. 19 (4), PEA; art. 22 (2), PAA);[256] (iii) if the fixed lump-sum amount is not enough to compensate damages from all the injured persons coming forward, the distribution will be done proportionally (art. 19 (5), PEA);[257] (iv) the judge is to point out, when ruling, an entity to manage the payments to unidentified persons (art. 19 (6), PEA),[258] attracting the advantage to manage the payments outside of courts, which can be more efficient[259]; (v) the unclaimed amount after a reasonable timeframe[260] will be used to pay the plaintiff's costs (art. 19 (7), PEA), which encompass the

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[254] Maria José Capelo, Carolina Cunha, *Práticas Anticoncorrenciais - Entre o public enforcement e a ação popular indemnizatória* (GestLegal 2023), p. 184.

[255] Miguel Sousa Ferro, 'Class Actions in Portugal: the little regime that could' (2021) 2 Mass Claims, 115, 115-124, p. 119. Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 162-163, stating that if the legal choice was a different one, demanding the identification of each and any person to calculate the specific amount of damages all the advantages presented by the opt-out system would be completely lost.

[256] This lump-sum amount is to be fixed according to economic metrics to measure and estimate damages: Frank Maier-Rigaud, Ulrich Schwalbe, 'Quantification of antitrust damages' (2013) Document de travail du LEM (Lille Economie & Management). Miguel Sousa Ferro, 'Class Actions in Portugal: the little regime that could' (2021) 2 Mass Claims, 115, 115-124, p. 119.

[257] Miguel Sousa Ferro, 'Class Actions in Portugal: the little regime that could' (2021) 2 Mass Claims, 115, 115-124, p. 119.

[258] Miguel Sousa Ferro, 'Class Actions in Portugal: the little regime that could' (2021) 2 Mass Claims, 115, 115-124, p. 119, "*The judgment should appoint an entity to receive, manage and pay out the global compensation, and this may be, inter alias, the claimant, one or several identifies injured persons or a guarantee fund (in the case of securities)*.".

[259] Maria José Capelo, Carolina Cunha, *Práticas Anticoncorrenciais - Entre o public enforcement e a ação popular indemnizatória* (GestLegal 2023), p. 63.

[260] Art. 22 (4), PAA, says otherwise, determining the timeframe of three years. About it: Miguel Sousa Ferro, 'Class Actions in Portugal: the little regime that could' (2021) 2 Mass Claims, 115, 115-124, p. 119, "*Under the general regime, represented persons have up to 3 years (limitation period) to ask for their share of the global compensation. But the special antitrust rules require the judge to set a "reasonable deadline" for the represented persons to ask for their share, before the remainder is used to reimburse the claimants' costs. The articulation of this provision with the general rule has not yet been clarified*.". Agreeing to that interpretation: Maria José Capelo, Carolina Cunha, *Práticas Anticoncorrenciais - Entre o public enforcement e a ação popular indemnizatória* (GestLegal 2023), p. 66.

third-party funder share;[261] (vi) the remaining amount will be directed to the Ministry of Justice to increment access to justice measures (art. 19 (8), PEA; art. 22 (5), PAA).

Hence the system abandons the idea of real damage to each individual (difficult or impossible evidence) to guarantee its effectiveness built since the beginning of the proceedings when starting from an opt-out model.[262]

3.2.2.5 Costs

The costs of the lawsuit must be borne by the plaintiff itself, and not by the class members, since representative group litigation, such as popular action, involves one person or entity assuming the position of plaintiff in a lawsuit on its own name and, therefore, being the subject of the procedural relations.[263] The main costs to be considered in Portugal are: (i) court costs, (ii) lawyer fees, (iii) time and organizational costs, and (iv) possible retaliations, which rarely apply for ideological claimants representing groups.[264]

When it comes to (i) court costs, there are specific and more-favored rules regarding popular actions, making the Portuguese legal frame for collective redress claimant-friendly.[265] The popular action plaintiff does not need to pay initial costs and is freed from any costs at all in the case of winning or a partial positive award.[266] In the case of losing, the judge will set the costs between 10 and 50% of the original cost amount considering the plaintiff's economic status and the reasoning of the ruling (Article 20, PAA).[267]

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[261] Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 169-171. The authors understand this as a claimant's right subject to two conditions: (i) the defendant has to pay the total amount due and (ii) there must be a remaining value once all the injured have claimed their damages in the stipulated time frame. About encompassing the third-party financing, *Ibid.*, p. 186.

[262] Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 163.

[263] Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 41.

[264] Miguel Sousa Ferro, Leonor Rossi, 'Private Enforcement of Competition Law in Portugal (II): actio popularis - facts, fictions and dreams' (2013) 13 Revista da Concorrência e Regulação, 35, 67-80, p. 69.

[265] Miguel Sousa Ferro, 'Class Actions in Portugal: the little regime that could' (2021) 2 Mass Claims, 115, 115-124, p. 120.

[266] This is aligned with the ELI/Unidroit Model European Rules of Civil Procedure, Rule 238, available at: <https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_UNIDROIT_Model_European_Rules.pdf>.

[267] Miguel Sousa Ferro, 'Class Actions in Portugal: the little regime that could' (2021) 2 Mass Claims, 115, 115-124, p. 120, "*Portugal is not a loser pays jurisdiction. Under the general rules of civil procedure, a party who is entirely unsuccessful (absent bad faith litigation) is ordered to pay only courts fees (and other expenses which the court may have incurred in the case) and half of the amount of the total court fees as a contribution to the other side's legal fees. But there are significant differences between the cost rules for popular actions and those for ordinary proceedings. First, no filing fees are owed. Second, at the end of the case, if the claim is at least partly successful, no court fees or adverse costs are owed. If the claim is entirely unsuccessful, at worst, the claimant will be ordered to pay between 1/10 and ½ of the costs which would usually be owed. The Court has discretion to determine the amount of costs within that interval, taking into account the formal or substantive reasons for the case's outcome and the economic situation of the claimant.*".

Considering (iii) time and organizational costs, the initial costs preceding the file of the lawsuit are significant, since the association has to hire experts and lawyers (ii) or to have them permanently in its staff, for instance, which can be highly costly, but even reaching a positive award, there will be no compensation for this kind of tremendous spending.[268] The publication of the ruling must be borne by the losing party (Article 19(2), PAA) and it represents around 250 euros.[269]

Due to this briefly described state of art, it is understandable why popular actions were claimed to be an interesting mechanism to safeguard private enforcement of Competition Law through collective redress in Portugal, but inefficient.[270] Even examining fee exoneration and small percentages in the case of absolute unsuccessfulness, it is relevant to bring some concreteness to the picture since the legislative measures taken before third-party funding, like exemption from initial costs to a popular action, were insignificant. When third-party funding enters the picture, the whole situation changes, and it demands a specific topic to this matter.[271]

Since the plaintiff must add a value to the case and there is usually no hint about the amount of damages when filing a lawsuit, the values are purely fictional and involve the following amounts at its maximum in 2021: 4.850 euros to the claimant and 2.410 to the defendant.[272] Since there is not much available funds for these payments from the beginning of the proceedings, it is usual to transfer these costs to the third-party who is financing the litigation, increasing the risk to the funder, since it depends on a positive award with few persons claiming their personal damages in order to get the costs back and even its remuneration,[273] but this topic and its nuances will be further analyzed.

[268] Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 145.
[269] Miguel Sousa Ferro, 'Class Actions in Portugal: the little regime that could' (2021) 2 Mass Claims, 115, 115-124, p. 120.
[270] Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 146.
[271] Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 146-147. According to the authors, there were three possible ways of making the collective redress path feasible, which are: (a) public funding, (b) *quota litis*, or (c) third-party-funding. The latter was selected in the Portuguese order.
[272] Miguel Sousa Ferro, 'Class Actions in Portugal: the little regime that could' (2021) 2 Mass Claims, 115, 115-124, p. 120, "*As a result, a popular action by one claimant against one defendant, even if it is appealed all the way to the Supreme Court and is deemed particularly complex, will cost the popular action's claimant a maximum of 4.820 EUR in court fees and 2.410 EUR in defendants' legal fees. Other costs of the procedure may be added, such as the price of publications in newspapers (typically a cost of circa 250 EUR) or the remuneration of court appointed experts*.".
[273] Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 174-175. The authors point out that this should be changed if the idea is to stimulate third-party funding.

3.2.2.6 Third-party funding

This topic could not be avoided, since the number of popular action cases in Portugal only increased since 2021 due to the third-party funding existence opening ways to the overly expensive popular actions as a feasible mechanism to claim damages once an anti-competitive conduct is detected affecting many individuals with relatively small amounts of damages.[274] This funding agreement is made between the funders and the association so that they will bear the popular action's related costs, but they will get a percentage of the global compensation resulting from its undistributed portion[275] if the claim is successful.[276] Considering the lack of public financing for these types of lawsuits, there is no better alternative than the third-party litigation funding for private enforcement,[277] considering its costs as something to be paid after the injured persons have claimed their damages (art. 19 (7), PEA) and only in the event of a positive outcome.

The first question the Portuguese doctrine had to face concerned the possibility of third-party funding in the country.[278] Although the answer to it was positive, the many follow-up questions presented (and some still present) equal or even more intricate issues to be addressed.[279] Not all of them will be explored here, since this would require a specific master thesis only to this. The main aim here is to present how third-party litigation changed the reality of private enforcement of Competition Law through collective redress in Portugal.

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[274] The economic logic is explained by: Paul H. Rubin, 'Third-Party Financing of Litigation' (2011) 38 N Ky L Rev 673, p. 679, "*So, for mass action litigation financed by third parties to be socially efficient, it must be the case that the matter is expected to be risky, time consuming, and expensive, and losses must be small for each individual but large in the aggregate. It must also be true that without such third-party financing, the case would not be brought.*". According to Maria José Capelo and Carolina Cunha, that is the reason behind the popular action in Competition Law no longer working as "class action procedure on the books", p. 44, Maria José Capelo, Carolina Cunha, *Práticas Anticoncorrenciais - Entre o public enforcement e a ação popular indemnizatória* (GestLegal 2023).

[275] Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 169-171. The authors understand this as a claimant's right subject to two conditions: (i) the defendant has to pay the total amount due and (ii) there must be a remaining value once all the injured have claimed their damages in the stipulated time frame.

[276] Miguel Sousa Ferro, 'Class Actions in Portugal: the little regime that could' (2021) 2 Mass Claims, 115, 115-124, p. 124. If the claim is not successful, nothing will be collected by the funder. About the intricacies of this mechanism, check: Ronen Avraham, Anthony Sebok, 'An empirical investigation of third party consumer litigant funding' (2019) 104 Cornell Law Review, 1133, 1133-1181.

[277] Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 183.

[278] Miguel Sousa Ferro, Leonor Rossi, 'Private Enforcement of Competition Law in Portugal – Virtues and Shortcomings of the Actio Popularis' (April 19, 2014). BENACCHIO, G. A., CARPAGNANO, M. (eds.), L'applicazione delle regole di concorrenza in Italia e nell'Unione Europea – Atti del IV Convegno biennale Antitrust (Trento, 18-19 aprile 2013), Editoriale Scientifica, 2014, p. 263, Available at SSRN: <https://ssrn.com/abstract=3077421>, p. 264, "*In Portugal, there is no precedent, or for that matter any legal basis for third party funding of claims. However it does not follow that such funding is forbidden*.".

