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Representative Actions in Private Enforcement of EU Competition Law. Transposition of Directive 2020/1828 in Germany, Portugal and Slovakia.

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Table of Abbreviations

CoJ	Court of Justice of the European Union
EC	European Commission
EU	European Union
NCA	National Competition Authority
TFEU	Treaty for the Functioning of the European Union
SMEs	Small and medium-sized enterprises
PCL	Portuguese Competition Law, Lei No. 19/2012
LPA	Law of Popular Action, Lei da Ação Popular No. 83/1995
LPE	Law on Private Enforcement, Lei No. 23/2018
PCPA	Portuguese Consumer Protection Act, Lei de Defesa do Consumidor No. 24/1996
SCL	Slovak Competition Law, Zákon o ochrane hospodárskej súťaže No. 187/2021 Z.z.
SCPA	Slovak Consumer Protection Act, Zákon o ochrane spotrebiteľa No. 108/2024 Z.z.
SCPC	Slovak Civil Procedure Code, Law No. 160/2015

RAD - Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (Representative Actions Directive)

ARC – Act against Restraints of Competition (German Competition Act), Gesetz gegen Wettbewerbsbeschränkungen – GWB (BGBl. I S. 1081 No. 1/1957, New announcement from June 26, 2013, BGBl. I S. 1750)

CREA - Consumer Rights Enforcement Act (Verbraucherrechtedurchsetzungsgesetz - Gesetz zur gebündelten Durchsetzung von Verbraucherrechten – VDuG) (BGBl. I No. 272/2023) transposes the EU Directive on representative actions (EU Directive 2020/1828) into German civil procedural law.

DMA - Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828, [2022] OJ L265/01 (Digital Markets Act).

Recommendation - Recommendation of the European Commission (Commission Recommendation) on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU, 11 June 2013)

Damages Directive - Directive 2014/104/EU of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (26 November 2014)

I. Introduction

For more than a decade, competent authorities of the European Union have been paying increased attention to the issue of private enforcement of competition law, as it is clear that the so-called administrative approach to the enforcement (public enforcement) of antitrust rules is no longer sufficient. In the context of private enforcement of competition law, the relevant question today is not only what sort of claims an entity affected by a breach of competition rules has against the infringers, but also how the harmed subject can effectively enforce these claims. As regards claims, Court of Justice of the European Union (hereinafter referred to as "CoJ") has held in several of its decisions that anyone who has suffered damage as a result of a breach of Articles 81 and 82 (now 101[1] and 102[2]) of the Treaty on the Functioning of the European Union (hereinafter referred to as "TFEU") has the right to claim compensation for that damage.[3] The right to claim compensation for the damage suffered applies to anyone who has been harmed by an infringement of the competition law. That is regardless of whether the actions for damages (redress actions) follow a finding of an infringement by a competition authority (so-called „follow-on actions") or do not arise from such a finding (so-called „stand-alone actions").[4]

A crucial document dealing (also) with collective redress actions in relation to infringements of competition law is Recommendation of the European Commission (Commission Recommendation) on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU, 11 June 2013). This document (hereinafter referred to as "Recommendation") follows up on the Green Paper on antitrust damages actions published by the European

[1] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47, Art. 101 <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF> accessed 8 February 2025 (TFEU).

[2] ibid, art. 102.

[3] Joined cases C-295/04 to C298/04 Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA, Antonio Cannito v Fondiaria Sai SpA and Nicolò Tricarico and Pasqualina Murgolo v Assitalia SpA [2006] ECR I-06619, Case C-453/99 Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others [2001] ECR I-6297

[4] DUFALOVÁ, L.: Pojem a podstata súkromnoprávneho vymáhania súkromného práva. In: Zmluvný systém a rekodifikácia súkromného práva, p. 266. Available at <https://www.flaw.uniba.sk/fileadmin/praf/Veda/Konferencie_a_podujatia/Session_of_Civil_Law.pdf> accessed 9 February 2025.

Commission in 2005[5] and a White Paper in 2008[6], which included policy proposal for antitrust specific collective redress measures. Recommendation was also based on Green Paper on collective redress measures for consumers issued by the European Commission in 2008.[7]

Recommendation deals with two aspects of private enforcement of competition law. One is collective redress for damages and the other are injunction measures in collective matters. Other private remedies for competition law enforcement (for example the right to declare an anti-competitive agreement void) are not the subject of Recommendation. Recommendation applies not only to the area of competition law, but also to the areas of consumer protection, environment protection, protection of personal data, financial services legislation and investor protection, as well as to other areas where collective claims for injunctions or damages in respect of violations of the rights granted under Union law would be relevant. [8] Due to the significant level of diversity between the laws of Member States, Recommendation aims to approach collective redress in a consistent manner in whole EU.

Unfortunately, Recommendation was not well accepted in EU Member States. Member States generally retained their national mechanisms for collective enforcement of competition law (if such a procedure was even incorporated in a particular legislation).

As a next step in evolution of private enforcement of competition law we consider the adoption of Directive 2014/104/EU of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (hereinafter referred to as "Damages Directive") on 26 November 2014.[9] This Directive laid down the rules necessary to ensure that any person who has suffered harm caused by an infringement of competition law

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[5] EC (2005) 672, 19.12.2005. Green Paper - Damages actions for breach of the EC antitrust rules, 2005. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52005DC0672&from=EN> accessed 9 February 2025.

[6] EC (2008) 165, 2.4.2008. White Paper on damages actions for breach of the EC antitrust rules. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52008DC0165&from=EN> accessed 9 February 2025.

[7] EC (2008) 794, 27.11.2008. Green Paper on Consumer Collective Redress, 2008. Available at <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0794:FIN:EN:PDF> accessed 9 February 2025.

[8] Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU). [2013] OJ L 201/1, Recital, par. 7

[9] DIRECTIVE 2014/104/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/01, (Damages Directive)

by an undertaking or an association of undertakings can effectively exercise his or her right to claim full compensation for that harm from that undertaking or association. However, Directive did not oblige Member States to establish collective redress mechanisms for the purpose of enforcing Articles 101 and 102 TFEU.

It was not until 2018 when legislation regulating collective redress measures was adopted at EU level for the first time. Surprisingly, it was not a legal regulation of collective redress for infringement of competition law, as envisaged by Recommendation, but only for infringement of consumer rights. Despite all expectations, Directive 2020/1828/EU of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (hereinafter referred to as "Representative Actions Directive" or "RAD") is still considered as a very important legal act even in the field of competition law. Directive was adopted by all Member States into their national legal systems within the specified transposition time till 25 December 2022 and its measures are applied from 25 June 2023.

Aim of this Thesis is precise and detailed analysis of Representative Actions Directive, comparing its legal instruments for collective redress with the similar institutes regulated either in third countries jurisdictions (especially with so-called Class action in the USA) or within the borders of EU (before all with so-called popular action ("ação popular") in Portugal or with so-called model declaratory action" ("Musterfeststellungsklage") in Germany). Research will also focus on estimation of the possible impact of Directive not only on consumer law, but mostly on competition law in the Member States. In particular we will focus on assessing the advantages and disadvantages of the new harmonized national legislation in Germany, Portugal and Slovakia. Thesis will analyze the possibility of consumers (and competitors) applying successfully the new legislation in order to protect their rights. Finally, Thesis will suggest new legal provisions that could contribute the further growth of competition law protection.

II. Private enforcement of competition law – the course of evolution

1. US legislation, basic features of the class actions

Inspiration for the legislative enshrinement of the institute of collective redress for infringement of competition law came from common law countries, especially the USA. Antitrust law in the USA has a century-long history.[10] US Sherman Act (1890) as a first competition law in the world, Clayton Act adopted in 1914 by US Congress and Federal Trade Commission (hereinafter referred to as "FTC") Act adopted by US Congress in 1914 represent the core antitrust legislation in USA. Since the entry into force of the Sherman Antitrust Act in 1890 competition law has been enforced through public and private actions.[11] "Group actions" are a form of (private) collective redress in which the damaged parties themselves, represented by a representative plaintiff, can take part. The archetype group action is the American-style class action.

Initially, class actions could only be brought in disputes in which the parties did not necessarily seek financial compensation but instead wanted some other type of protection. Gradually (since 1938), class actions were extended to include claims for financial compensation. [12] The primary purpose of class actions was to provide compensation for certain minor claims and to provide access to the courts for groups of persons who, for financial reasons, did not want or could not pursue their rights in court individually. The current form of class actions is included in Rule 23 of the Federal Rules of Civil Procedure (FRCP)[13] since 1966, which is entitled "Types of Class Actions".

According to Rule 23(a)[14], the prerequisites to any class action are: (1) class is "so numerous that joining all of the members is impracticable"; (2) there are "questions of law or fact common to the class"; (3) "claims or defenses of the representative parties are typical for the claims or

[10] Möllers, Thomas*:* Private Enforcement of Competition Law in Europe, 2014, Economic Competition Regime: Raising Issues and Lessons from Germany, 2014, p. 43. Available at <https://www.academia.edu/106244655/Private_Enforcement_of_Competition_Law_in_Europe> accessed 23 January 2025.

[11] Ottanelli, Marta, *Private Enforcement of EU Antitrust Law: Proposal for Harmonization*, 2013, p. 13. Available at <https://www.academia.edu/3639858/Private_Enforcement_of_EU_Antitrust_Law_Proposal_for_Harmonization> accessed 23 January 2025.

[12] Available at <http://legal-dictionary.thefreedictionary.com/class+action> accessed 9 February 2025.

[13] The original Rules of Civil Procedure for the District Courts were adopted by order of the Supreme Court on Dec. 20, 1937, transmitted to Congress by the Attorney General on Jan. 3, 1938, and became effective on Sept. 16, 1938. Available at <Federal Rules of Civil Procedure | Federal Rules of Civil Procedure | US Law | LII / Legal Information Institute> accessed 9 February 2025.

[14] As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 24, 1998, eff. Dec. 1, 1998; Mar. 27, 2003, eff. Dec. 1, 2003; Apr. 30, 2007, eff. Dec. 1, 2007; Mar. 26, 2009, eff. Dec. 1, 2009. Available at <Rule 23. Class Actions | Federal Rules of Civil Procedure | US Law | LII / Legal Information Institute> accessed 9 February 2025.

defenses of the class"; and (4) representative parties will "fairly and adequately protect the interests of the class. The next requirement is that the action must fit into one of three categories in Rule 23(b)[15]. Most class actions fall under the third category, meaning that the questions common to the class must predominate over any questions that affect only individual class members, and that class treatment must be "superior to other available methods for the fair and efficient adjudication of the controversy."[16] The American form of class action is characterized by its generality, it is not limited at all by the nature of the parties to the dispute or the type of claim. In order to file a class action, it is necessary to request permission from a judge. What is important is whether the claim being filed meets the above-mentioned established conditions of the procedure.

Ad 1) Numerousity. Rule 23 FRCP does not set a specific number of plaintiffs who must be included in a class action. Instead, Rule 23 requires that the group of potential plaintiffs be so large that a consolidated action on the individual claims would be impracticable. This means that the court must be satisfied that it would be impracticable (impracticable because of complexity) for all plaintiffs with their own claims against the same defendant to separately assert their claims in a common action. In fact, the court does not set a specific threshold for how many plaintiffs are needed to meet the class size requirement. Instead, it looks at a number of factors that influence whether consolidation of claims is impracticable. These factors include the ease of finding plaintiffs, the relative size and similarity of the claims, and the geographic distance between the plaintiffs. The number of plaintiffs is, of course, also important. This criterion is typically met when there are at least 20 to 30 plaintiffs, but the specific number may vary depending on the case and the jurisdiction.[17] Class members are not parties to the dispute. They are also not required to be named in the lawsuit.

Ad 2) Commonality. The factual and legal issues for the proceedings must be common to the entire group. It is sufficient for there to be only one such issue (e.g. the issue of the defendant's liability).

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[15] ibid, rule 23(b).

[16] Stöhr, Alexander, 'The Implementation of Collective Redress—A Comparative Approach', *German Law Journal*, Volume 21, Issue 8, December 2020, p. 1610, Available at <https://doi.org/10.1017/glj.2020.95> accessed 17 January 2025.

[17] Available at <https://legalscoops.com/how-many-people-do-you-need-for-a-class-action-lawsuit/ > accessed 9 February 2025.

Ad 3) Typicality. The court decides on the individual claim of the class representative, but the result is essentially applied to the entire class. The claims of the class representative must be sufficiently similar to ensure that the facts proven in the factual circumstances of the case by the class representative are capable of proving the claims of the other class members. Also the case of the class representative must not have elements so unique that the claims of the other class members are significantly stronger or weaker in comparison with this case. All class members will have the same claim, the same legal basis for the claim and the benefits of the same outcome.

Ad 4) Adequacy. The condition of adequate representation has two levels. Firstly, its aim is to ensure that there is no conflict of interest within the group, or rather, whether there is no conflict between the representing member of the group, i.e. the class plaintiff, and the other members of the group. Secondly, it is also necessary to ensure the adequate ability of the group representative, i.e. that he is sufficiently qualified, experienced and able to conduct this type of legal proceedings. The group representative must be able to adequately defend the interests of the entire group. One of the factors for assessing this condition is also the ability of the plaintiff to bear the costs of such proceedings, including any appeal proceedings.

In addition to the above statutory requirements, American courts have drawn up yet another requirement: ascertainability. According to it, a group must be defined in such a way that membership in such a group is ascertainable. This requirement is intended to prevent a vague definition of a group. Sometimes this condition is understood as a concretization of the numerosity requirement, because the impossibility of determining who is a member of a group also makes it impossible to determine the number of its members.

If the judge grants authorization to the class action, he or she will officially appoint a representative lawyer, taking into account not only his or her experience and knowledge, but also the human and financial resources at the lawyer's disposal. At the same time, the court will also order the publication of a summons to all members of the group (in a similar position). The duty of the appointed representative is therefore to make a public summons, but also to individually notify all known persons who come into consideration as members of the given group, including the obligation to provide the relevant information. The summons is intended to inform the persons that the action is being filed in their interest. The summons must also contain instructions on how the members of the group can exclude themselves from the proceedings if they are not interested in participating in the group. This shows that the American model of class action is based on opt-out principle. The opt-out principle means that the outcome of the process affects all damaged parties in the case at hand, even if they did not actively choose to take part in the process.[18]

It is important to mention some notable facts in the context of class actions as a form of collective redress. Punitive damages are available and there is a broad pre-trial discovery phase. According to federal procedure a defendant may be requested to produce documents, answer to written questions and testimony under oath as long as the plaintiff is able to show a plausible factual basis to introduce the claim. In relation to a legal costs and other expenses, a victorious plaintiff can recover attorneys' fees while there is no application of the "loser pays principle."[19] In the United States, business legal representation schemes operate in relation to class action proceedings, primarily through contingency fee agreements. If the lawsuit is successful, the judgment includes a monetary award in favor of the class members or, in complex cases, a judgment may be issued on the relevant merits only (interim judgment). Individual litigation may then continue.

