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Efficient Collective Redress Mechanisms in Visegrad 4 Countries: An Achievable Target?

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with keynote by prof. Astrid Stadler

Prague 2019

To cite this e-book: SIMON, R. – MÜLLEROVÁ, H. (eds.). *Efficient Collective Redress Mechanisms in Visegrad 4 Countries: an Achievable Target?* Praha: Institute of State and Law of the Czech Academy of Sciences, 2019, 280 p., ISBN 978-80-87439-39-5 (e-book).

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Cover photo: Petter Rudwall, unsplash.com/@petterrudwall

This book was supported by the International Visegrad Fund within the Visegrad Grant No. 21730099 “Progress in collective redress mechanisms in environmental and consumer mass harm situations”

supported by
Visegrad Fund

INSTITUTE OF STATE AND LAW
of the Czech Academy of Sciences

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ISBN 978-80-87439-39-5 (e-book)

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Preface

Twelve years ago, almost on the same day as our conference on “Efficient collective redress mechanisms in the Visegrad 4 countries: an achievable target?” I opened a conference in Prague, the first of that kind, on class actions in the Czech Republic. Very informative contributions came from it, including the presentations of prof. Gottwald and prof. Micklitz. More than five years ago, with my colleague Jan Balarin, we published the first draft law on class actions with a commentary. Currently, after the Legislative Proposal on Collective Actions Act has been submitted to the Czech Parliament, there is no doubt about the importance of a class action, at least from the viewpoint of the legislator.

In the present state of society and the market economy, as well as the state of technology, the lack of legislative regulation of class actions in the Czech Republic is more of a rarity in the European legal context and, in terms of its reputation, also a political disgrace. In general, its absence also represents a certain debit to citizens’ fundamental right to access to justice, which leads to certain “procedural asymmetry”.

Nowadays there are a vast number of claims that are difficult to enforce by court without collective procedural protection and so without class actions. These include, for example, unfair terms in the general business terms and unlawful provisions of loan agreements. However, many of the mass infringements consist of minor damage at the individual level, which are not enforceable under normal economic conditions (rational apathy), unless the harms caused are not irrelevant at the macroeconomic level. In these cases, mass harms can be enforced exclusively via collective actions: individual court actions cannot be expected. The second category of mass harms includes situations where individual claims themselves justify conducting individual proceedings (as opposed to the first ones); but a joint procedure would represent a significant cost saving, prevent the risk of contradictory judicial rulings, and would simplify the proceedings by reducing cases with respect to one comprehensive set of proceedings in which the litigation is resolved. Another expansion of the so-called heterogeneous interests of consumers or competitors means the existence of claims of mass detriments that can be effectively protected, not by means of public law or by individual legal disputes, but by collective civil proceedings. Using the class action, a balance between the plaintiff and the defendant is created. An entire group of individuals, representing the affected party as a whole can be an equivalent opponent to large corporations, which means that the class action can provide us with very positive preventive impacts, including deterrence. It reflects the preventive law function, consisting of regulating individuals’ behaviour and so it has a society-wide significance.

The national legislators should tackle both kinds of mass harms to create efficient collective redress mechanisms. The benefit of implanting the phenomenon developed in the USA, inspired by Joseph Story’s writing, it should be evident and should have been introduced into the legal culture of all European countries, but especially in the Visegrad 4 countries,

including the Czech Republic. It is indubitable that, in cases of mass harms, the requirements of commonality, typicality and numerosity are fulfilled. Its implementation should involve several measures.

Substantive debate should therefore be launched in the national Parliaments which should be ensured by consumer organisations as lobbyists, but mainly by expert teams, which should point to a very good rationale for the proposal submitted by the Ministries of Justice. The role of promoter should be played by consumer organizations. This campaign needs to be carried out in a logical intelligible way, based on knowledge of the matter. Finally, it is necessary to install specialized judges with the skill-sets to hearing class actions.

Concerning the Czech legislative proposal, some comments should be made here. First, the existing legislative proposal should be appraised. It is of a high standard. It is well-documented and includes financial and economic balance sheets. On the other hand, its imperfection lies in the absence of some procedural institutes that would prevent these special proceedings from delays and abuse. The deadlines and special sanctions should therefore be integrated into the final text of the proposal, and the registration process might be too time-consuming; the same applies to court depositions. Unfortunately, the Czech proposal does not reflect foreign experience. It is necessary to get to know the context of the legal regulations, not just the black letter of the statutes. In particular, it is necessary to enrich it with the experience that exists in comparable cultural-legal environments. The British collective redress project almost failed. What about Belgium? Professor Stadler may comment from the perspective of the very latest experience from Germany and based on the debate on this topic at the last Juristentag in Leipzig.

Although with some delay, I am glad to comment briefly on the problems of collective redress mechanisms in the Visegrad 4 countries today; I really wish the Czech proposal on Collective Actions Act to become an Act and I wish you to facilitate it. I therefore very much appreciate the fact that this proposal, with a special perspective on the issues facing the Visegrad 4, can be discussed at this conference today.

In Prague on 23. 11. 2018

Prof. JUDr. Luboš Tichý, Director of Centre for Comparative Law, Charles University, Prague

Introduction

This book presents the findings of our research project **"Progress in collective redress mechanisms in environmental and consumer mass harm situations",** supported by the International Visegrad Fund's Grant No. 21730099. For the first time in the V4 region, a project interlinked the study fields of consumer law and environmental law, in their common topic of introducing and functioning of collective mechanisms of legal redress in mass harm situations or situations of violations of laws in both fields. We believe that joining within the V4 region gives a chance to accelerate a better and more efficient implementation of the relevant legislation. Another benefit of the project lays in networking between the law experts and the representatives of civil associations (the consumer and environmental NGOs). Both groups discussed the experiences of their countries together at the conference in Prague on 23rd November 2018 and both present their analyses and reports in this book.

The starting point of our common research lays in the premise that private enforcement mechanisms of both consumer and environmental law areas – including especially the access of their representative associations to justice – should have been already functioning in all Visegrad 4 countries, based on the Directive 2009/22/EC on injunctions for the protection of consumers' interests, on Article 9 (3) of the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ('the Aarhus Convention') and on the 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). The participation of environmental and consumer protection organisations in law suits relating to mass harm situations is assessed as a key element in the affordable enforcement of protected rights granted also under the European policy and law. However, the instruments that are used by NGOs in mass harm violations of environmental rights and consumer rights in the V4 countries have a distinct character.

In the **consumer protection sphere**, private enforcement of infringements of consumer rights is possible, as an addition to public enforcement. Certain types of individual and collective claims (e.g. injunctions), enabling private enforcement, have been enacted in all V4 countries and class action mechanisms were also introduced in 2009 in Poland, and in 2016 in Hungary. However, the frequency of use and effectiveness of these collective claim types are low, and compensatory collective redress mechanisms are still incomplete or missing. Many criticisms have been raised regarding the injunction mechanism for consumer protection issues in all V4 countries. The most significant problem is that hardly any cases go to court, and if they do, the procedure may take too long. Due to the length of the procedure, the mechanism is ineffective, as by the time the decision is published, it is often too late to reverse the negative effect of a contract concluded with consumers. In some countries, such as the Czech Republic, the publication of the decision itself can also be problematic. The second main impediment, which fundamentally lowers the efficiency

of injunctions, is consumer organisations' inadequate funding. Not only does this cause a lack of expertise, but also it often results in consumer organisations being unable to file the suit at the second instance of jurisdiction. The risk of a lost case causing insolvency for the organisation significantly deters filing injunction suits in general. The third obstacle concerning the injunction mechanism is that consumer organisations are not entitled to bring a financial action to benefit consumers who suffered damages, so consumers cannot be compensated at the end of a long injunction action. Further problematic issues are, *inter alia,* uncertain court competences and missing procedural provisions. The other available civil law mechanism is a class action, where some deficits are also noticed, such as a too narrow scope of application, and overcomplicated certification procedures. Overall, in line with general European trends, serious flaws are visible in the collective redress mechanism in the Visegrad 4 countries, and the implementation of European law on this issue is insufficient, which was already pointed out in the "Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union" and the "Fitness check of consumer law". The consequences of these gaps are numerous unsuccessful claims for damages or injunctions e.g. on air pollution, highway traffic noise, or thousands of persons disadvantaged due to the foreign currency mortgage contracts in Hungary and Poland.

In contrast, in the field of **environmental protection**, which is predominantly a public law discipline, the remedial instruments are entrusted almost entirely to public enforcement, covering punishments for violations and cessation of illegal activities. However, serious enforcement gaps have been reported in recent decades at both EU and national level, which initiated a debate whether the insufficient and not enough effective public enforcement shouldn't be filled with the help of private protagonists like individuals or environmental NGOs. At the EU level, there have been several efforts to introduce certain elements of private enforcement and collective redress in environmental matters, but they haven't been successful so far. At the moment, there is no piece of EU legislation in place that would oblige the Member States to introduce environmental collective redress mechanisms.

As for the international law level, all the Visegrad 4 countries are State Parties to the Aarhus Convention, which establishes in Article 9 (3) and (4) certain elements of private collective enforcement of environmental rights and duties and of environmental injunctive collective redress. As any harmonised rules for implementation of these commitments are missing in the EU, the level and form of fulfilling them varies a lot within the European countries, including the Visegrad region. There are deep divergences of national procedural laws in the conditions of legal standing for individuals and NGOs; the types of decisions that can be appealed; the types of arguments that are permissible; the length of the procedure; the types of remedies that are available; and the costs of proceedings.

In the Visegrad region, only Hungary has a law that explicitly enables environmental class actions but these laws are recent and any case law is not yet in place. In the Czech Republic, the legislation on class actions is still under preparation, and in Poland, the respective Act excludes the environment from the scope of the collective litigation. Individual claims under the civil law regime are possible, but they usually enable compensation for material

damages of one's property only (which is not very appropriate for the environment) and are rarely used by individuals. Private enforcement tools of a collective nature are missing in both environmental law and practice. For none of the countries it may be said that there is a working collective redress mechanism for the environmental harm cases in place. The current situation in the environmental collective redress in the V4 countries thus cannot be described as satisfactory. The more it is useful not only to uncover this state of affairs and compare the situation in the neighbouring countries but also to identify the possible obstacles and search for legislative and interpretative solutions.

Our project has aimed to examine the legislative and implementation situation in the Visegrad countries, to compare the findings and to propose improvements within the legislation and implementation. In this book, we collect the knowledge in the V4 countries on collective redress in both the consumer and environmental fields, including the EU aspects of the problem; we link the theoretical findings of law experts and the practical experience of the associations. Their analyses and reports create the main parts of the book.

In the opening chapter, our honoured project guest, **Prof. Astrid Stadler**, gives her keynote on optimal instruments for collective redress in Europe, with a special focus on the objectives, and on the scope of application of the redress instruments. Further, she debates whether public or private enforcement should be preferred. Prof. Stadler delivers several guidelines that national legislators should take in consideration while fine-tuning their own instruments, and in parallel underlines that no uniform "one size fits all" solution can be recommended to the legislators.

Monika Jagielska opens the consumer protection part of the book. She clarifies the two different enforcement paths – public and private enforcement –, which exist in Poland, and explains why the number of claims in collective redress mechanisms is declining, despite class actions being available since 2009. Later on, she suggests possible improvements, where she sets out which tool-kit of public and private enforcement mechanisms could be the most beneficial for Poland, though not exclusively.

"Nothing ventured. Nothing gained" is main motto of **Katarína Gešková**'s chapter, where she makes the case for national legislators to introduce such sustainable collective redress instruments as class actions, which are based on market elements that do not burden and depend on the state budget. In this chapter, she also presents the main gaps in the existing collective instruments in Slovakia – the individual lawsuits with collective effect and abstract control lawsuits – with special focus on the position of consumer organisations.

Jan Balarin's chapter introduces the current handicaps to representative actions in the Czech Republic, while he underlines the complexity of drafting a viable statement of claims for injunction action and an urgent need for the proper regulation of collective redresses. Because of the rising interest in fully-fledged class action and recently delivering the first legislative draft on class actions, he evaluates the Czech legislative draft, with special focus on the litigation possibilities for NGOs. He underlines those collective action regulations that are not operable, merely symbolic or fail to have broad impact, are not worth existing.

In the following chapter, **Anežka Janoušková** presents, from the view of a national legislator, the reasons for and practical problems of drafting a class action act in the Czech Republic. As two main difficulties, which led to drafting a completely new collective redress mechanism, she highlighted the conservative local court tradition concerning tackling mass harm judicial enforcement and the inadequate representative instruments open to consumer organisations. Without compensatory redress, the slow, complicated and expensive injunction actions failed to achieve their aim in the Czech Republic. Further, she emphasised businesses' fear of class actions' abusive potential, which profoundly hinders the legislative process.

Sándor Udvary´s chapter presents the Hungarian four-pillar system of collective redresses, where, in addition to two types of public interest claims according to the Hungarian consumer protection Act, public interest litigation and joint litigation (class action), according the new Hungarian Code of Civil Procedure are available to tackle mass harm situations. Although this variety of instruments should be sufficient to resolve monetary damage, as well as injunction relief, in Udvary´s opinion they function well just on paper. He gives the costs for the procedural plaintiff as main obstacle, which limits filing suits exclusively to cases that have an overwhelming chance of being won.

After the presentations by legal experts, the national reports of the partner NGOs follow. First **Marcel Ivánek** of the Czech dTest asks how Czech consumers can enforce their rights and how consumer organisations can help them. He criticises the available system of private enforcement, which leads in practice to disappointment and passivity by those consumers; they have tired of enforcing their rights. Further, he clarifies the practical problems with filing injunction actions before courts; such attempts tend to be unsuccessful, mainly because of slow acting courts. As the most suitable instrument for consumer organisation is to stop violations by businesses, he outlines the process of requesting the competent authority. However, this instrument has also one huge shortcoming, namely that the decisions of public authorities cannot have as wide an impact as court rulings.

Dávid Kóródy of the Hungarian FEOSZ evaluates the practical effectiveness of the three different types of public interest actions in Hungary. After identifying the differences between them, he also lists, using the most important case law, the procedural difficulties in making claims, e.g. initiating and length of the procedure, and recruiting a significant number of affected consumers, as well as the reluctance of judges to satisfy compensatory claims in favour of harmed consumers. As a summary, he underlines the importance of injunction claims, which can be highly effective instruments and can draw the lawmaker's attention to marginal deficits in the law.

In the next chapter, **Petra Čakovská** of the Slovak consumer organisation S.O.S. presents the status of group actions in Slovakia. After presenting some current case law, she points out the main deficits in the actual legal situation. She highlights that, according to the current regulations, a consumer organisation is not able to achieve financial compensation for the consumer in an ordinary court procedure. Compensation is possible only via

out-of-court-settlements. Finally, she presents some positive element of the Portuguese, French and Italian collective redress mechanisms, which could be inspiring for national legislators in the V4 countries.

As the last reporter of the Visegrad 4 consumer protection organisations, **Kamil Pluskwa-Dąbrowski** presents how to launch collective redress cases in Poland, and whether consumer organisations can play an active role in these procedures. He underlines the gap between public enforcement and individual consumer interest, which not even consumer organisations can span, because they cannot initiate injunction suits, and cannot be parties in such a procedure, according to the current regulation. In public decisions on general compensation, which are quite new mechanisms, Pluskwa-Dąbrowski sees potential, although companies regularly challenge these decisions. Finally, he comments on group actions, in which consumer organisations are excluded from playing a representative role.

The environmental part of the book is opened by an introductory remark on the environmental collective redress situation at the EU level, written by **Gyula Bándi**. Bándi mentions the main development trends in the access to justice in environmental matters and the cornerstone cases of the CJEU that paved the way.

Vojtěch Vomáčka's chapter on the CJEU's interpretational approach to the standing conditions in environmental cases mentions several options for how the EU can meet the requirements of access to justice in environmental matters as set in the Aarhus Convention. However, these solutions can hardly fulfil their function if the CJEU persists in its narrow interpretation of Article 263 TFEU. Vomáčka's conclusion thus points instead to a legislative solution of the current violation of international law by the EU: to the prospective amendment of the Aarhus Regulation.

The following chapter, written by the same author, opens the national showcase of the *status quo* regarding environmental collective redress in the Visegrad region. Vomáčka presents the current debate on the Czech Draft of the Collective Actions Act, with special regard to how it plans to deal with environmental collective actions. After a thorough analysis of the proposed provisions, he claims that the concept of the environmental damage that falls within the scope of the proposed Act is too narrow to be able to solve the existing gaps in the enforcement of environmental law in the Czech Republic.

The description of the legislative situation regarding environmental collective redress continues with the Hungarian picture given by **Gyula Bándi**. Bándi first points out the importance of the constitutional right to environmental justice in the Hungarian supreme court's jurisprudence. He then turns his attention to individual provisions that serve the environmental NGOs and the public to protect the environment against damage. He mentions both the special environmental and general administrative laws that provide NGOs with special entitlements, such as the *quasi actio popularis* and *environmental injunction*. It must be stressed, however, that most of the legislation described comes from 2016 and entered into force in 2018; so there is hardly any practical experience in place.

Karolina Karpus presents the legislative situation of environmental collective redress in Poland. She covers both civil law and public law instruments and explains how they can contribute to the implementation of the third pillar of the Aarhus Convention. She pays special attention to the recent changes in the case law concerning air pollution problems, which were treated via personal rights actions under the Civil Code.

The environmental collective redress puzzle then continues with the V4 environmental NGOs' insights into the matter. The representative of the Czech NGO Arnika **Vendula Záhumenská** explains what legal instruments the Czech environmental associations tend to use to protect the environment when there is in fact no environmental collective redress in place in the Czech Republic. She brings several examples of environmental cases treated especially through general provisions on participation in permit procedures: through submitting complaints and initiating procedures at the Czech Environmental Inspectorate, at the police or other competent authorities, as well as through "soft" tools such as collecting and publishing statistical data on environmental issues, producing expert studies and providing assistance to the public in various environment-related problems.

Kiss Csaba presents a varied picture of serious environmental cases that were solved in Hungary, representing the association EMLA that deals with legal protection of the environment. In describing cases, he shows their legal background, lying either in reviewing their environmental permits or in private nuisances, and described their steps. In several of the cases, EMLA has helped the victims by representing them in the proceedings.

Magdalena Ukowska, the representative of the Polish Frank Bold Association, authors the last environmental-related chapter. She first clarifies the general entitlements available to NGOs in various types of procedures in Poland, and then she turns to the rules applicable specifically in environmental cases. She deals with all relevant procedures, including criminal and civil law instruments. She pays special attention to the recent air quality cases that shifted the judicial interpretation of personal rights related to environmental quality.

After the national reports, **Hana Müllerová** and **Rita Simon** recapitulate the national reports, list the main differences, and summarise the outputs. Although the conclusions of the book do not result in a positive view of the current state of affairs in collective redress in our countries, we hope that our common efforts (also those that we plan to develop as follow-up steps) will help to publicise the topic of collective redress among both academia and civil society in our countries, to start legislative and interpretative improvements and thus make a positive contribution to the protection of consumers as well as the environment.

KEYNOTE

1 Optimal instruments for collective redress mechanisms in Europe – What should the national legislator take into account?

Astrid Stadler

1.1 Uniform approach to collective redress?

The title of this chapter seems to imply that there is an "optimal" instrument for collective redress – a "one size fits all" solution for all types of cases and for all Member States? The following remarks will show that there is probably no such unique mechanism. Collective redress has to deal with various kinds of mass harm events in different fields of law and may require different solutions for different problems. The good news for national legislators tackling the issue of implementing new instruments of collective redress is that there is plenty of material: the activities at the European level comprise the EU Recommendation 396/2013[1] and the "New Deal for Consumers"[2] programme published in April 2018 which includes a proposal for a representative action in the collective interest of consumers.[3]

1 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 (2013/396/EU).

2 Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee "A New Deal for Consumers", 11 April 2018 COM(2018) 183 final.

3 Proposal for a Directive of the European Parliament and the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, COM(2018) 184 final.

There are also numerous reform activities in the Member States,[4] comparative studies,[5] and reams of publications by legal scholars. They all show that there is no uniform approach by legislators and scholars.

1.2 Key questions

The key questions that have to be addressed when national legislators consider collective redress include at least the following three: the scope of application of collective redress mechanisms, the goals and objectives to be achieved by the new instruments and, whether these objectives are better achieved by private enforcement tools or by public enforcement through public regulators, quasi-public ombudsmen etc.

1.2.1 Scope of application of collective redress instruments: horizontal v. sectoral approaches

Collective redress is not only a "consumer issue". The German *Volkswagen Dieselgate* clearly demonstrates that the victims of the use of the cheat device in diesel cars are not only consumers, but also numerous small and medium-sized companies. In cases of price-fixing cartels, not only the consumers at the end of the distribution chain may have to pay higher prices, but also (at least partially if passing the higher prices on to consumers is not possible) the direct purchasers. Whereas the EU Commission's Recommendation of 2013 had taken a horizontal approach and aimed at a very broad scope of application of

[4] Belgium (2014: "L'action en réparation collective" [Livre XVII, Titre 2 Code de droit économique]); Bulgaria (Chapter 33 of the Code of Civil Procedure – Articles 379– 388); Denmark (2008: Law no. 181, 28/2/2007: Section 254a-k Administration of Justice Act); England/Wales (Consumer Act 2015 Schedule 8 "Private Actions in Competition Law", Section 47B Competition Act 1998); France (Law No. 2014-344 March 17, 2014 and Decree No. 2014-1081 of September 24, 2014 inserted articles L. 423-1 to L.423-32 and R.623-1 to R.623-33 of the Consumer Code)"Action de groupe" [Code de consommation, Titre II, Chap. III], Law No. 2016-41 January 26, 2016 and the Decree no. 2016-1249 of September 28, 2016 (inserted at articles L. 1143-1 to L. 1143-22, R. 1143-1 to R.1143-11 and R. 1526-1 of the Public Health Code); Finland (Class Action Act 444/2007); Germany (Section 606-614 CPC as of 1 November 2018); Hungary (CPC 2.12.2016, MK 2016 No. 190 p. 7878, Part 8, Chapter XLII); Italy ("*Azione di Classe*") introduced by Article 140*bis* of the Consumer Code by Law No. 244 of 24th December 2007, and subsequently amended by Law No. 99 of 23rd July 2009, and Law No. 27 of 24th March 2012.); Lithuania (Art. 441-1 to 441-17 Code of Civil Procedure); Norway (Chapter 35 Act relating to Mediation and Procedure in Civil Disputes 2008); Poland (2010: Law of Dec. 17, 2009 (Dziennik Ustaw no.7 pos. 4); Portugal (Law no. 83/95; Law no. 24/96); Spain (Art. 11 [2] CPC 2001); Slovenia, Law on Collective Actions, Official Journal of the Rep. of Slovenia No. 51/2017 ("ZKolT", in force since: March 2018); Sweden (2003: Group Proceedings Act, SFS 2002:599); Switzerland Tentative Draft (March 2018), Art. 89a Swiss CPC. For the reform process in the Netherlands see DÜRR-AUSTER, H. *Die Qualifikation als Gruppen- und Verbandskläger im kollektiven Rechtsschutz*. Tübingen: Mohr Siebeck, 2017, p. 96, 234 and 344.

[5] Study on the State of Collective Redress in the EU in the context of the implementation of the Commission Recommendation, available at: <http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=612847>, see also HODGES, C. – VOET, S. *Delivering Collective Redress – New Technolgies.* Oxford: Hart Publishing, 2018; HARSÁGI, V. – VON RHEE, R. *Multi-Party Redress Mechanisms in Europe – Squeaking Mice?* Cambridge: Intersentia, 2014.

the instruments recommended, Member States across Europe have preferred a sectoral approach. Reform plans and newly implemented instruments very often apply only to consumer cases. They sometimes include competition law, as in the UK and Belgium, but rarely take care of securities law and the enforcement of claims by investors.[6] These findings rebut the often-heard criticism from the business sector, which likes to evoke the bugaboo of a "litigation industry" and warns of the US class action mechanism as an unsuitable legal transplant for Europe. European policy makers tried to avoid simply copying the American class action model and as a matter of act, in the USA, class actions have more or less completely lost significance in consumer cases.[7] Securities cases are a remaining US class action domain, which in turn apparently do not have priority in Europe. It is also remarkable that the EU Commission no longer adheres to its horizontal approach, but restricted the scope of application of its latest proposal for collective interest actions to consumer law. This step back is very likely not due to arguments of substance matter, but because the Commission did not want to challenge their jurisdictional competence.

1.2.2 Objectives of collective redress: compensation v. deterrence

Terminology in the debate on mass harm situations has changed remarkably over the years. Whereas in the beginning, "class" or "group action" have often been used to describe collective instruments in Europe, in the past 10 years "collective redress" has been preferred in order to avoid negative connotations to US class actions. However, "redress" does not mean or should not mean that collective instruments always seek damages or compensation. On the contrary, legislators must clearly distinguish between two different situations: There are cases in which the mass harm event has caused medium-sized or major loss to individuals. Then, of course, compensation is the primary goal and the victims will indeed have an incentive to go to court and sue for the recovery of damages. Therefore, any judicial system needs mechanisms to handle complex litigation involving numerous victims or claimants. There are, however, also many cases, particularly in consumer law or cartel law, in which individuals suffer only a minimal loss, but where the total amount of damages caused by a mass harm event forbids the legal system to let the violation go unpunished. These situations do not always require or even allow the victims to be compensated. It is very often not reasonable to distribute

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6 An exception is the German "Kapitalmarktmusterverfahrensgesetz" (KapMuG) implemented in 2005 which applies exclusively to the claims of investors and the Dutch WCAM (*Wet collectieve afwikkeling massaschade* (WCAM, Art. 7:907–910 Burgerlijk Wetboek and Art. 1013–1018 Dutch Code of Civil Procedure). The Dutch law was also enacted in 2005 and has in fact no restrictions on its scope of application. In practice, however, it has been used very often in international securities cases to settle the claims of European investors who had been excluded from US class actions.

7 One reason are widespread class action waivers in consumer contracts (and also in employment contracts), which have been upheld by the US Supreme Court in several decisions: AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011); Epic Systems Corp. v. Lewis, No. 16–285; Ernst & Young LLP et al. v. Morris et al., No. 16-300; National Labor Relations Board v. Murphy Oil USA, Inc., et al., No. 16–307 (US Supreme Court, May 21, 2018). For a detailed analysis of the decrease in significance of class actions see COFFEE, J. *Entreprenurial Litigation – Its Rise, Fall and Future*. Cambridge: Harvard University Press, 2015.

a few cents or Euros to consumers, but the illegally gained profit must in any case not remain with the perpetrator. Where compensation is not possible, deterrence becomes pivotal and requires effective procedural tools for the remedy of disgorgement of profits, for example. National legislators should therefore distinguish between these two case groups and should implement different instruments for each situation.

For a very long time, the EU Commission has agitated for compensation only – admittedly an understandable policy strategy, because consumers like to hear that they will receive compensation, even if it is only a small amount. Where only small amounts of loss are involved, compensation is possible, at least in cases in which the defendant is in a position to clearly identify the victims (because they are his costumers or clients) and to directly pay back what they, for example, have paid based on invalid standard contract terms. As such, in contract cases, courts may order banks, telecommunication providers, insurance companies, travel package and tour operators, airlines etc. to reimburse customers even if the amounts are small. In tort law, by contrast, the victims of mass harm events are often difficult to identify and can be described only by abstract criteria for the purpose of representative actions or group actions (e.g. in product liability cases or in cartel cases). In these instances, distribution of small amounts of compensation for each victim will require considerable administrative efforts and can be disproportionate.

With its proposal published in April 2018, the Commission has therefore finally changed its policy. For the first time, the Commission considers a specific solution for small individual damages. Art. 6 (1) of the draft establishes as a regular instrument a representative action which allows qualified entities to bring representative actions "seeking a redress order, which obligates the trader to provide for, inter alia, compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid, as appropriate." Member States are free to decide whether an opt-in or opt-out mechanism should apply. By contrast, Article 6 (3b) takes a different approach for small damages: In cases where "consumers have suffered a small amount of loss and it would be disproportionate to distribute the redress to them" Member States shall ensure that the mandate of the individual consumers concerned is not required and "the redress shall be directed to a public purpose serving the collective interests of consumers".

The solution proposed in Article 6 (3b) takes into account that deterrence is more important than compensation. It also accepts so-called "*cy prés*" solutions instead of individual compensation. The basic idea of *cy prés* can be described as follows: If the distribution of compensation funds to the group or class members is disproportionate, the money paid by the defendant should be used in a way that is at least close to consumer compensation. Such solutions have been provided in collective settlements in the US and in the UK, but they have also triggered a controversial debate about its legitimacy.[8] If agreed upon in

[8] MULHERON, R. *The Modern Cy Près Doctrine: Application and Implications*. London: Cavendish Publishing, 2006; MULHERON, R. Cy Près Damages Distribution in England: A New Era for Consumer Redress. *European Business Law Review*. 2009, n. 2, p. 307; TIDMARSH, J. Cy Près and the Optimal Class Action. *George Washington Law Review*. 2014, no. 82, p. 767–773. The US Supreme Court will have to decide whether cy près solutions are adequate in mass settlements, *Frank v. Gaos*, Docket No. 17–961.

a collective settlement, *cy près* is a matter of freedom of contract and of fair and adequate terms of the settlement, which normally requires court approval. If the court considers *cy près* an appropriate solution for the case at hand, it will approve the settlement. The situation is different when the case cannot be settled and it is up to the court to decide on the method and scope of compensation. The Commission's proposal in Article 6 (3b) aims at court decisions and, if it comes into force, will require a modification of substantive law in most Member States in order to allow such a flexible way of "compensation". Traditional concepts of tort liability or compensation do not take into account the possibility of giving compensation to anybody other than the tort victim. Nevertheless, the handling of complex mass harm situations requires more flexibility.

Procedural instruments similar to those suggested in Art. 6 (3b) of the Commission's proposal are already in place in some Member States. Germany, for example, implemented in 2005 a representative action for skimming-off illegally gained profit from companies that have violated the competition rules and have thus caused damage to a large number of consumers. (Section 10 Unfair Competition Act). This is from the outset not an action for damages, but a disgorgement instrument. The substantive basis of the claim is not in tort or contract law, but in unjust enrichment. Legal standing lies exclusively with consumer associations and other "qualified entities". Since its coming into force in 2005, not many actions have been brought, because the amount to be "skimmed-off" goes more or less completely to the federal budget. Consumer associations, which have small budgets for litigation anyway, have no financial incentives to bring such claims. On the contrary, actions under Section10 Unfair Competition Act involve a high procedural risk due to the application of the loser pays rule and the requirements under substantive law (such as an intentional infringement of competition rules, which is difficult to prove). Although a good idea as such, Section 10 Unfair Competition Act is an example of bad legislation. It was from the outset a mere paper tiger with almost no relevance in practice, and the legislature was well aware of that.

The situation has become even worse because of a recently published decision by the German Federal High Court.[9] In September 2018, the court decided that an action under Section 10 Unfair Competition Act, which was brought by a consumer association, was not admissible and constituted an abuse of procedural rights as it was primarily brought in the economic interest of a third party funder. The consumer association had in fact entered into an agreement with a commercial third party funder in order to mitigate its procedural risk and to bring the action in the first place. According to the agreement, the third party funder was entitled to approximately 30% of the proceeds in the event of a successful action. Although the Federal authority responsible for administrating payments made by defendants according to Section 10 Unfair Competition Act had given its consent to the agreement, the Federal High Court considered the action abusive. Its main argument was that the action ignored the legislator's objectives. The German legislature was aware of the financial problems of potential claimants when establishing the tool and had accepted that only a few actions would be brought. Using a third party funder was considered as bypassing the legislature's intention.

