A Behavioural Perspective on Collective Redress

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I. INTRODUCTION

Collective redress is a holy grail in Europe. For more than fifteen years, it has been the subject of policy initiatives, solid political fights and a vast legal literature. More recently, a new trend has emerged, both in the literature and in the practice of rule-making. It is often referred to as 'nudging' in reference to one of the best-known pop science books which brought the gist of behavioural sciences to the wider public.[1] Nudging is a misnomer because nudges are only one of the possible uses of behavioural insights in policy making.[2] The real debate is broader and pertains to whether, when and how to use behavioural insights sensibly in policy making.[3] Be that as it may, the use of behavioural insights in rule-making is gathering increasing interest from governments and international organisations at national, European and international level. So far, the reflection on class actions and that on behavioural law-making have not met. Collective redress has not to date received attention from a law and behavioural sciences perspective. This is quite surprising as behavioural findings represent an important contribution to any debate on

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[1] R Thaler and C Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (Yale University Press, 2008). Other helpful introductions include D Ariely, *Predictably Irrational: the Hidden Forces that Shape our Decisions* (Harper Collins, 2008); S Levitt and S Dubner, *Freakonomics: A Rogue Economist Explores the Hidden Side of Everything* (William Morrow, 2005); D Kahneman, *Thinking Fast and Slow* (Farrar, Straus and Giroux, 2011); M Bazerman and A Tenbrunsel, *Blind Spots: Why We Fail to Do What's Right and What to Do about It* (Princeton University Press, 2011). J Lehrer, *How We Decide* (Houghton Mifflin Hartcourt, 2010); S Mullainathan and E Shafir, *Scarcity: Why Having Too Little Means So Much* (Times Books, 2013).

[2] R Baldwin, 'From Regulation to Behaviour Change: Giving Nudge the Third Degree', 77 *Modern Law Review*, 6 (2014) 831–857.

[3] For an elaboration, see AL Sibony and A Alemanno introduction to A Alemanno and AL Sibony (eds), *Nudge and the Law: What Can EU Law Learn from Behavioural Sciences?* (Hart, forthcoming 2015).

opt-in versus opt-out, one of the much-discussed topics about collective redress. This short chapter aims to explain why the European debate on class actions would benefit from more research conducted in a behavioural perspective and outline questions for further study.

It may be useful to start by introducing briefly the growing behavioural trend in scholarship and government practice. I will then outline behavioural findings on the status quo bias, the most relevant behavioural insight for a reflection on collective redress and offer a preliminary analysis of how these insights may impact policy making at national and EU level. Finally, I will conclude by identifying questions calling for empirical research.

II. A VERY SHORT HISTORY OF LAW AND BEHAVIOURAL SCIENCES

Economists were the first to be hit by the behavioural wave. Indeed, the seminal work by Kahneman and Tzversky[4] showed empirically that people were not behaving in the way standard economic theory assumed. Not only were ordinary mortals not *homini oeconomici* (even economists knew that), but they did not seem to be even close cousins. From there, a new branch of economics emerged: Behavioural Economics.[5] On the law side, Law and Economics, a dominant paradigm in American scholarship, was hit next. Since economic analysis of law relied on the premises of standard price theory, its premises too needed to be revised in light of behavioural findings. Economic analysis of Law became behavioural, giving rise to a new field – Behavioural Analysis of Law –[6] recently described as 'one of the two most important innovations that is going on in legal scholarship today'.[7] In Europe, behavioural legal scholarship is only emerging.[8] One reason why European legal scholars got less excited about behavioural studies than their American counterparts is because European lawyers had been less excited

[4] D Kahneman and A Tversky, 'Prospect Theory: An Analysis of Decision under Risk' 47 *Econometrica*, (1979), 263–292. In *Thinking Fast and Slow* (above n 1), Kahnemann offers an account of this research for the lay reader.

[5] F Heukelom, *Behavioral Economics: A History* (Cambridge University Press, 2014).