Class action lawsuits are currently under heavy fire not only in the United States, but increasingly in the EU Member States as well. European states argue that this model is more prone to abuse and that in some states it may be unconstitutional or at least incompatible with procedural legal traditions (unaware passivity of a class member is considered as consent to be represented by a representative plaintiff. This may violate the class member's right to be heard by a court, or to dispose with the subject matter in the proceedings).

Despite the above, the concept of class action proceedings has spread also in countries with continental legal systems, including the EU Member States. The emergence of new legal mechanisms based on collective redress is supported primarily by the fact that by uniting the power of a certain group, equality of arms can be established in the legal process. Class actions are typical of a group of persons on the side of the claimants, who, by joining their rights, can

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18 Stöhr, Alexander, 'The Implementation of Collective Redress—A Comparative Approach', *German Law Journal*, Volume 21, Issue 8, December 2020, p. 1617, Available at: <https://doi.org/10.1017/glj.2020.95> accessed 17 January 2025.

19 Ottanelli, Marta, *Private Enforcement of EU Antitrust Law: Proposal for Harmonization*, 2013, p. 14. Available at: <https://www.academia.edu/3639858/Private_Enforcement_of_EU_Antitrust_Law_Proposal_for_Harmonization>.

combine their experiences in one typical proceeding, while at the same time sharing the risk of initiating a lawsuit, gaining greater publicity and a better negotiating position.

2. Recommendation (European Commission 2013/396/EU)

The situation in continental legal system was completely different from development in the USA. The very first signs of collective protection of rights could be observed only in the late 1960s and early 1970s, and even then only in a few countries, with a significantly narrow focus. In Germany and Italy, the initial legal regulation was aimed exclusively at protecting the rights of consumers, but not as part of protecting their rights as the weaker party, but in the interest of preventing the use of unfair contract terms, and therefore only as a mechanism of regulation and not of compensation for damage.

As was mentioned in Introduction of this Thesis, within the area of EU one of the first relevant document dealing with collective redress (also) in relation to infringements of competition law is Recommendation of the European Commission (Commission Recommendation) on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU, 11 June 2013). Recommendation follows up on Green Paper on antitrust damages actions published by the European Commission in 2005, White Paper in 2008, which included policy suggestions on antitrust-specific collective redress and Green Paper on consumer collective redress issued by the European Commission in 2008. Recommendation deals with two aspects of private enforcement of competition law: collective claims for damages and collective claims for injunctions. Due to the significant level of diversity between the laws of Member States, Recommendation aimed to approach injunctive and compensatory collective redress mechanisms in a consistent manner across the European Union. To this end, it contains definitions of important legal terms and instruments and sets out the basic rules for collective claims.

Recommendation defines the concept of collective redress. For the purposes of Recommendation, collective redress means *"(i) a legal mechanism that ensures a possibility to claim cessation of illegal behavior collectively by two or more natural or legal persons or by an entity entitled to bring a representative action (injunctive collective redress); (ii) a legal* *mechanism that ensures a possibility to claim compensation collectively by two or more natural or legal persons claiming to have been harmed in a mass harm situation or by an entity entitled to bring a representative action (compensatory collective redress).”*[20]

According to Recommendation, collective redress actions as a means of collective enforcement of claims in competition law should contribute to the protection of competition. Compensatory collective redress actions should serve as an effective means of compensation for entities that have suffered damage due to a violation of antitrust rules, primarily by allowing them to claim compensation even for damage that is not high in an individual case and would not be economically reasonable to sue for it individually. As Recommendation itself states „*the possibility of joining claims and pursuing them collectively may constitute a better means of access to justice, in particular when the cost of individual actions would deter the harmed individuals from going to court.“*[21] At the same time, in addition to the threat of a public law sanction for violation of antitrust rules in the form of a fine, a new obligation to pay compensation for the damage caused should strengthen "the functioning of the competition rules and discourage agreements or practices that may restrict or distort competition. This would protect not only the individual interests of injured parties, but also their collective interests, and ultimately competition itself. According to Article III, Section 13 Recommendation the Member States should also ensure that *“(...) the party that loses a collective redress action reimburses necessary legal costs borne by the winning party (‘loser pays principle’), subject to the conditions provided for in the relevant national law.”*

Recommendation continues to accept the dividing of law into public and private and points out that damage, as a means of private law enforcement of competition law, should not take the form of a sanction. Since the sanctioning function should be ensured by enforcement through public law means, the European Commission therefore recommends to Member States that the damages awarded should not fulfil a punitive function, it means damages should not include a sanctioning element.

Collective redress can also contribute to increasing legal certainty by avoiding parallel litigation of similar claims. Collective redress should be a means of supporting, but not replacing, individual legal protection. As regards the subjects who should have the right to pursue their

[20] ibid Recommendation (n 8) Art. II Sect. 3 letter a).
[21] Ibid, Recital, par. 9.

claims collectively, Recommendation does not explicitly express this issue, but it can be concluded from the text of its provisions that this right should not be reserved only for consumers but should also apply to other persons - other competitors.

In terms of the claim being brought, Recommendation distinguishes the following types of collective redress actions:

1. actions (claims) for injunctive orders (relief),
2. actions for damages.

From the point of view of claimant, Recommendation distinguishes the following types of collective redress actions:

1. group actions – actions that can be brought jointly by those who claim to have suffered harm;[22]

2. representative actions – Recommendation defines the term representative action as an *„(...) action which is brought by a representative entity, an ad hoc certified entity or a public authority on behalf and in the name of two or more natural or legal persons who claim to be exposed to the risk of suffering harm or to have been harmed in a mass harm situation whereas those persons are not parties to the proceedings;"*[23]

In relation to representative actions, EU recommends that Member States ensure that entities authorized to act as representatives meet certain criteria to ensure that these collective instruments are not abused. Minimum requirements for entities authorized to act as representatives should be as follows:

a) entity should have a non-profit making character;
b) there should be a direct relationship between the main objectives of the entity and the rights granted under Union law that are claimed to have been violated in respect of which the action is brought; and
c) entity should have sufficient capacity in terms of financial resources, human resources, and legal expertise, to represent multiple claimants acting in their best interest.

[22] ibid Recommendation (n 8) Recital, par. 17.
[23] ibid Art. II Sect. 3 letter d).

In addition, or as an alternative, the Member States should empower public authorities to bring representative actions.[24]

In terms of the scope of activity of harmed individuals for the purposes of their representation in representative actions, we distinguish two forms: opt-out and opt-in:

a) opt-in[25] - this option is preferred by Recommendation. These actions include only those persons that have actively chosen to be part of it; the judgment is binding on those who have chosen to be part of it, while all other persons allegedly harmed by the same or similar infringement may claim damages individually.

b) opt-out – in this case, the group consists of all persons belonging to the defined group who claim to have been harmed by the same or similar infringement of the law, unless they actively choose not to be part of it; the judgment is binding on all persons belonging to the defined group, except those who have expressly chosen not to be part of it.

From the perspective of presence a final decision rules a breach of EU law, we distinguish the following types of collective actions:

1. collective follow-on actions - Recommendation defines a collective follow-on action as a collective redress action that is brought after a public authority has adopted a final decision finding that there has been a violation of Union law.[26] If a competent public authority has launched proceedings for a breach of antitrust rules at the time when court proceedings in the matter of collective redress is already underway, the court should not decide contrary to the expected decision of this authority, it means the court trial should be suspended until the public authority has made a decision. Member States should also ensure that in case of follow-on actions, persons who claim to have been harmed cannot be prevented from seeking compensation due to the expiry of limitation or prescription periods sooner than the final decision is ruled by the public authority.[27]

[24] ibid Art. IV Sect. 4-7.
[25] ibid Recommendation (n 8) Art. V, Sect. 21-24.
[26] ibid Recommendation (n 8) Art. II, Sect. 3, letter e).
[27] ibid Art. V, Sect. 33–34

2. collective stand-alone actions – are understand as actions filed without the presence of a final decision issued by a relevant competition authority on a violation of competition law. The claimant must prove that the conditions for compensation damages are met, including the existence of a violation of competition law.

Recommendation further contains principles that concern not only judicial proceedings but also out of court settlements of collective redress, also known as collective alternative dispute resolution.[28] From the perspective of entity deciding on the claim, we can distinguish following types of collective actions:

1. actions decided by the court – collective claims are admissible only if the legal conditions for admissibility of actions are met;

2. actions as a subject to alternative dispute resolution – Recommendation suggests that the parties to the dispute should have the opportunity and be encouraged to settle their dispute consensually or out of court, but such a dispute resolution should not be a mandatory first step before resorting to the courts; the use of such means should depend solely on the will of the parties to the dispute. The Commission also recommends that Member States ensure that the outcome in such cases is confirmed by the courts, in order to ensure the legality of the result.

At the end of this part of research, we can state that Recommendation is focused on the following two principles:
- methods of collective redress must be fair, equitable, timely and not prohibitively expensive;[29]
- there should be procedural safeguards to prevent abuse of collective redress systems, such as the prohibition of punitive damages (i.e. excessive damages), the non-profit nature of entities representing claimants and the prohibition of payment of lawyers' fees dependent on the amount awarded (so-called contingency fee).

Recommendation urged all EU Member States to adopt mechanisms at a national level for both injunctive and compensatory claims in cases where more than one legal or natural person is or has been harmed as a result of a violation of rights arising from Union law.

[28] ibid Recommendation (n 8) Art. V, Sect. 25-28.
[29] Ibid Art. I, Sect. 2

Unfortunately, Recommendation was not well accepted in the EU Member States. Member States generally retained their national mechanisms for collective enforcement of competition law (if such a procedure was even allowed by a particular legislation). Harmonization of legal regulation of collective redress for infringement of competition law was thus not implemented and became a task for the EU authorities in the future.

3. Damages Directive 2014/104/EU

Directive covers compensation for harm caused by infringement of competition law, defined as an infringement of Article 101 or 102 of the Treaty on the Functioning of the European Union (TFEU), or of national competition law.[30] Member States were obliged to bring into force the laws, regulations and administrative provisions necessary to comply with Damages Directive by 27 December 2016.[31] At the outset, it should be emphasized that this Directive did not impose an obligation on Member States to adopt collective redress mechanisms for infringement of competition law (for the purposes of enforcing Articles 101 and 102 TFEU). It is so despite the fact that, according to the aforementioned Recommendation 2013/396/EU, fair competition is one of the priority areas in which collective redress mechanism should be enabled (introduced). However, Damages Directive has nevertheless regulated specific substantive and procedural instruments and rules for filing actions for damages suffered as a result of a breach of competition law provisions, which are applicable not only to actions for damages by individual injured parties, but are also fully applicable to possible proceedings for compensatory claims commenced by several injured parties, whether on the basis of joining the cases voluntarily by the claimants themselves, or by a court decision because they are factually related (so-called group actions).

As to the substantive legal provisions, as well as some procedural rules, the following can be mentioned:

a) Regulation of legal standing (active legitimacy), which is recognized to every person – natural person, legal person, public authority or consumer, who has suffered harm caused by an

[30] ibid Damages Directive (n 9), Art. 1 and 2
[31] ibid Art. 21, Sec. 2

infringement of competition law by an undertaking or by an association of undertakings.[32] This means that the right to claim full compensation for damage against the infringer is recognized to both direct and indirect contracting party (purchaser or its purchaser in the meaning of passing-on damage effect). The explicit legal regulation of this issue can only be welcomed, because it brings a higher degree of legal certainty.

b) Rebuttable legal presumption that a cartel infringement causes harm,[33] which is intended to prevent making the exercise of the right to compensate damage impossible or excessively difficult due to the burden of proof to prove liability for damage. Rebuttable legal presumptions make it easier for the injured party to prove one of the legal requirements for liability for damage;

c) Definition of full compensation for damages as actual loss (*damnum emergens*), loss of profit (*lucrum cessans*) and payment of interest accruing from the time the harm occurred until compensation is paid.[34]

d) Prohibition of excessive compensation for damages in the form of punitive, multiple or other compensation for damages (i. e. full compensation under this Directive shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages)[35], as well as prohibition of multiple liability or absence of liability of the infringer (i. e. to avoid that actions for damages by claimants from different levels in the supply chain lead to a multiple liability or to an absence of liability of the infringer).[36]

e) Court's authority (power) to estimate the quantification of harm is intended to prevent making the exercise of the right to compensate damage impossible or excessively difficult due to the burden of proof for its quantifying. The courts are empowered by this right if it is established that a claimant suffered harm but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available.[37]

[32] ibid Damages Directive (n 9), Art. 1, Sec. 1
[33] ibid Art. 17, Sec. 2
[34] ibid Art. 3, Sec. 2
[35] ibid Art. 3, Sec. 3
[36] ibid Damages Directive (n 9), Art. 15, Sec. 1
[37] ibid Art. 17, Sec. 1

f) Joint and several liability of all violators of competition law. Member States were obliged to ensure that undertakings which have infringed competition law through joint behavior are jointly and severally liable for the harm caused by the infringement of competition law; with the effect that each of those undertakings is bound to compensate for the harm in full, and the injured party has the right to require full compensation from any of them until he has been fully compensated.[38] Exception is to Small Medium Sized Enterprises who are only required to pay for their share of infringement on direct and indirect purchasers[39] as defined in Commission Recommendation 2003/361/EC.[40] From the point of view of purchasers protection, the establishment of joint and several liability of all violators of competition law can be seen as positive. The establishment of several liability would disproportionately burden the injured party with such a burden of proof that it could thwart any chances of success.

g) Matter of extending the limitation period for filing a claim for damages at least up to 5 years with a specific start of its running at the earliest from the day the infringement of competition law ceased and the claimant knows, or can reasonably be expected to know of the behavior and the fact that it constitutes an infringement of competition law, that the infringement of competition law caused harm to it and the identity of the infringer.[41]

Extension of the subjective limitation period for compensation for damage can be seen as an interest in increasing the protection of the rights of the harmed party. The separately resolved issue of the suspension of the limitation period also contributes to protection. As imply from Directive *„(...) a limitation period is suspended or, depending on national law, interrupted, if a competition authority takes action for the purpose of the investigation or its proceedings in respect of an infringement of competition law to which the action for damages relates. The suspension shall end at the earliest one year after the infringement decision has become final or after the proceedings are otherwise terminated.“* [42]

[38] ibid Art. 11, Sec. 1
[39] ibid Art. 11, Sec. 2
[40] Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36.
[41] ibid Damages Directive (n 9), Art. 10, Sec. 2 and 3
[42] ibid Damages Directive (n 9), Art. 10, Sec. 4

h) Rebuttable presumption of passing on the price increase to the indirect purchaser and thus the burden of proof is differently resolved, sometimes burdening the claimant[43] and sometimes the defendant[44]. The burden of proof on a party must be seen in conjunction with its right to access relevant evidence.