[279] Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 71.

At the European level, there is no specific legal framework about the topic[280], yet the Directive 2020/1828 on representative actions for the protection of the collective interests of consumers sets the basic legal framework to be implemented by the Member States when third-party funding is connected to consumers' protection through collective redress[281]. The result is third-party financing has been permitted if compliant with a broad set of requirements. These requirements are listed in the mentioned Directive in its Article 10, and they are drafted to safeguard funding sources transparency[282] and to ensure that there is no unduly influence on the demand itself.[283]

At the Portuguese level, the Directive's transposition has been timid, and the topic of Competition Law is not listed in its Annex I[284]. Nevertheless, some Member States, such as Germany, are regulating the Directive internally as to extend its scope to Competition Law. Even though the Directive 2020/1828 does not expressly cover Competition Law, its third-party finance legal framework should be analogously applied to collective redress in the field while there is no specific regulation about the topic at the EU level.[285]

This mechanism of third-party finance works due to the following basic structure: (a) the funder will provide sufficient funds to make the lawsuit and its proceedings feasible; and (b) the popular action's plaintiff has the obligation to return the amount provided by the funder and some remuneration up to the condition of a positive award.[286]

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[280] According to Paula Costa e Silva and Nuno Trigo dos Reis, there is great expectations about it being passed soon: Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 105.

[281] About this topic: Andrea Piletta Massaro, 'The new Directive on an EU-wide representative action and third-party litigation funding: an opportunity for European consumers?' (2021) 1 Revija Kopaoničke Škole Prirodnog Prava, 95, 95-117.

[282] Rule 237, ELI/UNIDROIT Model European Rules, states that: "Rule 237. Third-Party Funding (1) A qualified claimant may use third-party litigation funding.". In its comments: "*Details of the funding agreement are often confidential and should therefore be only disclosed upon the court's request and should not be available to the public or the defendant (see Rules 209(b) and 210(1)(f))*.".

[283] About it, please refer to: Maria José Capelo, Carolina Cunha, *Práticas Anticoncorrenciais - Entre o public enforcement e a ação popular indemnizatória* (GestLegal 2023), p. 39. On page 56, the authors established the difference between passive funding/hands off and active funding/hands on to state that both would be admissible as long as there is no unduly influence in the lawsuit.

[284] Severe critics have been made towards this omission: Andrea Piletta Massaro, 'The new Directive on an EU-wide representative action and third-party litigation funding: an opportunity for European consumers?' (2021) 1 Revija Kopaoničke Škole Prirodnog Prava, 95, 95-117, p. 100.

[285]Andrea Piletta Massaro, 'The new Directive on an EU-wide representative action and third-party litigation funding: an opportunity for European consumers?' (2021) 1 Revija Kopaoničke Škole Prirodnog Prava, 95, 95-117, p. 98.

[286] Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 83.

By consequence of the positive award as a condition, the remuneration to the funder will be taken from the remaining part of the uncollected damages.[287] Therefore, the debtor will be the undefined persons who did not claim their share of the sum.[288]

Since the plaintiff's costs and the funder's percentage will only be paid after the individuals had a reasonable period to claim their damages and if there is any amount left, this could be seen as an economic disincentive to potential plaintiffs when considering filing a popular action,[289] or disincentive to funding or, when it is done, to give proper notice to the individuals about the award and the payment itself, since it is not managed by the court. The Portuguese system relies on the individuals' inertia to remunerate the funder.[290] This is particularly risky once the situation motivates the funder to be less inclined to broadly notice unidentified class members about the possibility of the injured collecting damages, explaining the reasons to differentiate the one responsible for giving notice about the award and managing the payments to the one who is funding the popular action.[291] According to the art. 19 (2), PAA, the ruling must be published in two newspapers to be chosen by the judge. The question of whether this would be enough is a follow-up investigation once the many on-going popular action in the Portuguese courts start to come to their ends, since third-party funding is recent and the scenario only rotated to this pro-popular action phase in 2021.

Among the many concerns raised, it is possible to put together the following[292]: (i) the first one is the possibility of the funder taking part in decisions regarding the lawsuit, making its interests prevail over the class members. According to the Directive 2020/1828, in its Article 10(2)(a), Member States shall ensure that the third party does not unduly influence the association's decision in the lawsuit, damaging the class members' interests.[293] This aspect can be particularly sensitive considering the association's duty to inform the funder about its

[287] This logic is like the Australian one, as pointed out by Andrea Piletta Massaro, 'The new Directive on an EU-wide representative action and third-party litigation funding: an opportunity for European consumers?' (2021) 1 Revija Kopaoničke Škole Prirodnog Prava, 95, 95-117, p. 111.
[288] Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 175.
[289] Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 174.
[290] Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p.156.
[291] About this organization, check: Maria José Capelo, Carolina Cunha, *Práticas Anticoncorrenciais - Entre o public enforcement e a ação popular indemnizatória* (GestLegal 2023), p. 59-65.
[292] Different authors will put together the several concerns in different ways, for instance: Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 93, mentioning four classes of concerns.
[293] Directive 2020/1828, Article 10 (2) "[...] *Member States shall in particular ensure that: (a) the decisions of qualified entities in the context of a representative action, including decisions on settlement, are not unduly influenced by a third party in a manner that would be detrimental to the collective interests of the consumers concerned by the representative action;"*.

lawsuit strategies and decisions[294] balanced with the funder's prohibition to unduly influence the association's position as a claimant in the popular action.[295] Therefore, Article 10(3) of the Directive 2020/1828 imposes the duty to disclose the financing contract in order to assure independence between the party and the financing agent. If the court finds the violation of these rules, it must declare the plaintiff's lack of standing, and the Public Prosecutor's Office should take over the action not to damage the class members' interests.[296]

The second raised concern (ii) relates to the possible filing of popular actions based on profit seeking instead of an altruistic motif that should pave the way for it, creating the overdevelopment of the litigation service market[297]. This concern can be easily dropped out of the picture by settling specific limits to the funder remuneration, for instance,[298] or by addressing it under the right arena, therefore, abuse and bad-faith conduct,[299] or by realizing that the belief on altruistic motives for litigation financing escapes the economic contextual reality in which we are embedded[300] and cannot be verified externally once a popular action fulfills all the objective requirements to protect individuals from competition law violations.[301] This can be readily observed when reading Article 10(2)(b) of the Directive 2020/1828, which brings up the prohibition that "*the representative action is not brought against a defendant that is a competitor of the funding provider or against a defendant on which the funding provider*

[294] This is relevant to control the financing risk: Maria José Capelo, Carolina Cunha, *Práticas Anticoncorrenciais - Entre o public enforcement e a ação popular indemnizatória* (GestLegal 2023), p. 58-59.

[295] Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 85-86. On page 126, the authors underline that the popular action's plaintiff, the association, and the funder could work together gathering efforts to better consider the group members' interests.

[296] Directive 2020/1828, Article 10 (4) "*Member States shall ensure that, for the purposes of paragraphs 1 and 2, courts or administrative authorities are empowered to take appropriate measures, such as requiring the qualified entity to refuse or make changes in respect of the relevant funding and, if necessary, rejecting the legal standing of the qualified entity in a specific representative action. If the legal standing of the qualified entity is rejected in a specific representative action, that rejection shall not affect the rights of the consumers concerned by that representative action.".* In that sense: Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 127.

[297] Paul H. Rubin, 'Third-Party Financing of Litigation' (2011) 38 N Ky L Rev 673, p. 685, "*Third-party finance of lawsuits seems efficient because it increases the scope for free exchange. However, this appearance of efficiency is illusory, as allowing increased sale of lawsuits would create external costs in the form of incentives for inefficient lawsuits and for creation of inefficient precedents. The common law was right in forbidding champerty and its variants*.".

[298] That solution is pointed out by Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 96. Considering the parameters to these limits, check: Maria José Capelo, Carolina Cunha, *Práticas Anticoncorrenciais - Entre o public enforcement e a ação popular indemnizatória* (GestLegal 2023), p. 70-71.

[299] Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 113-114.

[300] Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 65. The authors underline that individual claims are almost non-existent considering the consumers' inertia based on the low values involved. If there are economic motifs to justify a popular action, or mediatic motifs, it does not matter to the proper development of the proceedings.

[301] Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 153.

is dependent", showing the legislator disquietude of this kind of collective redress being financed for selfish and market reasons.

The third (iii) and last concern to be mentioned here is the funders' economical purpose being contradictory with the collective rights' protection pursuit. Considering the Portuguese legal order establishes the payment to the identified members of the group to be done first, this can hardly be an issue.[302]

These three listed concerns do not have enough technical grounds to be justified.[303] From the injured persons' perspective, third-party funding enables substantial access to justice through collective redress when small-scale and scattered competition law damages are involved and the State cannot overcome the economic obstacles to fully enhance the right to access the courts,[304] by better balancing the strength between the parties,[305] because it facilitates the filing of lawsuits that would not be filed without financing and it gives better procedural conditions to the proper development of this claim considering the persons who usually occupy the defendant's position are repeat players.[306] From the public policy perspective, third-party financing of litigation enabled the increase of popular actions in Portugal, bringing a raise in the deterrence effect as well by getting persons to internalize the costs for their harmful behavior.

3.3 Concluding remarks

At this research point, it is possible to address the first question: *What are the mechanisms structured to facilitate the collective redress of Competition Law violations in both jurisdictions and how can they be compared?* In Portugal, the popular action has been broadly used. The PEA communicates with the PAA, reaffirming the popular action for damages as a mechanism of collective redress when Competition Law violations take place both to protect the mass of individuals and the welfare of the market.[307]

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[302] Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 99.
[303] Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 62-63.
[304] Maria José Capelo, Carolina Cunha, *Práticas Anticoncorrenciais - Entre o public enforcement e a ação popular indemnizatória* (GestLegal 2023), p. 42, when discussing the Irish state of art in this topic. Also: Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 89, "*[...] mas também no domínio da chamada "litigância de massa", em que o interesse individual do autor é diminuto por comparação com as despesas necessárias à preparação da ação e ao exercício jurisdicional do seu direito*.".
[305] Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 90-91. Also: Antonio do Passo Cabral, 'Convenções sobre o custo da litigância (II): introdução ao seguro e ao financiamento processuais' (2018) 277 Revista de Processo, 47, 47-78, p. 50-51.
[306] Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 188.
[307] Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 28.

It is relevant to stress that the draft of this law (PEA) was conducted by the Portuguese National Authority, which is not the most obvious choice. The idea was to bring a law to birth with the appropriate balance between the mutually reinforcing mechanisms of public and private enforcement[308] by, among many provisions and different goals, fostering the Portuguese opt-out system when trying "*[...] to overcome some of the practical difficulties raised by the collective redress regime and, therefore, to encourage its use both by businesses and individuals.*"[309] as a way of kindling extra deterrence and promoting consumer welfare.