[6] This labelling is ironic because it suggests that behavioural insights are brought to the law via economics when in facts these insights come from psychology and economists resisted them for several decades. D Kahneman, foreword to Mullainathan and Shafir (above n 1) at IX. This is why I prefer to refer to "Law and Behavioural Sciences".

[7] T Ulen, 'European and American Perspectives on Behavioral Law and Economics' in K Mathis (ed.), *European Perspectives on Behavioural Law and Economics, Economic Analysis of Law in European Legal Scholarship*, vol. 2 (Springer, 2015), 3–16 at 4. The other most important innovative field, according to Ulen, is empirical analysis of law, a field closely related to behavioural analysis of law.

[8] *Ibid*; Sibony and Alemanno (above n 3).

about economic analysis of law in the first place. [9] The critique of something which was never very important to them (law and economics), strong as it was, could not cause much arousal.

Academic neglect is not always a good predictor of practical significance. Irrespective of what place economic analysis of law occupies in the landscape of legal scholarship, behavioural studies are relevant for law-making, also in Europe. Law generally seeks to regulate behaviour and its effectiveness depends on how people behave in response to rules. Therefore, it is reasonable for regulators and law-makers to inform themselves of behavioural insights that could be relevant to the rules they are contemplating. This realisation took place first in the US,[10] then in the UK[11] and, to a lesser extent, in several other Member States.[12] Behavioural insights also garner attention at EU level with the recent creation of a Foresight and Behavioural Insights Unit.[13] On an

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[9] K Purnhagen, 'Never the Twain Shall Meet?' in K Mathis (ed.) *Law and Economics in Europe – Foundations and Applications* (Springer, 2014), 3–21. Other reasons are outlined in Ulen (above n 7). They include the less competitive functioning of legal academia in Europe, which accounts for the fact that scholarly innovations are less valued.

[10] Cass Sunstein, one of the authors of *Nudge*, served as a chairman of Office of Information and Regulatory Affairs (OIRA) during the first term of the Obama administration. Behavioural analysis informed in particular the way cost benefit analysis is conducted. See: Executive Order 13563 of January 18, 2011, Improving Regulation and Regulatory Review, Federal Register, Vol. 76, No. 14, 3821. Sunstein shares his government experience in *Simpler: The Future of Government* (Simon & Schuster, 2013).

[11] A Behavioural Insights Team, better known as the 'Nudge Unit' was created in 2010 within the Cabinet Office. In February 2014, it was partly privatised. The Unit still provides services to the UK government but also to private sector entities and foreign governments. http://www.behaviouralinsights.co.uk/.

[12] In Denmark, a bottom-up organisation, called iNudgeU, animated by academics, civic advocates and behavioural professionals, has been increasingly involved in advising government and local authority and has created a Danish Nudge Network (http://inudgeyou.com/). In Germany, the government announced it was hiring psychologists, behavioural economists as well as anthropologists to test new methods of 'efficient government': P Plickert and H Beck, 'Kanzlerin Angela Merkel sucht Verhaltensforscher', *FAZ*, 26.08.2014, http://www.faz.net/aktuell/wirtschaft/wirtschaftspolitik/kanzlerin-angela-merkel-sucht-verhaltensforscher-13118345.html. In France, the government is showing signs of interest as part of the effort to modernise public administration: http://www.modernisation.gouv.fr/les-services-publics-se-simplifient-et-innovent/par-des-services-numeriques-aux-usagers/le-nudge-au-service-de-laction-publique. In the Netherlands, the scientific advisory council (WRR) published a report on 'Policymaking with knowledge of behaviour', available (in Dutch) at: http://www.wrr.nl/publicaties/publicatie/article/met-kennis-van-gedrag-beleid-maken/. The Commission commissioned a survey on use of behavioural insights in policy making at national level. It is underway at the time of writing.