[9] Bundesgerichtshof, 13.9.2018 – I ZR 26/17, *Neue Juristische Wochenschrift* (NJW) 2018, p. 3581.

Even though the instrument was a "non-starter" from the beginning, it comes as a surprise that the Federal High Court did not even attempt to give it a chance in the interest of the consumer. Without the intervention of the legislator, the decision will be the coffin nail for skimming-off actions under Section 10 Unfair Competition Act in Germany.

The unfortunate development in Germany clearly shows that the effectiveness of collective redress instruments, in general, depends on the availability of funding. I will come back to that aspect in the final part of this chapter.

1.2.3 Private v. public enforcement

The question whether court-based redress mechanisms initiated by private entities or individual victims are preferable over public enforcement by public regulators or an ombudsperson has been discussed intensively since the EU Commission in 2004 promoted the idea of private enforcement in competition law for the first time. Based on the *Ashurst* study[10] DG Competition published White[11] and Green Papers[12] in which it expressed the idea of copying to some extent US class actions in European competition law. Animated debates followed. The EU Recommendation of 2013 and the "New Deal for Consumers" proposals of 2018 show that the Commission has finally adopted a more flexible approach, which takes into account the different traditions in Member States. The Commission still recommends private enforcement, but it is up to the Member States to decide whether the harmonised instruments should be laid in the hands of private entities or public regulators.[13]

In 2018, *Christopher Hodges* and *Stefaan Voet* published a study called "delivering collective redress" which strongly advocates for "regulatory redress".[14] According to their findings, court-based collective redress mechanisms are "too complex, costly and lengthy" and national legislators should instead go for consumer ombudsmen and public regulators to handle mass harm events. Apparently, the study is strongly influenced by experiences in the UK and Belgium and it is doubtful whether such an approach would work well in other Member States. ADR schemes such as ombudsperson and court-based redress should not be mixed. ADR institutions must be neutral, impartial and independent. If ADR does not work in a particular case, court-based collective instruments must be available and they require strong representatives of consumer interests. ADR institutions are not the right entities to do both. Secondly, public regulators and ombudsmen will often not be in the position to deal with all mass harm events and to present victims adequately. The strength and efficiency of these institutions depend on financial and personal resources, which in many Member States come from the government.

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10 Available at: <http://ec.europa.eu/competition/antitrust/actionsdamages/study.html>.

11 White Paper on Damages actions for breach of the EC antitrust rules, SEC(2008) 404; SEC(2008) 405; SEC(2008) 406; COM/2008/0165 final.

12 Green Paper – Damages actions for breach of the EC antitrust rules, COM/2005/0672 final SEC(2005) 1732; COM/2005/0672 final.

13 Art. 4 no. 3 Proposal for a Directive of the European Parliament and the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, COM(2018) 184 final.

14 HODGES, C. – VOET, S. *Delivering Collective Redress – New Technologies*. Oxford: Hart Publishing, 2018.

Admittedly, private entities or private individuals, as "qualified claimants", are susceptible to the influence of lawyers and third-party funders and their economic interest in litigation. Public regulators, however, are vulnerable to the influence of the Government. The *Volkswagen Dieselgate* again is a very good example of how public regulators can fundamentally fail to come up with adequate solutions for the victims of a mass harm event.

One lesson to be learned from the USA is that the more protagonists come into play; the better is the chance that mass harm cases will be taken to court.[15] Therefore, the idea of a kind of competition between several "guardians" has advantages compared to a monopolisation of legal standing. Although safeguards must be in place to prevent lawyers' and third-party funders' economic interests from becoming the primary driving force behind collective redress, the consumer or victims of a mass harm event in general are in a much better position if they can decide themselves whether a case should go to court or not. This does not exclude a combination of public and private enforcement. The effective handling of mass harm cases depends on an early identification of the cases. Public regulators (such as competition authorities) or ombudsmen (where existing in a Member State) might sometimes be in a better situation to identify violations. Nevertheless, collective redress instruments should be based on a broad concept of legal standing that also includes individuals.

1.3 Guidelines for collective redress

When implementing new instruments of collective redress, legislators should take into consideration the following guidelines.

1.3.1 Efficiency of collective redress

Collective redress tools must allow dealing with a mass harm situation efficiently and expeditiously. In the famous German Telekom Case 17,000 investors had filed claims for the recovery of damages against Deutsche Telekom at the District Court in Frankfurt in 2003. Whereas the claims of US investors against Deutsche Telekom were settled in a US class action within less than two years, the German case is still pending at the level of test case proceedings, despite the implementation of the *Kapitalanlegermusterverfahrensgesetz* – an Act designed to handle securities litigation more efficiently. The Act, which came into force in 2005, focuses on test case proceedings and its procedural rules turned out to be much too complicated to alleviate the handling of complex litigation.[16] In 2018, the German legislator made the same mistake again. It established a so-called *Musterfeststellungsklage* for consumer cases.[17] Again, the new instrument is unnecessarily complicated with its two-step-concept. Consumer associations have

[15] For details see STADLER, A. Kollektiver Rechtschutz – Chancen und Risiken. *Zeitschrift für das Gesamte Handelsrecht (ZHR)*. 2018, Vol. 6, p. 623.

[16] The results of an 2010 evaluation of the Act were not very promising; see HALFMEIER, A. – ROTT, P. – FEESS, E. *Kollektiver Rechtsschutz im Kapitalmarktrecht, Evaluation des Kapitalanleger-Musterverfahrensgesetzes*. Frankfurt: Frankfurt School Verlag, 2010.

[17] Bundesgesetzblatt Teil I 2018, p. 1151, Section 606–614 German Code of Civil Procedure.

to file an action for declaratory relief in the first step. Consumers may register in an electronic claims register in order to stop limitation periods from running and in order to benefit from a court decision given in the representative action. A consumer association's action does not lead to an immediate compensation of consumers. Each and every consumer who has registered with the representative action must sue the defendant individually for damages in a second step. Efficient instruments of collective redress look different![18]

In complex litigation, courts need room to manoeuvre; they must have case management powers and mechanisms to settle cases. European judges are often not well trained for such situations. Collective redress actions change the traditional role of judges and require an active judge. Whereas in regular two party proceedings, the judge has to be strictly neutral and can leave it, for example, to the parties to negotiate settlement terms, collective actions involve the interests of absent group members or even a public interest. Courts must have the power to supervise the lead plaintiff and they must be able to substitute him if he is not acting in the best interest of the group. Again, a lesson to be learned from the US class action includes tools such as "manuals for complex litigation" which help judges to structure proceedings and assist them in identifying conflicts of interest.

1.3.2 Conflicts-of-interest

Class actions in the United States are famous for their attorney-client conflicts, particularly where contingency fee arrangements are involved. The European approach to collective actions prefers to give legal standing to representative entities, such as consumer associations, but it is not immune to similar problems. Representative entities may also have conflicts of interest when representing selected groups of consumers and focusing on the "big cases". Many mass harm events also tend to produce conflicts of interest among the group of victims or claimants and the establishment of sub-groups might be necessary. Where public regulators have legal standing to enforce the consumer's interest, again conflicts may appear. As mentioned above, the German Volkswagen Dieselgate has shown that the public regulator should have reacted earlier and stronger. Where a "big player" is on the defendant's side, public regulators will have difficulties in considering the interest of a group of consumers exclusively.

1.3.3 Safeguards against misuse

Legislators must of course be aware of the necessary safeguards against the misuse of instruments of collective redress and they must try to find an appropriate balance. However, they must also take care not to believe any fairy tale about misuse planted by the business

[18] The new act was heavily critised by legal scholars and practioners: FÖLSCH, P. Der Regierungsentwurf zur Einführung der Musterfeststellungsklage. *DRiZ*. 2018, p. 214; JUNG, M. Musterklage – das stumpfe Schwert für Verbraucher. *AnwBl.* 2017, p. 185; HABBE, J. S. – GISELER, K. Einführung einer Musterfeststellungsklage – Kompatibilität mit zivilprozessualen Grundlagen. *BB.* 2017, p. 2188; KRANZ, D. Der Diskussionsentwurf zur Muster-Feststellungsklage – ein stumpfes Schwert? *NZG*. 2017, p. 1099– 1102; STADLER, A. Musterfeststellungsklagen im Verbraucherrecht. *Verbraucher und Recht.* 2018, p. 83.

sector! The well-known argument that collective redress tends to produce a US-style *"litigation industry"* implies that claimants will bring weak cases in order to *"blackmail"* settlements from which primarily the claimant's lawyer will benefit. Collective redress tools have started to be in use all across Europe since the beginning of the 2000s, when the Nordic countries implemented group actions according to the role model of the US class action (but often based on an opt-in mechanism).[19] Until today, there is no evidence that these tools are misused to bring completely unmeritorious cases to court. As a matter of course, not all cases were or will be successful, but there is no evidence that defendants – like defendants in US class actions – are willing to settle these cases just in order to get rid of the litigation and its costs. The loser pays principle, which applies as a matter of principle all over Europe is one of the best safeguards against unmeritorious claims and it must apply in collective redress. Its downside is, of course, that the procedural risk involved in mass litigation may constitute a high threshold to access to justice. The way out of this predicament is not contingency fees for lawyers. Financial incentives for lawyers are necessary to some extent, but they must be applied with caution. There is nothing wrong with lawyers earning money, but their economic interest must not become the driving force.

Finding the right balance between safeguards and incentives is definitely the most challenging task for legislators. In the US, there are too many incentives and no safeguards. The EU Commission's proposal includes too many safeguards and not enough incentives.

1.3.4 Flexibility

Collective redress cases require flexibility. Courts need flexibility with respect to the procedural handling of complex cases, but there is also a need to modify substantive rules sometimes. In numerous mass harm situations, it is not possible or not reasonable to fully compensate victims or to even go into the details of each and every claim. Courts should be able to generalise damages and to award "lump sum payments" which come along with the court's criteria for the distribution of the money among the claimants. As mentioned before, compensation of small individual loss can be disproportionate and *cy près* should accepted in settlement terms if fair and adequate. Compensation funds which result from court decisions or settlements need a general legal framework. Details must be negotiated by the parties and require court approval. Legislators, however, should put in place basic rules on the administration of funds and the supervision of fund administrators.

1.3.5 Broad scope of legal standing

In practice, the efficiency of collective redress tools depends on the question of who has legal standing to bring such actions. Whereas the EU Commission's Recommendation of 2013 preferred a broad approach, which included individual victims and "qualified entities"

[19] The national regulation see at footnote 4.

as claimants,[20] the 2018 draft for a Directive on representative actions in the collective interest of consumers is much narrower in this respect. The proposed directive is a further development of the European Injunctions Directive of 2009 and follows the same pattern with respect to legal standing. Only "qualified entities" are entitled to bring the representative action, not individual members of the group of victims.[21] This is in line with a general trend in the Member States. If we look at recently implemented instruments, national policy makers have quite often excluded group members from legal standing and favoured a representative action over the US model of a group or class action. The widespread reluctance to give individuals the role of a lead plaintiff or a group representative is not exclusively due to the lack of competence and forensic experience of individuals (which they often do indeed lack). It is more the assumption that individual group members are vulnerable to capture by lawyers and litigation funders that causes policy makers to restrict legal standing. Then, however, the probability that all mass harm events or even a majority of them will go to court declines considerably: more guardians guarantee more enforcement proceedings.

Irrespective of the scope of legal standing, collective redress actions need safeguards against a "race to the courthouse". One of the most important questions with respect to the lead plaintiff is "Who guards the guardian?" and the obvious answer is the court. Courts must supervise the lead plaintiff during litigation and make sure that he acts in the best interest of the group. Experience from the US, and also from the Netherlands shows that it is even better if the court already has some influence on the selection of the lead plaintiff. Notably where representative entities are entitled to bring collective redress actions, the lead plaintiff should not simply be identified on a "first come, first serve" basis. Legislators must define criteria for the qualification as a lead plaintiff,[22] but courts should be given the power to select the lead plaintiff who is the best qualified for a particular case at hand if several applicants exist. The new Dutch proposal for a representative action for damages, for example, allows a "beauty contest" among several entities that are interested in becoming the lead plaintiff. According to the draft submitted to Parliament in the Netherlands, a claimant must register the collective action in a central register within two days after initiating proceedings. After registration, a period of three months starts to run, in which other claimants can submit a collective action with respect to the same mass harm event. If more claimants file a collective action, the judge will appoint the most suitable claimant as an 'exclusive representative' according to the proposed Article 1018e (1) of the Dutch Code of Civil Procedure.

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[20] 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 (2013/396/EU, No. 3a (definition of 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)".

[21] Proposal for a Directive of the European Parliament and the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, COM(2018) 184 final, p. 4: "The proposal builds on the approach of the current Injunctions Directive which enables 'qualified entities' designated by the Member States to bring representative actions. Under the proposal, these qualified entities will have to satisfy minimum reputational criteria (they must be properly established, not for profit and have a legitimate interest in ensuring compliance with the relevant EU law)".

[22] For a comparative analysis of legal standing in collective redress see DÜRR-AUSTER, H. *Die Qualifikation als Gruppen- und Verbandskläger im kollektiven Rechtsschutz*. Tübingen: Mohr Siebeck, 2017.

1.3.6 Litigation funding

Last, but not least, money makes the world go around! Mass harm litigation is expensive and the aggregation of claims leads to high amounts of money at stake. Where the loser pays rule applies,[23] the risk of having to reimburse the defendant in addition to the claimant's own litigation costs may prevent claimants from filing collective actions in the first place. Claimants therefore need to find solutions in order to minimise the procedural risk.[24] There are several options. Collective actions can be funded by the claimant's lawyer, based on a contingency fee arrangement – this is the US class action solution which involves a high risk of conflicts of interest and inappropriate incentives. European policy makers are therefore hesitant to adopt that system. However, we should not reject from the outset success-based uplifts on lawyers' fees, as available, for example, in Sweden or the UK.

Another potential source of funding are the group members themselves. Collective actions can be funded by the contributions of the group members or by making them liable for adverse cost orders. Joint liability for costs may however prevent consumers or victims from participating in collective actions. They will be particularly disinclined to take any risk in cases involving small individual damages. Moreover, where advance payments are necessary, the organisation of the group becomes challenging. This is why most collective action models in Europe keep the group members entirely clear from litigation costs.[25] Only the group representative, who formally becomes a party to the action, is liable for costs.

A remaining option for the representative to mitigate the procedural risk is third party funding. Litigation funding has spread from Australia to Europe and fills a gap in countries where contingency fee arrangements with lawyers are prohibited by law or ethical codes. Third party funders normally operate on a contingency fee basis and take a high risk. If the case is won or settled, they will receive a percentage, of between 25% and 40%, of the compensation paid by the defendant. If the case is lost, they do not get anything and will often be liable for the reimbursement of the defendant's litigation costs. The European Commission's Recommendation and the proposal for a directive on representative actions both express concern about potential misuse of the funder's position and undue influence

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23 A detailed analysis of the situation in Europe is provided by HODGES, C. – VOGENAUER, S. – TULIBACKA, M. (eds.). *The Costs and Funding of Civil Litigation, A Comparative Perspective*. Oxford: Hart Publishing, 2010.

24 A comprehensive survey and analysis of litigation funding is provided by TILLEMA, I. *Entreprenurial Mass Litigation, Balancing the Building Blocks*. The Hague: Eleven International Publishing, 2018.

25 The same applies for the Proposal for a Directive of the European Parliament and the Council on representative actions for the protection of the collective interests of consumers; see p. 8 of the Proposal: *"Likewise, the action does not generate any costs for individual consumers, since they are not parties to the proceedings initiated by the qualified entity."* Art. 15 of the proposal suggests that Member States should support qualified entities: *"Member States shall take the necessary measures to ensure that procedural costs related to representative actions do not constitute financial obstacles for qualified entities to effectively exercise the right to seek the measures referred to in Articles 5 and 6, such as limiting applicable court or administrative fees, granting them access to legal aid where necessary, or by providing them with public funding for this purpose."*.

on the litigation strategy.[26] Although safeguards against misuse should be in place and national legislators must consider the option to provide a legal framework for third party funding, third party funders have a legitimate interest in having a say when it comes to settlement negotiations. Support by third party funders is nevertheless not an adequate remedy to mitigate litigation risks in all cases. Funders are interested only in collective actions that result in money awards, from which they can take their share as a success fee. Collective redress in consumer cases may have different goals and ask for the repair of goods, termination of contracts or declaratory relief. These types of collective actions are not attractive for third party funders.

National legislators should consider the establishment of "access-to-justice" funds for consumer collective redress,[27] following the example of Canada[28] or Australia.[29] Funds like these could be fed with left-overs from collective settlements, the payments made based on actions for skimming-off illegally gained profit (e.g. Section 10 German Unfair Competition Act), administrative fines[30] or penalty payments for violation injunctions. In such a setting, it is possible to use payments by the business sector itself to finance collective actions without additional input by the taxpayer or by the group members themselves. Money from the funds should be available upon application to qualified claimants further down the line. Any qualified claimant who seeks support from the "access-to-justice" fund for a collective action must convince the fund's administrators that the case has a good prospect of success. Applications to the funds, as well as agreements with third party funders based on due diligence, will prevent unmeritorious case from being pursued and will have filter effects.

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[26] Art. 7 of Proposal for a Directive of the European Parliament and the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, COM(2018) 184 final; 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 (2013/396/EU), No. 14–16.

[27] The idea is not entirely new, see for similar proposal in the past: WAGNER, G. *Verhandlungen des 66. Deutschen Juristentags (DJT*). Vol. II. München: C.H. Beck, 2006, p. 14; MICKLITZ, H-W. – STADLER, A. *Unrechtsgewinnabschöpfung*. Baden-Baden: Nomos, 2003, p. 129; MICKLITZ, H-W. –STADLER, A. *Das Verbandsklagerecht in der Informations- und Dienstleistungsgesellschaft, Gutachten BMVEL*. Münster: Landwirtschaftsverlag, 2005, p. 1142; STADLER, A. Kollektiver Rechtsschutz quo vadis?. *JZ* 2018, p. 793–801; FEZER, K. *Gutachten Unrechtserlöse*. 2012. p. 50, Available at: <https://kops.uni-konstanz.de/handle/123456789/23103>; BUCHNER, J. *Kollektiver Rechtsschutz für Verbraucher in Europa*. Göttingen: V&R, 2015, p. 202; MELLER-HANNICH, C. *Gutachten A zum 72. Deutschen Juristentag, Sammelklagen, Gruppenklagen, Verbandsklagen – Bedarf es neuer Instrumente des kollektiven Rechtsschutzes im Zivilprozess?* München: C.H. Beck, 2018, p. A 60, and A 88; VOET, S. Cultural Dimensions of Group Litigation: The Belgium Case. *Georgia J. of Int. & Comp. Law*. 2013, n. 41, p. 433– 469.

[28] Quebec („Fonds d'aide aux recours collectifs", available at: <http://www.faac.justice.gouv.qc.ca/> or „Access to Justice Funds" in Ontario, available at: <http://www.lawfoundation.on.ca/what-we-do/access-to-justice-fund-cy-pres/>.

[29] LEGG, M. – TRAVERS, L. Necessity Is the Mother of Invention: The Adoption of Third-Party Litigation Funding and the Closed Class in Australian Class Actions. *Common L. World Rev*. 2009, n. 38, p. 245; MULHERON, R. – CASHMAN, P. Third Party Funding: A Changing Landscape. *Civ. Just. Q*. 2008, n. 27, p. 312.

[30] In the VW diesel scandal, Volkswagen AG had to pay an administrative fine of 1 billion Euro to the Land Lower-Saxony (available at: <http://www.spiegel.de/wirtschaft/unternehmen/vw-dieselaffaere-volkswagen-muss-eine-milliarde-bussgeld-zahlen-a-1212807.html>) which came as a windfall profit for them. Used as seed capital for an "access-to-justice" funds it could have supported a great number of collective actions!

COLLECTIVE REDRESS IN CONSUMER PROTECTION

2 Collective redress and consumer enforcement in Poland – why doesn't it work?

Monika Jagielska[31]

2.1 Two paths of enforcement

Polish law gives consumers a variety of legal means through which to enforce their rights, performed either on a judicial or on an administrative path. In the first case; consumers are entitled to bring an individual[32] or collective[33] claim, not only to enforce the rights granted by the Consumer Protection Act of 2014[34] (the act implementing Directive 2011/83[35]) and other "typical" consumer rights, seeking protection against unfair contract terms; but also, for example, to claim damages on the basis of the Act on Combating Unfair Commercial Practices[36] implementing the UCP Directive[37]. An individual consumer may also obtain free legal assistance from a local consumer ombudsman and/or a non-governmental consumer

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[31] The author would like to thank Dr Aneta Wiewiorowska-Domagalska from the European Legal Studies Institute Osnabruck and Ms Dorota Karczewska Vice-President of UOKiK for the legal consultations and advice, which highly influenced the merits of this paper.

[32] See GAJDA-ROSZCZYNIALSKA, K. *Sprawy o ochronę indywidualnych interesów konsumentów w postępowaniu cywilnym.* Warszawa: Wolter Kluwer, 2011.

[33] See JAWORSKI, T. – RADZIMIERSKI, P. *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym. Komentarz.* Warszawa: C.H. Beck, 2010; GRZEGORCZYK, P. *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym – Ogólna charakterystyka*. Warszawa: LexisNexis, 2011; SIERADZKA, M. *Pozew grupowy jako instrument prywatnoprawnej ochrony interesów konsumentów z tytułu naruszenia reguł konkurencji.* Warszawa: Wolter Kluwer 2016; KULSKI, R. *Ochrona interesów zbiorowych w postępowaniu cywilnym*. Warszawa: C.H. Beck, 2016.

[34] Act of 30 May 2014 on consumer rights (Journal of Laws of 2014, item 827).

[35] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

[36] The Act of 23 August 2007 on combating unfair commercial practices (Journal of Laws No. 171 of 2007, item 1206).

[37] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive).

organisation, or may choose alternative dispute resolution (e.g. reconciling the positions of the parties by using measures such as mediation).

On the other hand, the Polish Office of Competition and Consumer Protection (UOKiK) acts as a central government administrative body responsible for implementing the consumer protection policy and acting in the public interest. It initiates administrative proceedings concerning infringements of collective consumer interests and conducts proceedings intended to determine whether standard form contracts contain any abusive clauses, and whether a prohibition on the use of such clauses should be imposed. As a result of the administrative proceedings conducted, UOKiK may issue a decision recognising the practice as infringing collective consumer interests, or a decision recognising the provisions of a standard form contract as abusive, and subsequently imposing a prohibition on its use and setting a fine of up to 10% of the trader's revenue in the preceding year. If it is justified by the public interest, UOKiK may issue a reasoned opinion in a case concerning consumer protection pending before a court of general jurisdiction. In order to obtain information that may constitute evidence in cases pertaining to practices that violate collective consumer interests, UOKiK may also use a method known as mystery shopping.[38]

2.2 Collective redress – Polish regulation

Collective redress was implemented in Poland in 2009 by the Act on Pursuing Claims in Group Proceedings of 17 December 2009,[39] and was recently amended by the Act on Amending Certain Acts to Facilitate the Seeking of Receivables.[40] The act was meant to be a generic mechanism covering all types of liability, but was then amended in the Senate (the upper house of the Polish Parliament) to apply only to consumer law, product liability and tort liability, which was further changed in 2017 to cover claims against the non-performance or improper performance of a contract; regardless of the object of such claims (including non-consumer claims) and unjust enrichment claims. As a rule, group proceedings may not be used to pursue claims arising out of a violation of personal rights; though it is possible to bring claims in group proceedings arising from a bodily injury or a health disturbance, including claims to which the closest members of the family of the injured party who died as a result of the bodily injury or a health disturbance are entitled. In this category of claims, pursuing cash claims in group proceedings is limited to demanding the establishment of the defendant's liability. According to the explanatory note to the act, it was introduced in order to enhance the effectiveness of justice and access to justice in cases where pursuing a claim as a part of a group is more advantageous than pursuing an individual claim. The Polish Class Action Act provides for an opt-in model, allowing a class action to be brought only by a class member or by a regional consumer ombudsman (public body). After certification,

[38] The description from UOKiK official website available at: <https://uokik.gov.pl/consumer_protection_in_poland.php>.
[39] Official Journal 2010 number 7 item 44 of 18 January 2010.
[40] Official Journal of 2017 item 933 of 12 May 2017.

potential class members can join the class within a time limit set by the court. The court is required to indicate a date by which group members must join the litigation. The deadline must be mentioned in the mandatory press announcement. Using other means to notify the potential participants is also possible, and statements justifying membership in the group should be addressed to the group representative. This issue is not directly expressed in the act and is subject to debate by the practitioners and academics. After forming the final group, the proceedings follow the provisions of the Polish Code of Civil Procedure. A final judgment concluding the class action then binds all class members. The Polish Class Action Act concerns judicial civil procedure in cases where the same types of claims are sought by at least 10 people. This group quantity requirement is traditionally analysed during the first stage in the course of group action, known as the certification or admissibility procedure. In principle, group members do not participate actively in the proceedings. Their activity in the proceedings is actually limited to filing a statement on joining the group. A group member is not a claimant in procedural terms, and so they are not a party to the group proceedings, although a group (or subgroup) member in group proceedings is heard, not in the capacity of a witness, but of a party. In accordance with Article 4 of the act, the action is instituted by a representative approved by all the class members.[41] The group representative may be a member of the group or a local consumer ombudsman. The representative conducts the proceedings in his or her own name, but on behalf of all the members of the class. Group proceedings can be adjudicated by circuit courts (but not lower regional courts), in front of a panel of three judges. The representative must be a professional legal counsel, or one must be established for the representative.

2.3 The (in)effectiveness of the collective claims system in Poland

According to the official data (see next page), 234 cases were filed in civil law and eight in business. The number of claims for collective redress is declining, and this way of pursuing consumer rights seems to be losing its attractiveness to consumers.[42] According to research prepared for European Parliament, there are several reasons that may explain this tendency, in particular the length of the proceedings and the lack of any spectacular successes. The most famous cases either ended with rejection by the court, though not on the merits but simply on the grounds of admissibility; or were stuck in proceedings (a highly publicised case, involving more than 1,000 consumers, has been going on for more than eight years now). Another possible factor is the lack of appropriate case management by judges, as they generally see collective proceedings as protecting the sum of subjective rights belonging to specific persons. In that way, collective proceedings do not differ from classic civil matters – the only difference lies in the procedure. The other possibility is that

[41] This part of the analysis was based on the report prepared for the current project "Progress in collective redress mechanisms in environmental and consumer mass harm situations" by SZOSTEK, D.

[42] See also SLOWIK, P. Zbiorowa niemoc. *Gazeta Prawna,* 8. January 2019.

Table no. 1 Collective claims in Poland

Wydział Statystycznej Informacji Zarządczej
Departament Strategii i Funduszy Europejskich Ministerstwa Sprawiedliwości

Pozwy zbiorowe w sprawach cywilnych (rep. C)
w sądach okręgowych w pierwszej instancji w latach 2010–2018

Lata	Wpłynęło	Załatwiono				Pozostało
		razem	w tym			
			odrzucono	oddalono	zwrócono	
2010	21	*	*	*	*	*
2011	37	21	4	–	11	20
2012	35	20	6	1	10	33
2013	22	26	5	6	5	29
2014	41	19	9	2	7	51
2015	32	31	9	2	7	52
2016	30	23	5	2	10	59
2017	16	27	6	3	4	48
2018	22	18	1	4	–	52

Pozwy zbiorowe w sprawach gospodarczych (rep. GC)
w sądach okręgowych w pierwszej instancji w latach 2010–2018

Lata	Wpłynęło	Załatwiono				Pozostało
		razem	w tym			
			odrzucono	oddalono	zwrócono	
2010	–	*	*	*	*	*
2011	1	*	*	*	*	*
2012	4	1	1	–	–	4
2013	–	2	1	–	–	2
2014	1	2	2	–	–	1
2015	1	–	–	–	–	1
2016	–	–	–	–	–	2
2017	1	1	–	–	–	2
2018	1	1	–	–	–	3

* brak danych za lata 2010-2011 dotyczących liczby spraw załatwionych oraz pozostałych na okres następny

Source: https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/

the subject of collective proceedings is the group interest, which is understood as a separate category, not only from individual subjective rights, but also from their sum. In this approach, a group interest is neither a single, specific subjective right, nor an ordinary sum of all individual claims. Polish courts, taking the literal interpretation of the Polish Act, adopted the first approach, i.e. that the subject of protection in the collective cases are subjective rights of specific persons, i.e. members of the group. As a result, there is no difference between the institution of procedural participation and collective proceedings, which makes collective proceedings ineffective.[43]

Neither Polish consumers, nor lawyers are interested in using the collective redress scheme, as it takes a long time, a lot of effort and is expensive, without giving any guarantee of success. The examples from practice show that is it much easier to win in an individual civil case. Judges are not eager and are not used to granting compensation in collective procedures. The procedural civil law of Western European countries, still based on nineteenth-century principles, is generally oriented to ensuring the protection of specific subjective rights. From that point of view, collective claims fall outside the traditional approach.[44]

2.4 The possible/suggested means of improvement

As mentioned above, Polish law (substantive and procedural) contains a huge variety of legal means for consumer protection. If they were all effective and worked properly then it would have been businesses facing problems and not consumers, as the legal basis is rather generous towards consumers. As such, it should be said at the outset that changing the existing law, especially radical change, is not the best or most effective way to improve the situation of consumers. Of course, some improvements to the existing scheme of collective redress may certainly be performed, but their role is rather minor. All the stakeholders must get used to the new regulations. The concept of collective claims, as explained above, is something new to the continental procedural law tradition. In Poland, the regime of collective claims was established 10 years ago – which is not long, given the gravity of the regulations and their specific nature. In the meantime, the law has been amended and, to some extent, tested in practice, but – as statistical data show – after a decade it has started to lose its importance and is unpopular among both "victims" and lawyers, because it does not work and does not offer an attractive solution for them. However, this is not because the regulations themselves are wrong, but it is rather the way they are used in practice, which leads to failure.

[43] SZAFRANSKA-REJDAK, M. *Funkcjonowanie w praktyce sądowej ustawy z dnia 17 grudnia 2009 r. o dochodzeniu roszczeń w postępowaniu grupowym*. Warszawa: IWS, 2017, p. 9, available at: <https://iws.gov.pl/wp-content/uploads/2018/08/IWS_Szafrańska-Rejdak-M._-Dochodzenie-roszczeń-w-postępowaniu-grupowym-po-red-bez-rej.-zmian.pdf>.

[44] Ibid., p. 2.

2.4.1 More consumer approaches

What should be done first is to change the approach of courts to collective redress schemes and to consumer protection as a whole. Collective redress/ protection of collective interest/ high-scale and -value proceedings discourage the competent authorities and become obstacles in the decision-making process. What we need is to change attitudes and sensitise courts for consumer cases. This can be done primarily through education and raising the awareness of all subjects engaged in the enforcement of consumer law. In this respect, we should consider various solutions.

2.4.2 Consumer department for consumer issues

One possible solution is greater specialisation in courts.[45] Perhaps the enforcement would be more efficient if the cases were to be settled by judges designated to deal mainly with consumer cases. The idea of creating special consumer courts or consumer departments in courts seems to be too far-reaching, but we could consider appointing to consumer cases those judges who have knowledge and experience in dealing with consumer issues. In Poland, according to the existing law, judges are currently selected at random to preside over cases.