However, the passing of this law by itself did not foster the popular action's use alone. The situation only changed in Portugal once third-party funding started to be consistently used between the years of 2020 and 2021. Therefore, an opt-out system is not enough to guarantee the use of collective redress, since "*[...] even if the group representative is a non-profit organization, failing public funding, the entity's expected costs and expected income have to be in balance to make the system sustainable.*". [310]

On top of that, there is the certainty of the administrative decisions conducted by the National Authorities being properly observed in the judicial instances, and the suspension of any lawsuit until the administrative decision has been taken. Also, the judge is to point out, when ruling, an entity to manage the payments to unidentified persons (art. 19 (6), PEA), taking this organizational and administrative phase out of the courts in the name of efficiency.[311]

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[308] Maria João Melícias, 'The art of consistency between public and private antitrust enforcement: practical challenges in implementing the Damages Directive in Portugal' (2016) 26 Revista de Concorrência e Regulação, 37, 38-49, p. 39.
[309] Maria João Melícias, 'The art of consistency between public and private antitrust enforcement: practical challenges in implementing the Damages Directive in Portugal' (2016) 26 Revista de Concorrência e Regulação, 37, 38-49, p. 46.
[310] Csongor István Nagy, 'The European Collective Redress debate after the European Commission's Recommendation: one step forward, two steps back?' (2015) 22 MJ 4, 530, 530-552, p. 62.
[311] Miguel Sousa Ferro, 'Class Actions in Portugal: the little regime that could' (2021) 2 Mass Claims, 115, 115-124, p. 119, "*The judgment should appoint an entity to receive, manage and pay out the global compensation, and this may be, inter alias, the claimant, one or several identifies injured persons or a guarantee fund (in the case of securities)*.". Also: Maria José Capelo, Carolina Cunha, *Práticas Anticoncorrenciais - Entre o public enforcement e a ação popular indemnizatória* (GestLegal 2023), p. 63, "*Por um lado não é o próprio tribunal que procede a distribuição das indenizações individuais devidas aos consumidores lesados, racionalizando-se, desta forma, os meios disponíveis".*

4 CHAPTER IV: PRIVATE ENFORCEMENT OF COMPETITION LAW THROUGH COLLECTIVE REDRESS IN BRAZIL

4.1 Substantive legal framework

The Brazilian Constitution from 1988 introduced a change in the economic policy to allow the market to operate with a low degree with state intervention, but still with specific actions aimed at curbing the abuse of economic power leading to market domination, elimination of competition, and uncontrolled profit increases at the market's proper functioning expenses.[312] Although the Brazilian equivalent to NCA, "*CADE*", had existed since the 1960s, it was considered ineffective. It only began to be perceived as active starting from its regulatory law in 1994,[313] behaving as the main figure in the public enforcement[314] through administrative proceedings concluded with fines, leniency programs and commitment procedures and, providing some evidence to justify enough grounds to the still early and under-developed private enforcement in the country.[315]

Nowadays, the Brazilian regulatory law dates from 2011 (Law n. 12.529/2011) and it establishes the legal framework needed to identify market anti-competitive behavior, which can be restrictive to competition by object and by effect (Art. 36), by market dominance (Art. 36, II), and by dominant undertakings in the market abusing their position (Art. 36, IV), among many other conduct examples listed in the mentioned Article 36. Once detected any listed behavior, the harmed individuals are allowed to claim damages individually or collectively in a follow-on or stand-alone damages lawsuit (Art. 47)[316]. The damages will be doubled in specific arrangements for concerted practices (Art. 36, § 3º, I and II).

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[312] Vicente Bagnoli, *Direito Econômico e Concorrencial* (9th edn, Revista dos Tribunais 2022), p. 197-198.
[313] Mauricio Oscar Bandeira Maia, 'Elementos das Ações Reparatórias por Danos Concorrenciais Decorrentes de Cartel' (Master Thesis, Instituto Brasiliense de Direito Público, 2020).
[314] Beatriz Kenchian, '*Enforcement* privado e ação coletiva para reparação de danos concorrenciais' (2023) 5 Mulheres no Antitruste, 245, 245-246.
[315] Mauricio Oscar Bandeira Maia, 'Elementos das Ações Reparatórias por Danos Concorrenciais Decorrentes de Cartel' (Master Thesis, Instituto Brasiliense de Direito Público, 2020), p. 23-24.
[316] Even if there were no legal provisions authorizing competition law damages to be claimed collectively, the constitutional framework in Brazil allows any right to be protected collectively. For more information, please refer to Fredie Didier Jr., Hermes Zaneti Jr., *Curso de direito processual civil: processo coletivo* (5th edn, JusPodivm 2010), p. 125.

4.2 Procedural legal framework

Once there is an anti-competitive behavior, there are the individual and the collective redress mechanisms options to be considered and they can be both stand-alone and follow-on.

When court proceedings are concerned and follow-on damages are being litigated, the administrative decision provided by the NCA must be brought into the discussion. While in the EU these decisions will be deemed as *irrefutably established*, in Brazil they will be considered as evidence, but the judge can rule otherwise based on further elements, introducing considerable uncertainty to the situation, making it necessary to consider this when private enforcement is to be enhanced.[317]

4.2.1 Individual redress

Despite the permission to any individual to file a claim regarding anti-competitive behavior and possible damages, for small and widespread damages deriving from market anti-competitive behavior, the individual redress does not present itself as the best path considering its costs and many other already discussed factors that also apply to the Brazilian reality. Therefore, intermediate sellers are usually the ones dealing with individual lawsuits for antitrust violations.[318]

The individual redress is so rarely used that in the last few years some changes have been introduced in the legislation, through new bills or resolutions[319], as an attempt to increase its use, such as highlighting the already existent Art. 45, CLA, enabling the consideration of the proof of compensation for competitive damages, either judicially or extrajudicially, as a mitigating circumstance for an antitrust violation. It enables the reduction of penalties already imposed by *CADE* considering compensation made directly to those harmed by the conduct, whether judicially or extrajudicially.[320]

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[317] Mauricio Oscar Bandeira Maia, 'Elementos das Ações Reparatórias por Danos Concorrenciais Decorrentes de Cartel' (Master Thesis, Instituto Brasiliense de Direito Público, 2020), p. 146.

[318] Mauricio Oscar Bandeira Maia, 'Elementos das Ações Reparatórias por Danos Concorrenciais Decorrentes de Cartel' (Master Thesis, Instituto Brasiliense de Direito Público, 2020), p. 60.

[319] CADE-Res - Resolution n. 21/2018, regulating access to documents and evidence - leniency programs, for instance.

[320] Daniel Caselta, 'Um regulamento à espera de uma lei: resolução do CADE sobre sigilo de documentos - a ausência de uma norma legal específica pode acarretar importantes consequências na aplicação da resolução' (2018) JOTA UOL, available at: <https://www.jota.info/tributos-e-empresas/concorrencia/um-regulamento-a-espera-de-uma-lei-resolucao-do-cade-sobre-sigilo-de-documentos-20092018>. Access on July 2nd, 2024.

Furthermore, the Resolution n. 21/2018 (CADE-Res), regulating access to documents and evidence when leniency programs and commitment procedures are into discussions, aims to better establish the procedures, phases, and responsible bodies in the operationalization of the publicity addressed by the mentioned norm. This, as previously mentioned, has the potential to provide interested parties/harmed individuals with the necessary information for their individual lawsuits and, at the same time, prevent them from having to resort to judicial or even administrative measures to obtain this documentation.[321] However, there are several setbacks, including the lack of an explicit norm regarding the statute of limitations during administrative proceedings and the established legal framework for claiming the mentioned evidence. Additionally, the offered discounts are likely insufficient to incentivize companies and undertakings to properly compensate the harmed individuals without a judicial ruling.[322]

A possible way to consolidate individual claims is through joinder. Similarly to Portugal, joinder exists in Brazil, under the same Portuguese word, which is "*litisconsórcio*", as a non-representative group litigation possibility through which each claimant is treated autonomously. Just like Portugal, it is not used to claim small-scale, scattered, and widespread Competition Law damages, since there are economic disincentives for a consumer, a small or a medium-sized business to file an individual lawsuit in this scenario, as previously addressed.[323]

In conclusion, individual redress mechanisms do not effectively address small and widespread damages in the Brazilian context, leading to a focus on collective redress options as a more suitable alternative.

4.2.2 Representative collective redress

Representative collective redress presents an interesting solution for addressing competition damages, as it allows for procedural efficiency due to the similarity of causes of action and potential reduction in legal costs, once it concentrates evidence, for instance. On top of that, its claimants can intervene in ongoing administrative proceedings at *CADE* to obtain

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[321] Mauricio Oscar Bandeira Maia, 'Elementos das Ações Reparatórias por Danos Concorrenciais Decorrentes de Cartel' (Master Thesis, Instituto Brasiliense de Direito Público, 2020), p. 134.
[322] Daniel Caselta, 'Um regulamento à espera de uma lei: resolução do CADE sobre sigilo de documentos - a ausência de uma norma legal específica pode acarretar importantes consequências na aplicação da resolução' (2018) JOTA UOL, available at: <https://www.jota.info/tributos-e-empresas/concorrencia/um-regulamento-a-espera-de-uma-lei-resolucao-do-cade-sobre-sigilo-de-documentos-20092018>. Access on July 2nd, 2024.
[323] CPC, Arts. 113-118.

information during the proceedings.[324] By consolidating disputes, collective lawsuits also help promote legal equality and legal certainty by reducing the likelihood of contradictory decisions. Although these benefits can be hardly perceived since individuals rarely promote lawsuits to claim small amounts of damages, there is an extra argument to be considered: collective lawsuits serve as an effective tool to prevent the recurrence of unlawful acts (deterrence effect) since a few number of individual lawsuits, if existent at all, will not suffice to change a repeat player's behavior,[325] but its promotion is highly dependent on competition policy decisions.

It is also noted that in cases of cartel activity, the involvement of an ideological claimant with standing for a collective lawsuit can ensure the protection of the harmed individuals, preventing them from facing retaliation from the offender, and encourage more active participation in the conflict, which could facilitate a consensual resolution.[326] Nevertheless, this form of redress is not used often in the Brazilian courts for Competition Law related topics,[327] and the aim is to investigate possible reasons.

4.2.2.1 Constitutional and legal framework

The first constitutional text to mention the collective protection to rights, including the economic order, is the one from 1988,[328] but there was already a passed bill about it from 1985 (Law n. 7.347 regulating the public civil lawsuit, or the Brazilian collective redress mechanism) and, later on, the Consumers' Protection Act (CPA) was passed in 1990 (Law n. 8.078), forming the so-called "collective procedural system".