[13] In 2014, the Commission set up a 'Foresight and Behavioural Insights Unit', which is located within the EU Commission Joint Research Centre. The unit's *raison d'être* is to centralize the efforts currently undertaken by some Directorates General of the EU Commission, such as DG Consumer Protection and Health (SANCO), to integrate behavioural insights into EU policymaking.

international level, OECD[14] and the World Bank are raising awareness among governments of developed and less developed countries about how small changes in rules can achieve large changes in behaviour at a minimal cost.[15] While behavioural insights are relevant to law-making in general, more attention has been given to their teachings in some fields of law than in others.[16] In EU Law, consumer law has received the most attention from behavioural scholars,[17] but the focus has been on substantive rules rather

[14] P Lunn, *Regulatory Policy and Behavioural Economics* (OECD, 2014); Workshop 'Behavioural Insights and New Approaches to Policy Design', Paris 23 January 2014, http://www.oecd.org/naec/NAEC_Behavioural-Insights-Programme_23-Jan.pdf. OECD is in particular investigating the potential of behavioural policy design Tax and Environmental policy and Antitrust.

[15] World Bank Group, *World Development Report 2015: Mind, Society, and Behavior* (Washington, DC, World Bank, 2015) available at https://openknowledge.worldbank.org/handle/10986/20597.

[16] A Tor, 'The Next Generation of Behavioural Law and Economics' in Mathis (above n 7) 17.

[17] F Rischkowsky and T Döring, 'Consumer Policy in a Market Economy: Considerations from the Perspective of the Economics of Information, the New Institutional Economics as well as Behavioural Economics' 31 *Journal of Consumer Policy* (2008) 285; E Avgoulea, 'The Global Financial Crisis and the Disclosure Paradigm in European Financial Regulation: The Case for Reform' 6 *European Company and Financial Law Review* (2009) 440; G Low, 'The (Ir)Relevance of Harmonization and Legal Diversity to European Contract Law: A Perspective from Psychology' 2 *European Review of Private Law* (2010) 285; M Faure and H Luth, 'Behavioural Economics in Unfair Contract Terms: Cautions and Considerations' 34 *Journal of Consumer Policy* (2011) 337; V Mak and J Braspenning, 'Errare humanum est: Financial Literacy in European Consumer Credit Law' 35 *Journal of Consumer Policy* (2012) 307; HW Micklitz, LA Reisch and K Hagen, 'An Introduction to the Special Issue on "Behavioural Economics, Consumer Policy, and Consumer Law"' 34 *Journal of Consumer Policy* (2011) 271; G Spindler, 'Behavioural Finance and Investor Protection Regulations' 34 *Journal of Consumer Policy* (2011) 315; J Trzaskowski, 'Behavioural Economics, Neuroscience, and the Unfair Commercial Practises Directive' 34 *Journal of Consumer Policy* (2011) 377; WH van Boom, 'Price Intransparency, Consumer Decision Making and European Consumer Law' 34 *Journal of Consumer Policy* (2011) 359; O Bar-Gill and N Helberger, *Forms Matter: Informing consumers effectively*, study commissioned by BEUC (European Consumer organisation), 2013; J Malbon, 'Consumer Strategies for Avoiding Negative Online Purchasing Experiences: A Qualitative Study' 20 *Competition & Consumer Law Journal* (2013) 249; A Tor, 'Some Challenges Facing a Behaviorally-Informed Approach to the Directive on Unfair Commercial Practices', in T Tóth (ed.), *Unfair Commercial Practices: The Long Road to Harmonized Law Enforcement*, (Pázmány Press, 2013) 9–18; O Bar-Gill and O Ben-Shahar, 'Regulatory Techniques in Consumer Protection: A Critique of European Consumer Contract Law' 50 *CMLRev* (2013) 109-126; JA Luzak, 'To Withdraw or Not to Withdraw? Evaluation of the Mandatory Right of Withdrawal in Consumer Distance Selling Contracts Taking Into Account Its Behavioural Effects on Consumers' 37 *Journal of Consumer Policy* (2014) 91; K Purnhagen and E Van Herpen, 'Can Bonus Packs Mislead Consumers? An Empirical Assessment of the ECJ's Mars Judgment and its Potential Impact on EU Marketing Regulation', Wageningen Working Papers Series in Law and Governance 2014/07, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2503342; A Pape, 'Miscounselling in the German Insurance Market: Utility-Orientated Implications for the

than on procedural issues. More generally, the rules on collective redress have not been confronted with the teachings of behavioural sciences. In this chapter, I do not purport to fill this gap, only to underscore that collective redress deserves attention from a behavioural law perspective.