2.4.3 Stronger competence and more funding for consumer representatives

Another crucial factor that must be looked at is the role of consumer organisations and consumer representatives in the enforcement process.[46] Again, if we look only at the mere numbers and regulations, we may say that Polish law guarantees a high range of engagement by various bodies in consumer affairs.

Polish consumers may seek help from a number of institutions in Poland that provide free legal assistance. At a local level, there are around 370 municipal and district consumer ombudsmen providing free consumer advice, mediation and legal assistance in court proceedings.[47] Another important part of the Polish consumer protection system is non-governmental consumer organisations. The two largest consumer NGOs, co-financed by the State Budget, are the Polish Consumer Federation[48] and the Association of Polish

[45] See also KARCZEWSKA, D. *Wiceprezes UOKiK: możliwe, że umowy „frankowe" będą na szerszą skalę uznawane za nieważne.* available at: <https://wiadomosci.onet.pl/tylko-w-onecie/wiceprezes-uokik-mozliwe-ze-umowy-frankowe-beda-na-szersza-skale-uznawane-za-niewazne/8l7cq7h>.

[46] See also KARCZEWSKA, D. *Oszukany konsument łatwiej dostanie odszkodowanie*. Available at: <https://biznes.interia.pl/finanse-osobiste/news/oszukany-konsument-latwiej-dostanie-odszkodowanie,2590313>.

[47] Detailed description from UOKiK official website available at: <https://uokik.gov.pl/help_and_advice.php>.

[48] Available at: <http://www.federacja-konsumentow.org.pl>.

Consumers[49] and, in cross-border cases, the European Consumer Centre.[50] They have a long tradition in Poland: the Polish Consumer Federation was created in socialist times (1981); the Association of Polish Consumers has been helping consumers for nearly 25 years now (since 1995), and consumer ombudsmen were appointed for the first time 20 years ago (in 1999). Despite, or perhaps because of, this long tradition, the position of consumer representatives in Poland is not strong. It should be strengthened by stronger competence and financial support from the state but, on the other hand, they should better adjust and react to the challenges of the contemporary world, as well as being better educated and more modern.

2.4.4 More active consumers

All these means are aimed at encouraging consumers to enforce their rights actively. They should be certain that if their rights have been abused, even to a very small extent, they may seek help and will probably also be represented by the competent bodies before the other competent authorities, so the case will be settled quickly and fairly. On the other hand, consumers are sometimes not willing to start any proceedings (even the easiest and fastest). Moreover, some procedures in these cases should not be initiated in a single consumer's interest, but in the interest of society as a whole.

From that perspective, we should look at the new European Commission initiative – the New Deal for Consumers, and particularly the proposal on representative actions for the protection of the collective interests of consumers.

2.5 The idea of representative actions and the Polish system of consumer protection

In April 2018, the European Commission proclaimed the New Deal for Consumers[51]. One of the initiatives proposed by the Commission is to introduce the representative actions scheme. A representative action is planned to be an effective and efficient way of protecting the collective interests of consumers. The legislative proposal presented by the Commission stipulates that eligible competent entities (appointed by Member States) would be entitled to bring representative actions that would be settled by the courts or public administrative bodies. As qualified entities would be the only subjects entitled to bring representative actions, they would need to be properly constituted according to the law of a Member State, which could include – for example – requirements regarding the number of members, the degree of permanence, or transparency requirements on relevant aspects

[49] Available at: <http://www.konsumenci.org>.
[50] Available at: <https://konsument.gov.pl>.
[51] Available at: <http://europa.eu/rapid/press-release_IP-18-3041_en.htm>.

of their structure, such as their articles of association, management structure, objectives and working methods. They should also be not for profit and have a legitimate interest in ensuring compliance with the relevant Union law. According to the draft Directive on increasing the procedural effectiveness of representative actions, qualified entities should be able to seek different measures within one or more representative actions or within separate representative actions. These measures should include interim measures for stopping an ongoing practice, or prohibiting a practice that has not been carried out but involves a risk of causing serious or irreversible harm to consumers, measures establishing that a given practice constitutes an infringement of the law; and if necessary, stopping or prohibiting the practice for the future; as well as measures removing the continuing effects of the infringement, including redress.

The qualified entity initiating the representative action should be a party to the proceedings. Consumers affected by the infringement should have adequate opportunities to benefit from the relevant outcomes of the representative action. Injunction orders issued under this Directive should be without prejudice to individual actions brought by consumers harmed by the practice subject to the injunction order.

The infringement confirmed in the final decision should be considered as prejudication for the purpose of any other action in which compensation is sought in connection with that infringement in the same Member State (order). A final decision issued in another Member State is intended to give rise to a rebuttable presumption of the existence of an infringement. The final declaratory decision has the same effect as a final decision in relation to the courts and administrative bodies of the Member State concerned.[52]

The solution proposed by the Commission has many advantages. It should facilitate and speed up proceedings, and it may enhance the position of consumer NGOs if they fulfil the criteria and become qualified entities.

On the other hand, the proposal in its current shape differs considerably from the existing system of consumer protection in Poland, and the implementation of the proposed changes may actually lower the level of protection. The essence of this directive lies in the point, that public law enforcement can be combined with private law enforcement. Nevertheless, the new scheme should not replace the existing system of collective redress.

Another crucial point is the “one-stop-shop” idea. Although it sounds tempting at first glance, it nevertheless raises many practical consequences. We are facing the problem of how to combine this order with the collective enforcement of claims.

The combination of the administrative procedure of injunctions (public interest) and the mechanisms of collective redress (as a rule this is private interest) is not possible under

[52] As described in the Proposal for a Directive of the European Parliament and the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, COM(2018) 184 final.

the current system of consumer protection, where the UOKiK plays a major role as a public administration body but cannot exercise justice.[53] If a case should have been settled by one body, then different models could be implemented.[54] This would depart from the current system of consumer protection and the role of the president of UOKiK, who would be empowered to grant compensation for a consumer; or creating a parallel system, under which authorised entities could initiate legal proceedings before representative courts or finally performing a profound reform of the consumer protection system and replacing the administrative system with a court system.[55] The first solution – leaving all the competences of the president of UOKiK, from injunction orders to awarding damages, would totally change the compensation scheme in Poland since, for now, it is the courts (judiciary power) that are entitled to grant damages or reimbursement in individual cases.

The second solution – introducing a judiciary system parallel to UOKiK's activity and giving consumers a choice – raises questions about the role of the president of UOKiK in the consumer law enforcement system, and primarily whether transferring the subject to the courts, would not slow down proceedings, which would be contrary to the aims that the draft directive seeks to achieve.

Finally, the third possibility – leaving all the procedures only to the judiciary – would certainly slow down the proceedings. In Poland, we were able to test the exclusively court proceedings model with regard to reviewing abstractive unfair contract terms. In the years 2000–2017, it was the Court of Competition and Consumer Protection that decided when a certain provision was forbidden. An action for such a judgment could be brought to court by anyone who had been or might have been offered a contract containing such a clause, as well as consumer organisations, consumer ombudsmen and the president of UOKiK. The system did not work properly; the Court became overloaded with cases, and the proceedings went on too long. As a result, in 2017 the power to control the abusiveness of standard contract terms was transferred to UOKiK, which made the system much more functional and efficient. The solution that may be implemented in Poland is to join administrative orders with individual claims; to leave the current administrative model and combine it with a parallel judiciary system, under which a compensation procedure would be conducted. It would be UOKiK that ascertains the infringement by a way of an administrative order, and the court that deals with matters of compensation. In this way, it would not impair the efficiency and effectiveness of the administrative procedure, which should only be carried out in the public interest while also easing the consumer's position by binding courts with an order stating the infringement. In the Polish jurisprudence,[56] the Supreme Court clearly indicates that the

[53] See KARCZEWSKA, D. *Oszukany konsument łatwiej dostanie odszkodowanie*. available at: <https://biznes.interia.pl/finanse-osobiste/news/oszukany-konsument-latwiej-dostanie-odszkodowanie,2590313>.

[54] Available at: <http://www.sejm.gov.pl/sejm8.nsf/biuletyn.xsp?documentId=F863F5F24FB50F47C12582AA004B2283>.

[55] See also SZCZEPANSKA-KULIK, I. – OLEJNICZAK, D. *Opinia w sprawie wniosku dotyczącego dyrektywy Parlamentu Europejskiego i Rady w sprawie powództw przedstawicielskich w celu ochrony zbiorowych interesów konsumentów i uchylającej dyrektywę 2009/22/WE (COM(2018) 184 final*) S-WAP/WAPM-1124/18, Warszawa, 4 czerwca 2018.

[56] Uchwała składu siedmiu sędziów Sądu Najwyższego z 23 lipca 2008 r., III CZP 52/08.

decision of the president of UOKiK should be treated as a preliminary ruling, though this position has not been fully approved by the judiciary as a whole.

One of the most important advantages that the New Deal and the proposed directive on representative actions may bring into Polish law is exactly the concept of giving UOKIK's order the status of a preliminary ruling.

In that way, the situation of consumers may be facilitated, as they will not be obliged to prove all the facts in civil court proceedings, but may rely on the facts already decided on by the administrative body.

2.6 Summary

The legal system of consumer protection in Poland is well developed, also in comparison to other EU countries. Collective claims were introduced into Polish law in 2009 and the Polish administrative authority (UOKiK) is empowered to initiate administrative proceedings concerning infringements of collective consumer interests. Proceedings concerning infringements of collective consumer interests – as in case of practices restricting competition – are also instituted *ex officio*.

Polish consumers may also turn to consumer ombudsmen, established at a local level. From that perspective, a radical change of Polish law does not seem to be desired or helpful. Of course, there are certain improvements that may be introduced, but not ones that are likely to change the core of the existing scheme.

Nevertheless, the system still does not work properly, and is neither effective nor fast. Certain actions should be taken to improve the situation but these should concentrate on education, better empowering the NGOs and local ombudsmen and also building a bridge between administrative proceedings and the judiciary.

3 Collective redress mechanisms in Slovakia – "nothing *ventured, nothing gained*"

Katarína Gešková

3.1 Introduction

The need for collective actions and collective redress mechanisms arose from practice. It is either rational apathy or the need to demotivate and punish the entity that abuses the mass of consumers, who are considered to be weak, uneducated, dependent on the supplier and with no resources.

We have to admit that collective litigation is specific, different and not usual in comparison with "classic" civil dispute litigation. This inevitably brings along the necessity to form new procedural rules to enable the mass of injured persons to fight for their rights and, what is more important, to achieve results. These rules will inevitably be different from those existing in "classic" civil procedure, and this is something we have to count on and we have to realise. We cannot compare class litigation with individual litigation. *"Class"* is different from *"classic".* We have to see them and look at them from different point of view.

In Slovakia, we have a saying that "who is afraid may not go into the woods". In English, the equivalent saying is "nothing ventured, nothing gained". The meaning is that if we want to achieve something, we must be courageous; we have to sacrifice something for it, to be steadfast and overcome fear.

Maybe we have to overcome the fear in order to make an essential step in the field of class actions to make them work. Without it, there will be nothing gained. The current situation is weak and only benefits suppliers. What is the current situation in Slovakia?

3.2 Current legislation in Slovakia

In Slovakia there is no Class Action Act and Recommendation 2013/396 has not been reflected in any special legislative step so far.

We can say that the steps in the field of collective actions are made separately in various fields (consumer law, competition law),[57] so there is no unified strategy. Nevertheless, we can say that there is legislation in individual matters, where individual decisions are issued but they have collective effect.

List of documents and legislation in Slovakia in this regard:

- Consumer Policy Strategy of the Slovak Republic for the years 2014-2020: plan to introduce measures to enable financial claims by qualified entities in favour of consumers.
- Act No. 40/1964 coll. Civil Code (CC);
- Act No. 250/2007 coll. Consumer Protection Act (CPA);
- Act No. 160/2015 coll. Civil Dispute Procedure Code (CDPC);
- Act No. 747/2004 coll. on Supervision of the Financial Market (SFM);
- Act No. 513/1991 coll. Commercial Code (CC);
- Act No. 513/1991 coll. Commercial Code (CC);
- Ordinary preliminary opinion of the Slovak Ministries and other organs on the proposal for a Directive of the European Parliament and of the Council on injunctions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC.

3.3 Mechanisms with collective effect

As mentioned above, there is no Class Action Act in Slovakia, but the legislation has several mechanisms that have a wider (collective) effect than only on the parties to the case. We can distinguish between two such mechanisms:

1) *Individual lawsuit with collective effect* – the lawsuit is based on the relationship between individual consumer and individual trader but has collective effect,
2) *Abstract control lawsuit* – a lawsuit between the competent authority as the plaintiff and trader (provider, supplier) as defendant.

[57] Section 53a of Act No. 40/1964 Coll. (Cicil Code), Section 298 and Section 305 of Act No. 160/2015 (Civil Dispute Procedure Code), Section 54 of Act No. 513/1991 Coll. (Commercial Code), Act No. 747/2004 Coll. on Supervision of the Financial Market (SFM).

3.3.1 Individual protection with collective effect

Pursuant to Section 53a Civil Code: “In individual cases, if the court determined some contractual condition to be invalid due to the unfairness of such condition, or did not award the performance to the provider due to such condition (payment in money), the provider shall refrain from using such a condition or any condition with the same meaning in contracts with all consumers.”

The provider shall have the same obligation even if the court ordered the provider to render the consumer unjust enrichment, compensate for damages or pay adequate financial compensation on the grounds of such a condition. The legal successor to the trader shall have the same obligation.

These rules apply providing that the consumer did not have the possibility to affect the content of the contract in a significant way. Consumers almost never affect the content of the contract in any way.

This provision has been included in Civil Code as effective from 1st of March 2010 in order to secure the full effect to Article 7 (1) of Unfair Commercial Practise Directive No. 2005/29/EC (hereinafter “UCTD”). The effect of a court decision establishing the unfairness of an unfair term is not further limited to the individual relationship between the specific trader and the consumer, but it could be regarded as extended to all contracts concluded with a given trader.[58] Some authors argue that Section 53a of CC may be understood as an establishment of precedential character of the judicial decisions in consumer matters.[59]

The court may impose an obligation to the supplier to refrain from using unfair condition or any condition with the same meaning in contracts with all consumers also in an interim measure pursuant to Section 325 of the Code of Civil Dispute Procedure (CDPC).

Apart from that, the violation of an injunction by a trader is considered as a particularly serious breach of obligations (Section 4 (10) CPA). Such a breach may lead to sanctions by the Trade Office and to the suspension of their trade licence (Section 58 of Trades Licencing Act).

With effect from 1 July 2016, Slovak civil procedure was re-codified and the Code of Civil Procedure (CPC) was replaced by three codes – the Code of Civil Dispute Procedure (CDPC), the Code of Civil Non-Dispute Procedure and the Code of Administrative Procedure. The CDCP is relevant in this area. This new law has taken over the instruments that enable the judgments to have wider effect and these instruments are now expressed in Section 298 CDPC:

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[58] Ustanovenie Section53a nie je o precedensoch’ see STRAKA, P. *Postavenie precedensu v našom právnom prostredí*. Bratislava: Univerzita Komenského, 2013, p. 66.

[59] FEKETE, I. *Občiansky zákonník. 1. Zväzok. (Všeobecná časť). Veľký komentár*. Bratislava: Eurokódex, 2014, p. 622.

Section 298 (1) CDPC: *"The court may state, in the judgment arising from a consumer dispute, even without any proposal, that a certain term used by the supplier in consumer contracts or other contractual documents related to consumer contract, is unfair; in such a case, the court shall state, in the statement of the judgment, the wording of such a contractual term as agreed in the consumer contract or other contractual documents related to consumer contract."*

Section 298 (2) CDPC: *"If the court has determined any contractual term in a consumer contract or general commercial terms to be invalid due to the unacceptability of such a term, has not awarded performance to the supplier because of that term, or the court has imposed an obligation upon the supplier to provide the consumer with unjust enrichment, compensate a damage, or pay reasonable financial compensation based on such term, the court shall explicitly state that term in the decision verdict – even without any proposal – in the statement of the judgment the wording of such contractual term as agreed in the consumer contract."*

This Section is in the part of the CDPC called Disputes for the Protection of Weaker Party, which includes consumer disputes, labour disputes and antidiscrimination disputes. This legislation enables the court to review the terms in consumer contracts and their validity (fairness) without any need for any activity on the consumer's side (*ex officio*). The wording of such terms is expressed in the statement on the judgment. Nevertheless, in practice, courts do not always specify the unacceptable terms, and if they do, it is in great detail, and refers to the articles of the contract. That part of the statement therefore does not have particularly high value. Moreover, there is no single list of unfair conditions.[60]

Due to such a wide effect of the court decision in an individual case, the literature calls it "collective protection" and Fekete[61] says that "Section 53a CC replaces the possibility of introducing a mass action, while it remains true that the court decision is binding only on the parties."

The practice shows that court decisions did have mass effect, e.g.[62]:

– The Regional Court in Prešov (decision of 12 October 2011, No. 6Co/177/2011) established the interim measure and ordered the defendant (trader) to refrain from any extrajudicial recovery of claims established by distance consumer contracts concluded via the given website except claims admitted by court decision.
– The Regional Court in Prešov (decision of 26 May 2011, No. 6Co/84/2011), established the interim measure and ordered the trader to refrain from the conduct by which he or she persuades, induces or otherwise influences the consumer in order to achieve the

[60] MASLÁK, M. Úskalia erga omnes účinkov rozsudku v konaní o abstraktnej kontrole v spotrebiteľských veciach. *Súkromne právo*, 2017, Vol. 3.
[61] FEKETE, I. *Občiansky zákonník. 1. Zväzok. (Všeobecná časť).Veľký komentár*. Bratislava: Eurokódex, 2014, p. 622.
[62] JURČOVÁ, M. – MASLÁK, M. Country Report Slovakia. In: *Study for the Fitness Check of EU Consumer and Marketing Law.* Brüssel: European Union. 2017, available at: <https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332>.

feigned state that credit is for the purpose of the consumer's profession or business, not for his/her personal use.

– The District Court Prešov (decision of 3 February 2012, No. 12 C 1/2012) ordered an interim measure and prohibited any assignment of claims from the defendant (trader) to another third person, except claims upheld by court decision, and ordered the defendant (trader) to refrain from any extrajudicial recovery of the claims referred to.

As mentioned above, it is possible to use a summary procedure and impose the interim measure the court under Section 325 CDPC.

The interim measure may be imposed also by the competent administrative authority (mainly by the Slovak Trade Inspectorate – STI and the National Bank of Slovakia – NBS), which is a very useful option when consumer rights are immediately threatened. Consumer organisations have a right to bring an action (proposal for interim measure) in these cases.

Prior consultation with the trader is mandatory only before a request for an interim measure before the Slovak Trade Inspectorate (administrative method, Section 21 CPA). Prior consultation is not mandatory in other cases.

The injunction procedure in Slovakia in administrative law is functioning very well (mainly by the activity of the STI, as the competence of the National Bank of Slovakia relating to ordering interim measures in the financial services sector has only been effective from 1 January 2015).

It is not possible to estimate to what extent the use of the injunction procedure has caused the reduction in the number of infringements of consumer protection rules and a reduction in consumer detriment.

3.3.2 Consumer organisation as the plaintiff

Under Section 3 (5) of the CPA, the consumer organisation may apply to a court to request that the breaching party must refrain from unlawful conduct if it injures the collective interests of consumers. Collective interests of consumers are those that are not just the mere sum of the individual interests of consumers affected by a breach of consumer rights but it derives from the conduct of the infringer applicable to all consumers.

Section 3 (5) CPA is a general and abstract provision, which can cover cases that are not governed by special norms.

The question is what the concept 'to remove the unlawful state of affairs' means in practice (provided in Section 3 (5) CPA). Does it represent a right of the consumer organisation to demand damages, reimbursement of unjust enrichment or financial compensation in favour of consumers? The answer is negative to all. The impossibility of consumer organisations

demanding monetary compensations was also confirmed by the legislative change of Section 3 (5) of CPA in 2013. The wording of the relevant provision entitling consumer associations to petition for the removal of the unlawful state of affair was changed in that their right expressed in the words 'including unjust enrichment" was deleted.[63] Another reason is that a consumer organisation is not a representative of consumers (under Section 3 (5) CPA or Section 54 (1) CommC), but a party to legal proceedings. Under Section 456 CC, the object of unjust enrichment shall be surrendered to the person at whose expense it was gained (and this person is not a consumer organisation but consumers). A consumer organisation defends the interests of consumers in the proceedings but it is not the representative of consumers; the organization is acting in them in its own name.

As a result, consumer organisations cannot make financial claims (unjust enrichment, damages, financial compensation) on behalf of consumers who suffered damage in cases for the protection of consumers' collective interests. Consumers whose rights have been violated and who have suffered financial loss must therefore exercise their rights individually.[64]

3.3.3 Abstract control procedure

The new Code of Civil Dispute Procedure (Act No 160/2015 Coll.) has also introduced the long-awaited abstract control of unfair terms in consumer contracts (Section 301 to 306 CDCP).

It is a new type of procedure, in which the court will review the unfairness of contract terms and the unfairness of commercial practices in consumer contracts and in other contractual documents related to the consumer contract, irrespective of the circumstances of the individual case. Introduction of the control is justified by the implementation of Directive 2009/22/ES.

The right to file an action belongs only to specific subjects – a consumer organisation or to the competent national authority (defined by particular legislation e.g. the STI or National Bank of Slovakia). A consumer thus does not have the right to file the action in this type of proceedings.

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63 From 1 of November 2012 to 9 of June 2013 the wording of Section 3 (5) CPA entitled consumer associations to claim monetary compensations in cases of violations of consumer rights. The legal grounds and measure of compensation however remained questionable and therefore this part of the relevant provision remained in practice inapplicable. District Court Bratislava I, in its decision of 20 February 2013, no 15C/234/2012, points out that Section 3 (5) CPA does not contain comprehensive substantive rules to establish the claim for unjust enrichment in favour of consumer associations. The court emphasised that the existence of unjust enrichment cannot be hypothetical; successful action is possible only if the conditions are fulfilled for reimbursement of the unjust enrichment under the CC.

64 JURČOVÁ, M. – MASLÁK, M. Country Report Slovakia. In: *Study for the Fitness Check of EU Consumer and Marketing Law.* Brüssel: European Union. 2017, available at: <https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332>.

The court is not obliged to hold an oral hearing; it is possible to decide on the basis of the documentary evidence. The court may also introduce evidence other than that proposed by the participants, if its introduction is necessary for establishing the decision (non-inquisitorial principle). If the court holds that the action is successful, it will specify the unfairness and text of the unfair contract term and/or unfair commercial practice in the statement of reasons of the court decision. The plaintiff (consumer organisation or other authority) is entitled to ensure the publication of that judgment in the appropriate forum. This is criticised because it seems that publication of the unfair contract term and/or unfair commercial practice in the court decision is not otherwise compulsory.[65]

What is also specific in these lawsuits is the jurisdiction of the courts. In abstract control procedures, the courts of second instance (concretely the Regional Courts in Bratislava, Banská Bystrica and Košice) decide these cases in the first instance and the Supreme Court shall then act as the Court of Appeal. This is the only exception to the courts' jurisdiction because it is just district courts that shall act in general as the courts of first instance. This also demonstrates that these cases should be taken seriously and decided by the senate of experienced judges.

The trader cannot use the unfair contract term (unfair commercial practice) defined in the dictum or an unfair contract term (unfair commercial practice) with the same meaning in any consumer contracts or other related documents. The dictum of the judgment is binding for everyone (Section 306 CDPC). This provision is criticised, because proceeding strictly under the wording of this provision, it may mean that it is binding (with the effect of an enforcement order) upon other suppliers that did not participate in the litigation as well. The CDPC enables them to participate as interveners but the law does not state the obligation to announce to the public that such litigation has started and therefore the binding effect is disputable. This provision is new to the Slovak legal order and there is no application yet in practice, so the extent of this effect is so far unknown.

The decision in abstract control litigation constitutes an enforcement order and the enforcement authority is entitled to impose a fine up to EUR 30,000 to the trader for the violation of that judgment (Section 192 (1) Enforcement Order). Due to the debate on the binding effect of the judgment in abstract control procedure, it is said that the judgment is not an enforcement order against the suppliers who were not a party to the litigation.[66] However, Števček[67] states that this provision may be understood as binding upon state authorities acting in administrative proceedings and result in imposing fines on traders that were not parties in the proceedings as well.

So far no litigation has been completed and only two procedures have started so far. We may conclude that expectations have not been fulfilled so far.

[65] GEŠKOVÁ, K. Abstraktná kontrola ako prosriedok ochrany viacerých subjektov (Abstract control as the way of protection of numerous subjects). *Acta iuridica Olomucensia.* 2018, Vol. 13, no. 1, p. 9–22.
[66] ŠTEVČEK, M. In: ŠTEVČEK, M. a kol. *Civilný sporový poriadok. Komentár.* Praha: C.H.Beck, 2016, p.1046.
[67] Ibid.

3.4 Position of consumer organisations

Consumer organisations play important role in consumer protection, both before courts and also before administrative authorities.

As mentioned above, consumer organisations have the power to sue a trader in an abstract control lawsuit (together with the Slovak Trade Inspectorate, the National Bank of Slovakia and other competent authorities). Consumer organisations also have an important role in individual disputes.

We can say that consumer organisations have so-called procedural legitimacy to sue, i.e. legitimacy given by the law. The consumer organisations themselves are not the holders of substantive rights.

As already mentioned above, under Section 3 (5) CPA, consumer organisations can sue the trader in collective interests of consumers cases with the aim of refraining from further violation and eliminating the unlawful situation created by the trader. Due to the practice and interpretation of this section (mentioned above), pursuant to which consumer organizations cannot make financial claims (unjust enrichment, damages, financial compensation) in favour of consumers who suffered damage in cases of protection of collective interests of consumers, consumer organisations became more passive. Therefore, consumers whose rights have been violated and who have suffered financial loss must exercise their rights individually. The Ministry of Economy of the Slovak Republic, in its policy document on the Consumer Policy Strategy of the Slovak Republic for the years 2014-2020, notes that they plan to introduce measures to enable financial claims by qualified entities in favour of consumers. However, the professional level of consumer organisations is not yet sufficiently developed for the proposed measure; the legal background in the Slovak Republic is not ready for the application of that measure and there is a risk of it being abused.[68]

The position of consumer organisations as the plaintiff is also regulated in legislation on unfair competition, under Section 54 (1) of the CommC:

"The right to demand that an offender refrains from their illegal conduct and eliminates the improper state of affairs may also be exercised, except for cases referred to in Section 48 through 51, by a legal entity entitled to protect the interests of competitors or consumers."

Consumer organisations are entitled to sue the infringer in cases of unfair competition in general and regarding the following specific types of unfair competition: misleading advertising, misleading designation of goods and services, conduct contributing to mistaken identity, and endangering the health of others and the environment. Consumer organisations

[68] See discussion on Law blog lexforum.sk, available at: <http://www.lexforum.cz/417 > or decision of District Court Bratislava I of 20 February 2013, No. 15C/234/2012.

have a right to sue and they are a party in the proceedings, not only a representative of consumers.[69]

The position of consumer organisations in the civil procedure can be either as the plaintiff or as "another subject" pursuant to new civil procedure legislation (Section 95 CDCP).

Before new Code of Civil Dispute Procedure (CDPC) came in effect, consumer organisations participated in proceedings as "interveners". This practice was criticised because the intervener has the right to compensation for its costs and the consumer organisations later entered into the procedure represented by attorneys because of the costs. Their contribution to the case was not very difficult or demanding, because they would usually send the copies of the statement or opinion to every case against the same supplier as the plaintiff/ defendant. Although the participation of the consumer organisations was criticised because of that, the judges also mentioned that their presence in the procedure made suppliers act more responsibly, as they could no longer rely on the passivity and unfamiliarity of consumers.

Currently, the most serious problems in terms of effective consumer organisation activity include:

– lack of funds,
– poor cooperation with state administrative bodies,
– insufficient interconnection and a lack of communication and cooperation between consumer associations.

As far as the financial context is concerned, in 2011 the amount of funds (financial support) from the state together for all consumer organisations was as following:

Table no. 2 State funding of consumer organisations in some European countries in 2011

Amount of funds in 2011	State
EUR 80,000	Slovakia
EUR 20,000,000	Germany
EUR 2,367,203	Austria
EUR 526,536	Czech Republic
EUR 266,372	Hungary

Source: Ministry of Economy of the Slovak Republic, 2011

[69] PATAKYOVÁ, M. Commentary of Section 54 CommC. In: PATAKYOVÁ, M. a kol. *Obchodný zákonník. Komentár*, Bratislava: C. H. Beck, 2013, p. 122.

In Slovakia, this support has been decreasing every year, e.g. in 2014, state funding for all consumer organisations decreased to EUR 20,000.

Consumer organisations report they have insufficient material and personal resources.[70] Consumer organisations are exempted from paying court fees (Section 4 (2) c) Court Fees Act) but court proceedings may be expensive with respect to the possible future payment of legal costs in the event of losing in the proceedings (Section 255 (1) CDCP).

In cross-border actions, Section 25 (1) b) CPA refers to legal persons created or established for the purpose of consumer protection listed in the list of qualified entities maintained by the Commission,[71] and their right to request interim measures under the CPA or to propose the initiation of civil proceedings. Consumer organisations and administrative bodies mention that they do not have experience of cross-border actions for the protection of collective interests of consumers. Cross-border protection in this context is not very effective. However, the administrative bodies do accentuate cross-border cooperation between national authorities.

The scope of the activities of consumer organisations:

The right of consumer organisations under Section 3 (5) CPA in the context of protecting collective consumer interests is expressed generally, without further specifications. It is not restricted to the specific area of consumer law or specific directives. The CPA has a general character, covering a wide range of consumer protection.

The competence of the National Bank of Slovakia in this regard is limited to the scope of financial services provided to consumers.

Proceedings for abstract control in consumer affairs under Section 31 to 306 CDPC is limited to a review of unfair contract terms and unfair commercial practice in consumer contracts and other documents related to consumer contracts.

3.5 Administrative protection

Consumers are protected before administrative bodies as well. The most efficient offices are the Slovak Trade Inspectorate and the National Bank of Slovakia. Besides imposing fines, these authorities are also entitled to issue interim measures in summary procedures. These interim measures also have a wider, collective effect. Consumer organisations are empowered to act for consumers or they may act individually.

[70] STRAKA, P. *Vymožiteľnosť spotrebiteľského práva' – Vymožiteľnosť práva v Slovenskej republike.* Pezinok: Justičná akadémia, 2010, p. 135–172.

[71] Notification from the Commission concerning Article 4 (3) of Directive 2009/22/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interests, which codifies Directive 98/27/EC, concerning the entities qualified to bring an action under Article 2 of this Directive – 2016/C 87/01.

3.5.1 Procedures before the Slovak Trade Inspectorate

Consumer organisation have the right to petition the competent national authority (Slovak Trade Inspectorate) to seek an interim measure if the trader violates the collective interests of consumers (under Section 21 CPA). However, they must first send a written notice to cease the unlawful conduct. If the trader does not refrain from harming the collective interests of consumers within two weeks of receiving of this notice, the competent national authority may order interim measures *ex officio* (Section 21 (2) CPA). The Slovak Trade Inspectorate quite frequently uses this measure (summary procedure) in practice (there are dozens of cases in which the Slovak Trade Inspectorate ordered interim measures and subsequently started procedures in which they imposed sanctions, mainly fines, e.g. decision of the STI of 23 September 2013, no SK/0619/99/2013, in which a fine of EUR 6 000 was imposed and this decision was preceded by an interim measure).