Collective redress mechanisms are not codified in Brazil, a civil law country based highly on codifications[329], therefore they are regulated throughout the complementary

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[324] Beatriz Kenchian, '*Enforcement* privado e ação coletiva para reparação de danos concorrenciais' (2023) 5 Mulheres no Antitruste, 245, 245-246, p. 255.
[325] Antonio Gidi, *A class action como instrumento de tutela coletiva de direitos: as ações coletivas em uma perspectiva comparada* (Revista dos Tribunais 2007), p. 32.
[326] Beatriz Kenchian, '*Enforcement* privado e ação coletiva para reparação de danos concorrenciais' (2023) 5 Mulheres no Antitruste, 245, 245-246.
[327] Beatriz Kenchian, '*Enforcement* privado e ação coletiva para reparação de danos concorrenciais' (2023) 5 Mulheres no Antitruste, 245, 245-246
[328] Beatriz Kenchian, '*Enforcement* privado e ação coletiva para reparação de danos concorrenciais' (2023) 5 Mulheres no Antitruste, 245, 245-246, p. 254.
[329] I do not follow the absolut duality among legislation vs. precedent law when discussing civil law and common law. About this topic, check: John Henry Merryman, Rogelio Pérez-Perdomo, *The Civil Law Tradition: an introduction to the legal systems of Europe and Latin America* (4th edn, Stanford University Press 2019), p. 27, "*One often hears it said, sometimes by people who should know better, that civil law systems are codified statutory systems, whereas the common law is uncodified and is based in large part on judicial decisions. The purpose of this chapter is to indicate the extent to which this observation oversimplifies and misrepresents, and at the same time the extent to which it expresses, an important set of basic differences between the two legal traditions. The distinction between legislative and judicial production of law can be misleading. There is probably at least as*

relationship among several pieces of legislation, having the CPA and the Public Civil Lawsuit Act (PCLA) in its core, but still supplemented by the Administrative Improbity Act (Law n. 8.429/1992), the Child and Adolescent Protection Act (Law n. 8.069/1990), the Senior Citizen Protection Act (Law n. 10.741/2003), the Writ of Mandamus Act (Law n. 12.016/2009), among other pieces of legislation. The Civil Procedure Code (CPC) is a residual source of this microsystem.[330] This seemingly complex system guarantees the collective due process.[331] When one is applying these complementary pieces of law, it must be borne in mind that the reciprocal application centers mainly around principles once specific rules demand express legal provision.[332]

4.2.2.2 Standing and adequacy of representation

Standing is granted to several public and private entities, namely: (a) the Public Prosecutor's Office, (b) the federal, state, and municipal governments, (c) public administration agencies, (d) associations established for at least one year, whose aim is to defend their members' collective rights (Art. 5°, BPCLA). These public and private institutions, in addition to their standing in collective lawsuits, are deemed adequate representatives of the group presumptively because of legislative choices (*ope legis*).

Considering the list, one could conclude there is no judge-controlled adequacy of representation.[333] However, the time frame requirement established for associations can be waived by the judge when there is social interest in the subject matter.[334] This clearly serves as judicial control over the associations' adequacy of representation, considering the group and the cause of action.

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much legislation in force in a typical American state as there is in a typical European or Latin American nation. As in a civil law nation, legislation validly enacted in the United States is the law, which the judges are expected to interpret and apply in the spirit in which it was enacted. The authority of legislation is superior to that of judicial decisions; statutes supersede contrary judicial decisions (constitutional questions aside), but not vice versa. The amount of legislation and the degree of authority of legislation are not useful criteria for distinguishing civil law systems from common law systems.".

330 Ada Pellegrini Grinover, Nelson Nery Jr., Kazuo Watanabe, *Código Brasileiro de Defesa do Consumidor: comentado pelos autores do anteprojeto, v. 2, processo coletivo* (10th edn, Forense, 2011), p. 124.

331 Fredie Didier Jr., Hermes Zaneti Jr., *Curso de direito processual civil: processo coletivo* (5th edn, JusPodium 2010), p. 124.

332 Susana Henriques da Costa, *O processo coletivo na tutela do patrimônio público e da moralidade administrativa* (Quartier Latin 2009), p. 133-135.

333 Like Nelson Nery Júnior and Rosa Maria de Andrade Nery do: Nelson Nery Jr., Rosa Maria de Andrade Nery, *Código de Processo Civil Comentado e Legislação Extravagante em vigor* (11th edn, Editora Revista dos Tribunais 2010), p. 1443.

334 BCPC, art. 82, §1°.

Therefore, standing is granted to various types of entities, and judges' control of the adequacy of representation is highly limited to one situation because *res judicata* cannot harm individuals. This does not justify spending more time and energy to grant judges control over representation.[335] Nevertheless, there is ample doctrinal material addressing various concerns about the adequacy of representation. For instance, practical problems have arisen from the handling of collective lawsuits by associations that, complying with legal requirements, lack credibility, seriousness, technical-scientific knowledge, economic capacity, and the ability to produce a valid legal defense.[336]

Probably as a consequence of this situation, this topic cannot be straightforward as it should, due to some judicial and legislative setbacks to the matter limiting standing in some occasions, such as the "thematic pertinence", which is a requirement drawn by the Brazilian Supreme Court[337] demanding a connection between the plaintiff, the class members and the cause of action, and the legislative measure that undermined the initiative interest of associations, Provisional Measure n. 1.984-24, adding Article 2º-A to Law n. 9.494/1997, with the following wording:

> The ruling issued in a collective lawsuit brought by an associative entity, in defense of the interests and rights of its members, shall cover only those represented who have, on the date of the filing of the claim, domicile within the territorial jurisdiction of the issuing body.
> Paragraph: In collective lawsuits brought against the Union, the States, the Federal District, the Municipalities, and their autarchies and foundations, the claim must necessarily be accompanied by the transcriptions of the assembly of the associative entity that authorized it, along with a nominal list of its members and their respective addresses.

This is a clear attempt to undermine the effectiveness of collective redress mechanisms, especially when the Public Administration is the defendant. After all, the legal provision violates the concept of procedural substitution, tying its effectiveness to an irrelevant criterion such as domicile.

Additionally, there are various layers of control during the proceedings. For instance, if an association abandons a claim, the Public Prosecutor's Office or any other entity with standing can take over the lawsuit (Art. 5°, §3°, BPCLA), which is believed to be the relation with the non-disposability of the claim. However, I consider it a form of control over the

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335 Understanding otherwise, check: Susana Henriques da Costa, *O processo coletivo na tutela do patrimônio público e da moralidade administrativa* (Quartier Latin 2009), p. 975/976.
336 Ada Pellegrini Grinover, 'Ações coletivas ibero-americanas: novas questões sobre a legitimação e a coisa julgada' (1993) Revista Forense, n. 301, p. 3-12.
337 ADI 2482/MG, STF, Pleno, Moreira Alves, j. 2-10-2002, DJ de 25-4-2003.

adequacy of representation by associations, as they are the only entities listed as potentially abandoning a claim.[338] Besides, the Public Prosecutor's Office will intervene in the lawsuit as a third-party observer when it is not the claimant (Art. 5°, §1°, BPCLA).

Therefore, regarding standing itself, the system adopted in Brazil is concurrent and disjunctive among various entities previously enumerated by the legislator. Among the entities provided for are civil associations, established for at least one year, whose institutional purpose is the protection of the interests at stake. José Carlos Barbosa Moreira highlights that the legislator likely intended to grant standing to these intermediary social bodies, which could give voice to hidden and unprotected interests.[339] However, what seems to occur is that these entities prefer to report a violation of collective interest to the Public Prosecutor's Office so that this institution can file the claim. The Public Prosecutor's Office is the most active body in the collective sphere.

4.2.2.3 Opt-out vs. opt-in model - a *res judicata* centered issue

In Brazil, there is no opt-in or opt-out system regarding the binding nature of decisions. This makes sense considering the *res judicata* established only to benefit individuals (Art. 103, CPA; art. 16, PCLA; art. 18, BPAA).[340] Basically, a judgment of dismissal based on the absence or insufficiency of evidence does not constitute *res judicata*. The lawsuit can be refiled based on new evidence. If a decision cannot create a more prejudicial situation than the one already faced, there is no reason to expend energy and resources to opt out of a collective lawsuit that can only bring advantages.

On the other hand, individuals can intervene in the collective lawsuit as joinders (Art. 94, CPA), working alongside the claimant who has standing (Art. 5, PCLA). For this to happen, sufficient publicity must be ensured through the official newspaper and other social communication means. If an individual chooses to participate as a joinder in the collective claim, the *res judicata* will apply both in favor and against them (*pro et contra*).[341] In the context of Competition Law damages for final consumers, particularly when small amounts of

[338] Gregório Assagra de Almeida, *Direito processual coletivo brasileiro: um novo ramo do direito processual* (Saraiva, 2003), p. 574.
[339] José Carlos Barbosa Moreira, *Temas de direito processual: oitava série* (Saraiva 2004), p. 18-19.
[340] Antonio Gidi, *A class action como instrumento de tutela coletiva de direitos: as ações coletivas em uma perspectiva comparada* (Revista dos Tribunais 2007), p. 306.
[341] Ada Pellegrini Grinover, Nelson Nery Jr., Kazuo Watanabe, *Código Brasileiro de Defesa do Consumidor: comentado pelos autores do anteprojeto, v. 2, processo coletivo* (10th edn, Forense, 2011), p. 150-151.

damages are involved, the state of inertia prevails, and this is not perceived as a useful instrument.

Although decisions are published in the official newspapers, few people become aware of the collective lawsuit. As a result, numerous individual lawsuits - not related to small and wide-spread antitrust damages - and collective claims are filed on the same issue regardless. This undermines the objectives of the collective redress system.[342]

4.2.2.4 Damages and evidence

The aim is to fully compensate for damages (Art. 11, BPAA),[343] but collective lawsuits aimed at compensating damages caused to indeterminate persons can bring about some difficulties.[344] Among these difficulties are identifying the individuals who make up the group, distributing the proportionate amount among them, and using any remaining funds after the damages have been paid. In Brazil, the compensation is residual because the primary object under protection is generic and indivisible. With the liquidation of the ruling for each individual, the damages are assessed for each victim.

If any victim does not liquidate their damage for any reason, or if the number of eligible individuals is smaller than the severity of the damage, the provision of Article 100, CPA, applies. That is, after the one-year period without victims of the damage coming forward in a manner compatible with its severity, the entities listed in Article 82, CPA, may promote the liquidation and execution of the compensation due, which will be reverted to a common fund created by PCLA[345].

Apart from the issue of damages and its quantification, there is the related topic of evidence, because due process will mean little if the represented parties cannot prove their claims.[346] This theoretical discussion is as pressing in Brazil as it is in the EU and Portugal, as previously addressed.

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[342] Beatriz Kenchian, '*Enforcement* privado e ação coletiva para reparação de danos concorrenciais' (2023) 5 Mulheres no Antitruste, 245, 245-246.
[343] Fredie Didier Jr., Hermes Zaneti Jr., *Curso de direito processual civil: processo coletivo* (5th edn, JusPodium 2010), p. 125.
[344] Ada Pellegrini Grinover, Nelson Nery Jr., Kazuo Watanabe, *Código Brasileiro de Defesa do Consumidor: comentado pelos autores do anteprojeto, v. 2, processo coletivo* (10th edn, Forense, 2011), p. 162.
[345] Art. 13, PCLA. For further information about this fund, please refer to: Hugo Nigro Mazzilli, *A defesa dos interesses difusos em juízo* (25th edn, Saraiva, 2012).
[346] Nelson Nery Jr., *Princípios do processo na Constituição Federal* (10th edn, Revista dos Tribunais 2010), p. 210-211.