III. BEHAVIOURAL INSIGHTS AND COLLECTIVE REDRESS: OF THE STATUS QUO BIAS

Among the noteworthy findings of experimental psychology regarding 'deviations' from perfect rationality, one is the inertia bias, also known as status quo bias.[18] Both names refer to our tendency to not call into question the current state of affairs even when we do not have a positive preference for it. This can manifest itself in a variety of situations, for example, as a tendency to keep a pre-ticked box ticked or in the form of procrastination when it comes to changing a mobile phone plan even if it would be beneficial. Kahneman and Tzversky first evidenced the status quo bias.[19] They showed experimentally that subjects have a strong tendency to take the current baseline (or status quo) as a reference point for making decisions – even if it is random and artificially created for the purpose of an experiment. In addition, any change from that baseline tends to be perceived as a loss. This is important because of loss aversion, a separate but related bias. Loss aversion refers to people's tendency to strongly prefer avoiding losses over acquiring gains. It implies, for example, that loosing €100 will cause an amount of unhappiness greater than the amount of happiness generated by a €100 windfall gain. This asymmetric perception of gains and losses is well known from marketers who know it is much better to frame an option as a price reduction (if you return the empty bottle, you get a refund) rather than as a price surcharge (you have to pay for the bottle separately from its content). The two options are equivalent for the seller but buyers interpret a price reduction from a high baseline as a gain while the equivalent price increase from a low baseline is interpreted as a loss. This makes the first option much more appealing.

Meaning of Miscounselling' 37 *Journal of Consumer Policy* (2014) 561; AL Sibony 'Can EU Consumer Law Benefit from Behavioural Insights? An Analysis of the Unfair Practices Directive' *European review of Private Law*, 6 (2014), 901–942; G Helleringer 'Retail Investors and Disclosures Requirements' in Mathis (above n 7) 193–210.

[18] W Samuelson and R Zeckhauser, 'Status quo bias in decision making', 1 *Journal of Risk and Uncertainty* (1988) 7–59; D Kahneman, J Knetsch and R Thaler, 'Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias', 5 *Journal of Economic Perspectives* 1 (1991), 193–206.

[19] Above n 1.

The general lesson about status quo is simple: defaults matter. [20] They matter for retirement plans, which are far more subscribed when subscription is the default than when people have to opt-in.[21] They matter for organ donation, where presuming consent leads to a manifold increase of the proportion of donors in the population.[22] They matter for collective redress too. Though data specific to collective redress is not available, empirical evidence of the status quo bias in various other contexts and cultures is robust enough to suggest that the choice of default is absolutely essential in the design of class actions. If the default is that anyone qualifying to be part of the class for a given action automatically joins (opt-out), there will be far greater enrolment than if the default is that any person concerned by the action has to express her will to enrol (opt-in). From a behavioural standpoint, a legislator who is serious about class actions should make them opt-out.

IV. COLLECTIVE REDRESS IN EUROPE AND THE STATUS QUO BIAS

At present, there are no EU rules on collective redress, only a Recommendation.[23] The informal nature of EU action on class actions can be explained by several factors, including powerful lobbying. From a strictly legal standpoint, the explanation is to do with the absence of a clear competence of the Union. Such a competence could be inferred in the field of competition law where, following the Court judgments in *Courage v Crehan*[24] and *Manfredi*,[25] there is a duty to ensure that those who have suffered a loss as a consequence of anti-competitive behaviour are fully and

[20] Sunstein (above n 10), chapter 5.