Recently the Slovak Trade Inspectorate ordered an interim measure to be applied to a relatively well-known travel agency, CK Hechter Slovakia, spol. s r. o. (interim measure of STI of 22 July 2016, no 2069/04/2016). The Slovak Trade Inspectorate ordered the cessation of the use of unfair commercial practice consisting of concluding package travel contracts with consumers, because the travel agency did not have compulsory insurance against bankruptcy or any bank guarantee. This summary procedure is very effective in stopping evident violations of the collective interests of consumers immediately. In these cases, the national competent authority opens the administrative procedure and imposes a fine on the trader of up to EUR 66,400, and for repeated violations within twelve months of up to EUR 166,000 (Section 24 (1) CPA). For gross breaches, the STI can prohibit the trader from selling products or providing services to consumers for up to three years, and if the trader harms the collective interests of consumers within 12 months after that, the trader is punished for violating collective consumer interests (Section 20a (2) CPA).[72]

3.5.2 Procedure before the National Bank of Slovakia

Under legislation effective from 1 January 2015, interim measures in cases of the breach of collective interests of consumers in the financial services sector can be ordered by the National Bank of Slovakia (Section 35e (3) Act No 747/2004 Coll.). The National Bank of Slovakia orders the trader to refrain from violating consumer rights and immediately initiates proceedings against a supervised entity. The National Bank of Slovakia can impose fines on the trader or (in cases of non-compliance with the interim measure by the trader) it can cancel the trader's licence to provide financial services (Section 35g (1) Act No 747/2004 Coll.) in subsequent procedures.

As mentioned above (part III.1), the Slovak legal order allows interim measures to be ordered by a court under Section 325 (1) CDPC.

[72] JURČOVÁ, M. – MASLÁK, M. *Study to support the Fitness Check of EU Consumer law – Country report SLOVAKIA, Final report part 3 – Country reporting. Slovakia,* available at: <https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332>.

3.6 The suggested means of improvement

3.6.1 Compensation and deterrence

The first main goal of class actions was only to gain monetary compensation, but this (mostly for damages, against unjust enrichment, etc.) has not been the only one for a long time. The practice shows that rational apathy prevails and consumers are not interested in compensation, when it is too small and the process connected with applying for a refund is not worthwhile. This fact should be considered seriously and taken into account. It seems to be a wise step to form a public fund in which the compensation money gained could be deposited if class action members do not request compensation in reasonable time. The legislation should state for what purposes the money can be used (consumer organisations, consumer education, class litigation funding, etc.). The goal is that the compensation awarded will always be paid by the violator.

This may discourage traders from illegal practices because they will be obliged to pay compensation irrespective of whether consumers request a share of it or not. Furthermore, it should be possible to generalise damages and to award lump sum payments.

3.6.2 Opt-in or opt-out system

The debate on choosing one of these systems has been a very long one. At first, the opt-in system was preferred, but in my opinion, it did not prove to be efficient. I would prefer the opt-out system with the very detailed and advanced system of publication of the start of class litigation. The legal principle *vigilantibus iura scripta sunt* should be applied also in these cases and litigation should not prevail or be discouraged by the rational apathy of consumers or harmed persons.

3.6.3 The position of the plaintiff

Pursuant to the Proposal for the Directive of European Parliament and of the Council on representative actions on protection of the collective interests of the consumers (Article 4), Member States shall designate an entity as qualified entity if it complies with the following criteria:

a) it is properly constituted according to the law of a Member State;
b) it has a legitimate interest in ensuring that provisions of Union law covered by this Directive are complied with;
c) it has a non-profit character.

This idea is very noble-minded and it declares the interest of the state itself to fulfil the collective protection. However, we have to add that the experience is that these “official”

organs tend to be backward and heavy-footed. The biggest problem is human resources. These organs certainly do not have the best people because salaries are low, generally resulting in poorer output/performance.

What is absent: is the market element. While it may evoke US class litigation, it is probably the driving force. Resistance to and rejection of dynamic and modern class litigation may be also the goal of large traders. Abuse may be prevented by the courts, which also need a strong position (see further section).

The fact that class actions tend to be a good business for attorneys is usually the driving force, otherwise the lawsuit will not be attractive. Another advantage of the attorney's motivation is that individual members of the group may receive their partial damages, but the action as a whole (the total damages awarded) deters the contractor from acting unlawfully in future, because it simply does not pay off.

However, it means that the traditional role of the attorney will change to being a *"litigation entrepreneur,"*[73] behaving more as an entrepreneur because he takes on the risk of the case. While it may bring along a financial loss rather than gain, if the attorney is sufficiently skilled, he will generally win and receive a considerable reward. The entitlement to a relatively high remuneration is justified by the fact that the attorney has provided a very valuable service to all members of the group**,** who will receive compensation that they would not receive without him.[74] Group action must be a good business for the attorney; otherwise, there will be no lawsuit.

3.6.4 The position of the court

In general, civil contentious proceedings tend to be ruled by the non-inquisitorial principle. It means that the parties are responsible for stating the facts, for presenting their evidence and for doing it in time. Usually this principle is compromised by exceptions, in order to decide the case in equity (e.g. there is some evidence that can be performed without the proposal of the party; the court may ask and demand new facts, etc.)

In class litigation, the judge should have a very strong position, with wide rights to detect the facts as they were and demand the evidence necessary to prove the facts. These rights may exclude any abuse of the class litigation.

Furthermore, there should only be specialised courts for such proceedings (for Slovakia with 5.5 million inhabitants, one court might be sufficient) and the first instance court should be the county courts, which are usually appeal court, and should decide as a panel of three judges.

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[73] SCHÄFER, H-B. The Bundling of Similar Interests in Litigation. The Incentives for Class Actions and Legal Actions taken by Associations. *European Journal of Law and Economics*. 2000, Vol. 9, n. 3, p. 183.

[74] KALVEN, H. – ROSENFIELD, M. The Contemporary Function of the Class Suit. *The University of Chicago Law Review*. 1941, Vol. 8, n. 4, p. 715–716.

3.6.5 Funding class litigation

The Proposal for the Directive of European Parliament and of the Council on representative actions on the protection of the collective interests of the consumers (Article 7) states basic rules for funding class litigation. Member States shall ensure that in cases where a representative action for redress is funded by a third party, it is prohibited for the third party:

a) to influence decisions of the qualified entity in the context of a representative action, including on settlements;
b) to provide financing for a collective action against a defendant who is a competitor of the fund provider or against a defendant on whom the fund provider is dependant.

These rules may be useful against the abuse of class litigation. One of the tools to be used can be the strong position of the judge, who should have the right to find the facts independently from those brought by the parties. This position of the judge may also be compatible with the case being funded by a competitor of the defendant; the judge will be the guardian of fair process. Usually a competitor has the greatest interest in the outcome, which may be the right driving motivation. Such motivation must not be open to misuse but it cannot be ruined.

The legislation should reflect also those lawsuits where the goal is not monetary compensation but the termination of contracts, replace/repair of goods, etc. Different rules need to apply to such lawsuits because funders are usually not interested in such cases; they are simply not worthwhile financially. In such cases, the idea of *"access-to-justice funds"* seems appropriate. Such funds may have a public nature and could consist of over the residue from repaid illegally gained profit, damage compensation which was not withdrawn by entitled consumers due to rational apathy, administrative fines, etc.

3.7 Summary

I would come back to the beginning of my article and to the saying *"nothing ventured, nothing gained."* Class litigation has many specific features that demand a departure from the traditional path of civil litigation. I am aware that changing ingrained and rooted principles and also the theoretical basis (e.g. *litis pendens*, *rei iudicata*, legitimacy to sue, reimbursement of costs, etc.) brings along worries and fear. Nevertheless, the experience so far shows that new principles are necessary in class litigation. Some degree of "market element" can be a stimulus and motivate a rise in the number of cases. So far, class action has not been a successful project, nor were numerous actions initiated. Accessible and motivating legislation may also, prevent unlawful conduct without litigation. Holding American class action practices as a bad example is unduly defeatist and European legislation should seek a positive outcome, because the current stagnation only benefits large traders.

4 Consumer collective redress in the Czech Republic: Current situation and perspectives

Jan Balarin

4.1 Introduction – current representative actions in Czech Republic

The current landscape of collective redress in the Czech Republic is rather bleak. Not only are there no effective collective civil procedure mechanisms, but no compensatory collective redress schemes whatsoever.

4.1.1 Consumer representative actions

Of course, Directive 2009/22/EC of 23 April 2009 on injunctions for the protection of consumers' interests has been implemented,[75] so consumer associations and professional bodies (NGOs) may petition for injunctions on behalf of consumers (i.e. file representative actions), and qualified entities according to the Article 3 of the Directive (registered on the list with the European Commission) are included too.

However, such actions are rare and they do not have more than a symbolic role in the market. Just a couple of them, if any, are filed every year. Although some of the cases have brought certain effect and publicity,[76] consumer NGOs complain that lawsuits for injunctions are lengthy, costly and complicated. Injunction actions lack any effective sanction (or deterrence element) that would motivate producers to settle; producers dodge liability by

[75] Section 25 of the Czech Act No. 634/1992 Coll., on Consumer Protection, as amended.

[76] E.g. action filed by Ekologický právní servis et al. against Danone a.s. in 1999 concerning "BIO – bifidus aktiv" yogurt designated as such, despite not being a product of organic farming (available at: <http://www.responsibility.cz/fileadmin/downloads/danone.pdf>, or the action initiated in 2016 by dTest, o.p.s. against O2 Czech Republic a.s. (telecommunications charges).

changing their market practices in course of the lawsuit (even several times in a row) by which the action becomes obsolete.[77] Indeed, the Czech Republic is no plaintiffs' paradise – courts usually do not facilitate plaintiffs' position much. Injunction actions are frequently challenged for procedural reasons; obviously more often than in other types of litigation. It is more complicated to draft a viable statement of claims for injunctions than or actions for money. Courts appear quite uncompromising as to the formal procedural standards.

The reality is that NGOs use the existing injunctive instruments in a very restrained manner. There is no established representative litigation practice in the Czech Republic.

4.1.2 Other representative actions

Consumer (or customer) organisations and organisations representing businesses may also file representative actions for injunctive relief in unfair competition cases.[78] Furthermore, there are scattered provisions of law[79] giving organisations representing small and medium-sized enterprises (SMEs) a right to sue to as regards generally applicable contract terms on payment periods and interest for late payment (being an implementation of Directive 2011/7/EU of 16 February 2011 on combating late payments in commercial transactions). However, these are isolated rules, without any context and no application instances were found in this research.

4.1.3 Spontaneous cumulation of claims

Compensatory claims are bundled from time to time on an *ad hoc* basis. Above all, a bank-fees case has to be mentioned that took place between 2011 and 2015. Following decisions by the German *Bundesgerichtshof,* which had declared bank fees on administering credit accounts (within mortgage terms) unlawful,[80] certain Czech law firms felt inspired and helped clients to sue their banks. Thousands of lawsuits were filed, but without success. The Czech Supreme Court, as well as the Constitutional Court, found the credit account fees in compliance with the law.[81] Even so, the case has had an impact: most banks reconsidered charging the unpopular fee, so the market practice has changed. Aside from that, a serious collateral problem appeared: before filing the actions; clients had been assured that litigation costs would be borne by the representing law firms, but these were reluctant to honour their responsibility in the end. It resulted in public resentment. The issue was finally disposed of,

[77] As follows from the questionnaire replies of dTest, o.p.s. in the project "Progress in collective redress mechanisms in environmental and consumer mass harm situations" by Ústav státu a práva Akademie věd ČR 2018.
[78] Section 2989 of the Czech Act No. 89/2012 Coll., the Czech Civil Code, as amended.
[79] Sections 1964(2) and 1972(2) in the Czech Civil Code.
[80] Especially the judgment of German Bundesgerichtshof of 7 June 2011, XI ZR 388/10.
[81] Constitutional Court judgment of 10 April 2014, III. ÚS 3725/13 and Supreme Court opinion of 23 April 2014, Cpjn 203/2013.

mostly through refinancing their clients' debts, but the controversy did not contribute overall to the good name of the Bar.

Anyway, the hapless mass action clearly showed the need for proper regulation of collective redress (not only in the sense of effective cumulation of claims, but also as regards protecting group members *vis-à-vis* the group representative).[82]

Another instance of "makeshift" mass-litigation activity can be lawsuits for injunctive noise protection alongside roads (initiatives of this kind border on public-interest litigation, as the individual legal interest to sue is elusive in this context). However, these attempts have not scored much success, either.[83]

4.1.4 Environmental matters

As to environmental matters in general, no special regulation of collective enforcement exists. Article 9 (3) of the Aarhus Convention[84] is more or less complied with, as affected persons are not prevented from exercising their general right to sue, but it is unclear, at the same time, whether this right belongs to environmental associations too (in terms of injunctions). However, in practice this issue is of almost no importance, as NGOs do not flock to file civil actions – they are vigorous, no doubt, but they concentrate almost exclusively on administrative matters (such as planning law), on which they – typically – exhaust their litigation resources.[85]

4.2 Broad *lis pendens* and *res judicata* effects for injunction claims

Interestingly, the Czech Code of Civil Procedure[86] contains two specific provisions on *lis pendens* and *res judicata* which, although not establishing a collective litigation scheme, have a lot to do with the enforcement of multiple parallel claims. According to Sections 83 (2) and 159a (2), filing an injunction action in consumer and unfair competition matters (as well as in certain other matters, unimportant for our purpose) prevents any other action for the same claims ensuing from the same acts or state, and judgments brought in those proceedings are binding not only on the parties themselves but also on everyone who can file the action.

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82 For summary of the case see, available at: <https://ekonom.ihned.cz/c1-63557480-spor-o-bankovni-poplatky-muze-skoncit-exekucemi>.

83 See e.g. Constitutional Court judgment of 11 January 2012, I. ÚS 451/11.

84 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters of 25 June 1998.

85 As follows from the questionnaire replies of Arnika, z.s. in the project "Progress in collective redress mechanisms in environmental and consumer mass harm situations" by Ústav státu a práva Akademie věd ČR 2018.

86 Czechoslovak Act No. 99/1963 Coll., the Code of Civil Procedure, as amended.

Although restrictions of this kind have a long record in Czech civil procedure (they appeared first in the Unfair Competition Act of 1927[87]), it is obvious that the approach is untenable considering the right to a fair trial. How can a procedure and judgment be binding upon those who were not parties to the procedure and who could not have had even any knowledge of it? This is a serious question, but it has not yet been not fully reviewed by the courts, as – as already mentioned – injunction actions in the public (general) interest are a rare occurrence. In cases where the Constitutional Court came in touch with the topic so far, (albeit marginally):[88] the rules discussed must be interpreted in a way that conforms with the Constitution whenever possible and, to that extent, there was no need to reverse them.

4.3 Rising interest

As a consequence of the unsatisfactory situation in the field of mass-claims enforcement just described, there have been loud calls for a fully-fledged class-action (collective redress) regulation in the last 10 years by many authors and – partially also – practitioners.[89] Quite a lot of legal texts appeared.[90]

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87 Section 15(3) of the Czechoslovak Act 111/1927 Coll.

88 Resolution of the Constitutional Court of 5 June 2014, III. ÚS 973/14.

89 As follows from the questionnaire replies of dTest, o.p.s. and Arnika, in the project "Progress in collective redress mechanisms in environmental and consumer mass harm situations" by Ústav státu a práva Akademie věd ČR 2018; and further: TICHÝ, L. – BALARIN, J. Efficiency of the Protection of Collective Interests: Judicial and Administrative Enforcement in the Czech Republic. In: CAFAGGI, F. – MICKLITZ, H.-W. *New Frontiers of Consumer Protection. The Interplay between Private and Public Enforcement*. Cambridge: Intersentia, 2009, p. 207–219; SIK-SIMON, R. Unterlassungsklagen als Instrument der Durchsetzung von Verbraucherrechten in der Tschechischen Republik und Ungarn. *GPR Zeitschrift für das Privatrecht der Europäischen Union*. 2014, n. 1, p. 16; SIMON, R. Country Report Czech Republic. In: *Study for the Fitness Check of EU Consumer and Marketing Law.* Brüssel: European Union. 2017, available at: <https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332> 265 *et seq.*, 279 *et seq.*; and Ministry of Justice of the Czech Republic. *Konzultace se spotřebitelskými organizacemi – shrnutí odpovědí a návrhů na zlepšení (příloha k věcnému záměru zákona o hromadných žalobách)*, available at: <http://www.aic.cz/ivlp/wordpress/wp-content/uploads/6120632-2017-09-26-text-navrhu-6120995.pdf>.

90 ZIMA, P. K tzv. hromadným žalobám. *Právní rozhledy*. 2003, n. 4, p. 178; WINTEROVÁ, A. Procesní důsledky skupinové žaloby v českém právu. In: WINTEROVÁ, A. – DVOŘÁK, J. (eds.). *Pocta Jiřímu Švestkovi k 75. narozeninám.* Praha: ASPI, 2005, p. 347; SMOLÍK, P. Hromadné žaloby – současnost a výhledy české právní úpravy. In: DVOŘÁK, J. – KINDL, J. (eds.). *Pocta Martě Knappové k 80. narozeninám.* Praha: ASPI, 2005, p. 381; SMOLÍK, P. Hromadné žaloby: současnost a výhledy české právní úpravy. *Právní fórum*. 2006, n. 11, p. 395; TICHÝ, L. (ed.). *Procesní ochrana kolektivních zájmů / Schutz der kollektiven Interessen im Zivilprozessrecht.* Praha: Univerzita Karlova v Praze, 2008; WINTEROVÁ, A. Hromadné žaloby (procesualistický pohled). *Bulletin advokacie*. 2008, n. 10, p. 21; WINTEROVÁ, A. – SMOLÍK, P. Hromadné žaloby. In: PAUKNEROVÁ, M. – TOMÁŠEK, M. (eds.). *Nové jevy v právu na počátku 21. století*. Díl IV: Poměny soukromého práva. Praha: Karolinum, 2009, p. 353; BALARIN, J. *Kolektivní ochrana práv v civilním soudním řízení*. Praha: Univerzita Karlova v Praze, 2011; SYLLA, M. Hromadné vymáhání práva v Evropské unii? *Právní rozhledy*. 2011, n. 9, p. 329; KŘIVÁČKOVÁ, J. – HAMUĽÁKOVÁ, K. Perspektivy alternativního řešení kolektivních sporů v ČR ve světle Doporučení Komise 2013/396/EU. *Právní rozhledy.* 2013, n. 13–14, p. 502; BALARIN, J. Ke koncepci mechanismů opt-in a opt-out v kolektivním civilním soudním řízení. *Acta Iuridica Olomucensia.* 2017, n. 3, p. 86; ZIMA, P. Hromadné žaloby. *Právní rozhledy*. 2018, n. 5, p. 153.

It is worth mentioning that even a full-text academic proposal for a group proceedings law was published.[91] The draft roughly corresponded to the Norwegian model, i.e. it had the form of group litigation with a certification, after which group members should have been drawn in on the basis of opt-in or, in for petty claims, opt-out. The standing was approached broadly – each group member and qualified non-profit organisations should have been entitled to file actions; this was juxtaposed with granting intensive managerial and oversight powers to the court. Money awards under opt-out judgments were to be paid into a trust, from where they could be distributed among group members.

4.4 Legislative project

4.4.1 Background

Finally, after a long period of inaction, the significance of collective redress has also been recognised at the lawmaking level. In 2016, the Ministry of Justice started to take the topic seriously – an advisory expert group was appointed and legislative work started. The triggering factor was obviously the European Commission Recommendation 2013/396/EU,[92] also taking account of the legal writing, piling up continuously, and probably also fresh experiences from other European countries.[93] Based on initial expert deliberations and consultations with certain professionals (such as consumer associations), a White Paper on a Collective Actions Act has been approved by the Government of the Czech Republic on 4 April 2018.[94] Following that, a full proposal for the Collective Actions Act is being drafted by the Ministry of Justice. A draft Bill should be finished by the end of March 2019. Although, even after that, the Bill will still be subject to regular government and parliamentary legislative processes, which may substantially modify its shape or abandon the project as a whole, it is useful to take a closer look at what the Ministry of Justice is working on.

[91] BALARIN, J. – TICHÝ, L. Kolektivní ochrana procesních práv v ČR: Sen či skutečnost? (Návrh právní úpravy). *Bulletin advokacie*. 2013, n. 3, p. 17.

[92] European Commission Recommendation 2013/396/EU of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under the Union Law.

[93] Especially neighbouring Poland (Ustawa o dochodzeniu roszczeń w postępowaniu grupowym of 2009).

[94] Draft of the material intent of the Collective Actions Act (Návrh věcného záměru zákona o hromadných žalobách), available at: <https://apps.odok.cz/attachment/-/down/KORNAVPF7NOI>.

4.4.2 Overview

Primarily, it must be underscored that the Bill[95] is daring. This is to be welcomed, in my opinion.[96] The primary source of inspiration of the Bill is the United States class action model, although with its features notorious for excesses leading to litigation abuse removed.

As such, standard group proceedings are proposed, which are not only known from the United States[97] and other common law jurisdictions but in certain forms also from Poland,[98] Sweden,[99] Norway[100] etc. It means a group representative, which is basically a member of the group (class) of affected persons, including NGOs in the relevant field, takes the lead and files a group action [either directly or through a group administrator, see 4.4.4 Standing and action filing below].[101] Other group members covered by the suit – either on the basis of opt-in or opt-out – are invited to participate in the proceedings too, but they have a limited procedural position (such as that they are not notified individually of the development of the suit). The proceeding is a two-phase matter: the first phase is certification, which is basically limited to the plaintiff and the defendant. Once the action is certified, the second phase follows, starting with notification of the group members and giving the opportunity for opt in or opt out; subsequently, it culminates by hearing the case on the merits. The final judgment, whether positive or negative, shall be binding on all participating group members.

4.4.3 Scope of application

The regulations should not be limited in the horizontal scope of applicability. This way, it could be employed not only in consumer matters but also in environmental and most other cases within the civil jurisdiction. Excluded are non-contentious matters (such as family law), corporate shareholder disputes (which should be governed by a special law) and damages cases against the state that are related to the exercise of sovereign governmental powers (these are perceived as sensitive).[102]

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95 For the sake of simplicity, the Ministry of Justice's project is further referred to as "Bill", although no full bill exists so far (as mentioned above).

96 The foremost concern of European collective redress regulations is not abuse but dormancy and lack of practical effect, see e.g. BALARIN, J. *Kolektivní ochrana práv v civilním soudním řízení.* Praha: Univerzita Karlova v Praze, 2011, p. 102 or, prominently, HARSAGI, V. – VAN RHEE, C. H. (eds.). *Multi-Party Redress Mechanisms in Europe: Squeaking mice?* Cambridge – Antwerp – Portland: Intersentia, 2014.

97 E.g. Federal Rules of Civil Procedure, Rule 23.

98 Ustawa o dochodzeniu roszczeń w postępowaniu grupowym of 2009.

99 Lag om grupprättegång of 2002.

100 Chapter 35 of the lov om mekling og rettergang i sivile tvister (tvisteloven) of 2005.

101 The group procedure, according to the Bill, is drafted just in an active mode, i.e. it is not intended to enable defendant groups (classes) too.

102 Draft of the material intent of the Collective Actions Act (Návrh věcného záměru zákona o hromadných žalobách), p. 36, available at: <https://apps.odok.cz/attachment/-/down/KORNAVPF7NOI>.

The question of vertical applicability is being approached very broadly too. There should be no *a priori* qualification criteria as to the amount or type of claims subject to the group proceedings. Damages and other monetary claims and in-kind restitution, as well as injunctions, should be eligible.[103]

4.4.4 Standing and action filing

Standing to file a group action is given to any group member, as well as to NGOs representing the interests concerned. No special requirements are proposed to be imposed on NGOs in order to stand as a plaintiff (such as minimum duration, membership or actions record); full screening against litigation abuse is left to the certification review (the fair-and-adequate-representation criterion).[104]

Nevertheless, opt-out suits can be initiated exclusively by a professional entity called a group administrator. The group administrator may be an attorney (advokát) but it is not compulsory – group administrators are designated a special legal profession, similarly to e.g. insolvency administrators. Group administrators are to be accredited by the Ministry of Justice upon documentation of various preconditions, such as integrity, financial strength and funding, expert knowledge and insurance. The Ministry of Justice is to be charged with continual oversight of group administrators' compliance. The accreditation and oversight powers should contribute not only to due representation of group members' interests but also that the defendant is not confronted with a "straw man" plaintiff, from whom litigation costs would be unrecoverable (see the insurance requirement).[105]

The group administrator is to act as an independent plaintiff, i.e. not a direct representative of group members (although a formal requirement of authorisation from at least one group member will most probably be stipulated).[106] If more plaintiffs are interested in filing the action, the "first come, first served" principle will probably be applied (so no selection procedure by the court or tendering will be constructed).

Any plaintiff, whether a group administrator or not, must be represented by an attorney (advokát). This should only not apply if the group administrator is an attorney himself.[107]

[103] However, certification criteria must be met any case.
[104] Draft of the material intent of the Collective Actions Act (Návrh věcného záměru zákona o hromadných žalobách), p. 54, available at: <https://apps.odok.cz/attachment/-/down/KORNAVPF7NOI>.
[105] Ibid., p. 54.
[106] Ibid., p. 54.
[107] Ibid., p. 58.

4.4.5 Litigation funding

The plaintiff (i.e. not group members) should be solely entitled to and liable for litigation costs (as corresponds to the English rule of costs).[108] Moreover, the group administrator should have the right to collect a share of 5–30 percent (20 percent as a rule) from the overall amount awarded by the judgment; the exact percentage is to be set by the court (it depends on further legislative deliberations whether the this should be fixed upon certification or in the judgment).

The Bill does not deny that investment-like financing by group administrators should be the actual leverage of group litigation. This is not to say that unbridled litigation business for third party claims is to be introduced. The model is based on the finding that a broader not-for-profit collective enforcement by NGOs looks like wishful thinking in the Czech practice in the short or medium term.[109] Multiple factors are to blame, such as: (i) lack of appropriate financing, (ii) the traditional focus of Czech NGOs does not include civil lawsuits, and (iii) courtroom stereotypes that are resistant to innovative litigation. The risk of frivolous litigation is to be addressed by the requirement of group administrators' accreditation, certification criteria [see 4.4.5 Litigation funding below], court litigation management and, of course, excluding US-specific factors leading to excesses (discovery, jury trials, punitive damages etc.).

Court fees should be assessed in two phases. The first charge is a pre-certification flat fee of a moderate amount (proposed as CZK 25,000, i.e. ca EUR 1,000). The second fee is paid post-certification at 2 percent of the aggregate claimed amount as assessed in the certification order (the standard court fee in the Czech Republic 4 or 5 percent from the claimed amount). The second fee is paid only if the case is heard on the merits.

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[108] In the original wording of the Bill, it was proposed that group members who opted in should have been jointly and severally liable for litigation costs (Ibid., p. 66). The ongoing discussions show this will be most probably be abandoned.

[109] Ibid., p. 27 *et seq.* See also e.g. illustratively CIHLÁŘOVÁ, I. Sympozium k hromadným žalobám [Report from the Symposium on Collective Actions held on 14 November 2018 by Stálá konference českého práva]. *Bulletin advokacie*. 2018, n. 12, p. 78, citing and paraphrasing Mr. Kryštof Kruliš, chairman of the board of Spotřebitelské fórum (Consumer Forum): *"NGOs associated with the Consumer Forum are limited financially as well as personally and that is why they refused the offer to act as group administrators and represent claimants in group actions. At the same time, they strongly disagree that administrating groups should be a business activity. 'We think NGOs should be the only group administrators because they would also be able to file actions that do not bring profit but may be a matter of public interest. This would have to be enabled by the state, e.g. by establishing a special fund which could be financed by proceeds from successful litigation"*. This position is ambiguous. It denies standing to any entities other than NGOs but, at the same time, it suggests very strict conditions under which NGOs would be able (or willing) to make use of the standing, namely financing ensured by the state; and – necessary to mention – even after that it would be far from certain that filing could work, as it is impracticable to secure full litigation financing (e.g. including reimbursement of the defendant's costs after a lost suit). This factor would necessarily keep constraining any NGOs' incentives to file group actions in the Czech court practice.

4.4.6 Group members

Group proceedings may be conducted in either opt-in or opt-out mode according to the Bill. No clear-cut test is proposed for distinction between opt-in and opt-out. The decision is basically at the court's discretion. However, opt-out is primarily intended for small-claims cases not viable if left to individual activity; the rough threshold should lie between CZK 20,000 and 30,000 (i.e. ca EUR 1,000) in terms of single claims. Pursuant to the Bill, opt-out should generally be preferred to opt-in.[110]

Opting in or opting out should take place in a period of time set by the court (within a certain framework defined by the law, such as 2–6 months), namely after certification and giving notice of the action to the group.[111] Group members who opt in or do not opt out, as the case may be, are to be bound by the judgment or settlement (however, it is being discussed whether an additional opt-out opportunity might be appropriate in opt-out proceedings before settlement is approved or it takes effect).

Group members who take part in group proceedings should have certain procedural rights, limited in scope to those of a full party. They may be represented by an attorney, may appear in court, raise objections (such as of judicial bias) etc. However, exercising group members' rights should be strongly concentrated and managed by the court, for example through streamlining submissions through the plaintiff. Group members must not be summoned individually, unless a specific action or appearance by a specific member is required.[112]

4.4.7 Notifications

The group must be notified of the proceedings and their progress. The primary notification means should be an open online register run by the Ministry of Justice (Group Actions Register). The Register should make publicly available – more or less – the entire course of all group proceedings, in particular initial complaints, defendant's answers and other pleadings, certification orders, judgments and other decisions of the court, as well as various notifications – such as scheduling, opt-in or opt-out periods etc. (personal data should be protected). Besides that, group members should be notified of key milestones, such as certification, settlement and judgment, through other effective means, especially individual notice, media advertising, flyers, special purpose webpages etc. The specific form of notification is up to the court.[113]

[110] Draft of the material intent of the Collective Actions Act (Návrh věcného záměru zákona o hromadných žalobách), p. 43– 44, available at: <https://apps.odok.cz/attachment/-/down/KORNAVPF7NOI>.
[111] Ibid., p. 67.
[112] Ibid., p. 53.
[113] Ibid., p. 51.

4.4.8 Certification

A certification order is required. It should declare that the preconditions on which the case can be heard on the merits have been met, define the group and the mode of the proceedings (opt-in/opt-out), name the group representative and provide for other particulars (such as notification means or opt-in/opt-out deadlines). For certification purposes, the court must not strictly follow the parties' motions, but it may define such proceedings as it sees most appropriate. The certification order may be revised later if relevant conditions change or wrong or insufficient findings come to light. The action can be even decertified (by staying the proceedings). In certain qualified situations, the group representative may be replaced, especially if he ignores his fiduciary duties towards the group.[114]

According to the Bill, the certification order may be appealed against; an extraordinary appeal to the Supreme Court is also likely to be enabled (to ensure procedural certainty before the trial is opened).

The preconditions upon which the court may accept the group action are standard:

- numerosity of the group (but no minimum membership threshold is proposed);
- commonality: questions of fact and law common to the group claims (although the "and" conjunction is used in the language of the Bill, there is probably no need to overstate this fact – the circumstances do not indicate that the commonality standard should be too high);
- typicality of the group representative's claim vis-à-vis claims of the entire group;
- adequacy of representation of the group by the group representative – requirement of a detailed examination of the representative's ability to conduct the suit on behalf of the group with regard to the particular case, such as absence of collusion, experience in the relevant field etc.;
- superiority – with regard to all circumstances, group action must be the best conceivable (preferable) way to enforce the claims of the group.