In the context of Competition Law damages, the parties are not on equal footing, and in most cases, proving damages can be burdensome or even impossible. Therefore, the quantification of the competitive damages themselves is probably the most complex evidence to be produced in a compensation claim for competitive damages.[347] This measurement requires comparing events that occurred in a market situation where the antitrust violation was observed with a hypothetical situation that seeks to characterize what would have happened in that market if the infraction had not occurred, known as a counterfactual or but-for scenario, as already explained when discussing this topic in the Portuguese framework. Considering that a thorough analysis of damage measurement could hinder the filing of corresponding compensation claims, some relatively more lenient criteria to ensure the quantification of such damages are needed.

Bringing this discussion to the Brazilian context highlights the significant difficulties faced by harmed individuals in producing evidence.[348] *CADE* could serve as a bridge to the evidence that would stimulate private enforcement. However, it has been denying access to this evidence, arguing that it was gathered during leniency programs or adjustment commitment proceedings, and allowing access to such evidence, *CADE* contends, would hinder the effectiveness of these programs by increasing disincentives for potential Competition Law violators to sign agreements, as they might face greater prejudice than they could anticipate.[349]

This scenario could improve if collective redress mechanisms were considered, since plaintiffs in collective claims usually have facilitated access to evidence. In this context, it is useful to revisit the Portuguese situation, where proof standards are adjusted according to the stage of the process. They are high for proving the Competition Law infringement itself and the general harm caused, but lower for quantifying damages. To facilitate this, awards are based on a lump-sum amount derived from estimated damages and sufficient criteria to identify the harmed individuals. However, this improved condition is not found in the Brazilian collective redress mechanisms for Competition Law violations because (i) it is needed to overcome the extreme difficulties of proving the anti-competitive behavior by itself and, if this first stage is successful, (ii) each harmed individual has to pursue throughout a different and new proceeding

[347] Mauricio Oscar Bandeira Maia, 'Elementos das Ações Reparatórias por Danos Concorrenciais Decorrentes de Cartel' (Master Thesis, Instituto Brasiliense de Direito Público, 2020), p. 88.
[348] William Burnham, Stephen F. Reed, *Introduction to the Law and Legal System of the United States* (7th edn, West Academic Publishing 2021), p. 179, "*Inequality in litigation because one side has superior resources is undoubtedly a problem in all legal systems. But inequality of resources is a special problem in an adversary system where the parties have so many responsibilities for gathering evidence and presenting the case*.".
[349] Mauricio Oscar Bandeira Maia, 'Elementos das Ações Reparatórias por Danos Concorrenciais Decorrentes de Cartel' (Master Thesis, Instituto Brasiliense de Direito Público, 2020), p. 126.

their individual liquidation of damages, proving the causal link between the defendant's harmful behavior and their injury, since the collective ruling determines the *an debeatur* (the right to be compensated), but it does not determine the *quantum debeatur* for each group member and who these individuals could be (Art. 103, CPA).[350] In other words, the very condition of being entitled to the right recognized in the ruling must be proven in another proceeding,[351] attracting all the previously mentioned disincentives for an individual to move out of their state of inertia. Therefore, if the significant difficulty of evidence in collective judgment is overcome, there are still the individual proceedings to be faced by the harmed individuals, small and medium businesses, hiring their own lawyers and paying new and different legal fees.

4.2.2.5 Costs and third-party funding

Since the problems of collective redress mechanisms in Brazil precede the discussion on third-party funding, unlike the current situation in Portugal, it is advisable to combine the topics of costs and third-party funding into a single section.

The debate on third-party litigation funding seems distant; however, public financial support does not change the fact that it is a form of third-party funding. As demonstrated, the obstacles to filing lawsuits are numerous, including economic ones, so there is no right of access to the courts without some form of funding or cost transfer to third parties.[352]

Thus, although the discussion about litigation funding in Brazil is still in its early stages compared to other legal systems and has not yet reached the collective sphere,[353] it can be understood that there is some form of public funding. This is evident when Article 18 of the PCLA provides for the exemption from court fees and any other expenses, except in cases of bad faith conduct by the plaintiff association.

[350] Ricardo de Barros Leonel, *Manual do Processo Coletivo* (2nd edn, Revista dos Tribunais 2011), p. 289-293.
[351] Araken de Assis, Carlos Alberto Molinaro, Luiz Manoel Gomes Jr., Mariângela Guerreiro Milhoranza, *Processo coletivo e outros temas de direito processual: homenagem 50 anos de docência do professor José Maria Rosa Tesheiner, 30 anos de docência do professor Sérgio Gilberto Porto* (Livraria do Advogado, 2012), p. 618.
[352] Paula Costa e Silva, Nuno Trigo dos Reis, *Private Enforcement e Tutela Coletiva* (Almedina 2022), p. 79.
[353] The doctrine has developed primarily concerning litigation funding in arbitration. For initial research, refer to: Marcel Carvalho Engholm Cardoso, 'Financiamento de litígios por terceiros (third-party litigation funding) em processos cíveis (judiciais e arbitrais)' (Master Thesis, Universidade de São Paulo, 2017).

4.2.3 Non-representative collective redress

Considering the many judicial set-backs to representative collective redress in Brazil and the tremendous legislative incentives to legal precedents as test cases, which have been used extensively by Courts as a way of establishing general and concrete rules, there is one important research question to be addressed at this topic, which is: "*Considering the Brazilian legal precedents, which are called the 'non-representative collective redress', approved by the legislative branch to bring efficiency in numbers to the Brazilian courts, would it be feasible to consider treating the follow-on damages through those mechanisms?*". Through these legal mechanisms, individual lawsuits are coordinated after they have been filed so the tribunal can decide on a repetitive legal issue once and the answer will be applied to all suspended, on-going or future pieces of litigation containing the same legal issue.[354] From this brief explanation, it is possible to foresee their limited applicability restricted to cases that overcame the many judicialization obstacles and were filed, "*[...] implying that the mechanism does not facilitate access to justice through a collective vehicle but coordinates claims that were susceptible of being brought on an individual basis*;",[355] working much more like a case management mechanism to handle mass repetitive cases.[356] This model works properly (or should, at least) for mass torts, not scattered loss, which are the Competition Law harms in its majority.[357]

According to Article 927 of the CPC, these mechanisms considered as test cases can be classified into different categories: (i) resolution of repetitive issues incident (RRII), which addresses cases where there is a large number of lawsuits with the same legal issue, aiming to standardize the interpretation of the law,[358] (ii) assumption of competence incident (ACI), that is used when there is a relevant legal issue with great repercussion that justifies an immediate

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[354] For a broad perspective on the matter, refer to: Lucas Buril de Macêdo, *Os precedentes judiciais e o direito processual civil* (3rd edn, JusPodivm 2019).

[355] Csongor István Nagy, *Collective Actions in Europe - A Comparative, Economic and Transsystemic Analysis* (SpringerOpen, 2019), p. 6.

[356] Eda Şahin, *Collective Redress and EU Competition Law* (Routledge 2019), p. 31-32, "*This procedure suffers inadequacies similar to joinder actions. Furthermore, the outcome of the test case does not resolve other similar legal actions, it merely serves as a precedent. It has thus been criticised for being unduly costly, causing procedural inefficiencies and creating unnecessary duplication*.".

[357] Gerhard Wagner, 'Collective Redress – Categories of Loss and Legislative Options' (2011) 127 Law Quarterly Review, 55, 55-82, Available at SSRN: <https://ssrn.com/abstract=1960904>, p. 65, "*In sum, mass torts are not a problem of too few claims due to rational apathy but of far too many claims, which pose problems of procedural efficiency. The resolution of these problems is not solely a concern of the public interest in a functioning system of civil justice, but also of the individual interest of potential claimants seeking compensation, who would otherwise have to line up behind the mass of tort claimants and wait for the resolution of the cases ahead in line.*".

[358] Ricardo de Barros Leonel, 'Intervenção do Ministério Público no Incidente de Resolução de Demandas Repetitivas' (2012) 1 Revista Jurídica da Escola Superior do Ministério Público, 173, 173-185.

decision by the court, either an appeal court or a higher court, even if there are no repetitive cases, but it can be used when a large number of lawsuits already exist too, as long as the issue is relevant,[359] (iii) general repercussion, applied by the Supreme Federal Court to recognize and decide on cases that have broad implications beyond the interests of the specific parties involved,[360] and (iv) repetitive cases in the Superior Court of Justice, involving a proceeding that ensures uniformity in the interpretation of legal norms when there are multiple cases with identical legal issues.[361]

Thus, a *sui generis* system of precedents has been formed, as it is peculiar when compared to legal systems with a tradition of observing them. In Western legal families, which follow either civil law or common law, the source of law is the statute or precedent, respectively. However, there is an increasing trend of convergence between these two systems, with common law countries increasingly seeking codification and civil law countries giving more force to precedents.[362] Brazil, a country with a roman-germanic legal tradition, follows this trend of convergence and grants significant weight to precedents, specifically those listed by the legislator as such, in a rather unique situation justifying an empirical analysis as proposed in the research framework.

4.3 Empirical analysis

Theory is fundamental for the structured understanding of legal phenomena. However, when isolated from its practical application, it risks becoming mere fiction. Considering this, I conducted empirical research in the appeal Courts of the state of São Paulo, both at the state[363] and federal[364] levels. To obtain a sample field of rulings enabling this analysis, (i) I first used the terms "Commitment Procedure"[365] and "*CADE*" in the research field for both Courts. The aim was to understand if follow-on damages claims would be filed after a commitment procedure was concluded by the NCA in the country, *CADE*. The follow-on damages claims

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[359] Ricardo Yamin Fernandes, *Do incidente de Assunção de Competência* (Revista dos Tribunais 2020).
[360] José dos Santos Carvalho Filho, *Repercussão geral: balanço e perspectivas* (Almedina 2015), p. 5.
[361] Anselmo Moreira Gonzalez, *Repetitivos ou "Ineditivos"? Sistematização do Recurso Especial Repetitivo* (JusPodivm 2020).
[362] These statements are sufficiently generic for the purposes intended in this master thesis. Regarding legal systems and the valorization of precedents, please refer to: Michele Taruffo, *Paginas sobre justicia civil - Las funciones de las Cortes Supremas* (Marcial Pons 2009).
[363] Available at the Court's website: <https://esaj.tjsp.jus.br/cjsg/consultaCompleta.do?f=1> access on July 8th 2024. Disclaimer: although the dates are indicated herein in the American way, I used the European and Brazilian models to cite Brazilian case law, since this will be the format found on the Brazilian Courts' websites.
[364] Available at the Court's website: <https://web.trf3.jus.br/base-textual/> access on July 8th 2024.
[365] *TCC (Termo de Compromisso de Conduta)* in Portuguese.

could be collective or individual, as previously explained. The results obtained will be analyzed separately as follows.