i) Disclosure of relevant evidence from the counterparty or a third party under precisely defined conditions.[45] In comparison, it can be stated that such an arrangement is typical in other dispute proceedings only in relation to a third party, not in relation to the counterparty to the dispute. Given the specifics of proving damage caused by a violation of competition law, such a burden on the counterparty to the dispute is justified. Otherwise, situations could arise where the harmed party would not be able to prove its claim for compensation for damage against the infringer. That is why the possible enforcement of the counterparty´s obligation to submit relevant evidence through the imposition of sanctions has been established.

j) Court's authority to impose sanctions on parties and also a third party if they fail to disclose evidence or if they destroy evidence that they were obliged to submit.[46] In terms of their effects, they appear to be practical unless the other party fulfills the editorial obligation.

k) Irrefutability of a violation of competition law, which was established in a final decision of a national competition authority or court, for subsequent decisions on actions for damages.[47]

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[43] According to Damages Directive (n 9), Art. 14, Sec. 1 *„(...) where in an action for damages the existence of a claim for damages or the amount of compensation to be awarded depends on whether, or to what degree, an overcharge was passed on to the claimant, taking into account the commercial practice that price increases are passed on down the supply chain, the burden of proving the existence and scope of such a passing-on shall rest with the claimant, who may reasonably require disclosure from the defendant or from third parties.“*

[44] According to Damages Directive (n 9), Art. 13 *„(...) the defendant in an action for damages can invoke as a defence against a claim for damages the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement of competition law. The burden of proving that the overcharge was passed on shall be on the defendant, who may reasonably require disclosure from the claimant or from third parties.“*

[45] According to Damages Directive (n 9), Art. 5 Sect. 1 *„(...) in proceedings relating to an action for damages in the Union, upon request of a claimant who has presented a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages, national courts are able to order the defendant or a third party to disclose relevant evidence which lies in their control, subject to the conditions set out in this Chapter. Member States shall ensure that national courts are able, upon request of the defendant, to order the claimant or a third party to disclose relevant evidence."*

[46] According to Damages Directive (n 9), Art. 8 Sect. 1 letter a), b) *„(...) national courts are able effectively to impose penalties on parties, third parties and their legal representatives in the event of any of the following:*
(a) their failure or refusal to comply with the disclosure order of any national court;
(b)their destruction of relevant evidence."

[47] According to Damages Directive (n 9), Art. 9 Sect. 1 *„(...) 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."*

When Damages Directive was adopted, it was expected that national courts would become an important player in the enforcement of competition rules. Their greater involvement may have been prevented by the fact that the Directive omitted the issue of legal costs. The amount of legal costs in compare to amount of suffered harm could have caused a so-called "rational apathy" in regard to file claims and start the litigation. Not only consumers, but also small and medium-sized enterprises could have suffered minor damage due to the anti-competitive behavior of other undertakings that did not exceed or were on the same level as the potential legal costs.

As mentioned above, Damages Directive did not harmonize all the issues of competition law in the field of damages. Nevertheless, it can be considered a significant step forward in the area of private enforcement of competition law. At the same time, the Directive became an important milestone for further legislative activity of EU, including collective redress regulation.

4. Call for harmonization of group/representative actions for the enforcement of competition law on the EU level

Damages Directive did not require Member States to introduce collective redress mechanisms for the enforcement of Articles 101 and 102 TFEU.[48] Omitting this system from the Directive had alleged reasons as follows:

• Firstly, inclusion of collective redress actions, being inherently controversial due to the so-called American problems of abusive litigation, could jeopardize the very adoption of the Directive;

• Secondly, it was considered that availability of collective actions could raise uncertainties for leniency applicants, and that they would refrain from coming forward if there was even a minimal possibility of being exposed to private claims from all victims;

• And lastly, Damages Directive primarily aimed to address the technical issues on damages claims, such as limitation periods, joint and several liability and others.[49]

[48] ibid Damages Directive (n 9), Recital 13.

[49] Juška, Žygimantas: The effectiveness of antitrust collective litigation in the European Union: a study of the principle of full compensation. *International Review of Intellectual Property and Competition Law*, Volume 49, January 2018, p. 68–69. Available at <https://doi.org/10.1007/s40319-017-0644-4>, accessed 21 February 2025

At this point, it is necessary to identify entities that are considered as possible claimants in the event of a breach of competition law. We can distinguish between consumers, small and medium-sized enterprises (hereinafter referred to as “SMEs”) and large enterprises. With respect to Damages Directive, in case of increasing the price of electricity because of the energy cartel, a powerful steel company as a large enterprise has the highest chance of being successful in obtaining compensation for harm (lost profits due to higher electricity bills for production and operation of enterprise). I even argue that if there is suspicion of concerted practice by two or more energy companies, a large steel enterprise has the best chance of succeeding in complaint addressed to a National Competition Authority (hereinafter referred to as “NCA”) or the European Commission. It is important to say that there is no legal obligation for NCA to initiate an investigation. NCA and EC have the right to investigate the complaint depending on their workload.

The situation is very different for SMEs and consumers. Increasing the price of electricity may have a significant impact on SMEs. For example, SME will not expand its business by hiring more employees or creating a new subsidiary or will not buy a new machine. It is also not always possible to pass on the increased price of electricity on customers by increasing the prices of their own goods. SMEs cannot do so if others, especially large players in the relevant market, do not take such a step.

SMEs can request a quote for cheaper electricity from other energy suppliers. Problem arises when it comes to the fact that it has received an offer with the same increased price everywhere. I argue that it is practically unrealistic for SME to file individual stand-alone action for damages upon Damages Directive. There are so many obstacles for SME to assert a claim, namely legal costs, the risk of not proving a cartel agreement, the difficulty of quantifying the damage, a legal dispute lasting several years, the risk of paying the defendant's attorney's fees if the burden of proof is not born (so-called “loser pays” rule).

I argue that even in the case of follow-on actions, for SMEs there is a very high risk of failure to obtain compensation. There can emerge such obstacles as protracted litigation, lack of funds for legal costs or the risk of a "fatigue" error on the part of the SME's legal representative in contrary to large law firm representing the defendant. SME should also take into account that there can be a risk of the national court's attempt to adopt such legal interpretation (of competition or other substance law or procedural rules) that will protect national champions in the energy sector not only from losing in a particular litigation, but also from the threat of future claims from other SMEs. It should be also aware that in case of accepting commitments from the infringer by NCA[50] the SME will have to independently prove that a specific concerted practice by specific undertakings caused the specific damage.

And for individual consumers, asserting a claim for damages for a violation of competition law by energy oligopolies is just a bare illusion. There are several reasons for this. Except of the rational apathy imply from the fact of small damage consists of a just tens or hundreds of euros there is also risk of a long-term dispute with an uncertain outcome (from my experience as an attorney, I can estimate that even with damage of up to 3,000 Eur, a consumer would rather accept the loss, disappointed with the judicial system, than risk several years of legal proceedings - in such a case the attorney´s fees of own legal representative are unbearable). Moreover, the chance that the NCA or the European Commission will deal with the complaint of an individual consumer or SME is (in my a bit experienced opinion) very low.

For the largest group of victims of competition law infringements (SMEs and consumers), collective claims for damages or for injunctions would be the most appropriate form of solution. Since both Recommendation and Damages Directive were unsuccessful in this achievement (for several reasons), it has been necessary to find other way to succeed rather than accepting that the legal system fails to protect claims arising from Articles 101 and 102 TFEU (and their equivalents at national level).

We can consider two options as compromises in finding solution for SMEs and consumers. At the EU level, it is Directive 2020/1828/EU of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (see below chapter III Thesis). And at the national level, there are various specific forms of transposition Damages Directive (for example, German and Portugal legislation explicitly extends its application to other claims based on infringements of competition law, such as declaratory actions, injunctions and interim measures)[51] and also specific forms of implementation of the aforementioned RAD (for

[50] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 001, 04/01/2003, Art. 9, Sec. 1

[51] COMMISSION STAFF WORKING DOCUMENT on the implementation of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European

example in Germany was adopted in gold-plating manner), both in connection with traditional institutes of national law (see below chapter IV Thesis).

As will be discussed, none of the outlined compromise solutions provide an ideal concept for all parties involved. However, either by themselves or because of their synergistic effect, they are a gateway for future progress of collective redress in the field of competition law and will therefore be subject to further analysis.

III. Representative Actions Directive (EU) 2020/1828

1. Introductory remarks - objectives of Directive (EU) 2020/1828.

Since only a small number of EU Member States have implemented the principles set out in Recommendation 2013/396/EU, the Inception Impact Assessment of the European Commission within the framework of the initiative "A New Deal for Consumers - revision of the Injunctions Directive" of 31 October 2017 [52] suggested, as one of four alternatives, a concept for European legislation that would uniformly regulate collective redress.

Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests[53] empowered a qualified entity (a consumer association or a public organization responsible for consumer protection) to file a claim for an injunction in the Member State where the infringement occurred, in the event of an infringement of EU law which adversely affected the collective interests of consumers. An injunction could have been sought to impose an obligation to refrain from an action which harmed the collective interests of consumers. However, the Injunctions Directive did not allow consumers to claim compensation for the damage suffered.

Union, SWD(2020) 338 final, Brussels, 14.12.2020, p. 5, available at: <05c4fe49-1ba7-40f9-80da-dd42e578ba7d_en>

[52] INCEPTION IMPACT ASSESSMENT of European Commission, Ref. Ares (2017)5324969, 31.10.2017, Available at: <https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-5324969_en>.

[53] Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests [2009] OJ L 110, p. 30–36 (Injunctions Directive).

Proposal for a Directive (EU) 2020/1828 has been followed up to the REFIT Fitness Check of EU consumer and marketing law, published on 23 May 2017[54], which covered also the Injunctions Directive, and to the Commission Report of 25 January 2018 on the implementation of Commission Recommendation 2013/396/EU[55].

The 2017 EC Fitness Check shows that, whilst Injunctions Directive being a crucial enforcement mechanism, the injunction procedure is not being used to its full potential across the EU, mainly due to cost, length and lack of direct effect of injunction procedures on the harmed consumers.

These evaluations demonstrated that the risk of infringements of Union law affecting the collective interests of consumers is increasing due to economic globalization and digitalization. Traders that infringe EU law may affect thousands or even millions of consumers with the same misleading advertisement or unfair standard contract terms in a number of different economic sectors. In light of increasing cross-border trade and EU-wide commercial strategies, these infringements increasingly also affect consumers in more than one Member State. Moreover, the Collective Redress Report showed that several Member States still do not provide for collective compensatory redress mechanisms tailored for mass harm situations.[56]

In its 2017 Recommendation to the Council and the Commission following the inquiry into emission measurements in the automotive sector[57], even the European Parliament called on the Commission to propose legislation on a harmonized system of collective redress for EU consumers, based on best practices within and outside the EU. This would end the current situation where consumers lack protection in many Member States which do not allow them to enforce their rights collectively.[58]

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[54] The Fitness Check covered the Unfair Contract Terms Directive 93/13/EEC, Consumer Sales and Guarantees Directive 1999/44/EC, Price Indication Directive 98/6/EC, Unfair Commercial Practices Directive 2005/29/EC and Injunctions Directive 2009/22/EC. See for results SWD (2017) 208 final and SWD (2017) 209 final of 23.5.2017, available at: <http://ec.europa.eu/newsroom/just/item detail.cfm?item_id=59332>.

[55] COM(2018) 40 final, available at: <report-implementation-collective-redress-mechanisms-2018_CC999AB7-9C95-14BA-0611270C724DE1F6_49502 (1).pdf>.

[56] Proposal for a Directive (EU) 2020/1828, 11.4.2018, COM(2018) 184 final, 2018/0089 (COD), p. 1. Available at: <COM_COM(2018)0184_EN.pdf>.

[57] 2016/2908(RSP). Available at: <European Parliament recommendation of 4 April 2017 to the Council and the Commission following the inquiry into emission measurements in the automotive sector (2016/2908(RSP)) - Publications Office of the EU>.

[58] ibid 56, p. 2.

The reason for the need to improve the legal basis established by Injunction Directive was therefore the importance of effective enforcement of EU rules for Europeans, as it affects their daily lives. This justifies the need for a strong, efficient and effective enforcement system to ensure that Member States fully apply, implement and enforce EU law and provide citizens with adequate redress.

Proposal for a Directive (EU) 2020/1828 concerned about those identified problems that hindered the effective and efficient application of Injunction Directive. Specifically, it is related to the extension of the scope of the proposed Directive, the establishment of minimum criteria relating to good repute that must be met by entities entitled to assert representative actions, the need to ensure appropriate measures to prevent the legal costs becoming a financial obstacle to file representative actions, the promotion of collective out-of-court settlements and establishing the irrefutability of evidence or a rebuttable presumption of a final decision declaring that an undertaking has infringed consumers´ right in a collective follow-on action, depending on whether both actions are filed within the same Member State or in different Member States. The proposal also concerned about enacting interim or final measures to stop the trader's practice and eliminate the continuing effects of the infringement, which may include orders for redress (e.g. imposing an obligation on the trader to provide compensation for damage, repair, replacement, discount, termination of the contract or refund of the amount paid) or declaratory decisions, on the basis of which the trader's liability towards consumers who have been harmed is recognized, which can be directly relied on in subsequent actions for the exercise of the right to redress.

Proposal for Directive (EU) 2020/1828 only covers certain key aspects necessary to establish a framework, which needs to be supplemented by specific procedural rules at national level. Although Directive does not oblige EU Member States to establish collective redress mechanisms for the purposes of enforcing Articles 101 and 102 TFEU, it does not exclude this possibility.

2. Systematic order of Directive (EU) 2020/1828 and utmost important factual points.

First chapter is devoted to the subject matter of the regulation and purpose (Article 1), the scope (Article 2) and the definition of terms (Article 3). The second chapter is devoted to representative actions and is divided in order to answer relevant questions, such as qualified entities (Article 4), information and monitoring of qualified entities (Article 5), bringing of cross-border representative actions (Article 6), classification of representative actions in accordance to claim specific measures and legal standing regulation of qualified entities (Article 7), injunctive measures (Article 8), redress measures (Article 9), funding of representative actions for redress measures (Article 10), redress settlements (Article 11), allocation of costs of a representative action for redress measures (Article 12), information on representative actions (Article 13), electronic databases (Article 14), Effects of final decisions (Article 15), limitation periods (Article 16), procedural expediency (Article 17), disclosure of evidence (Article 18), Penalties (Article 19) and assistance for qualified entities (Article 20). And finally, the third chapter is traditionally devoted to the final provisions, divided into repeal (Article 21), transitional provisions (Article 22), monitoring and evaluation (Article 23), transposition (Article 24), entry into force (Article 25) and addressees (Article 26).