In addition, a rather atypical test is required – a review that the group action does not constitute abuse of law.[115] Although this problem may (and should) be considered in court proceedings of any nature, it is normally a question of the merits and not a condition precedent which – if it fail to be met – is a cause to stay the proceedings.

4.4.9 Post-certification

While the precertification phase is conducted on individual basis (the plaintiff aka the group-representative candidate on one hand and the defendant on the other), certification is a breaking point after which the lawsuit takes a mass shape. The certification order should

[114] Ibid., p. 39.
[115] Ibid., p. 42.

be published and opt-out/opt-in must be enabled to group members in a specified period of time [see 4.4.6 Group members, above]. Subject to the result of the opting-in/opting-out process, group members who are encompassed by the proceedings may start to exercise their rights – appear in court etc. [see 4.4.6 Group members, above], and the suit heads to trial. The trial should preferably be organised as hearing a test (model) individual case, the result of which could be applied subsequently to the rest of the claims. However, other ways of hearing claims are not excluded either (such as skimming off aggregate damages with following distribution among group members).

Unsurprisingly, court management powers should be augmented in group litigation. Special disclosure duties should be imposed on the defendant. However, the practice is not intended to reach the level of US-style discovery, but rather be based on the elaboration of the currently applicable secondary explanation (presentation) duty of the defendant (*sekundäre Darlegungslast*). Hence, for example the defendant would be required to disclose the list of group members or group members' bills, if available.[116]

In addition, courts should supervise the group representative's acting within the proceedings overall (whether he complies with the interests of the represented group and that the group representative does not treat a part of the group preferentially to the rest); courts will have the power and responsibility to examine settlements, withdrawals and other material acts for their adequacy.[117]

4.4.10 Judgment

Opt-in judgments should name every group member covered and, if positive for the group, assign particular claims to them. Opt-out judgments should quantify the aggregate amount awarded to the group and give a formula according to which the amount is to be distributed among group members.[118] Subsequently, the aggregate award should be paid into court escrow by the defendant, from where it should be distributed by the group administrator, subject to individual applications by group members. Any disputes in the distribution phase are to be decided upon by the court. Should the fund not suffice for all registered claims, they must be satisfied proportionally. If the fund exceeds the sum of the claims, the balance is to be passed to the state treasury.[119]

Remedies against group judgments should be standard (appeal and extraordinary appeal, both subject to ordinary admissibility criteria). The Bill does not address who may file the appeal; however, up to now the discussions indicate that individual group members should

[116] Ibid., p. 47.
[117] Ibid., p. 60.
[118] Other mechanisms should be possible too (such issuing a declaratory judgment followed by adjudication of individual claims).
[119] The judgment should also specify all necessary particulars for collecting the award and distributing individual claims, such as application and payment deadlines or documentation of claims. Ibid., p. 60.

not be given a direct right of appeal on behalf of the group; the right should probably rest exclusively with the group representative.

Enforcement of judgments should be in the hands of the group representative too.[120] Any omission or negligence by the group representative in this respect (as well as in any other respect in course of the group proceedings) should be subject to liability in tort or contract, as the case may be.

4.5 Evaluation and recommendations

It has been mentioned that the ongoing legislative work is ambitious compared to the existing state of affairs in the Czech Republic. Anyway, it is clear that if collective enforcement should play a material (or at least any real) role in the foreseeable future in the Czech Republic, a decisive break with the *status quo* is needed. To this extent, the outlined legislative initiative of the Ministry of Justice and its overall shape are legitimate.

Although it may seem from a certain point of view that the Ministry of Justice's Bill is radical, it actually is not. It adopts a very standard class action scheme, which is probably the only time-tested model that proved to be a real influence on law enforcement so far. It is useless to say the class action model is not only employed in the United States but also in various other jurisdictions where it exists without major controversies;[121] the Czech scheme is watchful not to take over any features of the US class action model that are infamous for abuse (see 4.4.5 Litigation founding, above). It is also useless to say the main concern of most existing European collective actions regulations is not overuse but teetering on the verge of practical meaninglessness. Discussing collective actions, it should be borne in mind at all times that, they are not an end in themselves but they must effectively address the problem of enforcing of mass petty and diffuse claims.

This is also the answer to the possible objections to the entrepreneurial character of collective actions introduced by the Bill group administrators; (see 4.4.4 Standing and action filing, above).[122] This may or may not be the ideal model. However, what are the other options if we take into account the NGOs in the Czech Republic (especially consumer NGOs) are generally missing the momentum (zest) to sue? Indeed, it is so for various factors, not to overlook the absence of any significant tradition of representative litigation in the past decades, and NGOs are definitely not to be blamed for this situation. However, the reality is that the long unfavourable legislative conditions inhibited most NGOs' litigation activity, so NGOs shifted their *modus operandi* to other fields of support (and they perform more or less

[120] Ibid., p. 61.

[121] See e.g. for the current account in Israel: KLEMENT, A. – KLONOFF, R. Class Actions in the United States and Israel: A Comparative Approach. *Theoretical inquiries in Law*. 2018, Vol. 19, p. 151.

[122] Although it does not exclude non-profit group actions either (opt-in actions conducted by NGOs or opt-out actions initiated by a group administrator hired by an NGO).

well in that respect). Now, to invigorate the NGOs' willingness to sue, much more than just enacting an appropriate procedural framework would be required. If questioned on how to achieve a more intense engagement in collective enforcement, NGOs normally raise of the need for strong financial support, primarily aimed at eliminating litigation risks. Although it can be understandable from a certain perspective, is it realistic or even desirable?

If I leave aside whether (completely or predominantly) publicly financed enforcement is the right approach to civil litigation, there are serious concerns that the Treasury would not be able (for budgetary and transparency reasons) to ensure litigation funding capable of launching a robust collective enforcement by NGOs. It is also completely nebulous how a financing scheme should be set to create a viable mix of support and motivating efficiency through risk taking. Let's be clear – if there are one or two group actions a year, it may facilitate relief to a certain number of individuals, but the macro effect (compliance) will not improve in any recognisable way. Having "symbolic" collective actions regulations is not enough; if the law fails to have wide-reaching impact then it is not worth existing.

That is why probably the only workable solution for the Czech Republic in the short to medium term is to employ for-profit plaintiffs with thoroughly regulated standing, instead of building an exclusionary NGOs-based enforcement. At the same time, consumer and other NGOs must have standing too and must not be disincentivised from conducting the litigation anyhow.

The Bill of the Ministry of Justice respects these tenets and, as such, it can be recommended to be enacted into law.

5 Introduction of the new collective redress mechanism from the national legislator's perspective – class actions in the Czech Republic

Anežka Janoušková[123]

5.1 Introduction

Class actions have recently become an important element of procedural law systems in many countries, yet the Czech Republic is still not one of them. Obviously, the lack of a collective redress mechanism is not because people in the Czech Republic do not suffer from mass harm. On the contrary, the number of cases where there is a multitude of those injured, usually consumers is increasing. Considering these facts, the Ministry of Justice of the Czech Republic (hereinafter referred to as 'Ministry of Justice') started to contemplate amending national legislation and introducing class actions into the Czech legal system.

The following lines should briefly explain the process of drafting the new regulation from the Czech legislator's perspective, mainly focusing on the data and factors, which were considered. Afterwards, the article will summarise the resulting Draft Act on Collective Actions.[124] As collective redress is predominantly associated with consumer rights, the article explores the development of the Czech legislation from the consumer point of view.

[123] Author works as Head of Unit for civil procedure and insolvency law in the Legislative Department of the Czech Ministry of Justice. Opinions and ideas presented by the author in this Article do not represent an official standpoint of the Ministry of Justice.

[124] Draft of the material intent of the Collective Actions Act (Návrh věcného záměru zákona o hromadných žalobách), available at: <https://apps.odok.cz/attachment/-/down/KORNAVPF7NOI>.

5.2 Practical problems of compensation for damages raised by consumers in the Czech Republic

5.2.1 Does the Czech consumer need class actions?

Before a legislator concludes that it is necessary to prepare a new piece of legislation, they should first evaluate whether it is actually needed. The analysis, which is also known as a 'regulatory impact assessment', is very important not only to decide whether such legislation would be beneficial in practice, but also to help the legislator in choosing the best solution that would fit into the national social, economic and legal framework.

Such a task can be sometimes very difficult, especially when the intended legislation aspires to introduce a brand-new concept. It is then very hard to measure the prospective impact of the proposed mechanism, because there are no or very few data, no experience of the proposed tool and very often no measurable results.

Despite this fact, prior to drafting the White Paper for class actions, the Ministry of Justice conducted a survey, assessing the operation of the current legal rules in the area of consumer protection. The survey included, *inter alia*, a questionnaire that was sent to the courts and another questionnaire, which was distributed among all eight consumer organisations that are entitled to file representative actions pursuant to Act on Consumer Protection[125] and that are listed on the website of the Czech Ministry of Industry and Trade.[126] The findings were quite clear.

5.2.2 Rigidity of traditional rules of civil procedure

The Czech law on civil procedure is based on Austrian-German tradition from the 19th century, which focused strongly on the protection of an individual. This, naturally, does not mean in itself that it would not be able to adapt to the changing social and economic conditions. However, the survey clearly showed that, in general, the approach of the Czech courts to the interpretation and application of the legislative provisions is considerably conservative. For instance, according to *all* the respondent judges, the so-called consolidation of proceedings, pursuant to Section 112 of the Czech Code of Civil Procedure[127] based on common questions of facts and law, is used in practise 'very rarely'. The same applies to the joinder of parties, which cannot be even used for mass harm situations with hundreds or thousands of victims.

[125] Act No. 634/1992 Coll., on Consumer Protection.
[126] Available at: <https://www.mpo.cz/cz/ochrana-spotrebitele/kontakty-pro-spotrebitele/kontakty-na-vybrane-spotrebitelske-organizace--5724/>.
[127] Act No. 99/1963 Coll., the Code of Civil Procedure.

The conservative stance of the Czech judges became evident in the famous 'Bank fees' case, where the Czech courts were unable to handle thousands of individual disputes effectively, thereby leaving all the plaintiffs unsure whether they would be awarded damages or not. These lawsuits also manifested how the diverging case-law in similar cases can adversely affect citizens' trust in the national judicial system.

To conclude, it was obvious that the social and economic problem of mass harm situations could not be overcome within the established legal rules.

5.2.3 Ineffective system of injunction relief

Since traditional law on civil procedure clearly lacks an effective solution, the only way of dealing with consumer mass harm cases in the current legal system is a representative action under Section 25 (2) of the Act on Consumer Protection. This provision grants consumer organisations a right to file an action claiming injunction relief on behalf of consumers who were affected by the unlawful conduct of a trader. Another interesting piece of patchwork could therefore be gained from a questionnaire that was sent to such consumer organisations.

The consumer NGOs almost unanimously agreed that the injunction relief system is unsatisfactory due to several factors. First, it is very difficult for them to formulate correctly what constituted the actual unlawful conduct, as it is not exceptional for the trader concerned to change his practice in response to the filed claim. Second, even if the consumer organisation is able to formulate the illegal practice, the judgment needs to be delivered quickly in order to fulfil its purpose. However, this is not very common in pending cases, since civil proceedings can last up to three years.

5.2.4 Problems encountered by consumer organisations

Besides the deficiencies of the injunction relief mechanism itself, the consumer organisations also identified other obstacles that effectively prevent them from filing representative actions.

First, consumer organisations lack sufficient funding. This problem is not only related to the initial 'investment' in the court fee. Although NGOs do have some money that could be used to finance bringing a representative action, the potential consequences of losing the case are so severe that they have a significant chilling effect.

More importantly, consumer organisations also have limited personal resources, especially when it comes to lawyers who would be able to handle all the proceedings. As a consequence, consumer organisations tend to concentrate on other non-profit activities, such as individual legal assistance, rather than bringing actions before courts on their own.

Given all these problems of the injunction relief system and taking into account the other listed obstacles of consumer organisations as listed, the number of representative actions is very low. According to the answers in the questionnaire, consumer organisations have filed one or two representative actions and some of them have even no experience of it so far.

5.2.5 'Rational Apathy' of Consumers

To see the full picture of the procedural protection of consumer rights, it was also necessary to take a look at the enforcement of consumer rights by individuals.

The Ministry of Justice ascertained that consumers generally do not claim their rights before courts as it is unreasonably expensive compared to the actual pecuniary damage they might have suffered. Similarly to consumer organisations, the essential problem lies not only in court fees, but in the overall risk of losing the case, the remuneration of an attorney and also the time and energy that they must invest in the court proceedings.

Moreover, small claims[128] cannot be subject to a judicial review in the appellate proceedings, which also means that the precedential aspect of the appellate and review procedure cannot be fulfilled in these cases.

5.3 Creating a new collective action model – what else should a legislator take into consideration?

5.3.1 General comments

After having conducted the assessment of the current position of consumers and consumer organisations in procedural law, it could be concluded that the Czech legal framework lacks an effective tool which would provide a functioning and economical mechanism for dealing with mass harm situations.

The evaluation carried out in 2016 was a starting point for preparations for the Collective Actions Act. The data gained from the analysis served as a useful source of information and inspiration for future improvements. Nevertheless, the Ministry of Justice had to consider other factors as well.

[128] The financial limit to have a right to appeal is set on minimum of CZK 10,000, which is ca. EUR 380.

5.3.2 Comparative perspective

Legislators often search for inspiration in other national legal systems. This method is very helpful, especially where the national legal system has a substantially limited or even no experience of the proposed legislation whereas other national legal systems do.

Therefore, before choosing the 'right' collective procedure model, the Ministry of Justice carried out comparative research, looking at various approaches followed in other jurisdictions around the world, especially in Member States of the European Union and the USA. The Ministry's officials could even benefit from the possibility of taking part in an 'IVLP'[129] business trip to the USA, focusing on Class Actions and Consumer Protection. This gave the Ministry's employees a unique chance to study American class actions with all their advantages and drawbacks and to consult leading American experts, NGOs, politicians and judges who are engaged in class action lawsuits (plaintiffs as well as respondents) on the draft legislation.

What conclusions can be drawn from the comparison of national mechanisms around the world? There is not a dominant approach that would prevail over others. Even though there are some 'archetypes' of collective actions (such as class action versus representative action), each model has its remarkable features which are reflected in the national collective mechanism. Although the USA was always understood as an extreme model from our eastern side of the Atlantic Ocean, European states nowadays tend to draw some inspiration from it as, over the years, it has proved to be effective.

Besides all the differences between various national systems, one trend appears to be undeniable – a shift from injunction to redress class actions, and, at least for the enforcement of small claims, from opt-in to opt-out.

5.3.3 National and continental law traditions

It is always very important and extremely enriching when a legislator looks at other legal systems' solutions. Nevertheless, the legislation must be adjusted to the national level. It is thus crucial that the proposed regulation fits into the Czech Republic's economic, social and legal environment.

The Ministry of Justice therefore had to take account of some basic principles that are inherent to its procedural law or, broadly speaking, to the tradition of continental procedure. On the other hand, as was illustrated above, excessive respect for local traditions is one of the factors that leads to the malfunctioning of mass harm judicial enforcement. As such,

[129] International Visitors Leadership Program is a professional exchange programme organised by the US Department of State – for more information see, available at: <https://exchanges.state.gov/non-us/program/international-visitor-leadership-program-ivlp>.

the national and continental procedural law tradition cannot be overestimated. If there is a conflict between a 'traditional' and a 'more effective' rule, the latter should, in principle, be given priority.

In relation to class actions, four issues tackling the traditional principles of continental procedure are often subject to a passionate discussion.

a) Disposition principle: opt-in or opt-out?

Most 'traditional' procedural lawyers tend to reject opt-out, as it allegedly breaches the core tenet of continental civil procedure – the so-called disposition principle (only consumers can decide whether to bring their case before a court and if they wish to maintain it or withdraw the action).

First, the argument is questionable because consumers do have a right to decide if they wish to be included in the class proceedings. If not, they are free to apply for opt-out. Second, even if the opt-out was in breach of the disposition principle, this is exactly where more an effective rule should prevail over a traditional one.

Given the problem of rational apathy, the state must employ opt-out, at least for petty damages if it intends to solve the problem of enforcing judgments in mass harm situations.

b) Loser pays principle: who pays for losing the case?

In the USA, the loser-pays principle does not apply to class action proceedings. This may surely be an advantage for plaintiffs, since they do not have to face the potential risk of loss. It would be also beneficial to Czech consumer organisations, which lack adequate financial resources.

On the other hand, the principle prevents abusive and frivolous litigation, as it forces the plaintiffs to evaluate their real prospects of winning the case first, before they actually file an action. The loser pays principle therefore can play an important role in regulating the number of class actions and hence should be maintained.

c) Contingency fee: who pays for the lawyer?

Another major difference between continental and American common law rests in the method of remunerating the plaintiff's lawyer. Whereas Europe prefers an hourly or statutory fee, in the USA and some other states, the so-called contingency fee or sometimes referred to as a success fee is possible. In most Member States of the European Union, the contingency

fee is either completely prohibited or limited by law to a certain percentage of the amount of money awarded.[130]

The basically unlimited contingency fee in the USA used in class action lawsuits raises some serious questions. Firs, because there is no statutory requirement that would restrict the percentage lawyers may demand, they often get a huge 'piece of the cake', thereby leaving only a smaller part of it to those consumers who have been harmed. Second, this enormous financial motivation leads to other problems, such as over-litigation.

On the other hand, the US model, as opposed to the European one, produces a lot of class actions per year (some may be frivolous, some not). The idea of financial interest in the outcome of the lawsuit might thus be taken into consideration when drafting the national model, provided that such a financial interest is transparent, limited by law and determined in the early stage of the proceedings.

d) Representative or group action?

When it comes to collective redress mechanisms, representative actions prevail in the European national systems.

Generally, representative actions are a sophisticated solution when the action seeks an injunction or to determine whether the conduct was lawful or not, since the judgment would at least indirectly affect all cases of the same or a similar nature. However, when it comes to redress measures, especially damages, the group action or US model class action shall be given preference. The court explicitly deals with the individual rights of consumers for redress and individuals should hence be guaranteed some rights and standing in the proceedings.

5.3.4 Concern of undertakings

It is questionable to what extend the legislator should listen to businesses if most of them (or at least a majority of those who are loud enough) usually call for no or a very limited collective redress mechanism. The strong business lobby can be spotted in the USA; it is currently noticeable at the EU level and, naturally, in the Czech Republic as well. Undertakings profit from the 'rational apathy' of consumers and legislation targeting this phenomenon is obviously not in their favour. Consumers, on the other hand, do not tend to express their needs to the government and are usually represented only indirectly, through consumer organisations. Consequently, it may be very difficult for legislators not to yield to the pressure, but to evaluate the problem neutrally.

[130] For example, in the Czech Republic lawyers can ask for a maximum of 25% from the awarded amount – see the Czech Attorneys' Code of Ethics, available at: <https://www.cak.cz/scripts/detail.php?pgid=23>.

Of all the criticism and objections, one must be regarded with utmost seriousness. It is the fear of businesses that class actions will be used abusively, to eliminate the competition or compromise other competitors in the relevant market. Indeed, any right, even the right to file a class action, can be misused. That is why legislators should attempt to do their best in order to provide rules capable of preventing such abuse. All the more so when an abusive or frivolous collective action may be harmful not only for businesses, but also for consumers. National legislation should thus, in any case, ensure adequate safeguards.

5.3.5 European legal framework

As the Czech Republic is a Member State of the European Union, the national legislator is always obliged to respect the relevant instruments of Union law. As regards class actions, it is mainly Directive 2009/22/EC on injunctions for the protection of consumers' interests[131] and the Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms[132]. Indeed, both EU legislative acts were taken into account when drafting collective redress mechanism for the Czech national legal system.

More interestingly, only a few days following the government approval of the White Paper on Collective Actions Act, the New Deal for Consumers, including the Proposal for new Directive on representative actions[133] that should, *inter alia*, replace the Directive on injunction relief from 2009, was published by the European Commission.[134] Should the national legislator then reflect the Proposal when drafting its purely national law?

In order to answer the question properly, it is very important to allow for Article 1 (2) of the new Proposal for representative actions, which sets forth that "*the Directive shall not prevent Member States from adopting or maintaining in force provisions designed to grant qualified entities or any other persons concerned other procedural means to bring actions aimed at the protection of the collective interests of consumers at national level*".

The Ministry of Justice thus tried to incorporate the principles of the EU Proposal, yet only as one element of the national legislation, which otherwise also assumes other alternative ways of consumer protection. This approach gave us the possibility to reflect Czech specifics, as mentioned in this paper.

[131] Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests.

[132] 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.

[133] Proposal for a Directive of the European Parliament and the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, COM(2018) 184 final.

[134] The White Paper was approved on 4th April 2018, the New Deal was published on 12th April 2018.

5.4 Brief introduction to the proposal for a Collective Actions Act

As illustrated above, the Czech system of civil procedure, as it stands nowadays, is unable to tackle mass harm situations effectively. Consequently, the Ministry of Justice started to draft new legislation that should introduce an effective and economical solution for Czech consumers, especially considering the current problems listed in Chapter 2 and taking into account other factors, such as those illustrated in Chapter 3.

After around four years of preparations and within the bounds of the White Paper on Collective Actions, which was approved by the Czech Government in April 2018, the final Proposal for Collective Actions Act was sent for an official legislative procedure in March 2019.[135]

Not surprisingly, the Bill is attracting a lot of attention. Even though it will probably have to undergo some changes, the Ministry of Justice hopes the main ideas will remain unchanged. The basic principles of the national Proposal are as follows:

- The scope of application of the Act is broad; it encompasses not only consumer rights, but any civil law rights which stem from a mass harm situation.
- The remedies that can be subject to collective actions are also 'unlimited' – the plaintiff may seek an injunction order, an order for establishing an infringement (declaratory decisions) or a redress order, especially damages.
- As regards opt-in or opt-out, the Czech legislation is based on a combination of both. Whereas opt-out is reserved for small claims disputes,[136] opt-in should apply in the rest of cases.
- The Proposal introduces collective action as a principle because consumers do have some rights in the proceedings; they have a right to be heard, right to opt in/opt out and a right to access to the court file. Nevertheless, consumers are not a party to the collective proceedings and thus cannot withdraw the action or submit an appeal against the first-instance court's judgment. It also follows that they cannot be ordered to pay the defendant's procedural costs.
- As for legal standing, it is reserved only for certain categories of persons. In the case of opt-out proceedings, only the group administrator can file the collective action. In opt-in proceedings, legal standing is reserved for the group administrator, non-profit organization or member of the group.
- The Act shall introduce the so-called group administrator, whose main role is to initiate the proceedings, protect the group's interests and bear all costs of the proceedings. If someone wishes to be a group administrator, they have to apply for it to the Ministry of

[135] The full text of the Proposal is available at: <https://apps.odok.cz/veklep-detail?pid=KORNBA9EXSST>.

[136] The small claims dispute is defined as a situation where it is not efficient to enforce the rights of group members individually. The Act sets forth a rebuttable presumption of CZK 10,000 (ca. EUR 380) per claim.

Justice, fulfil strong statutory conditions (such as credibility and/or sufficient financial resources) and are subject to the Ministry's supervision. The licence is limited to only 5 years. Non-profit organisations will be also eligible for the status of group administrator and the Ministry of Justice assumes that they will apply for it, too.

- The collective action's conditions are traditional: numerosity, commonality, superiority, adequacy of representation and typicality. On top of that, there is one negative condition, namely the class action shall not be abusive or frivolous.
- The collective procedure is divided into two main parts. First, the court must assess whether the requirements for the collective action are met (admissibility of class action). If the court rules that the conditions are fulfilled, it can continue to hear the case on the merits (collective proceedings on merits).
- The Bill involves the possibility for parties to reach a settlement and thereby end the dispute prior to the court's judgment. The settlement must be approved by a court, which examines whether the settlement is fair and adequate and whether it is not in breach of any mandatory legal rules.
- Given the financial constraints of the Czech NGOs and provided the proposal comply with the traditional loser-pays-principle, it was crucial to find a viable solution for funding collective actions. Generally, all the responsibility rests on the plaintiff (group administrator, NGO, group member), as it is the plaintiff who bears all the financial risks of losing the case and besides is obliged to prove her or his solvency. From this follows that it was necessary to find some incentive for potential plaintiffs. The Bill thus contains a financial incentive – a reward, which will be paid to the plaintiff if she or he wins the case. The award shall be around 20% of the awarded sum, it must be established in the certification decision and it is determined by the court. Therefore, when consumers contemplate whether to opt-in or opt-out, they will already have been given the information on how much of their claim will be directed to the plaintiff if winning the dispute. Such a reduction of the claim is justified by the fact that the consumers can freely decide to join the proceedings and that they do not have any duty during the proceedings, especially a duty to reimburse the defendant's procedural costs.

5.5 Conclusion

Czech procedural law is awaiting a major change, as collective actions should soon be enacted into the national law. This article summarised the main arguments and factors considered by the national legislator and other aspects that had to be taken into account while drafting the Bill.

The Ministry of Justice sent the Bill into the official legislative process in March 2019 and, in spite of a very strong business opposition, there is a possibility that the law will be passed by the current Parliament (this would be in 2021 at the latest). If everything goes well, the Czech Collective Actions Act shall become law.

6 Collective litigation tools in the Hungarian legal system

Sándor Udvary

6.1 Introduction

Collective litigation tools are not the result of historical development in Hungary; they were introduced to the legal system by external influences: first due to the European Union's activity on consumer protection,[137] then – besides the continuing European interest[138] – due to the theoretical work of civil proceduralists.[139]

[137] Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests. (This directive was effective as of the access of Hungary to the European Union on May 1 2004); Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (currently in force); Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR).

[138] 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 (hereinafter: Recommendation).

[139] Several examples of scholarly articles and books on the subject: HARSÁGI, V. A kollektív igényérvényesítéssel kapcsolatos perek. In: VARGA, I. (ed.). *A polgári perrendtartás és a kapcsolódó jogszabályok kommentárja: II/III.* Budapest: HVG-ORAC Lap- és Könyvkiadó Kft., 2018, p. 2003–2044; HARSÁGI, V. *Európai válaszok a kollektív igényérvényesítés szükségességének kérdésére: Főbb európai modellek és a hazai szabályozás kialakítása*. Budapest: Pázmány Press, 2018, p. 158; HARSÁGI, V. Kollektív igényérvényesítés Belgiumban. *Közjegyzők Közlönye*, n.5, p. 5–12; HARSÁGI, V. Kollektív igényérvényesítés a német jogban. In: KOLTAY, A. – DARÁK, P. (eds.). *Ad Astra Per Aspera – Ünnepi kötet Solt Pál* 80. születésnapja alkalmából. Budapest: Pázmány Press, 2017, p. 311–325; HARSÁGI, V. Deficiencies of collective redress in Hungary and recommendations for codification. in: FANKHAUSER, R. – WIDRER-LÜCHINGER, C. – KLINGER, R. – SEILER, B. (eds.). *Das Zivilrecht und seine Durchsetzung*. Zürich: Schulthess Juristische Medien AG, 2016, p. 201–215; HARSÁGI, V. Gondolatok a kollektív igényérvényesítés kérdéséhez. In: GELLÈN, K. – GÖRÖG, M. (eds.). *Lege et Fide – Ünnepi tanulmányok Szabó Imre 65. Születésnapjára*. Szeged: Pólay Elemér Alapítvány, Iurisperitus Bt., 2016, p. 185–194; HARSÁGI, V. Quo vadis kollektív igényérvényesítés? In: BARABÁS, A-T. – BELOVICS, E. (eds.). *Sapiens in sapientia: Ünnepi kötet Vókó György 70 születésnapja alkalmából*. Budapest: Pázmány Press, 2016, p. 445–458; HARSÁGI, V. A holland kollektív igényérvényesítés rendszere. *Magyar Jog*. 2016, Vol.7–8. p. 478–484; HARSÁGI, V. A modellválasztás dilemmái a kollektív igényérvényesítés hazai szabályozásánál. *Eljárásjogi Szemle*. 2016, n.1, p. 24–29; UDVARY, S. Class action – az ördögtől való? In: BARTA, J. – WOPERA, Zs. *Kodifikációs tanulmányok a polgári jog és a polgári eljárásjog témakörében*. Miskolc: Novotni Alapítvány, 2011, p. 262–276; UDVARY, S. Az amerikai class action elméleti háttere és jogszabályi konstrukciója. In: VARGA, I. (ed.). *Codificatio processualis civilis, Studia in Honorem Németh János II.* Budapest: ELTE Eötvös Kiadó, 2013, p. 449–488; UDVARY, S. Az állam felelőssége a tömegesen jelentkező igények érvényesítése megkönnyítésében. In: RAFFAY, K. (ed.). Állam és Magánjog Törekvések és eredmények az Európai Unió joga, a nemzetközi magánjog, polgári jog és polgári eljárásjog keresztmetszetében. Budapest: Pázmány Press, 2014, p. 353–360; UDVARY, S. A perbeli fő- és mellékszemélyek státusának egyes kérdései – de lege ferenda. In: NÉMETH, J. – VARGA, I. (eds.).

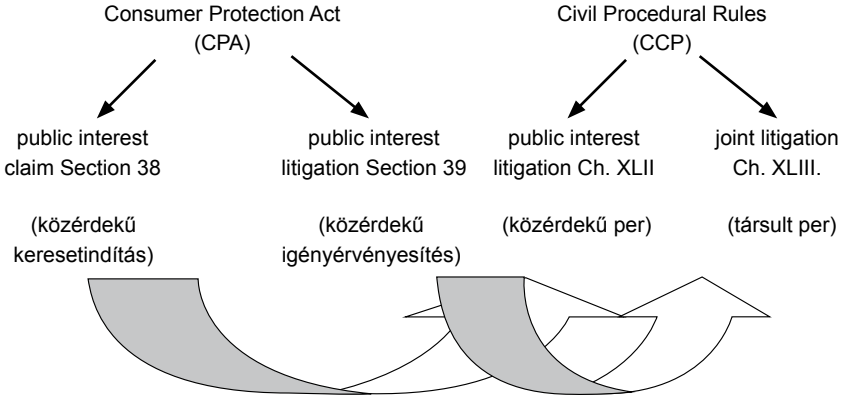
Regarding the first part, EU consumer protection legislation was implemented into the Act CLV of 1997 on Consumer Protection (hereinafter: CPA). Consumers who have encountered harms have different possible remedies if there are many others who suffered similarly. CPA Section 38 contains a "public interest claim" and Section 39 provisions on "public interest litigation". Both vehicles are civil cases, to which the general rules of "public interest litigation" in the Code of Civil Procedure apply.

When the EU showed an interest in general collective litigation tools and produced the Recommendation, it first aroused the above-mentioned theoretical interest, but the legislator also observed the need for this tool and considered to introduce it to the then prepared new Code of Civil Procedure.[140] Thus, the Code (Act CXXX of 2016 on the Civil Procedure, hereinafter: CCP) contain two kinds of mass litigation tools: Chapter XLII covers public interest litigation, while Chapter XLIII contains the rules for joint litigation.

6.2 Overview of the tools

Hungary has a four-pillar system for collective redress

Table no. 3 System for collective redress mechanisms in Hungary



Source: Author

Egy új polgári perrendtartás alapjai. Budapest*:* HVG-ORAC Lap- és Könyvkiadó Kft., 2014, p. 122–171; UDVARY, S. *Pro Actione Collectiva (habilitation monograph*). Budapest: Patrocínium, 2015, p. 287; UDVARY, S. Közérdekű Igényérvényesítés (XLII. fejezet), Társult per (XLIII. fejezet). In: WOPERA, Zs. (ed.). *Kommentár a polgári perrendtartásról szóló 2016. évi CXXX. Törvényhez*. Budapest: *Közlönykiadó, 2017*, p. 877–908.