After this first analysis, (ii) I checked for Competition Law related topics in the resolution of repetitive issues incident (RRII) and the assumption of competence incident (ACI) in the admitted incidents to verify if the non-representative collective mechanisms were being used to deal with Competition Law issues somehow. The general repercussion and repetitive cases were excluded simply because they are not applied in the selected Courts to the empirical research.

4.3.1 São Paulo State Court of Appeals

For the first part of the research (i), aiming to analyze possible follow-on damages in the state Court, 26 rulings were found, but 9 were dismissed from the analysis for not being related to Competition Law post-anticompetitive behavior and follow-on damages.[366] As a result, 17 cases were effectively analyzed, and all of them were related to cartel cases, among

[366] The exclusion of the 9 judgments was made for the following reasons: (a) 1 case involved only the discussion of attorney's fees. (TJSP, 9ª Public Law Chamber, Civil Appeal, n. 0011446-43.2011.8.26.0348, Date of the Judgment: 10/06/2015, Published: 11/06/2015), (b) 4 cases involved collection procedures by Cielo against commercial establishments using card payment machines to charge sales percentages established according to a Commitment Procedure signed by Cielo with *CADE*. These cases concerned the abusiveness and parameters of these clauses and had no relation to follow-on damages, justifying their exclusion from the present analysis. (TJSP, 38ª Private Law Chamber, Civil Appeal, n. 1029252-27.2020.8.26.0100, Date of the Judgment: 12/04/2021, Published: 12/04/2021; TJSP, 24ª Private Law Chamber, Civil Appeal, n. 1043558-69.2018.8.26.0100, Date of the Judgment: 15/04/2021, Published: 20/04/2021; TJSP, 12ª Private Law Chamber, Civil Appeal,, n. 1103290-78.2018.8.26.0100, Date of the Judgment: 15/01/2021, Published: 15/01/2021; TJSP, 20ª Private Law Chamber, Civil Appeal, n. 1107091-65.2019.8.26.0100, Date of the Judgment: 25/10/2021, Published: 08/11/2021); (c) 1 case involved a writ of *habeas data* in a public contest, aiming to obtain the complete data of the social investigation that disqualified the petitioner from the selection process. This case appeared in the search results due to a doctrinal citation in the judgment extracted from a scientific article whose title included the terms "TCC" and "*CADE*". (TJSP, 1ª Public Law Chamber, Civil Appeal, n. 1010419-34.2022.8.26.0053, Date of the Judgment: 27/03/2023, Published: 27/03/2023), (d) 1 case involved the granting of urgent relief in the case of ambulances, which was discarded since the judgment exclusively addressed the failure to meet the requirements for the granting of the preliminary injunction (TJSP, 36ª Private Law Chamber, Appeal n. 2053315-06.2023.8.26.0000, Date of the Judgment: 11/05/2023, Published: 12/05/2023), (e) 1 case involved competition between food delivery apps (iFood and Rappi), which I disregarded because the Court ruled that there was no unfair competition between the parties. (TJSP, 1ª Business Law Chamber, Civil Appeal, n. 1016934-33.2021.8.26.0405, Date of the Judgment: 13/12/2023, Published: 09/01/2024), and (f) 1 case addressed the lack of appellate jurisdiction of the Business Law Chambers of the São Paulo Court of Justice to analyze matters related to extracontractual civil liability. (TJSP, 2ª Business Law Chamber, Civil Appeal, n. 1000178-90.2021.8.26.0067, Date of the Judgment: 18/08/2022, Published: 18/08/2022).

them: the orange cartel, the currency exchange cartel and the international cartel of glass components for cathode ray tubes.[367]

It was further observed that the subject matter of 16 out of the 17 rulings corresponded to the discussion regarding the initial time frame of the statute of limitations for filing claims for the compensation of individual damages arising from anticompetitive practices. Only the judgment rendered in the appeal case n. 2053609-05.2016.8.26.0000 addressed a different subject, but it is still linked to the statute of limitations issue, since it is related to the possibility of notifying the defendant by public notice about the filing of a judicial protest lawsuit in order to interrupt the statute of limitation period, aimed at safeguarding the filing of a future lawsuit for damages by the appellant[368].

Regarding the possible criteria for the initial period for statute of limitations adopted by the São Paulo State Court of Appeals, it was found that in 11 judgments (68.75%), the date of the contract or the violation of the right was considered the *dies ad quo*, based on the objective *actio nata* theory. In 3 judgments (18.75%), the date of publication of *CADE*'s final decision was adopted as the initial term, considering it the moment of unequivocal awareness of the violation of the right and the extent of the damage. In 2 decisions (12.5%), the date of publication of the decision to initiate the administrative procedure at *CADE* was considered the starting point.

Given the results presented above, there was a significant divergence in the jurisprudence of the court regarding the initial period of the statute of limitations for filing follow-on damages claims. This finding has been a factor that rendered the judicial protection of the individual rights of those harmed by anticompetitive practices unfeasible in most cases analyzed. The lawsuits proceeded only in the 3 cases where the date of publication of *CADE*'s final decision was adopted as the *dies ad quo* (18.8%), in which the statute of limitations did not apply. For the other 13 situations, the cases were dismissed due to the statute of limitations. Therefore, the lack of judicial uniformity to a prior issue like statute of limitations led to the dismissal of most of the cases. This timeframe and statute of limitations issue could be resolved throughout a test case leading to a binding precedent that would be applied to all on-going and future pieces of litigation. When reviewing the cases selected for the empirical research presented here, I noticed that in the Civil Appeal n. 1000177-08.2021.8.26.0067, judged on

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[367] All the case law was analyzed and categorized in the following online sheet: <https://docs.google.com/spreadsheets/d/1DsleaT8-dEW0fCuvFmvreW4K3s1OT2Qb6-1HHQpktmU/edit?usp=sharing>. The link and its access are available to anyone.

[368] TJSP, 26th Private Law Chamber, Appeal n. 2053609-05.2016.8.26.0000, Judgment Date: 19/05/2016, Publication Date: 20/05/2016.

May 30, 2022, there was a mention of the RRII n. 2096817-68.2018.8.26.0000, which was not admitted as it did not meet the admissibility requirements of the institute, particularly the repetition and legal uncertainty criteria, according to the Court.

This perception leads to the need to present some comments on the mentioned incident and the following research question: *Considering the Brazilian legal precedents, which are called the 'non-representative collective redress', approved by the legislative branch to bring efficiency in numbers to the Brazilian courts, would it be feasible to consider treating the follow-on damages through those mechanisms?*

To that end, it is pertinent to briefly revisit the concept of RRII to better understand the reasons for its rejection in the admissibility phase. The RRII can be considered a new institute[369] introduced to the Brazilian legal system in 2015 by the CPC in response to the legal mandate to value judicial precedents, with the intention that courts comply with the provisions of Article 926, CPC, maintaining their jurisprudence consistent, stable, and coherent.[370] For this purpose, the binding ruling in a RRII will be applied to all on-going pieces of litigation related to the same legal issue (Art. 985, I, CPC). The RRII will lead to a ruling reached in one lawsuit that will be applied in many different present on-going cases and, in the future claims to be filed, with no discussion about representation and its adequacy. Therefore, it can be considered a non-representative collective mechanism to deal with repetitive litigation.[371]

The requirements for a RRII are both positive and negative. Among the positive ones, there are (i) the effective repetition of cases with the same legal issue,[372] and (ii) the risk of

[369] The RRII can be considered as a new institute because it has a unique design, despite its similarities to some foreign institutes, such as the *Musterverfahren* from Germany and the Group Litigation Order (GLO) from England, which were thought to deal with mass cases and, its relation to some Brazilian existent institutes as the repetitive appeals in the Superior Courts dating from 2008. About this research topic, check: Ricardo de Barros Leonel, 'Intervenção do Ministério Público no Incidente de Resolução de Demandas Repetitivas' (2012) 1 Revista Jurídica da Escola Superior do Ministério Público, 173, 173-185, p. 175. For further information on the GLO, please refer to: Richard Whish, David Bailey, *Competition Law* (7th edn, Oxford University Press 2012), p. 314, "*Actions for damages may be facilitated by a 'group litigation order' or 'representative actions' under the English civil procedure rules. Group litigation orders provide for the case management of claims that give rise to common or related issues of fact or law*".

[370] There are repetitive issues in the Brazilian Courts to the extent that led the legislative to value test cases as binding precedents, but this did not lead the system to be considered as a common law considering its historic background and different functioning. About this topic, please refer to: John Henry Merryman, Rogelio Pérez-Perdomo, *The Civil Law Tradition: an introduction to the legal systems of Europe and Latin America* (4th edn, Stanford University Press 2019).

[371] For further information about the RRII and non-representative collective mechanisms, please refer to: Antonio do Passo Cabral, 'O novo procedimento-modelo (*Musterverfahren*) alemão: uma alternativa às ações coletivas' (2007) 147 Revista de Processo, 123, 123-146.

[372] The issue has to be repetitive to avoid the harmful situation of a premature decision through a binding precedent. In the United States, this is known as percolation and it works for *certiorari* in the Supreme Court. For further information on the topic, please refer to: Hersel Watson Perry Jr., *Deciding to decide*: *agenda setting in the United States Supreme Court* (Harvard University Press 1994), p. 230-231, "*Justices like the smell of well-percolated cases. A case that has not percolated through various courts will usually be considered uncertworthy.*

offense to equality and legal certainty (Art. 976, CPC). The negative requirement (iii) is the inexistence of an appeal affected under the repetitive system in the higher courts, according to art. 976, §4º, CPC, since any court of appeal can admit a RRII posing a risk of conflicting decisions between courts of appeal and superior courts. Once a repetitive appeal is admitted in the higher court, the decision will be valid for the entire national territory, eliminating the need to resolve repetitive issues segmentally in each local court.

Once present the requirements, parties, Public Prosecutor's Office, Public Defender's Office or the judge, may request the initiation of the incident to the President of the Court of Appeals.

The mentioned RRII (n. 2096817-68.2018.8.26.0000) was initiated during the discussion of the Cement Cartel and its damages, particularly focusing on the statute of limitations issue. There were more than thirty lawsuits related to this cartel and this specific issue. The incident was not admitted based on the argument that there were not enough cases dealing with the same issue to create the risk of offense to equality and legal certainty, the requirements listed on Art. 976, CPC. It is worth mentioning that in this first phase of the RRII procedure, namely the analysis of its admissibility, there was no participation from the Public Prosecutor's Office or any *amicus curiae*.

There are significant criticisms regarding the situation of this incident from its request for initiation to the decision of its inadmissibility, for at least three reasons, namely: (i) the legal issue is tied to a fact situation limited in time and space: the cement cartel, disregarding the many other situations and cartels where the statute of limitations is also a controversial issue, (ii) the lack of participation from the Public Prosecutor's Office (Art. 976, § 2º, CPC) and society in the RRII, as the CPC requires (art. 983, §1º, CPC), and (iii) the risk to legal certainty linked to the number of cases, not the high degree of jurisprudential divergence on the subject.