Article 1 of RAD is devoted to the subject matter of regulation. This is to lay down rules enabling qualified entities to bring representative actions for the protection of collective interests of consumers while ensuring appropriate safeguards for traders to avoid abusive litigation that would unjustifiably hinder the ability of businesses to operate in the internal market.[59] As it emphasizes, the Directive does not prevent Member States from adopting or maintaining in force provisions providing qualified entities or other interested parties with other procedural tools for bringing actions for the protection of the collective interests of consumers at national level.

The scope of the Directive, according to **Article 2**, covers representative actions for infringements of the provisions of Union law listed in Annex I by traders, where such infringements harm or are likely to harm the collective interests of consumers. It applies to both domestic and cross-border infringements, regardless of whether the infringement has ceased before the representative action is brought or before the action was concluded. In view of the wording of Annex 1, the scope of the Directive has been extended compared to the repealed Injunctions Directive, from 15 EU legal acts to 66. The Directive includes more sectors, such

[59] Directive 2020/1828/EU of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC Union [2020] OJ L 409 /1, [Directive (EU) 2020/1828 or Representative Actions Directive], Recital, par. 10.

as general and specific product safety, that were missing in the Commission proposal. It goes beyond consumer law stricto sensu and encompasses, for example, data protection. [60]

Member States were explicitly empowered to goldplate RAD itself and make provisions of this Directive applicable to areas additional to those falling within its scope. [61] Therefore, the EU has decided not to adopt a general rule that would cover protection against infringement in all areas of consumer law.

Article 3 of the Directive contains definitions of the most important concepts such as consumer, trader, collective interests of consumers, representative action, practices and final decision.

Articles 4 to 6 and 10 can be considered one of the most important articles of the Directive, as it regulates the entities entitled to bring an action in representation and their funding.

According to the definition of Article 3, Section 4 RAD „(…) a qualified entity means any organization 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;" In the case of representative actions, these qualified entities and not the consumers themselves are parties to the trial. Waiving the right of consumers themselves to seek collective redress upon the Directive implies a certain demeaning approach towards consumers and their ability to defend themselves effectively.

Directive justifies the "qualified entity" model for bringing representative actions on the grounds of the need to solve the presumed lack of material and time capacity on the side of consumers. Qualified entities should guarantee sufficient legal knowledge, the ability to finance the dispute and manage the time-consuming nature of the case. This approach is intended to achieve a balance between consumers and large undertakings violating consumer's rights.

In Injunction Directive, the designation criteria for qualified entities fell entirely into the competence of the Member States. Now, the entities must be a legal person constituted by Member State's law, demonstrate 12 months of activity in protecting consumers' interest prior

[60] Hornkohl, Lena, 'Up- and Downsides of the New EU Directive on Representative Actions for the Protection of the Collective Interests of Consumers—Comments on Key Aspects', Journal of European Consumer and Market Law, Volume 10, Issue 5, p. 5, February 2021, Available at SSRN: <https://ssrn.com/abstract=3838586>

[61] ibid Representative Actions Directive (n 59), Recital, par. 18.

to their request to be appointed as a qualified entity, have a non-profit character and ensure they are independent of third parties whose economic interests oppose the consumer interest.[62] Moreover, Article 10 regulates financing of the entity entitled to bring an action. The entity must provide information not only on the source of the funds it uses to support the proceedings in the action, but also on the source of the funds it uses for its activities in general. From the title Article 10 implies that the information obligation is only linked to an action seeking an order for redress under Article 9. That means, not in an action seeking an order to cease or prohibit practices that infringe EU law or to determine that practices infringe law. It is questionable whether there is a legitimate reason for such a different approach.

From the perspective of transparency, it can be seen as positive that qualified entities must meet certain qualification requirements. However, the fact that defendant companies can directly challenge the fulfilment of these requirements in the proceedings can be seen as rather negative. Such a possibility is also in conflict with the Commission Proposal. The recognition of this right can be seen in part as a political demand raised at the initiative of large companies and enterprises.

The question of whether qualified entities meet the qualification criteria may become a very important matter of evidence during the litigation. It can be expected that proving the right to bring an action and participate in the legal proceedings will take several months or even years (including appeal proceedings). It is very likely that the defending traders will consider these possible objections as one of the important procedural arguments for the dismissal of the action.

Article 4 does not clearly state whether the criteria that eligible entities will have to meet are a closed calculation or whether Member States will be able to set additional criteria in their national law. However, we believe that any additional criteria set by a Member State must not hinder the achievement of the objectives of the Directive and must be non-discriminatory. Article 6 ensures mutual recognition of the legal standing of qualified entities entered in publicly available lists of Member States for bringing of cross-border representative actions.

Articles 7 to 9 set out the types of representative actions that qualified entities may bring before national courts or administrative authorities. According to Articles 1, Section 2, 4 and 7,

[62] ibid Hornkohl (n 60), p. 8

Member States must ensure that qualified entities now are entitled to seek both injunction and redress. The qualified entity can choose any of the procedural tool. [63] The Directive leaves it to the Member States to either integrate the procedural mechanism for representative actions required by this Directive as part of an existing or as part of a new procedural mechanism for collective injunctive measures or redress measures or as a distinct procedural mechanism. [64]

First category consists of representative actions seeking an injunction to stop or prohibit practices that infringe EU law or to declare that practices are infringing. Injunctions may take the form of interim measures or final decisions declaring practices to be infringing. For interim measures, it is sufficient that the practice can be assessed as violating consumer rights. For final measures, it is necessary to prove the violation of consumer rights by evidence. According to Article 8 (2), the Member States have a discretion to include final measures according to their national law that (i) declare that a given practice constitutes an infringement, in cases where that practice ceased before the representative actions had been brought, (ii) oblige the publication of the decision on the measure in full or in part, or (iii) an obligation to publish a corrective statement. In these representative actions, qualified entities do not need to have a mandate from the consumers concerned, to prove the damage suffered or the fault of the trader.

Second category of actions are representative actions in order to eliminate the continuing effects of an infringement. According to Article 9, qualified entities should be entitled to bring representative actions for requiring the trader to provide, as appropriate, compensation for damages, repair, replacement, discount, termination of the contractual relationship or reimbursement of the amount paid. Directive explicitly refrain from imposing punitive damages.[65] On the other hand non-material damage, as for instance regulated in Article 82 (1) GDPR,[66] comes into consideration assuming the extension of the scope of application of the Directive by the national legislator. The quantification of non-material damage itself will be a task that judicial practice will have to deal with.

[63] ibid Representative Actions Directive (n 59), Art. 1, Sec. 3.
[64] ibid Art. 1, Sec. 2, also Recital, par. 11.
[65] ibid Recital, par. 10 and 42.
[66] REGULATION (EU) 2016/679 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC [2016] OJ L 119 /1, (General Data Protection Regulation, also GDPR).

Directive also obliges the Member States to ensure that a redress measure entitles consumers represented in the action to profit from the remedy provided by that redress measure without the need to file a separate, individual action.[67] Likewise, Directive calls on the Member States to set out rules on the destination of outstanding redress funds that individual consumers do not recover.[68] Member States are recommend to direct the outstanding funds to consumer organisations.

Member States must allow to assert redress actions, which consumers directly can profit from, and which do not include representative actions seeking for injunctive measures. Furthermore, Member States must ensure that qualified entities are able to bring representative redress action without it being necessary for a court or administrative authority to have previously established an infringement as referred to in Article 2 (1) in separate proceedings. [69] This option will speed up the proceedings and make it effective.

Consumers should not have procedural obligations within the representative action. Member states can grant them certain rights, such as access to the file, but they are excluded from the right to be a claimant party or interfere with the procedural decisions taken by the qualified entities.[70] The consumers concerned by a representative action shall be entitled to benefit from both injunction and redress.[71] In the case of injunctive measures, the benefit would be the cessation or prohibition of a practice that constitutes an infringement; in case of redress measures, the benefit should come in the form of remedies.[72]

Crucial issue remains whether consumers should be required to express their will to be represented by a qualified entity. This fact is essential for establishing certain rules of the legal proceedings on the claim asserted, as well as for its enforcement. In accordance to Directive for injunctive measures, individual consumers shall not be required to express their wish to be represented by that qualified entity (to opt-in).[73] Qualified entity by itself brings the action for injunction on behalf of all consumers harmed by the infringement (opt-out). This also applies

[67] ibid Representative Actions Directive (n 59), Art. 7, Sec. 6, also Art. 9, Sec. 6.
[68] ibid Article 9, Sec. 7.
[69] ibid Article 9, Sec. 8.
[70] ibid Recital, par. 36.
[71] ibid Article 7, Sec. 6.
[72] ibid Recital, par. 37.
[73] ibid Representative Actions Directive (n 59), Art. 8, Sec. 3.

to declaratory actions where Member States have decided to use them in addition to or instead of injunctions.

On the authority of the Directive for redress measures, Member States can provide an opt-in mechanism, an opt-out mechanism, or a combination of the two.[74] Member States shall lay down rules on how and at what stage of the procedure individual consumers may, expressly or tacitly, within a reasonable period of time express their will to be represented by a qualified entity in a representative action procedure and to be bound by its outcome. It takes into account the different approaches between opt-in and opt-out mechanisms across the EU Member States.

According to Directive, only where the consumers harmed by the infringement do not habitually reside in the EU Member State where the qualified entity files the representative action for redress measures, applies an opt-in mechanism.[75] Otherwise, concerning how consumers have to act in both opt-in and opt-out systems to express their respective wishes, Article 9 (2) allows tacit or explicit reactions of consumers. Recital 43 falsely only mentions that consumers have to act in both opt-in and opt-out systems explicitly. Article 9 (2) clearly wants to grant the possibility, outside of non-habitual resident consumers, to allow also tacit expressions. Article 9(4) also stresses this possibility.[76]

Depending on the stage of the proceedings at which consumers must exercise their right to opt-in, Article 9 (2) does not preclude the possibility that some consumers may have to join before bringing a representative redress action in opt-in legal systems, while other consumers have a possibility to opt-in later, after the action has been brought. [77]

For both opt-in and opt-out redress representative actions, the qualified entity needs to provide sufficient information about the consumers concerned by the representative action when bringing the action.[78] This does not require the qualified entity to individually identify every consumer concerned by the representative action when bringing the claim.[79] Information on the consumer should instead lead to the court or authority to determine whether it has jurisdiction

[74] ibid Recital, par. 43.
[75] ibid Article 9, Sec. 3.
[76] ibid Hornkohl (n 60), p. 16
[77] ibid Representative Actions Directive (n 59), Recital, par. 44.
[78] ibid Article 7, Sec. 2.
[79] ibid Recital, par. 49.

or which law applies.[80] A description of the group of consumers affected by the infringement at the time of bringing the representative action is sufficient.[81] This is acceptable, as other consumers have the option to opt-in or out later.

Moreover, Commission proposal of Representation Actions Directive expressly incorporated the possibility that the court or administrative authority could ask the infringing trader to provide relevant information on the consumers' identity.[82] Although the text has not been transposed into the final Directive, qualified entities may use the disclosure right under Article 18 to obtain the necessary information from the trader.

Likewise, information requirements of **Article 13** and databases foreseen in Article 14 will allow consumers to be notified about ongoing and closed proceedings. Article 13(1) obliges the Member States to adopt rules which regulate the process of publishing information by qualified entities about representative actions on their websites. Article 13(2) also requires Member States to bring up the rules that ensure that consumers will obtain information about the possibility to opt-in or out under Article 9 (2). Article 13 (3) also sets out conditions when the court or administrative authority can require the trader infringing legal provisions to inform the consumers concerned, at its own expense, about any final decision or settlement issued based on the representative action (so not only redress). Member States may adopt rules in which cases qualified entities must first request traders to provide information.

However, Article 9 (6) and (7) first sentence and Recital 43 and 47 also signify that an opt-in after a decision has been made should be possible. If a Member State adopts such rules, consumers are not obliged to express their intent to be represented by the qualified entity during the proceedings. According to Article 9 (7), Member States may adopt legal conditions concerning time limits under which individuals may benefit from redress. Accordingly, Article 9 (5) stipulates that a redress measure shall at least describe the group of consumers entitled to benefit from this remedy.

Articles 9 (5) to (7) are relevant beyond and bring added value for consumers. Neither a qualified entity nor the court or authority deciding might be able to identify each purchaser as

[80] ibid Recital, par. 34.
[81] ibid Recital, par. 49.
[82] ibid Commission Proposal (n 56), Recital, par. 20.

a victim of anti-competitive practice with whom there is no lasting or no business relationship yet. Regardless of being an opt-in or opt-out redress mechanism and for the consumer being identified explicitly in the decision or only on the group level, in designated time limits redress measures entitle consumers to benefit from the decision without the need to file a separate action. In a certain period of time consumers should be allowed to benefit from the redress measure.[83]

Even if redress measures would only identify a group of consumers, according to Recital 50 of the Directive, these should contain instructions on what specific steps should be taken by traders and consumers to implement the remedies. These instructions should also include requirements that consumers must comply with, such as notifying themselves to an authorized entity that has been empowered by implementing the redress measure. The Directive does not contain precise rules on how such a procedure should look like. Nor does it specify how exactly consumers should prove that they are entitled to benefit from the redress measures. Member States have a "margin of discretion" in this regard, provided that the procedure set does not hinder the effective functioning of representative actions by harmed consumers.

In accordance to **Article 15** Directive, which regulates the effect of final decisions, all parties can use a final decision concerning the existence of an infringement of the law as evidence seeking redress against the same trader for the same practice before national courts or administrative authorities. Opposite to the Commission proposal, the Directive entails no recourse to the degree of the evidential value of such final decisions. The decision is not binding, and it is arguable whether it creates at least *prima facie* evidence. It is for the Member States to decide who need to take the independence of the judiciary and the free evaluation of evidence into account.[84] Directive itself does not establish any rebuttable or irrebuttable presumptions.[85]

Article 16, which, in connection with the filing of a representative action seeking an injunction to cease or prohibit practices that infringe EU law or to declare that practices infringe law, provides for the suspension or interruption of the limitation periods for filing an action for redress, undoubtedly aims to protect the injured consumer. It means that pending representative

[83] ibid Hornkohl (n 60), p. 18.
[84] ibid Representative Actions Directive (n 59), Recital, par. 64.
[85] In the context of the decision-making process, we can also mention **Article 11** which regulates the conditions for the settlement of the dispute. This provision concerns only representative actions for redress measures.

redress action should suspend or interrupt applicable limitation periods regarding the consumers concerned by that representative action.[86] Provision in question has a wide scope, as it suspends or interrupts all individual actions from all consumers concerned, regardless of the redress remedies applied in the ongoing representative action.