[140] The re-codification of the half-century old civil procedure started in July 2013; in 2015, on page 18. The concept guide to the new code contained a clear reference to the need to create collective redress tools, mentioning the Recommendation and other European models for reference. Available at: <http://www.kormany.hu/download/f/ca/30000/20150128%20Az%20%C3%BAj%20polg%C3%A1ri%20perrendtart%C3%A1s%20koncepci%C3%B3ja.pdf>.

6.2.1 CPA's Public Interest Claim

The CPA's public interest claim (Section 38) is available for the vindication of consumers' claims (including monetary claims) by the Consumers Protection Authority (hereinafter: Authority) or the consumer protection associations. In this case, the plaintiff (even being different from the actual "owner" of the claim) may ask for the payment of the discoverable claim, or if there is no discoverable damage, the plaintiff may ask for the verification of the fact of activity causing harm on the side of the business, upon which verdict the consumer may commence a follow-on procedure to determine his or her particular damage claim. Public interest claims are litigated according to the CCP's public interest litigation procedure (CCP, Chapter XLII.).[141]

6.2.2 CPA's Public Interest Litigation

The CPA's public interest litigation procedure (Section 39) is available if the enterprise's unlawful activity is harming a wide, personally undeterminable range of consumers, whereas the circumstances of the violation are available. If so, the public prosecutor and the consumer protection associations are entitled to commence litigation for the protection of the unnamed consumers. The public interest claim's rules are applied to this litigation (hence, the CCP's public interest rules also apply), but there is a special provision: the plaintiff may apply for an injunction to cease the violation and prohibit continued violation, and thus to remove the illegal situation and for *in integrum restitutio*. However, this public interest litigation shall not abridge the consumer's right to pursue his private claim.

6.2.3 CCP's Public Interest Litigation

The CCP's public interest litigation is a mandatory collective litigation tool, commenced by an entitled claimant without a material interest (public prosecutor, entitled associations etc.); however, the real holders of the claim may opt out after the entitled claimant has won the case, thus retaining his right to pursue his claim personally (but enjoying the previous procedure's effects). The provisions do not specify what claims can be pursued, but instead regulates the procedural framework for the litigation. However, according to Section 577 CCP, the court must oblige the defendant to pay damages (or take action or refrain from a certain behaviour) directly to the known actual holders of the claims (not the proxy plaintiff, entitled to commence and pursue the claim). Regarding the costs of the public interest

[141] A good overview of the practice of CPA tools can be found, see GELENCSÉR, A. Közérdekű igényérvényesítés Magyarországon I. II. – a gyakorlat tükrében. *Eljárásjogi Szemle*. 2016, n. 3. p. 31–45; GELENCSÉR, A. Közérdekű igényérvényesítés Magyarországon II. – a gyakorlat tükrében. *Eljárásjogi Szemle*. 2016, n. 4. p. 25–37.

litigation, Section 577 states that the plaintiff is directly liable if he loses, and also directly entitled to costs if it wins (and in this latter case, the award goes to the actual claimants).

6.2.4 CCP's Joint Litigation

The CCP's joint litigation is an opt-in procedure that is available for monetary claims. As a rather unusual tool, the parties may join by signing a joint litigation contract (regulated in the CCP, even though this is a substantive legal regulation). According to Section 586 (1) CCP, the joint litigation contract must contain that the compensation in the judgment belongs to the actual plaintiffs in proportion to their respective claims. Section 590 (2) states that the court must entitle those plaintiffs who have properly joined their claim to the joint litigation to the appropriate compensation.

As to my opinion, this four-pillar system seems sufficient to deal with monetary damages, as well as injunction relief for the great numbers of identifiable consumers – on paper. There is also a possibility for injunction with regard to unnamed claimants, in which case they are later entitled to identify themselves and connect their cases to the former procedure, thus linking their claim in the follow-on procedure. However, statistics indicate problems related to the efficiency of mass litigation. As András Gelencsér analysed some 90 cases related to the CPA's collective litigation tools, the numbers are very small. When we turn to the CCP's tools, we have to admit that, after more than one year of being effective, not one example of joint litigation has been commenced. The reasons are discussed below.

6.3 Features of the litigation tools

6.3.1 The method of collecting members of the litigants' pool

First, we deal with the method of collecting members of the litigants' pool, namely the opt-in or opt-out system. However, we have to mention a mandatory system as well (where interested parties are members of the pool by virtue of commencing a procedure in their name and no opt-out exists), which is virtually unknown in the continental systems due to constitutional law issues, but is recognised in the US class action system.[142]

The CCP's public interest litigation is an opt-out system, but with special features. First of all, substantive interest holders, potential claimants for personal redress, are not parties in the public interest litigation procedure [CCP Section 578 (2)]. Still, the procedure might have *res*

[142] One reason behind creating a mandatory class action is the relatively low costs of organising a group, so making the class action tool, see UDVARY, S. *Pro Actione Collectiva*. Budapest: Patrocínium, 2015, p. 69.

iudicata effect on those substantive claimants, if the plaintiff – as per Section 574 (1), named the beneficiaries and determined the method of verifying the conditions of membership in the claimants' group and the court accepted these. To enjoy *res iudicata* effect, further conditions are to be met: the defendant must inform the members of the group of the final verdict [Section 578 (1) (a)]; inform the substantive claimant that *res iudicata* applies to her case, unless she notifies the defendant in written form that she reserves her right to initiate proceedings as sole plaintiff [Section 578 (1) (b)] and the substantive claimant fails to give such notification. Since *res iudicata* applies by default and may be averted by action on the part of the substantive claimant, the system is opt-out but with a trace of mandatory system, since opt-out is available only after a verdict has been reached.

The CCP's joint litigation is a true opt-in system, where substantive claimants must join their claims in a joint litigation contract to be part of the procedure. Joining the claims will therefore result in *res iudicata* for the representative facts and legal issues, while the claimants must interconnect their material facts and circumstances within a specified time-limit.

The CPA's public interest claim and public interest litigation must follow the CCP's public interest litigation regulations; as such, both vehicles are opt-out with a mandatory feature, because in both procedures the procedural plaintiff might commence the procedure without the prior consent of an actual aggrieved party, who has the right to opt-out after a verdict has been reached.

6.3.2 The person of the procedural plaintiff

For the purposes of the procedure, the identity of the procedural plaintiff is of the utmost importance, and so the EU deals with this issue in the Directive and the Proposal as well. In both cases, entitled organisations are favoured to be selected as the procedural plaintiff in the application of non-present parties.

In the CPA public interest claim, the Consumer Protection Associations and the Authority are entitled to initiate such a claim; Directive 2009/22/EC specifies the consumer protection associations that may apply for inclusion on a European list of those organisations that are entitled to enforce consumer claims (under I Annex of the above-mentioned Directive).

In the CPA public interest litigation, the (procedural) plaintiff may be the public prosecutor or the consumer protection organisation.

CCP public interest litigation may be commenced by entitled organisations to initiate such special procedures. According to Section 6:88 (4) Civil Code[143], the public prosecutor is entitled to initiate a procedure to annul a contract and apply the legal consequences of annulment for the termination of a violation of public interest. This is public interest litigation.

[143] Act V of 2013 on Civil Code.

Furthermore, unfair terms of contract might be challenged in public interest litigation by the public prosecutor, minister and heads of certain administrative organs, the heads of the capital and county government offices, economic and professional chambers, and (with regard to the consumer interests protected by it), the relevant consumer protection association (Section 6:105 (1) Civil Code). Even certain substantive clauses of a commercial contract might be challenged in public interest litigation, if the unfair clause was part of the terms. This might be challenged by an organisation promoting and protecting the interests of undertakings (Section 6:106 (1) Civil Code). It should be noted that claimants with a material interest shall not be regarded as parties in the public interest litigation, since CCP Section 573 (2) specifically excludes the substantial interest holders from being procedural parties; nevertheless, *res iudicata* may apply.

In CCP joint litigation, the representative plaintiff must hold a material claim, alongside his or her fellow joined claimants. NGOs and authorities are therefore excluded if it their own substantive interest is not the subject of the procedure (which is rather unlikely, given the subject-matter limitations on joint litigation; see Scope of the Claim part).

6.3.3 Minimum number of group members

CCP public interest litigation has no minimum number of group members. In fact, the procedural party, the one entitled to initiate the procedure, is the only party in a procedural sense.

In the joint litigation there is a minimum number of 10 actual materially interested parties; they have to join their claim with a special procedural vehicle, the joint litigation contract. The procedure shall terminate, if the joint litigation is not admissible due to fewer than 10 parties.

6.3.4 Scope of the claim

Limitations on the scope of the available claims might impair the functioning of any tool. In general, we may assert that the scope of available claims are rather limited on the substantive legal side, but open from the point of view of the available remedy.

A CPA public interest claim may be initiated upon the violation of the listed rules of the CPA, that is Section 45/A, which contains a fairly wide list of commercial activities; however, it excludes, *inter alia,* problems arising from the existence, validity, legal effects and termination of the contract. Section 45/A contains those parts of the commercial activities, that can be supervised by the Authority, supervision review and validation of the violation is a prerequisite for commencing a CPA public interest claim. Hence, limitation arises in terms of substantive law: only consumers' rights and only those that were adjudicated in

a prior consumer protection procedure might be evaluated. However, having fulfilled this condition, the Authority and Consumer protection organisation may raise pecuniary claims in the name of unknown consumers as well and so this is a fairly wide possibility for the entitled organization.

CPA public interest litigation is available if the enterprise's unlawful activity harms a wide, personally undeterminable range of consumers, whereas the circumstances of the violation are obtainable. On the one hand, this is a wider possibility than that of a CPA public interest claim, since the Section 45/A subject matter limitation does not apply. However, in our opinion, this tool is restricted to applying to consumer protection claims (still, over a wider range than the previous measure). As for the possible claim, since Section 38 (2)–(6) is applicable to this instrument, this means that a pecuniary claim is available, whereas the procedural plaintiff raises the claim for the actual holders of the right. They will be entitled to lay claim to their particular portion after the enforceable verdict is reached.

CCP public interest litigation may only be commenced (under these rules) if (the substantive) law so orders. As such, challenging unlawful terms of contract in public interest litigation is based on the direct provisions of Section 6:105-106 Civil Code. Consumer protection cases are allowed by Section 38-39 CPA, environmental cases are allowed by Act III of 1995 on Environmental Protection, in which NGOs (Section 99) are entitled to commence litigation. The minister is also entitled to act for the enforcement of other's claims, if they fail to litigate and notify the minister of this within the statute of limitations period [Section 103 (2)]. This instrument is thus rather limited in scope, but as seen before, CCP public interest litigation does not exclude claims for pecuniary compensation.

CCP joint litigation has a limited scope of subject-matter. According to Section 583 (2) CCP, it only covers disputes arising from consumer contracts, labour law claims and certain environmental claims (personal and monetary damages caused by human activity or inactivity resulting in unforeseeable environmental load). Injunction is not included as an option in the environmental litigation. Pecuniary claims are available, indeed, supported by the legislator.

As comprising several particular types of damage, cartel damages might be enforced by the Hungarian Competition Authority if the competition law violation affects a wide but determinable range of consumers. This is a follow-on procedure that does not affect the rights of consumers to their separate litigation, but may simplify the procedure, as they only have to verify the damage and its causal link within the unlawful behaviour (determined during to the Competition Authority procedure). However, this is a special procedure, to which public interest litigation seemingly does not apply, as there is no provision giving direct guidance.

Company law damages are not included in public interest litigation or joint litigation. The Civil Code contains regulations on challenging the decisions of any legal person (Section 3:35–37), but this is a separate type of litigation.

Note that Act CXXV of 2003 on Antidiscrimination entitles the Antidiscrimination Authority to commence public interest litigation for the enforcement of claims (even personal claims) arising from the violation of the Act, which, the public prosecutor and the NGOs are also entitled to litigate.

6.3.5 Competency

The competence of the authorities and the court is relatively constant. Both CPA tools behave like CCP public interest litigation, which is to be commenced before the regional court.

Joint litigation may be commenced before a district or regional court, depending on the value of the claim (if above HUF 30 million approx. EUR 96,000, then the regional court has subject-matter jurisdiction).

6.3.6 Legal representation

Legal representation is crucial to ensure proper procedure, especially when actual (substantively interested) parties are absent from court.[144] Public interest litigation must be commenced before the regional court (Section 20 (3) ac) CCP), where legal representation by an attorney or other entitled person is mandatory (Section 72 CCP).

Although joint litigation might be commenced before a district court (where legal representation would not be mandatory), legal representation in joint litigation is explicitly mandatory [CCP Section 582 (2)]. The legal representative must be named in the joint litigation contract.

Agency problems[145] might arise between absent parties and their representative plaintiff (i) and/or the legal representative (ii). Regarding the first issue, the plaintiff in public interest litigation shall be an authority, public prosecutor or entitled association, so the legislator presupposes that the procedural plaintiff will appropriately represent the interests of the substantive claimants. Wherein the event that they are dissatisfied with their plaintiff, they may retain their right to separate litigation with the opt-out. Nevertheless, the first issue regarding joint litigation is that the representative plaintiff must be named by the joining parties in the contract, where the main limitations on his behaviour shall also be set (e.g. entitlement to settlement, approval of settlement). Section 586 (1) (g) CCP requires the joint litigation contract to contain specific rules on the professional responsibility of the representative plaintiff for performing his

[144] In the US federal class action, even the selection of class counsel is a very thorough procedure, in order to ensure adequate representation, as part of constitutional reqirement for the protection of absent parties. see UDVARY, S. *Pro Actione Collective*. Budapest: Parocínium, 2015, p. 128–37.

[145] Ibid., p. 170.

vicarious duties. CCP The court however has no power or duty to check if the representation by the plaintiff is appropriate [CCP Section 586 (4)].

As to the legal representative agency problem, the procedural plaintiff in public interest litigation or the representative plaintiff in joint litigation is entitled and obliged to check the actions of the attorney. Note that due to the rules on attorney fees, the attorneys have no such direct interest in pursuing the litigation as they might have in an American-style class action.

6.3.7 Certification

Certification is a supplementary part of the pleading phase in a collective action. Whereas ordinary actions proceed after a pleading phase to a preparatory stage, then meritorious trial, collective actions generally require a further step, mainly at the end of the pleading phase but certainly before the trial on the merit, this step being permission to proceed under these special rules. The main reason behind this is the *res iudicata* effect, which will be binding on absent parties as well and so the radiant effects of this single procedure require special attention.

CCP public interest litigation – hence, a CPA public interest Claim and Litigation, which are conducted according to these rules – has no formal certification procedure, but the pleading phase has special requirements. Section 574 (1) CCP requires that the claim form contains – beyond the general elements – reference to the substantive claimants and the method of verifying their claim, in order to enable the court to oblige the defendant in their claim. Should there be no commonality in the claimants' substantive claim-pool, the procedure must be terminated (Section 575 CCP). The procedure shall terminate *ex officio* if the method of verification is not uniform or cannot be determined uniformly. Thus, even though there is no formal certification, these two regulations work as a permission phase, where inadmissible non-common claims result in the termination of the public interest litigation.

CCP joint litigation has a formal certification phase. The representative plaintiff must apply for the certification within his claim (Section 584 CCP). The application for certification must contain the following elements:

- the joint plaintiffs and the fact of their joining;
- the name of the representative plaintiff and his/her substitute;
- the name and authorization of the legal representative (power of attorney to be enclosed);
- the representative right;
- the representative facts;
- the method that is appropriate to verify the link between the facts and the plaintiffs and the representative right (interconnection);
- reference to the joint litigation contract, which must be enclosed.

The claims must be marked by each joined plaintiff respectively. The court is to decide the application within 60 days after the lodging of the claim-form but no later than the closure of the preparatory phase of the procedure (Hungarian civil procedure has three stages: pleading, preparatory phase and trial on the merit.) The order on the certification must contain the representative right, the representative facts and the method of the verification of interconnection and the deadline for the actual verification. Should the certification be rejected, the procedure shall be terminated, but the claimants may lodge their claim within 30 days of the rejection. The order may be appealed and shall be decided within 30 days, after which the procedure may be continued.

As to the new rules of the public interest litigation or joint litigation, no practice exists yet.

6.3.8 Control over the procedure

Control over the procedure belongs to the parties, not the court. As to public interest litigation, the court has no control over the actions of the procedural plaintiff and the technicality-functionality of her action. The only discretion the court has regarding the group's composition is the possibility to terminate the action if the verification method is improper for verifying the interconnection – in the opinion of the court.

In CCP joint litigation, it is the representative plaintiff who appropriately represents the group. For assuring his duties, the joint litigation contract must contain rules on his responsibilities, especially his liability for incompetent or inefficient litigation. Section 586 (4) CCP explicitly states that it is not within the court's duties to monitor compliance with the joint litigation contract.

6.3.9 Res iudicata

Res iudicata estops the parties from a new procedure and shall be authoritative between the parties. If the verdict contains any obligation, it shall be enforceable.

As to public interest litigation (which is normative for CPA collective tool, as well), the CCP has rather difficult rules. *Res iudicata* shall be binding between the defendant and those affected claimants (the procedural plaintiff is not included, only regarding the amount of litigation costs) that fulfil the following conditions:

- the defendant sent a written notification to the particular substantive claimant within 30 days of the final verdict;
- this notification contains a 60-day period, within which the plaintiff may maintain his right to pursue separate litigation by direct written notice to the defendant;
- and the claimant failed to give such notice.

If the substantive claimants were not notified by the defendant, they are expected to maintain their right to pursue separate litigation. This approach is interest-based: according to the expectations of the legislator; even in a lost case, the defendant is more interested in finally closing the case than not sending the notice. In the unwelcome event of no notice, the right to pursue separate litigation is upheld, so the defendant could face an avalanche of litigation.

Joint litigation has special rules as well. According to Section 590 (4) CCP, If the action of one or more plaintiffs is dismissed by the court due to their failure to verify the link, the representative plaintiff may file an appeal against the judgment on this ground, but only on behalf of the plaintiffs concerned. The parties who failed to interconnect their case were substantive though absent parties to the case, therefore the rejection by the court shall result in the binding dismissal of their claims – in my opinion.

A judicial verdict in public interest litigation might have *erga omnes* effect, but only if substantive law so regulates. (A verdict dissolving a marriage, for example, has erga omnes effect per Section 4:23 (4) Civil Code). As to the scope of public interest litigation, we have no information on any provision giving *erga omnes* effect its verdict. Joint litigation certainly has no *erga omnes* effect; since it is an opt-in procedure, it is binding only on those parties that have properly opted-in by signing the joint litigation contract.

6.3.10 Publication of collective procedures

Regarding the publication of collective procedures, neither the public interest litigation nor the joint litigation rules require mandatory publication of the commencement of the procedure. However, the joint interest litigation plaintiff collects the plaintiffs to be joined, so it is in their interest to inform the public oft the possibility to join. The joint litigation contract must therefore contain a method of informing plaintiffs [who already joined, Section 586 (1) (k) CCP). There are publications on forming groups of plaintiffs, but again, there is no mandatory publication in an authentic register.

The CPA has special publication rules for the verdict in CPA public interest claims and litigation. According to Section 38 (6) CPA, the court may order in its verdict, upon sentencing the responsible enterprise, that the judgment and statement of reasons be published at its expense.

6.3.11 Unclaimed amounts left from compensation

Since opt-out procedures often involve unidentified consumers, substantive parties, circumstances may arise when the enterprise is obliged to pay remedies but no substantive party applies for the remedy. What happens if the harmed person (who either opted in or was an absent party, has no interest on the compensation, where does this amount go?

CCP public interest litigation (again, this also applies to CPA tools) is commenced by the procedural plaintiff, in which absent members might receive compensation. However, they must be identified to be compensated: according to Section 577 (1) CCP, the verdict must contain the *"affected claimants and the method of verification of their connection"*. CCP Section 574 (1), which requires a clear interpretation of the conditions to be affected and the method of its verification, is similar. This way no uninterested party shall be rewarded in the verdict.

In joint litigation, the absent claimant may only be rewarded if the interconnection of his claim is duly completed (Section 590 (2) CCP). It is hence impossible to oblige mandatory compensation of the plaintiff in connection with an uninterested "party".

6.4 Costs in collective litigation

6.4.1 Fees for court procedure

The fee of any court procedure in Hungary (including collective claims) in general is 6% of the value of the claim on first instance, 8% of the appealed value on appeal and 10% of the reviewed value of the case upon the Kúria's review. Should more cases and claims be joined, the value must be added, so the fee increases up to a maximum of HUF 1,500,000 at first instance, HUF 2.5 million on appeal and HUF 3.5 million on review. Hence, there is a monetary level of a (theoretically unlimited) claim, from which amount the fee shall not increase. (E.g.: above HUF 25 million – where the first instance fee reaches its maximum at HUF 1.5 million the claim may be increased, but the fee shall be flat maximum.) For those cases where there is no determinable value of the case – e.g. injunctions or determining a violation of law – Act XCIII of 1991 on Fees gives an imaginary base of fees: HUF 350,000 at a district court, HUF 600,000 at regional court (where the 6% rule applies, and there is rule for the appeal and review cases, too).

For public interest litigation the indicative base for fees is applicable if there is no monetary claim. If there is a monetary claim it must be added, up to the point of the fee-ceiling. In joint litigation the claims shall be added in order to determine the fee according to the above-mentioned rules.

6.4.2 Lawyers' fees

Lawyers' fees are one of the main deterrents to regulating and commencing collective actions. As such, their regulation must be carefully drawn up. However, scholarly opinion signalled that the so-called American rule might encourage plaintiffs to initiate frivolous procedures,[146] Even though The Act LXXVIII of 2017 on Attorneys provides the general

[146] See UDVARY, S. *Pro Actione Collective*. Budapest: Patrocínium, 2015, p. 245–247.

rules, the attorney fee is subject to total discretion of the parties. However, it has new rule on contingency fees – thereby allowing it –, which shall not exceed two thirds of the total attorney's fee. Hence, parties may (but naturally not must) agree in a commission fee, which consists of hour-based and contingency fee, latter which may not exceed the two third of the total commission fee. For example, the hour-based fee of the lawyer for the representation during the whole procedure is HUF 1 million and the contingency fee may not exceed HUF 2 million, since the total remuneration (HUF 3 million) may be composed of 1/3 hour-based or other calculable fee and maximum 2/3 contingency element.

However, there is a difference between the attorney's commission fee and the representation fee to be determined by the court. Commission fee is payable by the client to the attorney (sometimes in advance or on-the-spot, at the trial), but it might be reimbursed to him (at least partially) according to the loser pays principle. On the other hand, representation fee shall be determined by the court. Although according to 32/2003 IM (VIII. 22.) Decree of the Minister of Justice, the representation fee – determined by the court to be borne by the losing party – shall be determined in accordance with the commission fee of the attorney; the court might – in a reasoned order – reduce the fee in proportion to the actual work of the attorney. The winning party is alternatively entitled to claim a representation fee of 5-3-1%[147] of the value of the claim, in which case he shall waive his right to claim the commission fee in the contract with the attorney. Hence, commission fee may be reimbursed, but the court has discretion in decreasing it; in many cases this decrease adjusts to the representation fee that is to be determined by the court, according to the above-mentioned decree. Contingency fee is possible but limited to two thirds of the whole attorney fee and even this might be reduced if the court deems it inappropriate given the attorney's real contribution.

6.4.3 Third party funding

Third party funding is the continental solution to financing the risks of collective litigation. Even though the European Union's Recommendation refers to third party funding,[148] the Hungarian rules of the CCP or CPA do not contain such provisions. Hence, it is within the general liberty of civil actions to fund other person's litigation, but no rule assures the position of this lender. Problems might arise in cases under the Competition Act, where the aggrieved person might pursue her claim arising from the violation of the act (especially cartel damages, assumed to be 10% of the profit). Though this is not collective litigation *per se*, neither public interest litigation nor joint litigation (since its limited scope does not allow these claims to be joined), third-party funding might result in the case being funded by a competitor or his proxy. This should be excluded.

[147] Up to HUF 10 million value of the litigation the representation fee is 5%; between HUF 10 and 100 million value HUF 500,000 plus the 3 per cent of the amount above HUF 10 million; above HUF 100 milion value HUF 3,200,000 plus 1 per cent of the amount of litigation above the beforesaid HUF 100 million limit. See 32/2003 IM (VIII. 22.) Decree of the Minister of Justice Section 3 (2).

[148] Recommendation Article 14–16.

In my scholarly opinion, third party funding might produce little to no difference to the US style entrepreneurial litigation; only the person of the entrepreneur changes. In the US, the attorney decides on the risks of the commencing the litigation and provides the funds for the action – naturally with the prospect of profit –, the incentive being her attorney's fees. Excessive fees might be reduced; there is even a civil association that regularly challenges such fees.[149] As we saw above, Hungarian regulations cap the contingency fee of the lawyer in an action. However, no such barriers exist for profit-oriented third party funds, which will employ legal staff to evaluate risks, so not only the lawyers' costs but also the third-party fund's administrative costs shall be incurred in the litigation process.

6.5 Evaluation of efficiency, recommendations

Regarding the new rules of the CCP public interest litigation and joint litigation, we have no knowledge of new cases so we cannot report on the efficiency or effectiveness of those procedures.

As to recommendations, the main obstacle will be the cost-factor, where the procedural plaintiff and the representative plaintiff (both obliged to pay the costs, if they lose) shall avoid risks and commence only those cases with overwhelming chances of winning. The numbers of the cases will be low in my opinion, unless alleviations are made in the cost system towards the American approach (even though EU does not encourage this). If the losing procedural party were to bear only his already incurred costs (sunk costs), and bearing the other party's costs were waived, they could be more courageous in commencing collective actions. It should be noted that costs would be incurred for the losing party this way too, but the (normally commercial enterprise) defendant should bear surplus costs, unlike the familiar loser pays principle. However, this would be on a moderate scale because CPA public litigation is limited in subject matter, CCP public interest litigation may be commenced only by entitled plaintiffs, and CCP joint litigation must go through a certification phase.

As to public interest litigation, NGOs, public prosecutors and other institutions are rather widely entitled to commence specific litigation. Ombudsmen have no direct entitlement to commence a case in the name of others, but might intervene in judicial procedures, if the protection of constitutional rights so requires. The entitled procedural plaintiffs have a right to claim monetary compensation, too, in the name and for the sake of the substantive plaintiffs. Joint litigation is for the substantive claimants so I see no possibility to enable NGO's to litigate in the name of those others. However, giving them a license to intervene in the procedure might be sufficient to produce the expected result.

[149] See the activities of Center for Class Action Fairness, available at: <https://cei.org/issues/class-action-fairness>.

7 Problems with enforcement of consumer rights in the Czech Republic

Marcel Iványek

When we deal with consumer rights enforcement, there is some consumer with his claim (which is usually small) in the middle of everything. Although Czech the legal system contains many different options for enforcement, their effectiveness varies greatly. In order to make any conclusions about the importance of bringing a tool for collective redress or mass actions into Czech legal system, we have to describe the overall landscape of enforcement in the area of consumer protection and consumer rights.

7.1 How can Czech consumers enforce their rights?

The value of the vast majority of consumer claims is up to CZK 10,000, which is equivalent to EUR 400. If any consumer wants to enforce this kind of claim, there are two options, go to a court or to the relevant alternative dispute resolution (ADR) body. Each way has its own peculiarities, which make it more or less effective. Since ADR is the first option for many consumers, we start with that.

7.1.1 Consumer ADR system

Section 20e of the Act No. 634/1992 Coll., Consumer Protection Act, sets down four areas for consumer ADR: financial services, telecommunication, energies and the "residual group," where the most common disputes belong, such as a withdrawal of the purchase contract within the 14 days period or whether or not there is claim for faulty goods. When implementing Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes (ADR Directive), the Czech approach was to use the existing structures to the maximum extent.

The result is that consumer ADR bodies established by law are mainly existing supervisory authorities: Czech Telecommunication Office (CTO) for telecommunications, Energy Regulatory

Office (ERO) for energy and the Czech Trade Inspection Authority (CTI) for the residual group. The financial services sector is slightly different because the responsible authority – the Financial Arbitrator (FA) – is not a supervisory authority; its original purpose was to solve disputes that arise from specific financial services (e.g. payment services or consumer credit). However, the most significant differences are between the CTO and FA on the one hand and the CTI and ERO on the other hand, because the CTO and FA can impose binding decision, whereas the other two cannot. This distinction emerges from the nature of proceedings within each ADR body.

A "true" ADR procedure as it should look like only exists within the CTI, since there are specific rules for consumer ADRs and the outcome is a written agreement reached through mediation.[150] The ERO has chosen a completely different approach – there are no rules and hardly any outcomes, because its ADR department is practically non-existent. CTO and FA practices are not so far from administrative procedures. Both offices exercises jurisdiction based on sectoral laws, namely Act No. 127/2005 Coll. on electronic communications and Act No. 229/2002 Coll. on the Financial Arbitrator, but Act No. 500/2004 Coll., on administrative procedure is used for proceedings. Therefore, the CTO and FA carry out some sort of ADR/administrative hybrid procedure rather than ADR, which does not have to mean something disadvantageous for consumers, as described below.

The major drawback of the CTI-ADR procedure is the lack of traders willing to participate in such a system, which, if combined with its non-binding decisions and extremely low fines for not participating, means that this form of dispute resolution can be completely ineffective. This inadequate outcome wastes the efforts of both consumers and the CTI. On the other hand, the CTO and FA conduct procedures using their administrative powers and, at the end, they make binding decisions for both parties involved that can ultimately be reviewed by court.

7.1.2 Going to court

The possibility of a binding decision with judicial review is especially important when dealing with small claims in Czech law, inasmuch as there is no possibility to appeal in court cases where claim's value does not exceed CZK 10,000 (ca. EUR 400). The single instance proceedings therefore inevitably mean a lack of judicial protection in those cases where a judge makes a mistake. The only possibility for changing the first instance court judgment with regard to small claims is to file a complaint with the Constitutional Court.

The setting as described brings difficulties for consumers. Firs, the Constitutional Court, by law, only has competence to review a judgment from the constitutional law perspective, and since the vast majority of consumers' small claims cases do not have significant

[150] See Czech Trade Inspection. *Pravidla pro postup při Mimosoudním řešení spotřebitelských sporů* (ADR). 2017, available at: <https://www.coi.cz/wp-content/uploads/2017/08/2017-08-15-pravidla-adr.pdf>.

importance in terms of constitutional law or fundamental rights, the scope of review which the Constitutional Court can perform is not so wide. It becomes even more limited if we take into account the Constitutional Court's doctrine that its role is not to be a substitute appellate body. As stated in the Constitutional Court's judgment file No. III. ÚS 3725/13, when there is no right of appeal in small claims cases, it is the legislator's will to leave this field without additional judicial protection, namely without a system of case-law unification carried out by general courts (mainly by the Supreme Court).[151] The consequence of this is a significantly diminished level of judicial protection in the area of consumers' small claims.

7.1.3 Possible solution?

We can conclude that two major issues regarding enforcing individual consumers' claim are lack of effective sanctions and lack of reliable judicial protection. It is not only that the Constitutional Court would probably dismiss consumers' complaints but also that, if higher levels of the general court system do not deal with consumer cases, there is no appropriate case-law to shape the legal environment and market as a whole. Insufficient effectiveness on the other hand leads to consume passivity and so-called rational apathy – they have tried to enforce their rights once but it ended in disappointment so they do not have the motivation to try it again. All of this combines to create a toxic ecosystem of apathetic consumers and dishonest traders.