As for the first aspect, (i) if the situation justifying the request for the admission of the incident were broader to encompass the discussion of the statute of limitations for compensation of damages caused by anticompetitive behavior beyond the ‘cement cartel’, reaching, for example, the orange cartel, there would certainly be a greater number of ongoing and already adjudicated cases within the TJSP, highlighting the requirement used by the court for the inadmissibility of the institute: the risk to legal certainty in a great number of cases. Furthermore, the issue justifying the admission of the RRII must be a matter of law (Art. 976,

The concept is one well known in jurisprudence. The Supreme Court exists primarily to clarify the law. Once it speaks, however, its interpretation is final, so justices want to make sure that when they do speak, they can do so as intelligently as possible.”

I, CPC), detached from any fact situation limited in time and space as occurred in the case. If a binding ruling was issued regarding statute of limitations in cartel cases, there would be greater legal certainty for natural and legal persons who managed to break the apathy in seeking compensation for antitrust conducts. This situation only happened and still happens in other scenarios because the legislator did not establish what *repetitive* should be taken for. This is to be determined by the court in each case according to political leeways.[373]

Continuing the critical tone of this RRII, (ii) perhaps substantial participation from the Public Prosecutor's Office or society, through *amici curiae* (Art. 138, CPC) and public hearings (Art. 983, §1º, CPC), even in the phase of analyzing the admissibility of the institute, could have addressed this essential issue when defining the legal issue linked to a factual situation limited in space/time, compromising the admission and protection of relevant dispersed social interests.[374] Finally, (iii) it was justified that there was no breach of equality based on the number of lawsuits. However, as previously pointed out, there are different interpretations regarding the statute of limitations and its starting point.

Based on the analysis so far, we can assert that private enforcement has not yielded results in either individual or non-representative collective protection through the mentioned RRII.

For the second part of the empirical research (ii), aiming to check if Competition Law related topics are being discussed through any other RRII or ACI in the Court, I checked all the rulings extracted from the mentioned incidents in the TJSP and none deals with Competition Law related topics.

4.3.2 Federal District Court

To obtain a sample field of rulings enabling this analysis, (i) I first used the terms "Commitment Procedure" and "*CADE*" in the research field, aiming at follow-on damages either collectively or individually discussed. I obtained three rulings from this tribunal, but none is related to follow-on damages, since one involves data protection,[375] the other pertains

[373] Teresa Arruda Alvim; Bruno Dantas, *Recurso especial, recurso extraordinário e a nova função dos Tribunais Superiores no Direito Brasileiro* (3rd edn, Revista dos Tribunais 2016), p. 539.
[374] For further explanation about the topic and highlighting the amici curiae' importance to bring legitimacy to the binding precedent, please refer to: Elpídio Donizetti, *Curso didático de direito processual civil* (20th edn, Atlas, 2017), p. 311.
[375] TRF3, 3ª Group of Judges, Civil Appeal, n. 5004952-27.2018.4.03.6000, Judged on: 25/03/2024, Published on: 01/04/2024.

to the administrative due process debate[376] and one intermediate appeal related to urgent injunction order[377]. This result demonstrates the nonexistent access of the individual as a final consumer seeking the Judiciary in the face of damages caused by violations of Competition Law. The previous assertive stems from the concern with the individual damages caused by anticompetitive practices, leading to the clarification: what happens to individual damages in the face of a commitment procedure? They remain unprotected. Although the direct protection of individuals with the signing of the mentioned document is not the legal purpose chosen by the legislator, these individuals could mobilize in follow-on claims, but this does not occur in the context of the TRF3.

After this analysis, (ii) I checked for Competition Law related topics in the resolution of repetitive issues incident (RRII) and the assumption of competence incident (ACI) in the admitted incidents to verify if the non-representative collective mechanisms are being used to deal with Competition Law issues somehow, and none deals with Competition Law related topics.

4.4 Concluding remarks

Therefore, the principle of procedural economy is traditionally addressed from two perspectives: microscopic procedural economy, which is the idea of making the proceeding more economical when considered individually; and macroscopic procedural economy, which considers the procedural system as a whole to analyze the system's economic efficiency. Instead of looking at a lawsuit individually, the entire set of lawsuits and established proceedings are considered, forming the civil procedural system. What is interesting for the purpose of this master thesis is the second perspective, namely, macroscopic procedural economy, which aims to achieve the maximum result with the minimum possible activity given the factual-legal circumstances. Examples of procedural institutes that operate in this area, providing economic efficiency to the civil procedural system, are numerous, such as joinder of parties, counterclaims, and most notably, the collective redress mechanisms. While those institutes are important in achieving a certain level of procedural economy, this potential can

[376] TRF3, 3ª Group of Judges, Civil Appeal, n. 5026830-96.2018.4.03.6100, Judged on: 14/04/2023, Published on: 19/04/2023.
[377] TRF3, 6ª Group of Judges, intermediate appeal, n. 5028798-31.2018.4.03.0000, Judged on: 20/03/2020, Published on: 24/03/2020.

be amplified in the collective sphere due to its subjective element, namely, the large number of individuals involved in just one lawsuit.

However, once there is almost non-significant data to consider in several individual claims for final consumers when wide-spread Competition Law damages are considered, collective redress mechanisms do not seem as an efficient way out and this is probably one of the reasons for its low rate use. The system is designed to address bottlenecks when there are too many demands in certain areas.

The Superior Court of Justice[378] recognized that the collective lawsuit was introduced into the national procedural system with two promises: the harmonization of judgments and the reduction of cases, thus contributing to an efficient, swift, and uniform judicial service. Since this type of post-anti-competitive conflict does not even reach the judicial stage, it does not become a concern through collective protection in the Brazilian context.

In this chapter, it was possible to address the question regarding legal precedents, which is: *Considering the Brazilian legal precedents, which are called the 'non-representative collective redress', approved by the legislative branch to bring efficiency in numbers to the Brazilian courts, would it be feasible to consider treating the follow-on damages through those mechanisms?* The answer to this question is unequivocally negative, as evidenced by the empirical data gathered. It is possible to foresee the limited applicability of these mechanisms working as test cases, restricted to situations that have overcome numerous judicial obstacles and were ultimately filed. This implies that the mechanism does not facilitate access to justice through a collective vehicle but instead coordinates claims that could have been brought on an individual basis. Consequently, it functions more as a case management mechanism for handling mass repetitive cases. This model is suitable (or should be) for mass torts, but not for scattered losses, which are the predominant harms in Competition Law under the research object of this master thesis. Based on the analysis thus far, private enforcement has not yielded results in either individual or non-representative collective protection through the mechanisms, such as RRII.

For the second part of the empirical research, which aimed to determine if Competition Law-related topics were being addressed through any other RRII or ACI in the selected courts, I reviewed all the rulings extracted from the mentioned incidents. None of these rulings addressed any Competition Law-related topics. Consequently, it is possible to conclude that small and scattered losses from anticompetitive behavior remain unprotected.

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[378] STJ, 5ª T, REsp n. 1.142.630/PR, Rel. Min. Laurita Vaz, judged: 7/12/2010. Informative n. 459.

5 CHAPTER V: CONCLUSIONS & RECOMMENDATIONS

The last chapter of the master thesis shall not summarize the results from the research but also provide recommendations *lege lata* and *lege ferenda* when necessary, from the legal perspective. Private enforcement of Competition Law through collective redress is the intersection between legal implementation, political interest, and economic development.

5.1 Conclusion

To address the research questions concerning the comparison between private enforcement of Competition Law through collective redress in Brazil and Portugal, a clear understanding of the research rationale was established. The focus is on small and widespread overcharges that harm both direct and indirect final consumers. These overcharges often lead to a stalemate in antitrust violation discussions, as consumers typically purchase in small quantities, resulting in minor damages that do not justify filing individual lawsuits. Therefore, a specific aspect of post-anti-competitive conduct was analyzed, excluding deadweight loss consumers, intermediate sellers, and companies/competitors that have been excluded from certain markets due to exclusionary practices. Moreover, the main instruments of private enforcement of Competition Law have been explored in detail in both Brazilian and Portuguese contexts. This exploration revealed the representative and non-representative collective mechanisms for private enforcement of Competition Law using a comparative research methodology. The European framework enabling Portuguese collective redress for Competition Law was examined considering the EU legal framework. In practice, empirical research was conducted by analyzing the lawsuits filed that discuss the research object, and the findings are elaborated below.

Regarding the premises of the master thesis, they were established as to be considered that (i) private enforcement is relevant and must be facilitated by legislators; (ii) collective redress is essential to guarantee the adequate protection to victims of Competition Law violations causing small-scale, scattered and widespread harm both in the repressive and the preventive fronts; (iii) there are economic disincentives for individuals, small and medium-sized businesses to pursue their damages individually, and (iv) there are economic disincentives for claimants that must be overcome to initiate a collective lawsuit.

The research questions posed are:

1. What are the mechanisms structured to facilitate the collective redress of Competition Law violations in both jurisdictions and how can they be compared?
2. Considering the few collective lawsuits filed in the São Paulo State Court of Appeals, what are the main issues faced by the Court considering both Competition Law and Civil Procedure?
3. Considering the Brazilian legal precedents, which are called the 'non-representative collective redress', approved by the legislative branch to bring efficiency in numbers to the Brazilian courts, would it be feasible to consider treating the follow-on damages through those mechanisms?
4. Is there anything that could be learned from the European and Portuguese experience in the area to improve what has been done in Brazil?

Regarding them, the research shows that:

1. In Portugal, there has been the option of popular action since 1995, and the recent collective redress option regulated following Directive 2020/1828, implemented in 2023. In Brazil, collective civil lawsuits have been available since 1985, with legal precedents based on non-representative models such as test cases, typically arising from individual lawsuits, especially since the passing of a new CPC in 2015.
2. In the empirical research conducted in the Brazilian judicial reality, no collective lawsuit was found addressing follow-on damages, and the primary issue discussed in the individual lawsuits is the statute of limitations.
3. No binding precedent related to Competition Law in a broad sense was found in the courts of the state of São Paulo. Therefore, it would not be feasible to consider addressing follow-on damages through those mechanisms.
4. Test cases as binding precedents play an important role in avoiding conflicting rulings on already filed cases, but they do not address the issue of consumer inertia in claiming damages. Representative collective mechanisms need to be organized and financially supported to incentivize claimants to bring cases to court. Additionally, the administrative decisions taken by the NCA need to be binding to avoid evidence setbacks.

These answers to the research questions posed will be discussed in detail below.

Considering all the obstacles faced by individuals harmed with small and wide-spread amounts of damages in the discussed context of Competition Law, no lawsuit - either individual or collective - was detected to discuss this type of compensation, assuring that the reasons behind consumers' inertia prevail over any economic incentive to file a lawsuit in the present state of art in the Brazilian context. Some follow-on individual lawsuits were detected in the State Court of Appeals in São Paulo, but they all involved medium or large amounts of damages, usually by intermediate sellers in the production chain. Even these cases faced early issues, such as the statute of limitations, and only a small percentage (18.75%) were not dismissed. As a result, numerous victims of anticompetitive behavior remain undetected by the system, as no collective lawsuits were found in the empirical research.