Procedural expediency enshrined in **Article 17** is an expression of the principle of procedural economy, which has long been a central principle of virtually every civil proceedings.

Establishment of an editorial and information obligation is in many proceedings the only possible basis for proving the facts. The requirement in **Article 18** of the Directive is therefore fully justified.

Article 19 does not distinguish between final decisions depending on the form of representative actions. Requirement contained in Article 19 is fully covered by the legal regime of enforcement proceedings. This is valid also with regard to the enforcement of the obligation to refrain from practices that are in breach of Union law. Since this is a case of non-monetary performance, fines up to the statutory maximum amount may be imposed as a means of enforcement.

Article 20 requires Member States to take the necessary measures to ensure that the costs of proceedings relating to representative actions do not constitute a financial obstacle preventing qualified entities from effectively exercising their right to bring representative action. Examples include limiting court or administrative fees, providing access to legal aid for qualified entities or providing public funding to qualified entities for this purpose.

How certain Member States decided to transpose RAD, or rather its most important provisions as were described above into their national law will be a subject of the next chapter. In it, we will review original solutions, especially in Germany and Portugal, which have potential to be beneficial in the legal field of collective claims arising from infringements of competition law.

[86] ibid Representative Actions Directive (n 59), Article 16, Sec. 2.

IV. Transposition of Directive (EU) 2020/1828 in the relevant EU Member States

Before we introduce German legislation and the legislation of other relevant countries, it is appropriate to mention the study called "Ashurst Report"[87], which was carried out on the basis of a request from the EU Commission on the state of collective enforcement of rights in the context of competition. According to this report, there are several forms and models of collective enforcement of rights in the EU Member States, which could also lead to compensation for damages. The study defines the following types of collective claims (group litigation):

a) Public interest litigation (for example in Germany):

Represents a civil procedure that is not conducted on behalf of any identified individuals but rather for the benefit of public interest at large. For this reason, in practice, the rule is that the awarded compensation for damage is spent on public benefit purposes or is a direct source of income for the state budget. Specific signs: damage compensation, by public authority, identified or unidentified individuals, income of the state, more consumers than competitors.

b) Class action (originally from the USA):

It is a dispute in which one party, or a group of parties, file a claim as representatives on behalf of members of the group who are not individualized. The court's decision is binding on all members belonging to the group, except for those who opt out of the proceedings. The compensation for damage is determined by a single amount, to which individual members of the group are entitled in proportion. Specific signs: damage compensation, by individual/representative body, unidentified individuals/opt out, income for the class (then individuals), as consumers as competitors.

c) Collective claim (for example in Portugal):

[87] European Commission: Ashurst (BE) and Directorate-General for Competition, Study on the conditions of claims for damages in case of infringement of EC competition rules – Comparative and economics reports, Directorate-General for Competition, 2004, Available at: <https://op.europa.eu/en/publication-detail/-/publication/38de282a-fdda-4f30-91be-2a2ef2019a59>.

It is a solution that roughly corresponds to a class action; in this case, a single plaintiff files a lawsuit on behalf of the entitled members of the group. They may or may not be specifically identified. In this case, compensation is also determined by a single monetary amount. Specific signs: damage compensation, by individual/representative body, identified/identifiable individuals/opt out, income for the class (then individuals), as consumers as competitors.

d) Representative claim (for example based on Representative Actions Directive):

It is an action brought by a single party (usually a private association) on behalf of individually identified or identifiable, jointly interested persons. Because the members of the group can be identified, compensation for damages is not awarded in a single amount, but in favor of the individually entitled persons. Specific signs: Redress measures (including damage compensation), by representative body, identified/identifiable individuals/opt in/opt out, income for the individuals, only consumers – if gold plated as in Germany – also under competition law.

e) Joint action:

It means that a lawsuit based on a common subject matters (for example same defendant, damages resulting from the same facts) is filed jointly by several persons representing a common claim, each of whom appears in the process separately and acts in his or her own name. For this reason, the court decides individually on each asserted right in one judgment. Specific signs: damage compensation, by identified individuals/no opt system, income for the individuals, as consumers as competitors. (hereinafter referred to as „Joint action“).

f) Assignment of claims (for example in Germany – see CoJ judgement in case C-253/23, ASG 2, 2025, ECLI:EU:C:2025:40):

Allows third party not involved in the underlying dispute to independently exercise rights to compensation for damage previously suffered by several persons, based on the assignment of claims for compensation for damage (legal succession). Specific signs: damage compensation, by identified individuals/no opt system, income for the individuals, as consumers as competitors. (hereinafter referred to as „Assignment of claims“).[88]

1. Germany

Basic legal framework for the collective enforcement of rights in the field of competition law in Germany is represented by the following legal regulations:

1. Act against Restraints of Competition, Gesetz gegen Wettbewerbsbeschränkungen – GWB (BGBl. I S. 1081 No. 1/1957, New announcement from June 26, 2013, BGBl. I S. 1750), (hereinafter referred to as „ARC“).

2. Injunctions Act - Gesetz über Unterlassungsklagen bei Verbraucherrechts- und anderen Verstößen (Unterlassungsklagengesetz - UKlaG) (BGBI. I S. 3422, 4346), date of issue 26.11.2001 (hereinafter referred to as „Injunctions Act“).

3. Unfair Competition Act, Gesetz gegen den unlauteren Wettbewerb – UWG (New announcement from March 3, 2010, BGBl. I S. 254), (hereinafter referred to as „Unfair Competition Act“).

4. Model Declaratory Proceedings (Gesetz zur Einführung einer zivilprozessualen Musterfeststellungsklage - MuFKlaG) (BGBl. I S. 1151 No. 26/2018).

5. Consumer Rights Enforcement Act (Verbraucherrechtedurchsetzungsgesetz - Gesetz zur gebündelten Durchsetzung von Verbraucherrechten – VDuG) (BGBl. I No. 272/2023) transposes the EU Directive on representative actions (EU Directive 2020/1828) into German civil procedural law (hereinafter referred to as „CREA“).

Representative Actions Directive (RAD), which was transposed by CREA, has now completed the range of possible collective actions in Germany. The following actions are therefore possible:

[88] ibid Ashurst Report (n 87), p. 43

a) Action for injunctive relief (under the Injunctions Act, Section 8 Unfair Competition Act and Section 33(4) ARC),

b) Action for disgorgement of commercial benefits (under the Section 10 Unfair Competition Act and Section 34a ARC),

c) Model declaratory action (now also included in the CREA),

d) Redress action (under CREA).[89]

Of course, other types of collective actions are also possible, such as the aforementioned Joint action and Assignment of claims. In particular, Assignment of claims will be assessed in terms of practical applicability alongside other types of collective actions in the field of competition law. According to the desired outcome we recognize the following collective actions in the field of competition law: injunctions, disgorgement of benefits, model declarations, and redress actions.

A. Injunctions:

Competition law violations do not fall under the scope of Injunctions Act. In principle, the scope of application laid down in Article 2 (2) Injunctions Act has been extended to reflect Annex I RAD. Although the consumer protection laws mentioned are not exhaustive, competition law is not covered. For competition law violations, Article 33 (4) ARC remains the relevant dedicated *lex specialis*.[90]

Representative injunctions, as regulated in Article 33 (4) ARC are considered as a form of popular action. This action concerns fundamental interests of society - in this case, violations of competition law - which is actually a task of the state and is considered worthy of protection by general public opinion. This action can be brought on behalf of a wider circle of harmed persons by a professional association or certain qualified organization (for example an organization focused on consumer protection), it means an organization or a state-appointed entity. The injured ones are therefore not represented by one of them, but by a qualified entity. Opt-in or opt-out is not necessary. Association that files the lawsuit does not represent the

[89] Hornkohl, Lena: Collective Actions for Competition Law Violations and DMA Infringements Following the Transposition of the Representative Action Directive (Germany), *Journal of European Competition Law & Practice*, Volume 15, Issue 5, July 2024, p. 311, Available at: <https://doi.org/10.1093/jeclap/lpae008. >

[90] ibid Hornkohl, Lena (n 89), p. 312

individual interests of its members, but the public interest in enforcing an objective right. The association as such may not be affected by the defendant's actions. The purpose of an action for injunction is not to remedy the harm (compensation for damages) caused to the weaker party, but to prevent a certain action by the infringer.

German law is based on the premise that competition law also serves to protect consumers. Since infringements of competition law often also affect consumers or small and medium-sized enterprises (SMEs), it makes sense to call also consumer associations as qualified entities for collective protection of rights in competition law.

B. Disgorgement of benefits

Associations authorized to file representative injunctions under Article 33 (4) ARC are also empowered to initiate an action for disgorgement of benefits in the event of competition law violations under Article 34a ARC.[91] Under certain conditions, selected qualified entities can demand that the financial benefit gained through cartel agreement must be transferred to the state budget. This is a procedure whose purpose is to seize the illegally obtained financial advantage (Gewinnabschöpfung). This procedure is applied mostly in the case of minor damages caused to many harmed individuals and the risk of higher costs would be incomparable to the damage incurred. This is also the reason why the persons affected in such cases generally waive their right to assert the claim in court. Therefore, in 2005, German legislator introduced a model of collective law enforcement in public interest in the field of cartel and competition law that allows the unfairly obtained profit to be disgorged from the defendant (Gewinnabschöpfungsanspruch). If a company intentionally violates the rules of competition or cartel law, the resulting profit of the harmed party can be disgorged and transferred to the public budget. Such a lawsuit is, among others, authorized to be filed not only by consumer protection organizations but also by chambers of industry and commerce or other associations representing the interests of traders and self-employed persons.

C. Model declaratory action

[91] ibid Hornkohl, Lena (n 89), p. 313

In connection with the Volkswagen emissions affair, Germany adopted the model declaratory action in 2018.[92] RAD Implementing Act now places model declaratory actions alongside redress actions in CREA; both types of action can be combined. Under the model declaratory action, consumer associations can seek a collective declaration concerning generalizable facts and legal issues related to consumer claims, followed by individual redress claims. In principle, competition law violations could be addressed through such actions.[93]

Possible predecessor of the Model declaratory action can be considered the action based on the Capital Markets Model Case Act from 2012 [Gesetz über Musterverfahren in kapitalmarktrechtlichen Streitigkeiten (Kapitalanleger-Musterverfahrensgesetz – KapMuG of 19 October 2012]. The reason for adoption this law were the content-identical lawsuits (approximately 16.000) against Deutsche Telekom and individual shareholders, whom this company misled when issuing a securities prospectus (which is why the law is also referred to as "Lex Telekom"). Capital Markets Model Case Act was originally adopted as a temporary solution to a single case with a number of injured parties (similarity to the Volkswagen case and the Model declaratory action).

D. Redress

CREA gold-plated RAD obligations in two ways. First, according to Article 2 (1) CREA, redress actions can be filed for 'civil disputes concerning claims and legal relationships of a large number of consumers against a trader'. Article 1 (1) CREA thus goes beyond the scope laid down in Annex I RAD, which only covers specific consumer protection law. The scope of Article 1 (1) CREA therefore covers also competition law pursuant to Article 33a ARC. Such an interpretation is supported by the categorization of such actions as civil disputes under Article 87 ARC. The 11th ARC amendment has also included breaches of Articles 5–7 Digital Markets Act Regulation (hereinafter referred to as „DMA")[94] in the scope of the dedicated competition law damages provision of Article 33a ARC. Consequently, damages actions for DMA violations can also be asserted by means of the new redress action. Corresponding inclusion of the DMA in Article 87 ARC also argues in favour of such an interpretation.[95]

[92] Article 606 et seq. Code of Civil Procedure old version, now included in the CREA.
[93] ibid Hornkohl, Lena (n 89), p. 314
[94] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828, [2022] OJ L265/01 (DMA).
[95] ibid Hornkohl, Lena (n 89), p. 314

CREA gold-plated RAD provisions for the second time in defining consumers, who are for the purposes of filing redress actions pursuant to Article 1 (2) CREA also companies “that employ fewer than 10 people and whose annual turnover or annual balance sheet does not exceed EUR 2 million”.

Only entitled domestic or cross-border consumer organizations have the right to bring a redress action. Professional associations are excluded from the right to bring a redress action, even though SMEs are included in the definition of consumer. These SMEs will therefore be able to rely on legal protection only in cases where consumers are also harmed. This significantly reduces the effectiveness of redress action for SMEs in the field of competition law.

Two essential conditions arise from the provision of Article 4 (1) of CREA for the filing of a redress action. First, a quorum of at least 50 harmed consumers (including SMEs) is required. At the same time a mere possible concern is sufficient for the affected ones (consumers do not need to be registered in any official register).

For a consumer to actively participate in an ongoing redress action, he must register his claim with the Federal Representative Action Registry (opt-in). The law, specifically Article 46 (1) CREA, provides him with a period of three weeks from the conclusion of the final oral hearing. Moreover, pursuant to Article 15 (1) CREA the redress action may be accepted by the court and the hearing can be conducted only if the asserted claims of the affected consumers are ‘essentially similar’.

Under CREA, we can identify two main procedural forms of conducting a redress action. The summary form of the proceedings is considered when the qualified entity (representative association) is able to identify the affected consumers at the beginning of the trial. In such a case, unless other circumstances prevent it, the court has the option of issuing a redress judgment for payment under Article 16 (1) CREA.

Second, the standard procedure for hearing a redress action is much more likely. This is regulated in Article 14 – 16 CREA and consists of several subsequent procedural steps. In this case, a representative organization brings an action on behalf of consumers who are not yet identified by name. The claim is made either by stating a specific collective monetary amount or, if that is not possible, by indicating the method by which the individual monetary claims can be calculated. Provided that all the essential conditions of the proceedings are met (in particular, a minimum of 50 consumers at the outset with mere possible concern of harm, which are essentially similar), including the credibility of the qualified entity, the court is authorized to issue a judgment on the merits (see Article 16 (1) CREA). The credibility of qualified entity is demonstrated, for example, by the fact that there is no financing of a collective redress action by a third party on the condition that, in the event of success of the action, it will be entitled to a reward of more than 10% of the total amount of compensation paid (see Article 4, Section 2, No. 3 CREA). According to Article 16 (2) the judgment must contain the specific conditions under which the harmed consumers are entitled to benefit from the judgment and an indication of the evidence by which the consumers are to be identified in order to benefit from the judgment in the transposition procedure.

After the judgment on the merits is given, the so-called settlement phase via Article 17 (1) CREA follows. If the parties do not agree on a final redress at this stage of the proceedings, the court will issue a final redress judgment (see Article 17 (2) CREA). In judgment in question, the court decides that the total amount of money is to be paid into a fund to be managed by a trustee appointed by the court under Article 18 (2) CREA. The court has the discretion to estimate the final amount of money (which does not have to be precisely justified). At the same time, the final redress judgment must also determine the costs of implementation proceedings in accordance with Article 18 (1) CREA.