Given the above, it seems obvious there is a need to strengthen enforcement at the individual level in the early stages. Since the ADR/administrative hybrid model seems to be solving the majority of the problems described, it could be the solution. Being empowered make binding judgments in private law disputes is the domain of courts, but when we combine the facts that the Czech legal system excludes minor claims from the possibility of appal and that consumer disputes require a certain level of specialisation, redirecting some specific disputes to state administration may be how to improve the position of consumers. It would introduce another binding decision to the chain of solving disputes.

Moreover, the FA has proved to be a well-regarded authority; it shapes the financial services market and its procedures are quite quick – their average length is approximately six months.[152] Participants even have the option to use the regular form of appeal within the institution itself, a so-called "resolution". In conclusion, there are actually three stages of decision-making, plus the possibility of constitutional review through the Constitutional

[151] Judgment of the Constitutional Court of the Czech Republic file No. III. ÚS 3725/13, 10. 4. 2014.

[152] Finanční arbitr. *Souhrnné informace o finančním arbitrovi*. 2016, available at: <https://www.finarbitr.cz/download/download/450_cs_souhrnne_informace_-podle__21_zakona_o_financnim_arbitrovi.pdf>. Six months may look like a considerable amount of time but if we compare this information with average length of civil proceedings in the Czech Republic for 2008-2017, which is 298 days (ca 10 months), it looks much better. Also, delays over 500 or even 1,000 days are not absolutely exceptional. See Ministry of Justice. České soudnictví 2017: Výroční statistická zpráva. 2018, available at: <https://justice.cz/documents/12681/719244/2017_vyrocni_stat_zprava.pdf/27ba4524-49cb-4744-b834-2c6812f13e5d>.

Court as last resort. This kind of system is capable of providing sufficient protection for consumers' rights and it is also expected to be able to raise the standard of the Czech market.

7.2 What can consumer organisations do?

From the perspective of EU law, consumer organisations could be perceived as strong enforcers with a wide variety of options for protecting the interests of consumers. However, for consumer organizations to be efficient enforcers, their purpose, as well as the meaning and purpose of civil society has to be understood by officials. This ideal, unfortunately, has not been met across Central Europe, even though the democratic transition happened 30 years ago. We can see quite a few issues in the Visegrád 4 member countries, including financing non-profit organisations, problems with their infrastructure and their public acceptance.[153]

The situation became even worse in 2018, when some Czech populist politicians widely tried to connect all kinds of non-profit organisations with the migration crisis. The Ministry of Finance responded to the proposal to cut financing of the non-profit sector, which led to problems and delays in grant allocation for 2019. This turn of events led to a loss of trust in many non-profit organisations working in the fields of social services, education, the environment and also consumer protection. Moreover, although funds from state grants limit the amount that can be spent on administration, many inspections by officials and the use of assigned funds only for their intended purpose, non-profit organisations are seen as "limited liability companies for grant scavenging" and somehow as lucrative business serving no purpose.[154] All of these factors must be taken into account when we deal with the question in hand: "What can a consumer organization do?"

7.2.1 Injunction procedure

The idea behind injunctions for the protection of consumers' interests, as stated in the first Injunctions Directive, was very simple in its essence.[155] Its aim was to create the means

[153] RAKUŠANOVÁ, P. *Povaha občanské společnosti v České republice v kontextu střední Evropy*. Praha: Sociologický ústav AV ČR, 2007, p. 98–104.

[154] This picture of non-profit organisations is supported via public opinion surveys on trust in some public institutions conducted in the Czech Republic in March 2018 and November 2018 by the Public Opinion Research Centre (part of the Czech Academy of Science). In both surveys, non-profit organisations were ranked as second least trustworthy, scoring 36 % (March 2018) and 37 % (November 2018). See HANZLOVÁ, R. Důvěra k vybraným institucím veřejného života – březen 2018. *CVVM SOÚ AV ČR*. 2018, available at: <https://cvvm.soc.cas.cz/media/com_form2content/documents/c2/a4580/f9/po180405.pdf>; and HANZLOVÁ, R. Důvěra k vybraným institucím veřejného života – listopad 2018. *CVVM SOÚ AV ČR*. 2018, available at: <https://cvvm.soc.cas.cz/media/com_form2content/documents/c2/a4767/f9/po181213.pdf>.

[155] Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests.

for terminating infringements harmful to the collective interests of consumers in good time, so the internal market would function smoothly and consumers would have confidence in it. These goals can also be found in the recitals of the current Injunctions Directive[156] and even in the proposal for new Directive on Representative Actions.[157] Every new amendment or directive was aimed to remedy lack of effectiveness and efficiency of the injunction procedure. The Proposal itself names all key shortcomings of the Injunction Directive: limited scope, no possibility of redress and the cost and length of the whole procedure. The last two remarks are especially visible in the Czech reality.

The Czech legal system has known the injunction procedure since 2003, which was the era of approximating Czech law with that of the EU law before the Czech Republic entered the EU. Technically, the transposition was done by adding one sentence to Section 25 of the Consumer Protection Act; proper transposition had to wait until 2006 and there was no change thereafter, so Czech law covers only the first Injunctions Directive.

The Czech consumer organization dTest has tested the injunction procedure three times and all were unsuccessful, mainly because of slow acting courts. The first two lawsuits related to unlawful fees for "credit account management" and started in 2012. In those cases, dTest asked the courts to issue injunctions against two Czech major banks so they would not be able to charge such fees in future. It seemed quite promising because the practice described had been found unlawful in other European countries and some Czech consumers were successful in their individual claims while the two actions were pending at courts. Unfortunately, one of them was denied by the first instance court but there was still possibility to appeal and the other was still pending and there was not even a first hearing after a year and a half. Moreover, thanks to the medial pressure created by the initiative, individual consumers and commercial subjects were able to persuade banks to change their policies, so the actions were withdrawn.[158]

The last case started in 2016 against one of the three Czech mobile network operators, namely O2 Czech Republic a.s. The infringement to which the lawsuit related was a unilateral change of terms and conditions disadvantageous to consumers without the possibility of terminating their contract early without any sanction. So O2 was in breach of the Electronic Communications Act and was even fined for it by the CTO (the investigation took it approximately 4 months).[159]

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[156] Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests.

[157] Proposal for a Directive of the European Parliament and the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, COM(2018) 184 final.

[158] See dTest. *dTest podal žalobu na Českou spořitelnu, žádá zákaz bankovních poplatků*. 2013, available at: <https://www.dtest.cz/clanek-2823/dtest-podal-zalobu-na-ceskou-sporitelnu-zada-zakaz-bankovnich-poplatku>; and dtest. *dTest bere zpět žaloby*. 2014, available at: <https://www.dtest.cz/clanek-3636/dtest-bere-zpet-zaloby>.

[159] dTest. *Operátor O2 dostal šestimilionovou pokutu*. 2016, available at: <https://www.dtest.cz/clanek-5482/operator-o2-dostal-sestimilionovou-pokutu>.

It would seem that everything was on the best course to get the court to issue the necessary injunction to support consumers against the company. Unfortunately, changes to the Electronic Communications Act came faster than the court's ruling. In the beginning, the first instance court dismissed the case, reasoning that courts are not empowered to deal with such issue and referred it to the CTO, which is part of the executive power. This led to dTest's appeal, and the second instance court ordered the first instance to adjudicate the case. The court was still not eager to start solving the matter so it was pending before the first hearing for over a year. Since the dispute practice had been already forbidden by law, there was very little need for the injunction therefore dTest withdrew the action.[160]

From this litigation experience, it is obvious that the injunction procedure in the Czech legal system serves merely as one of many means of putting pressure on unfair business practices; therefore, it is not following its purpose as stated in the Injunction Directive. A procedure already lasting more than one year without the possibility to even start to litigate before, unfortunately, cannot be seen as terminating infringements harmful to consumers in good time. However, these issues could be a product of the specifics of the Czech Republic and its legal system, because the injunction procedure has proved to be a very useful and functional tool of consumer associations for protecting consumers' interests in other EU member states. From an overall perspective, the Injunction Directive has helped to end many unlawful practices and it has had a significant impact on contract terms and on commercial practices.[161]

On the other hand, the issue of missing the possibility of getting actual consumer redress is still present. Even if the injunction procedure is successful and fast, each consumer has to claim his compensation individually which is implying that there is insufficient pressure to create part of the procedure in terms of financial costs. For rogue traders, it is still more economically efficient to act unlawfully and risk litigation costs because they will not face the risk of compensating all of the injured consumers.[162] Another outcome of no compensation is lack of interest from the side of consumers. Why should they pay any attention if there is nothing to redress the damage done to them? We can conclude this part with the statement that the injunction procedure is not well suited to protecting collective consumers' interests in the Czech Republic.[163]

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[160] dTest. *Podali jsme žalobu na O2 kvůli změnám podmínek*. 2016, available at: <https://www.dtest.cz/clanek-5190/podali-jsme-zalobu-na-o2-kvuli-zmenam-podminek>; dtest. *Zpětvzetí žaloby na O2 ohledně změny obchodních podmínek*. 2016, available at: <https://www.dtest.cz/clanek-6191/zpetvzeti-zaloby-na-o2-ohledne-zmeny-obchodnich-podminek>.

[161] ROTT, P. – HALFMEIER, *A. Reform of the Injunctions Directive and compensation for consumers*. 2018, available at: <https://www.beuc.eu/publications/beuc-x-2018-022_reform_of_the_injunctions_directive_and_compensation_for_consumers.pdf>.

[162] Ibid.

[163] For more data on the problems of the injunction procedure in the Czech Republic, see the analysis contained in the Draft of the material intent of the Collective Actions Act (Návrh věcného záměru zákona o hromadných žalobách), p. 27–29, available at: <https://apps.odok.cz/attachment/-/down/KORNAVPF7NOI>.

7.2.2 Request to competent authority

Besides the injunction procedure, Czech consumer organisations are empowered to address public authorities with requests or initiatives in connection with their oversight of protecting consumer interests. This general authorisation, as stated in Section 26 of the Consumer Protection Act, is connected with the obligation of the public authorities to inform consumer associations about processing their initiatives without undue delay and no later than two months after the receipt of the complaint; there is hence a certain level of assurance that the public authority will proceed rapidly.

From the perspective of a consumer organisation or any non-profit organisation, it is cheaper and easier to turn to public authorities, mainly because all legal and related work can be done in-house by employees, whereas litigation requires at least to cooperate with some attorney to represent its interests in court. There are also court fees and, in some cases, those for external experts. All the requirements result in a costly procedure, which means, if combined with the length of court proceedings and uncertainty over the result, that any investment of time and expense into litigation is not very effective so the economically rational course of action is to address efforts towards public authorities.

If we return to the O2 case outlined in the previous subchapter, the public authority for telecommunications (CTO) had been able to impose a fine for the unlawful action of the mobile network operator many months before the courts even started to actually deal with the issue. The fine was not one of the small ones either – the CTO fined O2 CZK 6 million (approximately EUR 230,00).[164]

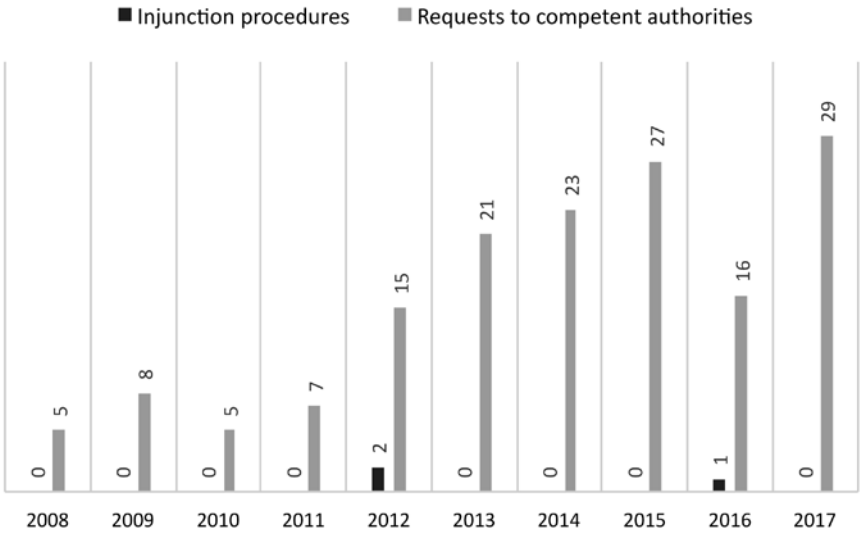
The chart below shows the growing tendency by dTest for requests addressed to public authorities. It should be noted that requests, initiatives and complaints do not have to be based only on the empowerment from the Consumer Protection Act but also on other national or EU legislation.[165] A high level of harmonisation of consumer protection law or unification in some other areas allows cooperation with other consumer organisations within the European Consumer Organization (BEUC) at high level. In this context, it means using model complaints with support from specialised BEUC personnel.

Actions connected with requests towards public authorities can be undertaken in various sectors: food and food products, product safety, telecommunications, energies, unfair and unlawful practices in offering goods and services in general, competition, banking and data protection. The shortcoming in this type of approach is that public authorities' decisions cannot have as wide an impact as court rulings. Imposing fines is the greatest helps in nurturing the Czech market, with some exceptions, such as ordering dangerous

[164] Czech Telecommunications Office. *Měsíční monitorovací zpráva 10/2016*. 2016, available at: <https://www.ctu.cz/sites/default/files/obsah/ctu/mesicni-monitorovaci-zprava-c.10/2016/obrazky/mmz-2016-10.pdf>.

[165] See Article 80/1 of 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 (GDPR).

Table no. 4 Injunction procedures and requests to competent authorities done by the consumer organization dTest



Source: internal data of dTest

products or food to be withdrawn from the market but it is only an ad hoc solution to these issues, and case law, which would help in future, is non-existent. Moreover, fines can be disproportionately low.

The perception of consumer organizations also varies between public authorities. Some of them seem sceptical towards such subjects resulting in less responsiveness to handling consumer organisations' requests and indecisive treatment of the concerns of wide groups of consumers. When a consumer has a problem, he is likely to contact a consumer organisation in the first place, which means consumer organisations have up to date information on consumers' issues. Unfortunately, public authorities often do not see this, as an advantage; quite the opposite, and it can be very challenging to persuade them to change their priorities in accordance with data held by consumer organisations.

7.2.3 Where to next?

As we can see, both possible approaches have their limits and their success rates vary a lot. Trying to protect consumers' interests via a public authority can be somewhat effective but logically cannot substitute for a court judgment. On the other hand, it is very unlikely for

consumer organisations in the Czech Republic to have the necessary means to withstand enough long-lasting civil procedures for the injunction procedure to start giving good results. The logical next step seems to be to adopt some sort of compensatory collective redress mechanism into the Czech legal system. If done properly, it can not only benefit consumers. The situation in a variety of EU member states shows that in can be a very powerful tool for protecting consumers and also shape the market in favour of honest traders.[166]

7.3 In expectation of compensatory collective redress

The ambition of this contribution is not to explain the need for compensatory collective redress in the European society of the 21st century in the light of socioeconomic development, but rather to pinpoint some elements of the prepared Collective Actions Act in the Czech Republic. The landmark in the legislation process has been the approval of the Draft of the material intent of the Collective Actions Act by the Czech government in April 2018.[167]

From the consumer perspective, it is beneficial that the leading principle is opt-out and not opt-in. The scope of the Act should not be limited to only consumer issues, which means that it should allow compensation to be available for a wide spectrum of subjects. Opt-in has been not completely overlooked and its place is in cases where the individual value of a claim is more significant or where individual claims are not completely identical. This setting provides the opportunity for large groups to receive compensation but also does not close the door on small ones. The inclusion of both principles promises equal flexibility in the court proceedings.

Another important question, which is not included in the Draft, is who will deal with and decide the cases, i.e. which courts will be competent in this matter. Proper consideration is absolutely crucial for there to be a functioning mechanism for collective redress in the Czech Republic. Since not all Czech courts get to solve consumer disputes or other disputes that can be litigated through the procedure, it seems reasonable to give this agenda to the selected courts or to create special panels within some courts. This suggestion can be supported with the prediction that the proceedings at hand will probably be very complex because of the high number of participants and a large amount of evidence. If this issue is not emphasised properly, the courts could be overwhelmed and as a result, overall trust in justice and its effectiveness may drop, which would be the direct opposite of the intended impact of the planned legislation.

[166] AZAR-BAUD, M.-J. – CORNELOUP, S. – AMARO, R. – JAULT-SESEKE, F. – FAVARQUE-COSSON, B. *Collective redress in the Member States of the European Union*. Brüssel: European Parliament, 2018, p. 17–20.

[167] The bill, which will go to the Czech Parliament, should be ready by the end of March 2019.

Maybe an even more important issue is financing litigation. The Draft assumes a so-called manager of the group, who represents the interests of plaintiffs and carries the risks of an action. He is also required to pay the court fees, which could be a considerable amount in cases where there would be large number of individuals with claims counted in thousands of Czech crowns. The purpose of entry fees is to eliminate vexatious litigation and very doubtful actions. There is also possibility of getting a third party to fund the litigation. How those fees are set must allow non-profit organisations (not only consumer ones) to finance a reasonable amount of cases without significant help, otherwise there is a possibility that the majority of cases would proceed without the direct participation of such organisations, which is capable of endangering the protection of public interest. Stretching class actions beyond non-profit organisations is definitely worth considering, but some equilibrium must be met.

The last remark partly relates to the field of finance but from a slightly different perspective. In the event of a successful action, the sued subject would have to pay the fine into some kind of depository. Members of the suing group would subsequently have to claim their compensation within a certain period of time. If they do not, the uncollected funds could afterwards be redirected into a fund connected with enforcing claims in the public interest or financing consumer protection, environmental protection or something else in accordance with the subject of the case. This measure could be very helpful for protecting such interests in the future.

8 Public interest action and public interest enforcement as efficient instruments against collective consumer harms in Hungary?

Dávid Kóródy

8.1 Introduction and background

This chapter and its observations rest on the experiences of National Federation of Associations for Consumer Protection in Hungary[168] (hereinafter: "NFACPH" or "Federation"). NFACPH does not only act in favour of its member organisations, but also in the public interest, in conformity with the provisions of Hungarian Act CLV of 1997 on consumer protection (hereinafter CPA). Among the aims of the Federation are to develop conscious consumer behaviour, educate professionals in the field of consumer protection and promote consumer interests. It has to be noted that in Hungary, the Act referred to determines the role and aims, tasks and activities of the Hungarian consumer organisations precisely.[169] In the context of our topic, the related tasks of the Federation are the following,

[168] Members of the Federation:
1. Association Defending the Rights of Car Owners,
2. Central-Hungarian Association for Consumer Protection,
3. Confederation of Social Associations,
4. Federation Defending the Rights of Consumers and Patients,
5. Federation for Defending Condominiums' and Housing Cooperatives' Rights,
6. National Association of Consumer Protectors, and
7. Organization of Physically Handicapped People Living in Budapest.

[169] Hungarian Act CLV of 1997 on consumer protection: „Chapter IX: Associations representing consumers' interests, Section 45 (1) The state and local governments shall promote and support the activities of associations representing consumers' interests that aim to
a) *help, with their exploratory work, the enforcement of consumers' economic interests and consumer rights, explore consumers' problems and assess the enforcement of consumer' rights in this context..*"
b) *monitor the standard contract terms applied to consumers,*
c) *represent consumers in interest representation forums and bodies,*
d) *bring actions in the public interests and initiate procedures, inspections and measures in order to protect consumer rights or consumer interests,*

as legally determined: first to help with its exploratory work, the enforcement of consumers' economic interests and consumer rights, to explore consumers' problems and to assess the enforcement of consumer' rights in this context; second to monitor the standard contract terms applied to consumers; third to bring actions in the public interest and to initiate procedures, inspections and measures in order to protect consumer rights or consumer interests; and fourth to inform the public by publishing its experiences in the course of its activities.

8.2 The possible legal instruments for Hungarian consumer associations to bring actions in the public interest (operative legal background)

In Hungary, there are three, main legal instruments that can be used by consumer associations:

1 *"Action in the public interest with respect to unfair standard contract terms"* (legal basis: Act V of 2013 on the Civil Code),
2. *"Bringing an action in the public interest"* (legal basis: Act CLV of 1997 on consumer protection, hereinafter: CPA),
3. *"Enforcing claims in the public interest"* (legal basis: Act CLV of 1997 on consumer protection).

8.2.1 Action in the public interest with respect to unfair standard contract terms

Definitions

Based on the Act V of 2013 on the Civil Code, this kind of action can be brought to establish the invalidity of an unfair contract term that became part of a contract between a consumer

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e) provide opinions on legislative proposals affecting consumers and initiate the amendment of laws in order to protect consumer rights or consumer interests,
f) participate in developing consumer protection policy and monitor its implementation,"
g) operate advice offices that provide information to consumers and facilitate the enforcement of their rights, and run information systems providing information to consumers,
h) organise or conduct consumer protection training and information sessions in order to promote informed consumer behaviour and raise the awareness of consumers,
i) inform the public by disclosing their experiences in the course of their activities,
j) participate in the activities of international organisations in order to protect consumer interests,
k) contribute to national standardisation in the organs of the Hungarian Standards Institution.".

and an undertaking. The Federation (as a Hungarian consumer organisation) can be one of the possible plaintiffs in this action.[170]

This action is often used by Hungarian consumer organisations and by the Federation too, because there are so many cases in which unfair contract terms are applied by Hungarian undertakings against consumers.

First, to establish which standard contract terms count as unfair in Hungary, we must set up the legal definition of standard contract terms. Standard contract terms mean those terms that are not negotiated individually by the parties, but are determined unilaterally and in advance by the person applying them for concluding several contracts.

Going forward, those standard contract terms that unilaterally and unreasonably, and by violating the principle of good faith and fair dealing, set forth the rights and obligations arising from a contract to the detriment of the party contracting with the person applying that contract term shall be considered unfair. However, it is an important exception that a standard contract term set forth by law or established in accordance with the requirements set forth by law shall not qualify as unfair.

For consumer contracts (contracts between consumers and undertakings), there is another legal rule, and on the basis of it, the provisions on unfair standard contract terms shall also apply to contract terms that are determined in advance by the undertaking and not negotiated individually. In this case, the undertaking shall be liable for proving that the contract terms were individually negotiated by the parties. Another important provision – for consumer contracts – determines that the unclear nature of standard contract terms and contract terms determined by the undertaking in advance and not negotiated individually shall in itself suffice for the term to be deemed unfair.

If an unfair contract term becomes a part of a contract between a consumer and an undertaking, this contract term shall be legally null and void. This nullity may be relied upon only in the interest of the consumer.

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[170] Act V of 2013 on the Civil Code: *Section 6:105 [Action in the public interest with respect to unfair standard contract terms]*
"(1) An action in the public interest to establish the invalidity of an unfair contract term that became part of a contract between a consumer and an undertaking may be brought by
a) the prosecutor;
b) the minister and the heads of autonomous state administration organs, government agencies and central agencies;
c) the heads of the capital and county government offices;
d) economic and professional chambers or interest representation organisations; and
e) with regard to the consumer interests protected by it, the association that is engaged in the protection of consumer interests, and the association established to protect consumer interests under the law of any Member State of the European Economic Area.".

Establishing the invalidity of an unfair standard contract term by the court, publication of the unfair nature

Based on the action in the public interest, the court establishes the invalidity of an unfair standard contract term effective against all parties contracting with the undertaking that applies the term, and shall order it to arrange, at its own cost, the publication of an announcement on the establishment of the contract term's unfair nature.

The court also decides on the text and manner of publishing the announcement, which shall contain the precise identification of the contract term concerned, the establishment of its unfair nature and the arguments on which its unfair nature is based.

8.2.2 Other, available legal instruments in Hungary for consumer organisations (bringing an action in the public interest, enforcing claims in the public interest)

Besides Act V of 2013 on the Civil Code, which determines the legal instrument *"Action in the public interest with respect to unfair standard contract terms"*, CPA also gives two other possible legal instruments for Hungarian consumer organisations to bring actions in the public interest:

1. *"Bringing an action in the public interest",*
2. *„Enforcing claims in the public interest".*

Because they have very similar rules, we are introducing both of the legal instruments under the same subtitle in our monograph.

Definitions

1. Bringing an action in the public interest: if the infringing conduct of the undertaking affects a wide range of consumers, who are not identified individually but are easy to define based on the circumstances of the infringement or if that conduct causes a significant disadvantage, and the procedure falls under the material jurisdiction of the court, the prosecutor or the association representing consumers' interests is entitled to bring an action.

2. Enforcing claims in the public interest: the consumer protection authority or the association representing consumers' interests may bring an action to assert the civil law claims of consumers against those the actions of which were in breach of consumer protection provisions as established in decisions with administrative finality by the consumer protection authority, if the infringement affects a wide range of consumers not identified individually but who are easy to define based on the circumstances of the infringement.

As it can be seen from the definitions, the Hungarian associations representing consumers' interests may bring both of these actions and may be the plaintiff in these judicial procedures, and which action may be brought depends on the nature of the harmed consumer interest or the concrete case,.

Common rules of the two legal instruments

1. Time limitation;
2. Determined request to the court;
3. Specifying the range of consumers;
4. Enforcement of the judgment;
5. Publishing a public notice of the infringement;
6. Consumers' right to bring individual civil actions.

1. Time limitation: no action may be brought after three years following the infringement or, if a specific Hungarian Act sets a shorter limitation period for the civil law claims of consumers, after the expiry of that period. Non-compliance with this time limit results in the forfeiture of the right.
If the infringement is continuous, the time limit starts on the day when the violation is terminated. If the infringing conduct is realised through a failure to terminate a particular situation or circumstance, the time limit does not commence as long as such a situation or circumstance exists.

2. Determined request to the court: the plaintiff may request the court to oblige the undertaking in question to satisfy claims, or otherwise to establish the infringement covering all consumers referred to in the claim.
However, obliging the undertaking in question to satisfy claims may be requested from the court only if the legal basis of the claim and the amount of damages demanded or, regarding other claims, the content of the claim can be clearly established (with respect to consumers affected by the infringement).
If there is no obligation in the judgment, but just the fact of infringement was established, the consumer affected by the infringement in the action brought by him individually against the infringing party shall be required to provide proof only of the amount of the damage and the causal link between the infringement and the damage.

3. Specifying the affected consumers: in its judgment, the court specifies the range of consumers and the data required to identify those with respect to whom the infringement was established and who are entitled to demand that the obligations provided for in the judgment be satisfied.

4. Enforcement of the judgment: if the court, in its judgment (in addition to having established the infringement), orders the undertaking to provide satisfaction for a specific claim, the undertaking is required to satisfy the claim of the entitled consumer in accordance with

the judgment. The entitled consumer may request judicial enforcement if the claim is not satisfied voluntarily. The consumer's entitlement is examined by the court in its procedure for issuing an enforcement certificate.

5. Publishing a public notice from the infringement: at the request of the person enforcing the claim, the court, in its judgment, may order the undertaking to publish a public notice at its own expense. The wording of such a public notice and the form of its publication are decided by the court. Publication means, in particular, publication in a national daily newspaper and being posted on the Internet.

6. Consumers' right to bring individual civil actions: enforcing consumers' claims and rights by initiating one of the two legal instruments ("bringing an action in the public interest", "enforcing of claims in the public interest") is without prejudice to the consumers' right to bring a civil action against the infringer independently.

Other, special rules in the case of bringing an action in the public interest

In the event of bringing an action in the public interest, the prosecutor or the association representing consumers' interests may have other claims besides requesting the court to oblige the undertaking in question to satisfy claims, or otherwise to establish the infringement covering all consumers referred to in the claim.

Namely, the plaintiff may also demand that the infringement be discontinued and the infringer be banned from further infringement, the infringing situation be terminated and the previous state be restored.

8.3 Examples, case studies

From the reviewed legal instruments, the NFACPH mostly uses the "*Action in the public interest with respect to unfair standard contract terms"* and *"Bringing an action in the public interest"* in the practice and has already brought several actions to exercise the rights of consumers.

These activities comply with the referred provisions of CPA, concerning the tasks of associations representing consumers' interests.

To explore consumers' problems in Hungary, the Federation constantly monitors standard contract terms applied to consumers and bring actions in the public interest, if it obtains knowledge of unfair standard contract terms or such practices that constitute infringements.

In practice, the NFACPH also informs the public by giving out press releases on the actions brought, reporting he identified infringer, naming the undertaking and describing the case briefly and understandably. This activity helps the media, consumers and other undertakings

to understand the main consumer problems and increases the consumer awareness. Sometimes the Federation learns of the concrete infringement from the complaints by consumers addressed to it, in which consumers ask for help on how to exercise their rights.

It has to be noted here that the third type of action (*"Enforcing claims in the public interest")* is rarely used by NFACPH, as it requires a prior procedure by the Hungarian consumer protection authority as well.

Here are three typical examples or case studies from the practice of the NFACPH from recent years.

8.3.1 Magyar Telekom case (electronic communication service provider)

As a result of monitoring the standard contract terms, the NFACPH noticed that the service provider Magyar Telekom Nyrt. charged a transaction fee (the sum was HUF 142, or then approx. EUR 0.50) in its general contract terms, for each account and for each bill, when the consumer payed in person at the provider's personal customer services or by postal cheque. This practice was used from 1st May 2012 until 17th November 2012.

The transaction fees were also charged on landline phone-service, mobile phone-service and television service (broadcasting TV programmes) bills.

The NFACPH realised that this practice was an unjustified discrimination of payment methods and therefore harmed the interests of Hungarian consumers.

First of all, the transaction fee was not charged if the payment was made online (with the so-called "2E-account" app) or by bank transfer. However, the "E-account app" was only available for consumers who had an internet connection and there were many consumers who only used TV-services or phone-services. If the consumer wanted to pay by bank transfer then he also had to have a payment account, which also generated other payment obligations, such as fees, towards the bank.

Second, the service provider did not provide any real service against the transaction fee, because issuing receipts, bills and postal cheques are inseparable parts of the service provided by the company. Extra fees for these activities could therefore not be charged from the standpoint of the NFACPH. Last but not least, it was also incomprehensible why the transaction fee was charged for personal payment, because no administrative or postage costs were incurred that would justify charging the fee in this case.

The practice harmed many consumers' interests, the postal cheque payment method was the most widely used as in Hungary and there are many retired people (vulnerable

consumers) who are also most accustomed to postal cheque payments and do not use the internet.

The Federation therefore brought an action against Magyar Telekom in 2012 and requested the court to state that the contract terms were unfair prohibit the defendant from using the infringing terms and conditions; order the defendant to repay the transaction fee paid by consumers; determine the scope of eligible consumers and the data necessary to identify them, or who are entitled to claim the judgment to be served and to oblige the defendant to publish a notice at its own expense.

In its judgment, the Hungarian court found that the relevant contractual terms and conditions were unfair, so they were invalid for all consumers who contracted with the defendant. However, the NFACPH's other requests (1. to prohibit the defendant from using the infringing terms and conditions; 2. to refund the transaction fee;, 3. to identify the affected consumers; and 4. to publish a notice) were dismissed because the action was brought in May 2012, and the legal basis for them in the Act on Consumer Protection only came into force in June 2012.

The Statement of Reasons in the judgment explained that the balance between the rights and obligations of the consumers and Magyar Telekom Nyrt. had been broken, and this had not been restored by any other service.

Consumers therefore did not get any „real" remuneration or service for paying the transaction fee and the court said that there was no reason to discriminate between the payment methods. Last but not least, with its practice, Magyar Telekom unreasonably limited the possibilities for paying the bills.