[21] B Madrian and D Shea, 'The Power Of Suggestion: Inertia In 401(k) Participation And Savings Behavior', *Quarterly Journal of Economics* (2001) 1149–1187 and other references cited by Sunstein (above n 10) 55.

[22] For a survey of empirical studies, see M Palmer, *Opt-out systems of organ donation: International evidence review*, Welsh Government Social Research paper n° 44/2012, http://wales.gov.uk/docs/caecd/research/121203optoutorgandonationen.pdf; for a policy discussion, see *The potential impact of an opt out system for organ donation in the UK: An independent report from the Organ Donation Taskforce* (2008), http://www.nhsbt.nhs.uk/to2020/resources/ThepotentialimpactofanoptoutsystemfororgandonationintheUK.pdf; for a critical discussion, see M Quigley and E Stokes, 'Nudging and Evidence-based Policy in Europe: Problems of Normative Legitimacy and Effectiveness,' in Sibony and Alemanno (above n 3).

[23] Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, OJ L 201 of 26.07.2013, 60–65.

[24] Case C-453/99, *Courage v Crehan*, EU:C:2001:465.

[25] Joined cases C-295/04 to C-298/04, *Manfredi a.o.,* EU:C:2006:461.

adequately compensated.[26] Arguably, effective compensation entails, at least in certain cases, collective redress. However, the EU chose to leave the matter to Member States and abstained from including any provision on collective redress in the recent Directive on actions for damages for infringements of the competition law.[27]

In other areas of EU law, such as consumer protection or environmental law, it is even more difficult than in antitrust to assert EU competence to legislate on collective redress. It is not possible to reason by analogy with antitrust as EU legislation manly consists of directives, which, unlike Article 101 and 102 TFEU, do not have horizontal direct effect and can therefore not be invoked by consumers (however many of them) against companies.[28] In such contexts, collective redress may be necessary for effective enforcement of individual rights granted under UE law, but the competence to adopt measures regarding class action clearly stays with Member States. Where the EU is undoubtedly competent is to adopt measures facilitating mutual recognition of judicial and extrajudicial acts in relation to cross border class actions (in any domain) under Article 81 TFEU.

It is therefore Member States who are in a position to rely on behavioural insights in designing rules on collective redress. By recommending opt-in, the Commission is not helping. From a behavioural perspective, this recommendation is unsound. Both the political choice to recommend opt-in and the principles articulated about the possibility of opt-out beg questions.

As explained above, the message from behavioural sciences is very straightforward: if you want people to do something, make it simple. Therefore, if any government wants to make collective redress available, they should make it simple to use. Opt-out seems to be the easiest way to make things simple and could make a very large difference in the actual use of collective actions, though other factors also affect recourse to the judiciary. It should be stressed that adopting an opt-out principle does not preclude incorporating all sorts of safeguards to avoid the much-dreaded excesses of US-style class actions, notably by prohibiting multiple damages and regulating contingency fees. Instead, the preferred option of the Commission seems to be for Member States to adopt both all sorts of safeguards to avoid abusive collective litigation *and* opt-in.[29]

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[26] See among many expressions of the official position, J Almunia (then Commissionner for Competition policy), 'Common standards for group claims across the EU', SPEECH/10/554, http://europa.eu/rapid/press-release_SPEECH-10-554_en.htm; Commission, Green Paper – Damages actions for breach of the EC antitrust rules, COM(2005) 672 final at 4; Recital 4 of directive 2014/104/EU cited at fn. 27.

[27] Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ L 349 of 5.12.2014, p. 1–19) does not address this aspect, see its Recital (13).

[28] Case 152/84, *Marshall*, EU:C:1986:84.

[29] Above n 23, para 21.