As already mentioned, in the implementation phase, the trustee appointed by the court plays an important role. He establishes a fund into which the defendant is obliged to pay the total amount of money, including the costs of the proceedings. Trustee then manages the fund and handles the claims of individual consumers according to the conditions set out in the judgment on the merits. It is possible to file an objection against the trustee's decisions (see Article 28 (2) CREA). If the total amount of money paid is not sufficient, additional proceedings can be initiated to increase it (Article 21 CREA). Conversely, in the case of an unjustified payment, this must be returned to the defendant trader. While an individual cannot file an individual action for redress until the final redress judgment is issued, this is already possible during the implementation phase. Such an individual procedure will of course concern those affected persons who did not use the opportunity to join the proceedings (did not register their claim).

E. Assignment model

From the point of view of collective legal protection, we would like to add that in German law there is a special form of opt-in action, so-called Assignment model. Unlike Joint action (Sammelklage), Assignment model does not involve the joining of several separate cases (actions) but only joining of several claims into one action. Assignment model is often used in practice. Its essence is that a large number of injured parties contractually assign their claims for compensation to a legal service provider, who, with the help of specialized lawyers, subsequently files a single lawsuit for all individual claims. This legal service provider is a third party who, in the event of the success of the lawsuit, is entitled to share the total amount of compensation paid (also known as success fee). This procedure is often supported by litigation financiers, who, again for a certain fee, provide financial coverage for the entire procedure, including legal costs.

Not long ago, the legitimacy of Assignment model was questionable. Even though Federal Court of Justice has supported the model outside of competition law claims[96], the admissibility of Assignment model under the Legal Services Act for competition law damages claims has been assessed differently by Regional Courts in Germany.[97] Meanwhile, Regional Court of Dortmund has referred a question on the necessity of Assignment model by virtue of EU law to the European Court of Justice (CoJ).[98] Questions referred focus on the issue whether the lack or limits of available collective redress measures on EU and national level require the assignment model as a fallback option to ensure the effective enforcement of EU competition law.[99] Positive answers of questions posed were formulated in the CoJ judgment as follows:
„Article 101 TFEU (…) must be interpreted as precluding an interpretation of national legislation which has the effect of preventing persons allegedly harmed by an infringement of competition law from assigning their rights to compensation to a provider of legal services so that it may assert them, collectively, in an action for damages that does not follow the decision of a competition authority finding such an infringement that is final and binding, in particular with regard to the establishment of the facts, provided that

[96] Federal Court of Justice, 13 June 2022, VIa ZR 418/21; 13 July 2021, II ZR 84/20.
[97] Regional Court Mainz, 7 October 2022, 9 O 125/20; Regional Court Stuttgart, 28 April 2022, 30 O 17/18; 20 January 2022, 30 O 176/19; Regional Court Hanover, 1 February 2021, 18 O 34/17; 4 May 2020, 18 O 50/16.
[98] Regional Court Dortmund, 13 March 2023, 8 O 7/20 (Kart).
[99] ibid Hornkohl, Lena (n 89), p. 316

— national law does not provide for any other possibility of grouping together the individual claims of those injured persons that would ensure the effectiveness of the exercise of those rights to compensation, and

— the bringing of an individual action for damages is, having regard to all the circumstances of the case, impossible or excessively difficult for those persons, with the result that they are deprived of their right to effective judicial protection.

Should it not be possible to interpret that national legislation in a way that complies with the requirements of EU law, those provisions of EU law require the national court to disapply that national legislation."[100]

In conclusion, it can be summarized that Germany was one of the few Member States that included competition law violations in the transposition of RAD. On the other hand, due to a numerous limits of the redress action, it can be expected that Assignment model will continue to be a significantly used alternative for the collective damages claims resulting from infringements of competition law. There can be seen the following deficiencies of the new redress action legislation in Germany:

- rule of being represented only by selected specialized entities,
- only consumer organizations can file a lawsuit and not professional associations;
- regulation of financing qualified entities by a third party and limiting conditions of such financing,
- necessity for consumers to act (opt-in),
- exclusion of larger companies from the protection provided by RAD (which do not meet the definition of a consumer[101]).

Assignment model will primarily be applied by companies that will not be able to benefit from the redress action legislation because they are not SMEs meeting the definition in Article 1 (2) CREA (companies "that employ fewer than 10 people and whose annual turnover or annual balance sheet does not exceed EUR 2 million").

New legal regulation of redress actions can help consumers to obtain damage compensation, but only in some cases. In particular there must be a clear violation of competition law, which can be proven, for example, from the contractually agreed purchase price, provided that the

[100] Case C-253/23, ASG 2, 2025, ECLI:EU:C:2025:40

[101] Article 1 (2) CREA

damage is easily quantified. Whether the new legal framework will be applied in practice will also depend on the activity of financially undersized consumer associations, as well as on consumers, since without their active registration in Federal Representative Action Registry (opt-in), the entire legal concept of redress action may become obsolete.

2. Portugal

Basic legal framework for the collective enforcement of rights in the field of competition law in Portugal is represented by the following legal regulations:

1. Portuguese Competition Law (hereinafter referred to as "PCL"), Código da Concorrência, Lei No. 19/2012, of 8 May, last amended by Lei No. 17/2022 of 17 August. PCL introduced new regulation in line with EU regulation, in particular Regulation No. 1/2003.

2. Article 52 Portuguese Constitution (Decreto de Aprovação da Constituição, No. 86/1976 of 10 April) enshrines a right to recourse to class actions, the so-called popular actions/ações populares.

3. Law of Popular Action (hereinafter referred to as "LPA"), Lei da Ação Popular No. 83/1995, of 31 August, regulates the right to procedural participation and the so-called popular action ("ação popular"). Portugal has allowed to file collective actions under the rules of the Lei da Ação Popular, which was originally aimed at protecting collective interests, particularly in matters of public interest and consumer rights.

4. Portuguese Consumer Protection Act (hereinafter referred to as "PCPA"), Lei de Defesa do Consumidor No. 24/1996, of 31 July. This law allowed consumer protection organizations to file lawsuits to protect the collective interests of consumers, as well as to protect consumer rights against unfair business practices.

5. Law on Private Enforcement (hereinafter referred to as "LPE"), Lei No. 23/2018, of 5 June, implementing the Damages Directive 2014/104/EU[102] – in a nutshell, LPE deals with damages

[102] ibid Damages Directive (n 9),

awards regarding the violation of Articles 101 and 102 TFEU and the equivalent Portuguese rules (Articles 9 and 11) as well as Article 12 PCL. The implementation of the Directive has significantly improved the legal framework for the successful exercise of collective redress claims, in particular by introducing mechanisms to simplify the taking of evidence, access to evidence, extending limitation periods and strengthening the rights of injured parties.

6. Decreto-Lei No. 114-A/2023, which entered into force on 6 December 2023, implementing Representative Actions Directive 2018/2020/EU[103]. Adopted legislation maintains a system based on the "opt-out" principle, which allows all affected consumers to be automatically included in a collective action unless they actively choose not to participate. It complements existing legal framework for collective redress that was in Portugal before the adoption of EU Directive, making the country one of the preferred venues for conducting large collective litigations.

For the purposes of this Thesis, we will primarily examine popular action as the main legal instrument for collective redress in competition law.

The Law of Popular Action (LPA) was last amended by Law No. 214-G/2015. This legal regulation fulfilled the purpose of Article 52, Sec. 3, of the 1976 Portuguese Constitution. Until the adoption of the law, popular action had only the control character over administrative authorities. By its using, individuals (natural or legal persons) can currently file a collective action and seek prevention, prosecution of offenses and also claims for compensation for damages.

According to the currently valid and effective Article 52, Section 3 of the Constitution, everyone has the right, personally or through associations defending the relevant interests, to file a popular action in cases and under the conditions established by law, including the right to claim adequate compensation for the injured party or parties, in particular in the field of consumer protection (standard contractual terms and conditions and unfair commercial practices), but also protection against violations of competition law. Protection also includes, for example, violations of public health, environmental protection, securities and women's

[103] ibid Representative Actions Directive (n 59)

rights. [104] If the popular action pursues collective civil law interests, it is governed by the provisions of the Civil Procedure Code (see Article 12 LPA). As such, claimants can seek declarations of law infringements, injunctions and damages.

1. Scope and standing

The right to bring a popular action is addressed to any citizen who enjoys civil and political rights, as well as to associations and foundations that defend the public interests concerned, regardless of whether they have a direct interest in the matter or not. In theory, the constitutional right of access to court guarantees the right to bring a collective action not only to Portuguese citizens, but to any natural person, including foreigners. As for a legal persons, the requirements for their entitlement to file a popular action are that they do not carry out any business activity or are not the competitors in relation to the companies or independent professionals concerned.

Article 17, Section 1 PCPA (Law No. 24/96, last significantly amended by Law No. 63/2019) establishes specific requirements for standing of consumer associations to bring popular action. According to this provision, consumer associations must be non-profit associations with legal personality, the main objective of which is the protection of consumer rights in general or the protection of the interests of its members as consumers.

The law also distinguishes three types of associations: national, regional or local, taking into account the number of their members [3,000, 500 or 100 members (Article 17 (2) LPA)]. According to the Article 17 (3) LPA, consumer associations can be either so-called general interest or specific interest associations of consumers (of certain goods or services). In both cases, the law requires that the bodies of the associations must be elected by universal and secret ballot of all members.

According to Article 6 (2) Decreto-Lei No. 114-A/2023 an association or foundation shall be deemed to be independent, in particular when it is solely responsible for taking decisions on the initiation, withdrawal or settlement of a collective action, the main principle of which is the protection of consumers' interests.

[104] Sousa Ferro, Miguel, Class Actions in Portugal: The little regime that could, (2021) 2 *Mass Claims*, Volume 2, 2021, p. 46.

Another entity entitled to bring a popular action for damages are associations of (thus affected) undertakings or trade associations, regardless of whether their statutes provide for the protection of competition. The Law on Private Enforcement does not lay down any further specific requirements for these associations [see Article 19 (2) (b) LPE)]. Moreover, municipalities, to the extent of their residents, the Public Prosecutor and associations protecting the interests of investors in the field of securities also have the right to file a popular action.

It is possible to consider whether further restrictions on individuals or legal persons to file a popular action would not be appropriate. However, given the constitutionally guaranteed right to popular action, all restrictive interpretations are assessed as illegitimate.

In terms of the interest pursued by popular actions, a distinction can be made between i) public interest, which is the interest of the State and other territorial units; ii) diffuse interest, which means that each subject shares interests that belong to the community (regarding public goods, such as air or water quality); iii) collective interest identified by the common purpose of persons joined by a legal bond in the same group or class (regarding private goods, such as the right to compensation); iv) homogeneous individual interests (for example, investors´ claim under securities law[105]).[106]

2. Representation

According to Article 14 LPA, popular action is a form of representative action. The plaintiff therefore has legal status as a representative under Article 15 LPA, representing all interested parties who have not refused such a representation (opt-out regime). The plaintiff does not need any special authorization for such a representation.

After the writ of popular action has successfully passed the initial examination on the *prima facie* basis (Article 13 LPA), the court summons all potentially harmed persons. The reason for this procedure is to express the intention of the relevant parties to act in their own name. If they do not expressly do so, their silence is understood as consent to representation (Article 15, Section 1 LPA). All the decisions subsequently made in the proceedings are binding on the

[105] Article 31, Sec. 2 of the Securities Code, Decreto-Lei No. 486/99.
[106] Henrique Sousa Antunes, Class Actions in Portugal, 2022, Available at: <https://www.academia.edu/73097853/Class_Actions_in_Portugal>.

persons represented. The period for expressing the will to be excluded from representation lasts until the end of the evidence phase and must be recorded in the case file (Article 15, Section 4 LPA).

Summons is made by means either in the form of a notice published in social media or in the form of a public edict. The specific method is determined depending on whether the issue of action is of general interest or regionally specific interest (Article 15, Section 2 LPA). Public notification of the case itself does not have to include the identification of individual persons. According to Article 15 (3) LPA, it is sufficient to notify the proceedings and other relevant information to enable the readers to understand that the matter in question concerns them (identification of the defendant, description of the claim).

3. Procedure and *erga omnes* effects

The court shall dismiss the action if, after hearing Public prosecutor and conducting a preliminary examination, it concludes that the action is highly likely to be failed. Furthermore, the court may also order to examine the evidence that has not been proposed by the parties (Article 17 LPA). The court also has the right to grant a suspension of the decision in the event of the threat of serious damage that would be impossible to remedy (Article 18 LPA).

Decision on the merits becomes *res iudicata* except in cases where, for example, the reason for dismissing the action was lack of evidence. Decision is binding *erga omnes* except for those parties who have expressly excluded themselves from representation in the proceedings. The defeated party is obliged to publish the final decision at its own expense (depending on the scope of the decision, either in full or in the relevant part). Failure to comply with this obligation would constitute contempt of court. The court will select two social media outlets with the expected greatest impact on interested parties (Article 19, Section 2 LPA).

4. Damages class actions

Main purpose of a collective action in Portugal is also prevention against minor damages, when an individual is not interested in initiating legal proceedings and seeking compensation due to the small lump of sum (theory of rational apathy). The goal is precisely to collect and file claims in a single amount.

In Article 22 LPA, the law establishes the subjective liability of the agent (in the case of damage caused in competition law, these will usually be the infringing undertakings) and distinguishes compensation for individual harmed parties and also compensation for the violation of the rights of unidentified parties. The question of how much compensation should be awarded for unidentified harmed persons is not a simple one. Its determination should be based on the amount of enrichment of the infringer at the expense of all affected parties (it means the obligation to compensate for all damage caused by the infringer).

At the same time, it is necessary to consider the issue of awarding non-patrimonial damage, the award of which is not excluded by any provision. [107] According to the information available, compensation has never been paid to unidentified harmed parties based on a popular action.[108] However, the law provides that the compensation received but unpaid to unidentified harmed parties will be transferred to the Ministry of Justice in order to promote access to justice through popular actions (Article 22, Section 5 LPA).

From a procedural point of view, Article 31 (2) Securities Code (Decreto-Lei No. 486/99) provides that the final decision must specify the entity entrusted with the administration of the compensation paid to unidentified injured parties. This entity may be a guarantee fund, an investor protection association or one of the plaintiffs named in the action. The same applies to collective claims of plaintiffs under Article 19 (4) and (6) LPE. According to Article 19 (7) LPE, the judge must also set a reasonable period for the harmed parties to notify themselves and claim compensation. The rest of the unpaid monetary compensation shall be used to cover the plaintiffs' legal costs.