These conclusions align with the sociological and political premises based on Marc Galanter's work, noting that: (i) the defendants in the selected cases were repeat players who mostly won, as many cases were dismissed for statute of limitations reasons; (ii) the RRII in the TJSP was not admitted under severe criticism from the doctrine; and (iii) information and financial asymmetry was present in all the selected cases.

In the European framework, the Directives transit through damages over Competition Law and collective redress to protect consumers from different legal frameworks (Directives 2014/104 and 2020/1828), which fragment the protection to anticompetitive damages, which is a matter of union law, but its exercise is a matter of national law. Although the principle of effectiveness mandates that member states should not make the exercise of a right difficult or impossible, compensating for antitrust damages has faced many setbacks due to civil law taboos. These include issues like opting out, selecting group representatives, funding mechanisms, and calculating damages.

Portugal was chosen for this comparative research due to its experience with popular actions to protect individuals harmed by anticompetitive behaviors in the market. Furthermore, the examination of Competition Law collective redress in Brazil and Portugal is based on recent European legislative advancements and significant changes in the Portuguese legal and judicial arenas, aligning with the EU legal framework but even going beyond it to regulate and act in the sense to stimulate private enforcement of Competition Law through collective redress. In Portugal, there has been a notable increase in popular actions targeting the protection of consumers from anti-competitive market practices, significantly supported by third-party funding in recent years. This Portuguese experience offers valuable lessons for the practical enhancement of Brazil's current legal framework and for proposing new theoretical legal frameworks, if necessary.

The positive aspects noticed in the Portuguese collective redress model to protect victims from anticompetitive practices are:

(i) there are no major obstacles for associations to propose collective claims in the country. This perspective, combined with funding, facilitates access to the courts for collective redress mechanisms.

(ii) third-party litigation funding, which allows private-sector companies to finance litigation for profit based on Article 10 of Directive 2020/1828, was introduced into the system, really driving the filing of collective lawsuits. Before this possibility, the Portuguese legal framework for collective redress was considered claimant-friendly due to measures such as court cost exemptions. However, these measures were insufficient to adequately encourage claimants to widely file popular actions.

(iii) an opt-out system that allows the representative of the group to conduct the lawsuit without the express authorization of every group member, thereby reducing organizational costs. This Portuguese perspective places this member state at the forefront of the European discussion, which still favors the opt-in approach over the opt-out, as indicated by the recent Directive 2020/1828. Furthermore, the *res judicata* is designed to ensure that no member of the group is harmed, thereby justifying their continued permanence in the proceedings as represented parties, not opting out.

(iv) the administrative decisions from the NCA are deemed irrefutably established, avoiding evidence push backs and, the lawsuits are to be suspended while the administrative proceedings are being conducted to prevent contradictory rulings between the National Authority and the courts, resulting in most cases in this domain being treated as follow-on damages, according to PEA provisions.

(v) lump-sum award based on estimated damages according to the standard of proof adjustment based on the context: while the criteria are stringent for proving the Competition Law violation itself and the overall harm caused, they are more lenient when it comes to calculating the damages.

(vi) the judge must designate, when ruling, an entity to receive and manage the payment to unidentified persons outside of the courts, which can be more efficient.

In Chapter IV, the private enforcement of Competition Law in Brazil was examined, with a focus on identifying the primary factors that impede its effectiveness:

(i) in judicial proceedings involving follow-on damages, the administrative decision issued by the NCA must be considered. While in the European Union, such decisions are considered irrefutably established, in Brazil, they are treated as evidence. However, the judge retains discretion to rule differently based on additional factors. This introduces considerable uncertainty, highlighting the need for careful consideration when seeking to enhance private enforcement.

(ii) obtaining evidence from *CADE* is not straightforward. While CADE could potentially serve as a conduit for evidence that would bolster private enforcement, it has been denying access to this evidence based on the argument that it was gathered during leniency programs or commitment proceedings.

(iii) various legislative and judicial setbacks regarding the standing and adequacy of representation of associations, compounded by financial constraints, often compel these entities to report collective interest violations to the Public Prosecutor's Office. This institution assumes responsibility for filing claims and plays a prominent role as the most active body in the collective sphere within the Brazilian context. Meanwhile, associations themselves do not function as active social bodies in this regard.

(iv) everyone harmed must pursue their own separate legal proceedings to quantify damages, proving the link between the defendant's actions and their injury. While a collective ruling establishes the entitlement to compensation (*an debeatur*), it does not specify the amount owed to each member or identify them. In essence, individuals must prove their entitlement in separate proceedings, which often discourages them from acting. Even if the challenges of evidence in collective cases are overcome, individuals and small businesses still face the burden of engaging their own lawyers and paying additional legal fees in individual proceedings.

(v) no third-party funding discussion considering the presence of associations as claimants in collective lawsuits to discuss anticompetitive behavior is inexistent.

(vi) legal precedents from test cases have limited applicability, typically restricted to cases that have navigated numerous judicial obstacles and were formally filed. These precedents function primarily as a case management tool to handle mass repetitive cases, particularly suited for mass torts rather than the scattered losses that constitute most Competition Law harms.

(vii) the empirical research indicates that:

TJSP:

a) Only significant amounts of damages were under discussion. There was a notable divergence in the court's jurisprudence regarding the initial timeframe for the statute of limitations in follow-on damages claims. This divergence significantly hindered the judicial protection of individual rights for those harmed by anticompetitive practices in most analyzed cases.

   Legal proceedings advanced only in the 3 cases where the date of publication of CADE's final decision was considered as the starting point (18.8%), exempting them from the statute of limitations. However, in the remaining 13 cases, the lawsuits were dismissed due to statute of limitations issues. Therefore, the lack of judicial uniformity on the statute of limitations issue led to the dismissal of most cases.

This issue regarding the timeframe and statute of limitations could potentially be resolved through a test case that establishes a binding precedent applicable to all ongoing and future litigation.

b) One RRII about this topic (statute of limitations) was not admitted, but it could have been. It can be asserted that private enforcement has not produced results in either individual or non-representative collective protection through the mentioned RRII.

c) To determine whether Competition Law-related topics were being addressed through any other RRII or ACI in the Court, I reviewed all the rulings extracted from the mentioned incidents in the TJSP, and none of them addressed Competition Law-related topics.

d) Thus, we observe that there is no effectiveness in individual judicial protection nor in representative and non-representative collective protection, considering the absence of collective proceedings and the non-admission of the RRII on the legal issue under analysis. This creates a gap in private enforcement, which, despite being well supported by legislation, does not deliver the expected results in practice. However, there is an expectation that legislative changes to the Law n. 12.529/2011 dating from 2022, related to statute of limitations, will contribute to strengthening private enforcement.

TRF3:

e) TRF3: There is no case law related to follow-on damages. This outcome underscores the lack of access for individuals as final consumers seeking judicial recourse for damages resulting from violations of Competition Law.

f) TRF3: I examined the incidents admitted verifying if non-representative collective mechanisms were addressing Competition Law-related topics. None of the admitted incidents dealt with Competition Law issues.

5.2 Recommendations

Based on the findings in the thesis and additional research, certain problems identified by previous authors have been resolved. These include the opting-out issue when centered around the *res judicata* principle based on the only-benefit principle, for instance.

However, there are some open ends to be addressed and since it is important to structure private enforcement of Competition Law through collective redress to protect the interests of individuals and the overall welfare of the market, I have drafted some recommendations based on current law (*lege lata*) and proposed future law (*lege ferenda*). This approach promotes both deterrence and consumer welfare.

5.2.1 Regulating a proper legal framework for third-party funding

Considering that the financing of litigation by private third parties was what changed the landscape of collective redress in Portugal, this aspect demands greater attention when the objective is to enhance this path of protection for victims of antitrust violations.

The funders' economic motives might conflict with the pursuit of collective rights. For injured persons, third-party funding enhances access to justice for small-scale, scattered Competition Law damages, balancing the parties' strength and enabling lawsuits that otherwise wouldn't be filed. From a public policy perspective, third-party litigation financing has increased popular actions in Portugal, enhancing the deterrence effect by making harmful behavior costlier.

However, there are still some aspects needing some attention in the Portuguese legal system, as previously raised, and in Brazil, there is an enormous legislative gap. In the Portuguese situation, since plaintiff costs and funder percentages are paid only after individuals have had a reasonable timeframe to claim damages and if funds remain, this could economically discourage potential plaintiffs from filing popular actions. It could also disincentivize funding or proper notification to individuals about awards and payments, as the court does not manage these. Therefore, the Portuguese system depends on individuals' inertia to compensate funders, risking funders' reluctance to adequately inform class members about damage claims. Thus, the responsibility for notification and payment management should differ from that of funding the action.

Furthermore, among the concerns raised, key points also include the risk of the funder influencing lawsuit decisions to prioritize its interests over class members'. According to Directive 2020/1828, Article 10(2)(a), Member States must ensure third parties do not unduly influence an association’s lawsuit decisions, potentially harming class members' interests, but how this is to be conducted is not yet defined in neither legal systems.

Finally, there is also the concern related to motives, in other words, that popular actions might be filed for profit rather than altruistic motives, leading to an overdeveloped litigation market. This can be mitigated by setting limits on funder remuneration or addressing abuse and bad-faith conduct.

5.2.2 The administrative decisions from CADE need to be considered as irrefutably established or binding in court proceedings

This recommendation is directed exclusively *lege ferenda* to the Brazilian reality where CADE administrative decisions can be considered by courts, but it has no express binding effect, not even deemed as irrefutably established.

When court proceedings involve follow-on damages, the competition authority administrative decision must be considered in the decision. In the EU, these decisions are deemed irrefutable, while in Brazil, they are treated as mere evidence, with judges potentially ruling otherwise based on additional elements. This introduces uncertainty, which must be addressed to enhance private enforcement. NCA decisions, deemed irrefutable, prevent evidence disputes. On top of that, lawsuits are suspended during administrative proceedings to avoid contradictory rulings, resulting in most cases being treated as follow-on damages, which enhances both public and private enforcement of Competition Law.

5.2.3 Statute of limitations for private enforcement once there are administrative proceedings to be considered conducted by the Competition Authority

The major discussion identified in the empirical research relates to the statute of limitations when there is an administrative proceeding to investigate an antitrust violation. Although this issue was resolved in Brazil in 2022, many ongoing cases that predate this resolution are still reaching the courts, resulting in contradictory rulings. A test case could have addressed this issue, but it was not admitted, and the controversy remains.

This leads to a follow-up question for this master thesis: *are cases filed after 2022 facing the same issue?* However, there is not enough case law to answer this question now, and it is unlikely that there will be many relevant cases in the coming years. This is because individual redress does not adequately cover small and dispersed Competition Law damages. This strengthens the argument that representative collective redress is the appropriate means to protect these individuals.

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