By favouring opt-in, the Commission seems to ignore evidence about the power of the status quo bias. This is surprising as the Commission itself, in another context, showed that it was precisely very aware of the importance of inertia. Indeed, such insights provided the rationale for the prohibition of inertia selling. The Consumer Rights Directive adopted in 2011 prohibits the use of pre-ticked boxes on e-commerce websites.[30] It is no longer possible for a website selling air tickets to tick by default the box “yes, I want an insurance”. In other words, a common way for private companies to leverage the status quo bias to their advantage and to the disadvantage of consumers has been outlawed. Apparently, it is not as important in the Commission’s view to protect consumers from a procedural rule that certainly works to their detriment though the same mechanism (inertia) is at stake. National legislators are discouraged to provide for inertia enrolment in a class as though this were comparable to inertia selling. In my view, a legislator who realises the power of inertia should use it consistently to foster its policy objectives. Assuming that the policy objective for class actions really is to provide effective remedies in situations where individuals do not have incentives to go to court (rather than keeping appearances of a pro-consumer policy and protecting the interest of businesses), the consistent position for the Commission would be to admit that inertia can work to the detriment of consumers when it is exploited by businesses (which the consumer rights directive does) but also where procedural rules governing class actions follow the opt-in principle. In the first case, the proper role of the law is to regulate businesses when they design choice architecture. In the second case, it is to nudge consumers to make the choices most favourable to them and to effective enforcement of the law. Opt-in should be mandated in the first case (consumers have to actively choose the extra insurance) and banned in the second case (in their own interest and in the interest of justice, litigants should not have to make an active choice).

The way in which the Commission articulates the opt-in principle and the principle of sound administration of justice is very striking. According to paragraph 21 of the Recommendation on collective redress, “any exception to [the opt-in] principle, by law or by court order, should be duly justified by reasons of sound administration of justice”. It seems curious that opt-out, which should be the recommended default, needs to be justified on a case-by-case basis. The opposite should be the case both from a behavioural point of view and as a matter of EU law. The right to an effective remedy, protected under Article 47 of the Charter of fundamental rights, must be considered a component of ‘sound administration of justice’, and in relation to effective-

[30] Article 22 of Directive 2011/83/UE on Consumer Rights, OJ 2011, L 304/64. The prohibition, which had to be enacted by Member States before 31 December 2013 is effective since 13 June 2014.

ness of remedies, the more reasonable presumption is that the effectiveness principle commands opt-out rather than opt-in. Nevertheless, it cannot be ruled out that, even in the face of policy-relevant evidence about the magnitude of the inertia bias (see below section V), there will be no political agreement to recommend opt-out. This is why it is important to look beyond the most immediate legal translation of behavioural insight, as a reversal of the principle articulated in the Recommendation.

With the Recommendation as it stands, there are two ways for Member States to rely on behavioural insights in designing collective redress mechanisms and explaining their design choices to the Commission. First, they can seek to justify opt-out on grounds of sound administration of justice by showing that it is the only way to obtain compensation for large-scale damages made up of significant, but low-value, claims. While this seems common sense, the Commission requires Member States to adduce evidence, though there is no formal standard of proof regarding such evidence. It will not be easy for Member States to gather relevant data because that would require gaining insights in how many actions were *not* brought before court because of inadequate collective redress mechanisms. Short of statistics, case studies might suffice.

Alternatively, Member States can choose to follow the Recommendation and adopt an opt-in principle. In this case, there is a second best way to legislate in a behaviourally sound manner. It consists in making opt-in *really simple*,[31] for example by allowing one-click opt-in and making it practically possible for consumer associations and for anyone interested to publicise actions in ways that will produce a good click-through rate, in particular through social media. If consumers can learn about a class action of concern to them via Facebook, follow a link and click to opt-in, there may be a future for opt-in class actions, albeit a biased one in favour of the connected fraction of the population.