5. Costs and funding

In Portugal, the principle of *victus victory* (the loser pays principle) applies. In addition, in the case of popular action proceedings, any person, foundation or association is exempt from legal fees when exercising a right [Article 4, Section (1) (b) of Law No. 34/2008]. The following

[107] According to Article 496 (1) of the Portuguese Civil Code (Decree-Law No. 47344, of 25 November 1966):
In determining the compensation for damages, account must be taken of the non- patrimonial damage which, given its seriousness, deserves the protection of the law.

[108] ibid Sousa Ferro, Miguel, Class Actions in Portugal (n 104), p. 51.

exceptions to this exemption apply: a) if the claim is manifestly unjustified, b) the claimant has been completely unsuccessful. In these cases, the claimant also pays adverse costs. According to Article 21 LPA, the amount of legal costs is determined by the court depending on the complexity of the case and the amount of compensation claimed. In addition, Article 20 LPA rules that if the claim was justified at least in part, the plaintiff does not pay court costs; if the plaintiff was unsuccessful in its entirety, he is liable only to the extent determined by the court (10 - 50% of the total costs, depending on his financial situation and the reason for the dismissal of the claim).

Funding popular action by a third party is possible. In Portugal, courts have repeatedly dismissed defendants' arguments that third party funding deprives the claimant of its active legitimacy to file and pursue the opt-out representative action, but they have yet to rule on whether and how a funder's remuneration will function. [109]

Last but not least, according to Article 19 (7) PLE for antitrust popular actions, the costs of proceedings that are not paid by the defendant may be reimbursed from the damages that were not claimed by the unidentified injured parties within the time limit.

Conclusion:

As has already been mentioned in the Commission Recommendation of 11 June 2013: Portuguese legislation is incompatible with Recommendation in two aspects: Firstly, the popular action in Portugal is based on an opt-out system whereas paragraph 21 Recommendation states that the claimant party should be based on an opt-in principle. Secondly, standing in Portugal is granted not only to non-profit entities whereas Article 4 (a) Recommendation requires representative parties to have a non-profit making character.

Even the transposition of Representative Actions Directive 2018/2020/EU[110] did not change the legislative trend in Portugal. Transposition of EU Directive had in principle only a supplementary character, since the basic legal mechanisms had been already contained in

[109] Sousa Ferro, Miguel, Consumer Antitrust Private Enforcement in Europe, *Journal of European Competition Law & Practice*, Volume 13, Issue 8, December 2022, Pages 578–593, Available at: <https://doi.org/10.1093/jeclap/lpac047> (Extended Version Available at SSRN: <https://ssrn.com/abstract=4223770> or <http://dx.doi.org/10.2139/ssrn.4223770>), p. 55.

[110] ibid Representative Actions Directive (n 59)

national legislation. For example, nor the obligation of prior certification for qualified entities (the need to meet certain legal conditions) does not apply to entities entitled to bring a popular action. Since the right to bring a popular action belongs to practically every citizen, it is important that there is a guarantee of proper conduct of the proceedings by the claimant. The power of Public prosecutor (under Article 16 (1) LPA) to replace the plaintiffs in cases of failure to properly fulfill their duties (proper representation of the harmed parties) can be considered as such.

Overall, Portuguese collective redress system supports the access of interested parties to the courts, including the application of antitrust collective claims mechanisms. Concise legal regulation is complemented by the interpretation provided by courts, which has an impact on the increased number of lawsuits filed. Currently, important mass redress actions based on popular action are underway in the field of competition law (Meliá[111], Super Bock[112], Sport TV[113]). Results of these lawsuits will lead to further development of the legislation under review.

3. Slovakia

Basic legal framework for the collective enforcement of rights in the field of competition law in Slovakia is represented by the following legal regulations:

[111] Consumer protection association Ius Omnibus submitted on 6 July 2021, before the Competition, Regulation and Supervision Court, a popular action to force hotel chain Meliá to disclose documents needed to confirm that consumers were injured by Meliá's anticompetitive practices identified in the European Commission's Decision of 21 February 2020. On April 7, 2022, the Portuguese Competition Court has confirmed Ius' right to file popular actions representing Portuguese consumers to seek disclosure of documents necessary to determine if consumers were injured by Meliá's anticompetitive practice. The court's ruling opens the door for a first in Portugal where a company may be required to provide access to means of evidence necessary to prepare an action for damages. By judgment of 13 July 2022, the Lisbon Court of Appeal confirmed the international jurisdiction of Portuguese courts for pre-filing discovery access to determine whether consumers have been harmed by anti-competitive practices. In addition, it confirmed that the jurisdiction of the courts in private enforcement actions is determined by the residence of the consumers, i.e. the place where the damage occurred. Available at: Ius Omnibus v Meliá – Ius Omnibus.

[112] Super Bock case: An opt-out representative action (popular action) was filed on December 14th, 2020 at the Portuguese Competition, Regulation and Supervision Court by Ius Omnibus, a consumer protection association, aimed at compensating all Portuguese consumers who were injured by Super Bock's anticompetitive practices, identified by the Portuguese Competition Authority. 21 September 2023 The Lisbon Appeal Court fully rejects Super Bock's appeal, thus wholly confirming the judgment of the Competition Court which declared the infringement of competition law by Super Bock (which this popular action is based on). If it is successful, this action will force Super Bock to pay damages in an estimated total of about 400 million EUR, granting each Portuguese consumer the right to an average compensation of 40 EUR.

[113] The Portuguese OdC v. Sport TV case concerning potential infringement of antitrust law in relation to concentration notified by one of the Defendant's shareholders.

1. Slovak Competition Law (hereinafter referred to as "SCL"), Zákon o ochrane hospodárskej súťaže No. 187/2021 Z.z. SCL contains a national legal regulation of competition law in line with EU Regulation No. 1/2003.

2. Law No. 350/2016 Z.z. on certain rules concerning the application of damages claims caused by infringements of the competition law. This legal act, implementing Damages Directive 2014/104/EU[114], deals with damages awards regarding the violation of Articles 101 and 102 TFEU and the equivalent Slovak rules (Articles 4, 5 and 7 SCL).

3. Law No. 261/2023 on actions for the protection of collective interests of consumers, implementing the Representative Actions Directive 2018/2020/EU[115].

4. Slovak Civil Procedure Code, Law No. 160/2015 (hereinafter referred to as "SCPC").

Before all we must concede that there is no specific legal instrument (action) for collective private enforcement of competition law in Slovakia. As a certain form of group actions that allow such proceedings can be considered joint action and assignment of claims.

1. Joint action

Joint action based upon Article 76 SCPC is a typical procedural institute that has been known to Slovak legal system for a long time. Its essence lies in the fact that in the same proceedings several entities, at least two, appear on the side of the plaintiff or the defendant. Each of them exercises or defends its own subjective right in the proceedings, which means that an action taken by one of the party produces effects only against him, and not against the others. The court decides on each claim separately. However, it may decide on all claims in one judgment. It is not excluded that the court may decide on all claims in the same way, which means that it may grant or deny the right to all plaintiffs, but the verdicts may also be different for each party.

Joint action can occur in two ways. Either at the request of the plaintiff, or on the basis of a court decision. The plaintiff is the only one who is authorized to determine the rest of

[114] ibid Damages Directive (n 9),
[115] ibid Representative Actions Directive (n 59)

participants in the dispute. If several persons are to appear on the defendant's side, it is sufficient to list them in the claim. The defendant cannot change other defendants on his own initiative. This means that in the defendant case it is not possible to speak of either an opt-in or an opt-out system.

If there are to be several subjects on the plaintiff's side, each of them must agree to this. The principle applies that no one can become a plaintiff against their will. This means that the joint action resembles an opt-in system, which is based on the interest of the subject to join the proceedings. However, it cannot be said that this is a typical opt-in system. The reason is not so much the fact of time, because there is no rule in Slovakia that after the filing of a lawsuit by one or more plaintiffs is starting a time period provided to other potential subjects to join the proceedings on the plaintiff's side. The additional joining of other plaintiffs with their own claim is not limited in time in Article 79 SCPC (it is limited only by the so-called concentration of proceedings, which means that the dispute has already progressed to such a phase that the accession of a other persons would no longer be practical). Compared to a regular group action, in which multiple entities participate in the proceedings, the difference is that any additional party who would like to enter the proceedings as a plaintiff can only do so with the consent of the original plaintiff (all plaintiffs).

As already mentioned, the creation of a joint proceeding is also possible by a court decision if the legal conditions are met (Article 166 SCPC). These conditions are as follow:
– several proceedings have been initiated in the same court,
– the proceedings are factually related or alternatively concern the same parties,
– the joining of proceedings into one is in the interest of the efficiency of the proceedings.
From the point of view of collective enforcement of claims, one can speak primarily of the joining the matters that are factually related. In the case of the existence of a factual connection between the matters, we can also speak with high probability of legal identity or high similarity. And these are the basic conceptual features of a mass or collective action.
A court decision to join several litigations into one proceeding can be compared to the so-called certification of joint action. The court also has the authority to stop the joint proceedings if the conditions for such a trial are not met.

In the case of joint action or joint proceedings, Slovak legislation, specifically the provision of Article 75 (2) SCPC, empowers the court with the authority to decide that only one entity will act on behalf of the rest participants (for example one plaintiff among all plaintiffs, not another person). It is not an obligation for the court to decide in this way. It is left solely to its discretion. The condition is that more than ten entities appear on one side (whether on the side of the plaintiff or the defendant), it means at least eleven. It does not matter whether such a number of entities occurred as a result of the action of the plaintiff or the court's decision to join several cases into one proceedings. The consequence of such a court decision is that further steps in the proceedings will be performed only by a designated entity, only this entity will be summoned to hearings, and only this entity will be served with decisions. According to the literal wording of Article 75 SCPC, the only exception is the amendment of the claim, which must be delivered to all parties.

There is no doubt that in the case of an independent joinder of parties, the subject matter can only be a contentious one (not a non-contentious one). Therefore, the parties are entitled to dispose of the claim. Disposition naturally also includes the possibility of concluding a settlement. It has already been stated that the consent of all affected parties should be required for a settlement. A settlement could take the form of a single agreement, within which all individual subjective rights (claims) would be specifically defined. Alternatively, multiple settlements could be concluded, corresponding to the number of subjective rights, with a separate agreement for each. However, it may be assumed that, under the law, a third type of settlement is also possible — one in which all parties agree on the total amount of compensation for the damage and on the rules for its distribution among the individual beneficiaries. Only in this way can the level of certainty required for the settlement to constitute an enforceable title be ensured.

Based on the foregoing considerations, it can be stated that the concept of an independent joinder of parties (joint action), as regulated in the SCPC, allows for the collective exercise of claims (including those arising from violations of competition law), even in the absence of explicit legislative provision for collective actions.

2. Assignment of claims

This institute is form of legal succession and allows one person not interested in the underlying dispute on the basis of assignment the damage claims independently exercise the right to damage compensation previously suffered by several persons. Assignment of a claim is one of the traditional substantive law institutes. It is regulated in Articles 524 – 530 Slovak Civil Code (Law No. 40/1964).

Asserting collective claims by a single representative is permissible in Slovakia only for the protection of consumers. These representative actions are available on the basis of the following regimes: i) declaratory actions on abstract control in consumer matters, ii) injunctions for anti-competitive behavior, unfair contract terms and commercial practices, iii) redress actions regulated by Law No. 261/2023 implementing Representative Actions Directive 2018/2020/EU. Whereas there is no possible representative action for consumers in the field of competition law, we will focus on these forms of legal protection only in brief review.

A. Abstract control proceedings in consumer matters

Articles 301 – 306 Civil Procedure Code, which regulate the abstract control in consumer matters, are a consequence of implementation Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests. In this proceedings an association (a legal entity established for the protection of consumers) may file a declaratory action for unfair contract terms or commercial practice. In case of claimant success, the court shall order injunction relief and prohibit the defendant from using the unfair contractual term in question or a contractual term with the same meaning in all consumer contracts or prohibit the defendant from using the unfair commercial practice.

B. Provisions of Articles 53 and 54 Commercial Code (Law No. 513/1991):

Persons whose rights have been infringed or threatened by unfair competition may claim against the infringer that he refrains from such behavior. They may also demand appropriate (monetary) satisfaction and damage compensation. The right for an infringer to refrain from unlawful behavior may also be exercised by a legal entity authorized to defend the interests of competitors or consumers. Final judgments issued on these claims are also effective for other harmed parties.

C. Collective redress action

Procedure may be initiated if at least 20 harmed consumers are present and register their intention to participate in proceedings within the specified time limit. In this procedure, the court may impose one or more redress measures on a trader, for example damage compensation, repair or replacement of the product, a discount on the purchase price, a reimbursement of the amount paid and others.

Claim is not filed by the consumer himself, but by a qualified entity (an association established for the protection of consumers) registered in the National Representative Action Registry. If a consumer decides to participate in the proceedings, he or she shall register with the relevant notary chosen by the qualified entity to maintain the list of registered consumers. Consumers may also register after the beginning of court trial, at the latest by the end of the evidence phase. At the same time the consumer is also entitled to withdraw his consent to participate in the action.

During the proceedings the court may order to examine the evidence that has not been proposed by the parties. The court may order the defendant or a third party to make available evidence that they possess and that is essential for the decision in the case.

If the qualified consumer association was successful in proceedings, it is entitled to the reward or a proportional part of the reward specified in the action, according to the proportion of success in the case, but not more than 20% of the recovered amount; the qualified entity shall satisfy its claim for the reward from the value of the recovered damage compensation. Court shall also award the legal representation costs of the qualified entity only if there are reasons worthy of special consideration.

Redress action may end by a court judgment granting or rejecting the claim, or by a settlement concluded between the qualified entity and trader (and approved by a court). Registered consumers are entitled to the redress measure (most probably damage compensation) determined by the court decision without having to file a separate action. Claims of registered consumers are satisfied by the designated notary without delay after the delivery of the final court decision and the deposit of the damage compensation in the notary's custody by the trader and after the payment the reward to the consumer association who filed the action.

Conclusion:

In Slovakia, collective redress regulation is closest to German law, but only to a limited extent. Contrary to German law, SMEs are not considered consumers. According to Article 3 letter a) a consumer is a natural person who, in connection with a consumer contract, an obligation arising from it or a commercial practice, is not acting within the scope of his business activity or profession.

Moreover, in contrast to German transposition of Representative Actions Directive, a trader cannot be obliged to pay non-patrimonial damage to the consumer under redress measures (on the contrary, he can be expressly obliged to restitution for unjust enrichment).

Overall, Slovak consumer cannot assert a claim for infringement of competition law (transposition of EU Directive without gold-plating). Furthermore, SMEs and other competitors can file collective claims for damages resulting from infringement of competition law only through a joint action, or assignment model.

V. Conclusions

Collective redress is a procedural mechanism that allows several (means hundreds or thousands) similar legal claims to be involved into a single procedure for the purpose of simplifying legal proceedings and effectively enforcing violated rights.

Collective redress facilitates access to justice, particularly in cases where the individual damage is so minor that potential claimants would not consider it worthy to bring an individual claim to the court. It also increases the bargaining power of potential claimants and contributes to the efficiency of the judiciary by preventing multiple actions for infringement of the same legal provision.

Such a "form of macro justice in a compact form" may be attractive for several reasons: it allows for cases that are related to each other to be assessed simultaneously, efficiently, quickly, consistently and with a final decision at reasonable costs. There are many arguments in favor of introducing a legal regulation of collective protection of rights in civil proceedings. These are based not only on the needs of real life, but also on empirical experience with ineffective legal regulation.

However, collective mechanism for the protection of damaged or threatened rights also has disadvantages. One of them may be the limited influence of represented persons on the civil proceedings. Another disadvantage may be the risk of a conflict of interest that may arise between the representative (a person representing a certain group of persons) and the represented persons, precisely because of their personal absence from the proceedings. Problems related to the representation of persons will be directly proportional to the size of the group of represented persons. Size of the group will depend to a large extent, among other things, on whether the opt-in or opt-out model will be applied in a given case.

Prevailing view is that the collective redress can be seen as an effective means of protecting a larger group of threatened or violated rights. It is a means that allows protection to be provided also to persons who do not have the finances, knowledge or experience to individually enforce their claims. It is a means that can significantly reduce the number of disputes with the same or very similar factual basis, which at the same time leads to an increase in the efficiency of the judicial system and reduction in the financial and time requirements on the part of the harmed parties.

Need for collective redress in civil proceedings is illustrated by some examples from practice. Among many examples where the imbalance between the participants in legal relations has exceeded the imaginary limit of acceptability, one can mention, for example, some concerted practices of mobile operators or banks (for example concerning fees for issuing or accepting payment cards). Scandal at the pan-European level, which concerns the alleged difference between the declared and actual level of emissions of the cars manufactured by Volkswagen concern, has been known as Dieselgate. However, collective protection of rights is not only about direct damage on the part of competitors (or consumers). We cannot forget other by-products, which have primarily environmental impacts.

Question remains, what should the collective redress look like so that it is a sufficient guarantee of protection of violated rights, it is economically and temporally advantageous, and at the same time it cannot be abused either by a group of individuals against the infringer of the law, or conversely by the infringer of the law against the holders of substantive rights.

Principle on which collective redress actions operate is very simple. Just as the production and provision of services were considerably rationalized during the industrial revolution and subsequent developments, it is also necessary to "rationalize" legal proceedings and create a process in which injured parties could benefit from the cost-effective nature of such a dispute in the position of plaintiff. In other words, the purpose of collective redress actions in the field of competition law is to create a procedural means that will enable the collective enforcement of identical or very similar claims in a single legal proceeding. Therefore, it is necessary to pay only one court fee, evidence phase is taken only once, the entire case is dealt with by a single lawyer and a single judge decides on it. Total damage that has arisen for a large number of competitors (and consumers) as a result of the short-term or long-term activities of the infringer is applied. Although the amount of individual damages is very or relatively low, in its aggregate it reaches high amounts and conducting such a dispute is economically worthwhile for plaintiff. Individual members of the injured group will incur almost no costs when applying the law, and the representative who bears the risk of the dispute is rewarded accordingly at the end of a successful dispute. With the help of a collective redress action, the power is thus balanced on the side of the plaintiff and the defendant. Equal opponent of large commercial corporations cannot be an individual with his small claim, but only the entire group of injured parties as a whole. In short, collective redress action is intended to eliminate the factual inequality that currently arises in cases of mass infringements of competition law and to ensure equal access to the court and equality of arms in civil proceedings.

Financial savings compared to conducting a large number of individual disputes can also be expected on the part of the state, which will be able to resolve a dispute involving many hundreds or thousands of individuals in a single legal proceedings. Costs of providing court personnel, collecting evidence or enforcing the decision will thus be kept to a minimum. In addition, problems of inconsistent court decisions in similar cases will be eliminated. Similarly, collective redress proceedings should also be advantageous from the point of view of the procedural position of the defendant, because there will be savings on his side. Not only in terms of time and personnel, but also in terms of money. In addition, it will be possible to end the entire dispute by a settlement, from which both parties and ultimately the state will benefit.

Moreover, further benefit is expected as a by-product of the rationalisation of the enforcement of small claims. In jurisdictions with collective redress mechanism of enforcing subjective substantive rights, an increase in the enforcement of competition law is expected. This should increasingly discourage corporations from violating law as a manifestation of their efforts to maximise profits (the preventive function of competition law). State will thus be less and less forced to intervene in predominantly private law relationships and to correct the imbalances that have arisen “from above”. This socio-economic incentive can be considered, in addition to the rationalisation of the costs of legal proceedings, as an equally important consequence of introduction of collective redress actions.

Several specific versions of collective redress have emerged in legislation of the Member States of the European Union. With regard to already effective transposition of EU legislation, we can assess approaches chosen in the selected Member States.

Germany and Slovakia fall short of the ideal for collective redress action regulation. However, German legislation can be considered to be of much higher quality. Main reason is that Representative Actions Directive in Germany was transposed in gold-plating manner. Thanks to this, consumers can also seek collective redress for infringements of competition law. In addition, German law also considers SMEs that employ fewer than 10 people and whose annual turnover or annual balance sheet does not exceed EUR 2 million, to be consumers. However, key points that will most likely hamper the collective enforcement of competition law have not been resolved. These are primarily i) obligatory opt-in principle, ii) possibility of filing a redress action only by specialized consumer associations and iii) too high requirements for the transparency and independence of such consumer associations, which may be even objected to by the defendant. These legal conditions will probably significantly hinder any efforts to assert collective redress action for infringements of competition law.

Other competitors than consumers (including specific SMEs) cannot file a collective redress action due to a violation of competition law. The only option is to initiate an action for disgorgement of benefits in the event of competition law violations under Section 34a ARC. Under certain conditions consumer protection organizations as well as chambers of industry and commerce or other associations representing the interests of traders and self-employed persons, can file an action for disgorgement of benefits gained through cartel agreement. Since such a claim is essentially a revenue of the state budget, this legal instrument can be considered obsolete, without practical use.

Assignment model, supported by a recent CoJ decision[116], is thus for the rest of competitors the only practical tool in Germany for the real enforcement of claims for infringement of competition law through collective action.

In **Slovakia**, collective redress actions for infringement of competition law are not granted to consumers, SMEs, nor to other competitors. There is a problem even with basic institutes of competition law, such as the acceptance of stand-alone action if the plaintiff has unsuccessfully firstly notified Slovak NCA for the alleged infringement of competition law before filing the lawsuit. In Slovakia, the plaintiff can only be an individual, but the legal consequences *de lege ferenda* also apply if Slovak legislation would allow collective redress action for violation of competition law. So, if Slovak NCA does not find a violation of competition law (decline the notice, regardless of the lack of justification of its decision), court will dismiss the stand-alone action without hearing the case due its obligation to respect NCA's decision. In this view, we point to the decision of the Constitutional Court of the Slovak Republic of 02.12.2021, file no. II. ÚS 564/2021:

"The assessment of a specific trader´s behaviour in an individual case from the point of view of whether it meets the prohibited content belongs to the competition law authority. In light of the concept of defining prejudiciality according to CSP[117], general courts apply Art. 101 and Art. 102 TFEU when deciding on a claim for damage compensation in connection with an already authoritatively established violation of competition law by NCA. From the point of view of the effectiveness of the protection provided in the field of competition law, the harmed party is entitled to demand a redress in the form of a private law action, provided that the existence of a prohibited behaviour is declared by NCA."

Therefore, also in Slovakia, assignment model is the only practical tool for the collective enforcement of claims for infringement of competition law (but with many pitfalls of undeveloped decision-making practice).

Only in **Portugal**, after the transposition of Representative Actions Directive and with support of popular action institute, any person is allowed to file a collective redress action in the field of competition law. By other words, collective redress action can be filed for protection of

[116] CoJ judgement in case C-253/23, ASG 2, 2025, ECLI:EU:C:2025:40.
[117] Slovak Civil Procedure Code, No. 160/2015.

competition law not only by consumers, but also by competitors (SMEs, as well as other undertakings). Lawsuit can be asserted by an individual, but also by an association for the protection of consumers or competitors. In the case of popular action an opt-out system is applied. Reimbursement of legal costs is also regulated in favor of the claimant. Last but not least, claimant can cooperate with specialized companies as funders in order to balance power in the dispute with large companies as alleged violators of competition law.

Portuguese legislation can be considered the most favorable in terms of collective redress for infringements of competition law. On the other hand, many critics say that this legislation will be abused to create a business model for certain groups who will threaten to sue every major competitor in order to obtain financial compensation for not initiating legal proceedings, or rather, to finish the trial as soon as possible. In defense of such claimants, we can argue that litigation in the area of collective redress for violation of competition law is very difficult, long-lasting and, in terms of collecting evidence, certainly very costly. Therefore, I would consider the initiation of legal proceedings on the basis of popular action as something that is not common, that anyone could do and what happens every day. It takes extensive knowledge, deep preparation and legal skills to bring collective redress action to a successful conclusion (it is expected that at the earliest after six to ten years from filing the lawsuit).

Regarding **proposals to improve the current legislation**, which would have the potential to support overall compliance with competition rules in EU and contribute the further growth of competition law protection with an increasing emphasis on consumer protection and market fairness, following legislative changes at EU level are considered:

1. Addition the protection of competition law in Representative Actions Directive.

2. At least consumer associations (at least those that are regulated in RAD) should have an explicit right to appeal against a negative decision of NCA concerning notified alleged infringement of competition law and simultaneously NCA should have an obligation to give proper justification (provide adequate, sufficient and excessive reasons) for its decision.

Arguments for the proposal: Qualified entity considering initiating a collective redress action may decide to verify the validity of factual evidence (usually resulting from an initiative by harmed individual) and therefore prefer a follow-on action over a stand-alone action. That is, it will first submit a notice of potential violation of competition law to NCA. However, NCA may (for example for a purely pragmatic reason such as “busyness”) issue a brief negative decision (without proper justification) that it has not found an infringement of competition law. In such a situation, qualified entity will be reluctant to file a stand-alone action, which may not only be to the detriment of consumers, but also to the development of competition law.

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Annex

Competition law has undergone a long period of development. From the first provisions of the Treaty, through the robust decision-making practice of the European Court of Justice, which subsequently became the basis for significant legislation in the field of public and private law. As the latest important legislative activity from the European Union in this regard, Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers was introduced. Thesis will focus on the most important elements of the new EU legislation (its objectives and key legal provisions) and analyze the way in which this Directive was transposed into the legal orders of the selected EU Member States.

Research will assess advantages and disadvantages of the new national legislations in Germany, Portugal and Slovakia (which have been adopted on the basis of Representative Actions Directive), considering the possible impact on collective private enforcement of competition law. We will identify not only the law by which Directive was adopted, but also the position of new legal regulation within the existing national order in the field of competition law (how Germany and other Member States have extended the scope of the "consumer" Directive in the context of its transposition). In relation to Germany, we will evaluate the impact of newly adopted legislation on legal regime of so-called model declaratory action and assignment model. Regarding to Portugal, we will analyze the relation of new legislation to so-called popular action and existing opt-out regime. And in concern to Slovakia, we will identify different aspects of the newly adopted legal regulation compared to the German and Portuguese legal regulations.

Thesis will also examine whether the consumers (and competitors) could be collectively more successful in protecting their rights thanks to the new legislation. Finally, Thesis will suggest the new legal provisions that could contribute the further growth of competition law.

Keywords: Competition law, private enforcement, representative actions, injunctive measures, redress measures, Representative Actions Directive, Portugal, popular action, Germany, Slovakia, assignment model, consumers, SMEs and other competitors.

Deutscher Annex

Das Wettbewerbsrecht hat eine lange Entwicklung durchlaufen, von den ersten Bestimmungen des Vertragswerks über die prägende Entscheidungspraxis des Europäischen Gerichtshofs, die anschließend zur Grundlage für bedeutende Rechtsvorschriften im Bereich des öffentlichen und privaten Rechts wurde. Als jüngste wichtige gesetzgeberische Maßnahme der Europäischen Union in diesem Zusammenhang wurde die Richtlinie (EU) 2020/1828 über Verbandsklagen zum Schutz der Kollektivinteressen der Verbraucher eingeführt. Die Arbeit wird sich auf die wichtigsten Elemente der neuen EU-Gesetzgebung konzentrieren (ihre Ziele und wesentlichen Rechtsvorschriften) und analysieren, wie diese Richtlinie in die Rechtsordnungen ausgewählter EU-Mitgliedstaaten umgesetzt wurde.

Die Untersuchung wird die Vor- und Nachteile der neuen nationalen Rechtsvorschriften in Deutschland, Portugal und der Slowakei bewerten (die auf Grundlage der Richtlinie über Verbandsklagen erlassen wurden), wobei der mögliche Einfluss auf die kollektive Rechtsdurchsetzung durch private Akteure im Wettbewerbsrecht berücksichtigt wird. Es werden nicht nur die konkreten Rechtsakte identifiziert, durch die die Richtlinie umgesetzt wurde, sondern auch die Stellung der neuen Rechtsvorschriften innerhalb der bestehenden nationalen Rechtsordnung im Bereich des Wettbewerbsrechts (wie Deutschland und andere Mitgliedstaaten den Anwendungsbereich der „Verbraucherrichtlinie" im Rahmen ihrer Umsetzung erweitert haben). In Bezug auf Deutschland werden die Auswirkungen der neu eingeführten Gesetzgebung auf das Rechtsgefüge der sogenannten Musterfeststellungsklage sowie des Abtretungsmodells bewertet. Im Hinblick auf Portugal wird das Verhältnis der neuen Gesetzgebung zur sogenannten Volksklage sowie zur bestehenden Opt-out-Regelung analysiert. Und bezüglich der Slowakei werden unterschiedliche Aspekte der neu erlassenen Rechtsvorschriften im Vergleich zu den deutschen und portugiesischen Rechtsvorschriften herausgearbeitet.

Die Arbeit wird außerdem untersuchen, ob Verbraucher (und Wettbewerber) ihre Rechte durch die neue Gesetzgebung kollektiv erfolgreicher durchsetzen können. Abschließend wird die Arbeit neue gesetzliche Bestimmungen vorschlagen, die zu einer weiteren Stärkung des Wettbewerbsrechts beitragen könnten.

Stichworte: Wettbewerbsrecht, private Durchsetzung, Verbandsklagen, Abhilfemaßnahmen, Unterlassungsmaßnahmen, Richtlinie über Verbandsklagen, Portugal, Volksklage, Deutschland, Slowakei, Abtretungsmodell, Verbraucher, KMU und andere Wettbewerber.