Besides the issue of how a class is formed, there is another element in the design of a collective redress mechanism where the status quo bias could be relevant. This element relates to another vexing issue with class actions, namely financing. The idea would be to nudge successful claimants to donate part of the money they have been awarded in the trial or settlement. At first glance, this may seem a strange idea. In many class actions, especially consumer class actions, the sums awarded to each member of the class will be quite small. Would people want to share the small amount of money that is owed to them as a compensation for a wrong they have suffered? My hunch is that they might. The collective dimension of the class action may affect individual perception of what is at stake. Perhaps litigants feel they are part of something bigger, bigger even than the class of which they are a member,

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[31] On the art of making things simpler, see Sunstein (above n 10).

a mechanism that produces distributive justice. If it is the case, it might be possible to leverage this engagement to make class actions financially sustainable by creating a fund, preferably at EU level, that would receive donations from successful litigants. Here, behavioural insights on the status quo bias could inspire procedural rules. The law could either mandate or let courts decide that members of a class are presented with the choice between two options when informed of the successful outcome of the trial: they could either take the whole sum or donate a fraction of the money to a fund which would finance future collective actions.

To sum up: the status quo bias could be taken into account in relation with two distinct elements of collective action design: class constitution and financing through voluntary contributions. For each of these elements, the suggestions that can be made from a behavioural perspective are clear, but they are only suggestions. Before rule-makers can adopt or reject them, more evidence is needed.

V. NEED FOR EMPIRICAL EVIDENCE

To test the foregoing arguments, four empirical research questions deserve attention. They are offered as starting points for empirical research on collective redress and are by no means exhaustive.

A. How Strong is Inertia in the Context of Class Actions?

Behavioural studies show that the status quo bias exists, that it is strong and robust. This provides a powerful effectiveness argument in favour of opt-out. Yet, resistance to opt-out is great. Therefore, it would be extremely useful to conduct studies to test the existence and magnitude of the inertia bias in the context of collective actions. It would be very difficult to do in real context, because it would be impossible to control the all factors in a real environment that affect decisions to join a collective action. The problem would lend itself to laboratory testing. The experimental design would have to involve lawyers next to psychologists in order to simplify reality (for the purpose of the experiment) in a way that is acceptable, ie in a way that will let the simplified model be informative for the policy debate, notably in the framework of the revision of the Commission Recommendation scheduled for 2017.

B. How Much Does Opt-in/Opt-out Matter?

In real context, opt-in and opt-out matter but many other variables matter as well. It would be extremely interesting to model and test the effect of default in relation to that of other variables, which can impact the choice to join a collective action (such as, for example, the perception of the efficiency of the judiciary, of fairness of trial, of chances of success).

C. How Should One-click Opt-in be Designed?

The design of one-click opt-in should be tested. The difficulty will be in designing a system that allows for sufficiently simple opt-in while being compatible with other procedural principles. In particular experiments could shed light on when it is best, from an effectiveness perspective, to introduce the indispensable checks (eg, to make sure that each click represents one person). For example, results with ID verification before or after the "I join the class" click may lead to very different results.

D. Can Contributory Financing of Class Actions Work?

To test the validity of the proposal outlined above, several elements would deserve empirical scrutiny. First, the motivation of litigants would need to be assessed. Do people want justice more than they want €30 (a realistic sum in the case of a follow-on suit to obtain compensation for a cartel overcharge on consumer goods or services)? Does the willingness to share gains (if indeed there is such a willingness) depend on amounts?

If there is evidence of some willingness to share, the design of the above proposal should be tested. The basic design would be that members of a class which was awarded compensation are presented with the choice between two options: (a) take their money (often a small sum) or (b) donate a fraction of the money they obtained to a fund which would finance future collective actions.

The generous option (b) should be the default, with a possibility to opt-out and choose the selfish option (a). What would need to be tested is what fraction generates the most contribution. Should successful claimants be nudged to donate 5%, 10%, 15%, more? Should they be given a choice on how much they want to contribute to the fund? How should that choice be framed?

It is my hope that these questions will meet with the research interests of empirically minded lawyers working together with experimental psychologists and/ or behavioural economists. Experimental work on collective actions is much needed to move in the direction of more evidence-based policy making on collective redress at national and at EU level.