Although the NFACPH's four other requests were dismissed, qualifying the relevant standard contract terms as unfair was a great success for the Federation and consumers against the largest Hungarian telecoms service provider. The NFACPH gave out a press release on the action, which had great media presence (TV, radio, internet) and millions of consumers were reached.

Furthermore, Hungarian lawmakers noticed that there was a need to amend the law, and new rules came into force in the Act on electronic communications.[171]

It has to be noted here that the NFACPH afterwards called on Magyar Telekom to repay the transaction fee to consumers, but the service provider rejected it, since establishing the invalidity (infringement) could be obtained under the Hungarian consumer protection law as being applicable at the date of filing the statement of claim.

[171] Act C of 2003 on the Electronic Communications: *"Section 128 (4) An electronic communications service provider may not charge a fee for the service element that is necessarily associated with or closely related to the provision of the service and which is not cost-effective. In particular, it is not possible to calculate a separate fee for the form of the invoice and for the payment of the invoice regardless of the payment method."*.

8.3.2 Játékvár.hu Kft. case (webshop)

Játékvár.hu Kft. is a Hungarian webshop that makes distance contracts[172] with consumers. By monitoring its standard contract terms, the NFACPH found in 2017 that the undertaking uses unfair contract terms against consumers, so action was brought by the Federation in order to exercise the rights and interests of consumers.

First, in its standard contract terms, the company determined the limitation of warranty period for material defects as only six months; however, in Hungary limitation period in a consumer contract is two years if there is a material defect, so the consumer can exercise his rights for two years.[173]

Another unfair contract term was the following wording on the undertaking's webpage, when it informed on exercising the right of withdrawal for consumers:

> "*The original packaging must be suitable for any resale, and consumers shall send it back also with the affected goods. The refunding period is 30 calendar days, and it does not apply to shipping costs (the cost of shipping from the webshop to the consumer).*"

This also meant unfair conditions for consumers, when they wanted to exercise the right of withdrawal within 14 calendar days. The refunding period should be a 14-calendar day maximum (instead of 30 days), and requiring the original package also generally meant an infringement (if the affected good and the concrete case is not an exemption on the basis of the Consumer Rights Directive,[174] (hereinafter: CRD). These terms were detrimental to consumers and limited their rights, and the content was against the CRD and the Hungarian national law that transposed the CRD.

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[172] Directive 2011/83/EU Of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council:"*Article 2 Definitions (7) 'distance contract' means any contract concluded between the trader and the consumer under an organised distance sales or service-provision scheme without the simultaneous physical presence of the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded;".*

[173] Hungarian Act V of 2013 on the Civil Code: *„Section 6:163 [Statute of limitations with respect to a claim of warranty for material defects]*

(2) For contracts between consumers and undertakings, the consumer's claim of warranty for material defects shall lapse after two years from the time of performance. If the subject matter of a contract between a consumer and an undertaking is a thing that has been used previously, the parties may agree on a shorter limitation period; however, setting forth a limitation period shorter than one year in such cases shall not be valid either.".

[174] Directive 2011/83/EU Of the European Parliament and of the Council of 25 October 2011 on consumer rights: *„Article 9 Right of withdrawal*

1. Save where the exceptions provided for in Article 16 apply, the consumer shall have a period of 14 days to withdraw from a distance or off-premises contract, without giving any reason, and without incurring any costs other than those provided for in Article 13(2) and Article 14."

„Article 13 Obligations of the trader in the event of withdrawal

1. The trader shall reimburse all payments received from the consumer, including, if applicable, the costs of delivery without undue delay and in any event not later than 14 days from the day on which he is informed of the consumer's decision to withdraw from the contract in accordance with Article 11.".

The Federation therefore brought an action in 2017, and requested the court first to state that the contract terms were unfair, and therefore to establish the invalidity of the unfair standard contract terms effective against all parties contracting with the entity that applied the terms; second, to oblige the defendant to publish a notice at the expense of the defendant; and third the infringement to be discontinued and the infringer to be banned from any further infringement.

The Hungarian court of first instance fully granted the requests of the NFACPH. The defendant subsequently appealed against the judgment and the next hearing was held on 17th January 2019 at the court of second instance, which upheld the judgment of the court of first instance without evaluating the merits of the case. It was also a great success for consumers and the Federation.

8.3.3 Aridus Kft. case (webshop)

The third example shows also that in Hungary there are many webshops that did not transpose the Consumer Rights Directive (and nor the related Hungarian national law, which transposed the CRD in Hungary) to their contract terms. This is shown by the so called "Aridus Kft." case, in which the Hungarian undertaking also operated a Hungarian webshop via its webpage and also had and used unfair contract terms against consumers.

There were unfair conditions in the event of exercising the right of withdrawal within 14 calendar days, because the term stated that the "*Refunding period is 30 calendar days",* while – on the basis of the CRD – the refunding period may be only a maximum of 14 calendar days for the webshops.[175]

It was also an unfair term that determined the following (concerning the right of withdrawal): "*The original packaging and the product should be intact and the accessories of the product should be presented in a complete state"*, because it was a clause to the detriment of consumers; while the CRD only allows the traders to offer such kinds of contractual arrangements that go beyond the protection provided for in the CRD.[176]

It also limited the consumers' right to withdraw from the contract within 14 days, because the referred term required such a kind of additional condition that was not determined in the CRD (if the affected good and the concrete case is not exempted under the CRD).

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[175] Directive 2011/83/EU Of the European Parliament and of the Council of 25 October 2011 on consumer rights: *„Article 13 Obligations of the trader in the event of withdrawal*
1. *The trader shall reimburse all payments received from the consumer, including, if applicable, the costs of delivery without undue delay and in any event not later than 14 days from the day on which he is informed of the consumer's decision to withdraw from the contract in accordance with Article 11.".*

[176] Directive 2011/83/EU Of the European Parliament and of the Council of 25 October 2011 on consumer rights: *„Article 3 Scope 6. This Directive shall not prevent traders from offering consumers contractual arrangements which go beyond the protection provided for in this Directive.".*

The NFACPH hence brought an action in 2017, and requested the court: to state that the contract terms were unfair, and therefore to establish the invalidity of the unfair standard contract terms, effective against all parties contracting with the entity that applies the terms; to oblige the defendant to publish a notice at its own expense; and for the infringement to be discontinued and the infringer to be banned from further infringement.

As soon as the undertaking (Aridus Kft.) was informed by the court that there was a statement of claim filed against it, the undertaking immediately offered the possibility of an agreement between the NFACPH and the defendant. All unfair contract terms were voluntarily changed by the webshop in order to comply with the legislation.

The judicial process ended with success for the Federation and there was no need to issue a judgment, because there was an agreement between the parties.

8.4 General experiences

8.4.1 Bringing actions in the public interest are effective instruments

In the NFACPH's experience, bringing actions in the public interest are really effective instruments. In most cases (not only in the Aridus Kft. case), after the public interest claim was submitted to the court, the undertakings voluntarily revised their unfair contract terms and conditions of in accordance with the law. Many times the judicial processes thus ended before a judgment could be delivered. Usually the undertaking concerned contacts the Federation when the defendant is informed by the court of the fact of the statement of claim being filed and offers the possibility of an agreement, together with the voluntary amendment of the unfair terms.

Our experience shows that publication of the infringement notice is really needed, but not enough, and press releases given out by consumer organizations can greatly enhance the effect. A strong media presence can be achieved using this tool, if the organisation is transparent and regularly gives out press releases on its activity (NFACPH does it constantly). The organisation also needs good media relations (the NFACPH name is well known to the Hungarian media for news on the topic of consumer protection). Last but not least, giving out press releases also really has a preventive effect and makes other undertakings use fair terms that comply with Hungarian consumer protection law.

8.4.2 Some difficulties and problems

It also has to be noted that there are some difficulties and problems, such as the lack of capacity among Hungarian associations representing consumers' interests, and legal difficulties.

Lack of capacity of Hungarian associations representing consumers' interests

1. General situation and the Hungarian funding system

In Hungary, the associations representing consumers' interests do not have predictable operating conditions, because of the funding system[177]. They are not profit-oriented due to their organisational nature and type and do not have stable, reliable and predictable revenue sources like undertakings do. That is' why they are not in a position to finance litigation costs without increased funding.

It has to be noted that the Hungarian funding system for associations for consumer protection is based on tenders (with only a one-year tender period).

Applicants are obliged to state in their proposals the exact activities they plan to contribute. One exact activity (category) is to bring actions against undertakings that apply unfair contract terms against consumers.

Based on the above, in 2018, one association and a maximum of two actions could be supported in the project category "Bringing actions in the public interest", so altogether in 2018 in Hungary only six actions were supported. In a year, the maximum funding limit per action was HUF 500,000 which is about EUR 1,540.

For the sake of completeness, it has to be noted also that there is the so-called "National Co-operation Fund" in Hungary, but this fund is not only for Hungarian consumer organisations, but also for all kinds of organisations that defend different interests (such as cultural, traditions, sport and environmental protection).

This fund therefore does not provide a real chance for Hungarian consumer organisations to have predictable operating conditions for several years, because there are so many other types of NGOs in Hungary (it is completely uncertain whether fa consumer protection organisation's proposal will succeed proposal), and the tender period is no more than one year in this case too.

[177] Hungarian Act on Consumer Protection*: „Section 45 (3) The state shall provide funding for associations representing consumer interests in the Act on the central budget.".*

There are also some other projects that are supported by the Hungarian National Bank by the Hungarian Competition Authority, but these are for particular topics (such as financial consumer protection) and do not support the activity of bringing actions in the general public interest at all.

2. Reduced possibilities for Hungarian consumer organisations

On the basis of this situation, Hungarian consumer organisations really have to consider which undertaking should be chosen as a defendant in a public action. They find only clear, simple, and "*certain-winner"* cases.

It is true that there are many other cases which are also clear (in legal terms), but are far from simple (if, e.g. the defendant is a major bank or operates across borders) and litigation costs can be horrible crippling, especially those for legal or technical expert witnesses. While Hungarian associations have exemption from paying procedural fees in the judicial processes, it does not mean that they have cost exemptions, too.

This has a major inhibitory effect, because Hungarian consumer organisations will choose the case and defendant according to its fit with the association's financial status (the concrete available funding).

Based on the Code of Civil Procedure, in Hungary the "loser pays" principle[178] operates in the judicial process, so losing the case can have severe financial consequences.

3. Procedural difficulties

The main procedural difficulties on this topic in Hungary are:

Protracted litigation*:* see for example the Játékvár.hu Kft. case. The statement of claim was filed on 21st December 2017 to the court of first instance, and more than one year elapsed without a final and binding judgment, while the case was very simple and clear. It only ended on 17th January 2019; over such a long period the case may lose its relevance because the undertaking changes its terms and conditions but, if not, the undertaking continues to benefit from the unfair terms and more consumers lose out.

[178] Hungarian Act CXXX of 2016 on the Code of Civil Procedure:
„Section 577 [The content of the judgment]
(2) If the plaintiff is successful in the action, the defendant shall be obliged by the judgment to perform towards the beneficiaries concerned. With regard to the litigation costs, the losing plaintiff shall be obliged to pay, and the succeeding plaintiff shall be entitled to the payment of the litigation costs, respectively.".

Hungarian judges generally do not deliver a judgment that obliges the undertaking to satisfy claims, so judges usually only establish an infringement covering all consumers referred to in the claim.

Hungarian associations only have a fee exemption in the judicial process, but no cost exemption: in the case of exemption from procedural fees, the party does not have to pay the procedural fee in advance or any unpaid procedural fee afterwards, unless otherwise provided by law.

However, this does not cover all the costs of litigation, such as the fees and expenses of attorneys, and judicial experts.

Too strict rules when filing a statement of claim: the new Hungarian Act on the Code of Civil Procedure (hereinafter: CCP) came into force on 1st January 2018, and it is often called "an attorney's nightmare". The provisions of the Act are very strict and detailed information is needed to file a statement of claim properly, otherwise it will be rejected.[179]

[179] Hungarian Act CXXX of 2016 on the Code of Civil Procedure: "*Section 170 [The statement of claim]*
(1) The introductory part of a statement of claim shall indicate:
a) the name of the proceeding court,
b) the name of the parties and their position in the procedure, identification data of the plaintiff, known identification data of the defendant, including his domicile or seat at least, and
c) the name, seat, phone number, and electronic mail address of the plaintiff's legal representative, as well as the name of the legal representative designated to receive official documents, if multiple legal representatives participate.
(2) The substantive part of a statement of claim shall indicate
a) an explicit claim requesting the court's decision,
b) the right to be enforced by specifying the legal basis,
c) the right to be enforced and the facts supporting the claim,
d) legal arguments demonstrating the relationship between the right to be enforced, the statement of fact, and the claim, and
e) available evidence and motions to present evidence in support of each statement of fact, in the manner specified in this Act.
(3) The closing part of a statement of claim shall indicate:
a) the value of the subject matter of the action, and the facts and legal provisions taken into account to determine that value,
b) the facts and legal provisions establishing the material and territorial jurisdiction of the court, as well as its jurisdiction if an international element is involved in the case,
c) the amount paid as a procedural fee and the method of payment or, if no procedural fee was paid, a request for legal aid or, in the event of being exempted from paying procedural fees by virtue of law, the facts and legal provisions underlying exemption,
d) the facts and legal provisions establishing the capacity of a party other than a natural person to be a party, as well as the power of representation in the proceedings of the person identified as the statutory representative of a party and of an agent, and
e) the evidence supporting the facts presented in the closing part.".

This makes the position of associations more difficult if they want to bring an action. Furthermore, there are also strict rules concerning the attachments.[180]

There are other, special rules according to the CCP that give further obligations when a public interest action is brought by a consumer organisation.

The statement of claim must also name the beneficiaries of the action in the public interest and the method of attesting that the individual beneficiaries belong to the respective group of beneficiaries, in order to entitle them to benefit from performances under the judgment or from the application of the judgment.[181]

Besides, the beneficiaries concerned must be defined by presenting the facts and circumstances by which the relevant group of beneficiaries can be determined, and by which the identical nature of the beneficiaries' direct concern can be established.

Difficulties with proving that the infringement affects a wide range of consumers: the NFACPH's experience, one of the biggest challenges in the judicial proceedings was to prove this.

The court regularly calls upon the Federation to justify this claim.

This may be easy if the defendant is a webshop, as it is accessible to a wide number of consumers through the Internet.

However, if the defendant undertaking trades in another way (e.g. it makes off-premises contracts with consumers or sells products only personally from its registered address), there may only be a few customer complaints available to the Federation, so it can already be a problem to prove the wide range; especially if the defendant in question does not make a statement at all.

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[180] Hungarian Act CXXX of 2016 on the Code of Civil Procedure: "*Section 171 [Attachments to a statement of claim]*
(1) The following shall be attached to a statement of claim:
a) an authorisation, unless it is recorded in the client settings register according to this Act, or a general authorisation is recorded in the national and public register of general authorisations,
b) the evidence identified in the substantive part of the statement of claim,
c) the evidence identified in the closing part of the statement of claim, and the documents required by law in case of applying for legal aid or if the litigation costs are reduced by law.".

[181] Hungarian Act CXXX of 2016 on the Code of Civil Procedure: "*Part eight – Actions relating to the Collective Enforcement of Rights – Chapter XLII-Action brought in the Public Interest*
147. Applying the rules of the action brought in the public interest and the general rules
Section 574 [Bringing the action]
(1) Beyond those specified in Section 170, the statement of claim shall also name the beneficiaries of the action in the public interest and the method of attesting that the individual beneficiaries belong to the respective group of beneficiaries, in order to entitle them to benefit from performances under the judgment or from the application of the judgment.
(2) The beneficiaries concerned shall be defined by presenting the facts and circumstances by which the relevant group of beneficiaries can be determined, and by which the identical nature of the beneficiaries' direct concern can be established.".

8.5 Recommendations for the future

Based on the NFACPH's experiences, we propose the following to make actions in the public interest even more efficient instruments for Hungarian consumer organisations:

1. Giving cost exemptions for associations representing consumers' interests when bringing a public interest action (not only fee exemptions), and giving cost exemptions for the enforcement process.
2. The court should proceed as a matter of priority in a public interest action and shorter deadlines are needed; there is a demand for faster and more efficient litigation.
3. There is a need for a simpler judicial process from the beginning (less strict rules when filing a statement of claim to bring a public interest action).
4. Mitigating the obligations of associations concerning the burden of proof (wide range of consumers, etc.).
5. Giving more resources for the associations representing consumers' interests in order to terminate the present situation and give them greater opportunities to bring actions in the public interest. Choosing the defendant undertaking should be only a "matter of choice", and not depend on how much money is available from the relevant fund and project category.

9 A big step closer to group actions anywhere in the EU

Petra Čakovská

9.1 Introduction

The European Parliament confirmed in a plenary vote on 26th March 2019 that it wants citizens in all EU countries to be able to go to court as a group if a company has caused damages on a mass scale. Currently, only a handful of EU countries have a working and efficient system in place. In most countries, the system either does not work well or is non-existent, leaving consumers without this essential recourse to justice.

The Commission found that 79% of EU consumers would be more willing to defend their rights if they could join other consumers who suffered the same harm.[182]

This is a big step forward in the fight for consumers to obtain justice when they have been cheated. The Volkswagen emissions scandal is a painful reminder that, despite eight million people having been affected, a company can simply turn around and refuse to give out any compensation. It is unacceptable and it is going to change thanks to EU action.

Only in Belgium, France, Italy, Portugal and Spain is there a fairly well functioning system allowing consumers to go to court as a group in case of mass damages. Some countries have recently introduced such a system but it is too early to tell if it works well.

The next step for EU Member States (and Slovakia especially) is to give this initiative the urgency it deserves and guard against scaremongering from certain business groups. Slovak stakeholders should also make sure the group action procedure does not become burdened with unnecessary restrictions that make it harder for consumers to make use of the tool.

In this chapter, the Slovakian consumer protection organisation, Společnosť ochrany spotřebitelov (SOS) underlines its experiences regarding collective redresses.

[182] Eurobarometer, EU Commission, 2011, available at: <http://ec.europa.eu/commfrontoffice/publicopinion/flash/fl_299_sum_en.pdf>.

9.2 Slovak experience – the three biggest collective cases of the consumer organisation

9.2.1 Poems portal case

This case concerned a subscription trap on online platforms: they offered poems for free downloading, and thousands of people were affected. SOS organised an opt-in public campaign, which some 5,000 consumers joined and filed a court action based on an individual test-case, which finished in favour of the consumer organisation.

Case summary: There were websites offering content such as poems, calendars, birthdays and Christmas greetings or even football results for download, but the fact they were not free, was very well hidden at the end of terms and conditions. Consumers were unable to discover they were concluding a contract and would be charged until the provider started to issue actual invoices for EUR 60. The contracts were to last for two years, so the EUR 60 would have been charged twice.

The SOS organisation made a public campaign, gathered consumers on an opt-in principle and started to negotiate with the owner of those websites but unfortunately was unable to conclude an out-of-court agreement; SOS decided to go to court in the form of an individual test-case. SOS won the case and stopped the misleading practice from being used, but consumers who did pay received no money back. The unfortunate result was that no financial compensation for consumers or the consumer organisation was achieved.

9.2.2 Energy supplier case

This case challenged energy contracts signed by consumers as a result of door-to-door selling. SOS organised an opt-in public campaign, to which around 700 consumers joined. As result, an out-of-court settlement was signed between the consumer organisation and the energy provider.

Case summary: The energy provider refused to return annual overpayments to consumers, did not accept contract withdrawals made within the legal period of 14 days, concluded new contracts through door-to-door selling, even with people who did not own the property or rewrote the duration of the contract after it was signed by the consumer

SOS made a public campaign, gathered consumers using an opt-in principle and started to negotiate with the energy supplier. As a positive result, SOS managed to conclude an out-of-court agreement, which not only specified financial compensation for every single

consumer, but also a payment for the consumer organisation as the legal representatives of this group of consumers.

9.2.3 Dieselgate case

It was also an opt-in public campaign, which involved approximately 1,100 car owners, but no collective action has been filed in Slovakia yet.

Case summary: We have gathered data on over 1,000 cars owned by Slovak drivers, but the planned court action will not be in Germany, because this amount of people was not economically attractive enough for the German funder, and we are not able to take court action in Slovakia because of our lack of financial resources and the lack of legal grounds for collective action.

In an ideal world, consumer organisations would have all the human and organisational resources they need; they would motivate citizens to get access to justice, and it would not take 10 years until the consumer actually gains some compensation. However, nowadays consumer protection organisations mainly struggle with financing lawsuits, their main problem field. Consumers are unwilling to pay anything in advance and do not want to carry the risk that they will have to pay all costs if the court case is lost. For a small consumer organisation such as SOS with no regular income or sustainability, the biggest challenge is taking a case to the court. No financial compensation has been won, either for consumers or for the consumer organisation yet, which is both a cause and the consequence of the financing problem.

9.3 The current legal situation in Slovakia

Slovakia currently does not have any type of collective action for damages. Section 3 5) Consumer Protection Act No. 250/2007 only states that “The consumer association may file a court appeal against the infringer in order for the infringer to refrain from unlawful actions and to remove an unlawful situation, even if such conduct adversely affects the interests of consumers, which are not just a simple summary of the interests of individual consumers damaged by a breach of consumer rights (hereinafter “Collective Interests of Consumers”).

9.3.1 Precautionary measure

Where a seller infringes the collective interests of consumers, the association may submit a request for an interim precautionary measure to the state control authority. It must include a description of the conduct that breaches the collective interests of consumers,

a description of the facts justifying the issue of an interim measure and a statement with reasons for the urgency of the proposal and the need for immediate cessation of conduct. Precautionary measures may only be ordered if the seller will not stop breaching the collective interests of consumers within two weeks from the receipt of the written request from consumer association, which will initiate the start of a legal procedure for violating this law, which can finish with issuing a penalty or referring to the court.

Based on the weak and inadequate legal framework defining collective redress, we have decided not to move forward with the VW case in Slovakia and wait for the results from the German, Italian, Portuguese or Dutch courts. Our main reasons, which also illustrate the main obstacles to collective actions in Slovakia in general, are economic facts.

9.3.2 Economics

It remains unclear whether a court would award damages based on the purchase price of the vehicle (less a deduction for use), or a difference in value. No (preliminary) expert evidence is currently available on technical or valuation issues to substantiate a diminution in value/significant loss. There are (relatively) few potential claimants in Slovakia.

9.3.3 Legal and procedural issues

If the subjective limitation period has expired, it would be necessary to prove that VW intended to cause damage. For the purposes of proving intent, it is currently unclear when VW's board first became aware of/failed to discontinue emissions cheating. Slovakia does not have an established legal framework for consumer class actions to be brought before national courts. The proposed assignment of claims to the Slovak consumer association would be legally innovative and open to challenge.

The consumer has the right to be represented by a consumer organisation at the court in individual cases or collective cases. However, the law is too general. There are no other conditions or tools. It is not clear how to use the law in practice – whether there should be an opt-in or opt-out base for compensation cases, and who will pay the court fees and total costs. The loser pays principle is one of the factors in consumer organisations' reluctance to pursue collective cases.

Even in individual cases, SOS only goes to court when it is positive and certain that it has all the evidence needed to prove our claim and win. It is also very good there are no court fees for individual consumers to be paid in advance to start a court action in Slovakia. However, SOS is facing huge difficulties over collective claims, because there is no legislative framework so far for such consumer actions. Consumers must pay the court fees and also the total costs of the court proceedings if they are not successful.

It is not possible to launch a class action before our national court. SOS tried it once, but the main claim was that of individual consumers and the second focused on defining and stopping the misleading practice affecting a group of people. It was not possible to ask for compensation for consumers directly.

Court proceedings in Slovakia can last for decades; they are far too administrative, there is no tradition of dealing with collective cases, judges very often do not understand the basic principles of consumer protection legislation and it is not clear who will pay the court fees and final costs of the case.

9.3.4 The main obstacles to be removed to achieve more effective collective action in Slovakia

- introduce and define the rules in a clear and simple way in terms of the administration (we would prefer the opt-out system as it works in Portugal)
- shorten the duration of the court and institutional procedures
- create special bodies that will deal only with collective consumer actions for mass damages
- specify exactly who is paying for what during the whole collective court action and how the consumer organisation, as the representative, should be rewarded
- introduce regular and sustainable financial support for consumer organisations that deal with collective cases on a national or European level
- get more visibility and publicity for collective cases and final results (obligation to publish).

The Commission is proposing an upgraded system of actions on representation, building on the current directive on court orders, which enables legitimate non-profit organisations, such as consumer organizations and independent public authorities, to defend the collective interests of consumers in cases of mass harm. However, it will be necessary to revise the system of guarantees and limit the possibility of bringing actions only to those entities that meet the specified criteria and are transparent as to the sources of their funding. However, who, for example, will begin to determine whether they have the reputation and financial capacity for such an action, for example, to be brought by a newly established consumer organisation?

9.4 Some positive inspiration from other countries

9.4.1 Portuguese experience

A telecom company charged more than it ought to, you bought a car and the company misled you and you were out of pocket, or your personal data were sold, without your knowledge or consent, to a third party. Imagine thousands or millions of consumers were

affected by these practices. What are the chances that your problem gets fixed, that you get your money back, and some compensation for damages? The Portuguese Group Action Law has addressed those questions since it was passed by Parliament in 1995.

The Portuguese consumer organisation gathers the evidence, finds the witnesses, and pays the lawyers who will represent the association in court, but does not have to pay court fees, because consumer organisations are exempt.

If it loses the lawsuit (it has never happened) it can be asked to pay between 10% and half of the regular court fees. In a group action, the consumer organisation represents all or almost all consumers involved, because a controlled opt-out system is used. Opt-out, because consumers who do not wish to be involved, have to say so to the court, controlled, because a judge studies the merits of the claim and can dismiss it, if he finds it without merit. The lawsuit must be advertised in the two most popular newspapers in Portugal to allow consumers to opt out if they want – usually only very few of them (less than five) opt-out. In some of the lawsuits, the consumer organisation settled because the company acknowledged that its practices were wrong, and in such cases have to find an easy way for consumers to get their money back. The settlement however must be checked by the public attorney and he has the power to continue with the lawsuit if he finds the settlement is not fair for all the consumers of the group. In other cases, the procedure went all the way to the Supreme Court. Although business groups worry in particular about the US class action system, it has four main characteristics very different from a Portuguese group action: The first difference is the jury system, which does not exist in Portugal for this kind of lawsuit. The second is punitive damages. In Portugal, as long as consumers get their money back and compensation for damages, punitive damages (damages meant to deter the defendant from the same behaviour in future) are not allowed. Third, contingency fees (or as they say in Portugal "*quota litis*" – are forbidden); as are, fourth, so-called blackmail settlements (where the defendant settles for a higher sum than a judge would award to avoid a lengthy and expensive trial). In Portugal, settlements during the lawsuit must be checked by the judge and the public attorney.

9.4.2 French experience

The French collective redress procedure, where consumers can go to court as a group, will soon enter its fifth year of operation. The primary goal of collective redress has always been to ensure a fair market for consumers so that they are compensated for harm and to prevent violations of the law by companies from being economically advantageous. A concrete example in France was the anti-competitive agreement reached between French mobile phone operators back in 2002 (20 million subscribers with an average damage of EUR 60 per consumer – a fraud of EUR 1,2 billion EUR). The cartel was sanctioned in 2005 by the French Competition Authority, after a consumer organisation initiative. The fine reached EUR 534 billion. After the introduction of Article L.623-1 into the French Consumer Code in 2014, compensation for individual damages suffered by consumers, where the breach

of legal or contractual obligations by a trader for selling goods, providing a service or for anticompetitive practices is the same, is now also possible. A collective action may be launched by certified national consumer organisations, as long as there are a minimum of two cases of consumers who have suffered damages. Since 2014, a dozen actions have been launched and the following problems were reported:

– only consumer associations active at national level can use the tool;
– the burden placed on consumer associations to organise how the compensation to consumers is paid out;
– damages covered by the law are restricted to the economic loss of the consumer resulting from material damage;
– the complicated quantification of the harm suffered by consumers;
– the length of the procedure;
– the need to restrict information on the case to the victims until a judgment on the liability of the trader is no longer subject to appeal.

The last two points are especially problematic, given the need to preserve all evidence.

No collective action was launched in the Dieselgate scandal because of the difficulties in proving economic prejudice.

In no way should complexity be used as an excuse to deny consumers a right to compensation. What is covered under damages should be extended (moral prejudice should be included) and the quantification of the damage should be as easy as possible to make compensation to consumers possible. One should take inspiration from the EU Directive on actions for damages in competition law regarding a possible flat-rate evaluation by the courts when it comes to the quantification of the harm (Article 17.1).

The courts themselves can be reluctant. In recent decisions, two collective redress actions in the area of housing were declared inadmissible. The courts gave a very restrictive interpretation of the law, stating that the rules governing the housing sector were not governed by the French Consumer Code, and therefore collective redress was impossible. This interpretation could endanger the whole procedure by excluding any legal obligation not included in the Consumer Code.

9.4.3 The Italian experience

If the market is the carrot, then group actions are the stick. The Italian consumer group Altroconsumo has used this stick 14 times to repair problems in the market.

Article 140-bis of the Consumer Code came into force in 2010 and protects three different types of rights: consumers' rights with respect to the same contractual term; the right of consumers of a given product/service against the manufacturer/provider; and the right to

compensation for unfair commercial practices or anti-competitive behaviour. Under Italian legislation, the collective redress procedure requires consumers to expressly join it (opt-in). Once the action is started, other consumers and users who are in the same legal situation can join it, within a determined timeframe.

The experience of the Italian consumer organisation, with about 200,000 sign-ups to its fourteen group actions in sectors such as banking, public transport, Dieselgate or anticompetitive practices by Big Pharma and the most recent against Facebook, shows that the tool can be one of the best instruments for protecting consumer rights. However, the exclusive opt-in system requires that the affected consumers are duly informed about the action.

This information burden has been legally placed exclusively on the promoters of the actions, which means it is very hard to reach and communicate effectively with all or even some of the consumers concerned. The responsibility to communicate should instead be placed by the courts on the defendant companies once the class action has been declared admissible.

The courts have set expensive and inefficient ways, such as traditional announcements in the print media, through which the promoter of the action can communicate with the affected consumers, as happened in the Dieselgate case. These announcements proved to be useless in reaching out to all the relevant consumers who were more effectively reached through public registers of car owners.

In order to improve Italian class action law, the consumer organisation asked for the scope of class action remedy to be widened to damages resulting from breaches of all consumer protection rules, even those not contained in the Consumer Code and regardless of contractual or non-contractual liability.

It also requested that, once the class action is declared admissible, the costs of communicating to the public should be borne by the defendant, in this way reducing their legal advertising costs, and allowing it more freedom to inform potential adherents through the internet. A further improvement would be to reduce the time necessary to obtaining the admissibility decision from the court.

Based on its direct experience of these points, the consumer organisation believes the class action tool could become even more effective in Italy, both to provide compensation to consumers more effectively and to act as a greater deterrent to repeated offences by companies.

9.5 Why Slovakia needs collective redress

Group actions are urgently needed to ensure fairness in the market place, the trust of consumers in the Single Market and equality in people's access to justice across the EU.

It would ensure justice for people and bring us closer to a modern, fair and balanced Single Market for many reasons. Only five EU countries offer a working system of collective redress, Slovakia is one of nine that still do not offer any form of collective redress. The others offer a system that is either too difficult to use or too recent to be evaluated properly.

When faced with damages and breaches of their rights, most consumers do not go to court individually, as the procedure is long, costly and sometimes intimidating. This situation is unfair for consumers and the businesses that play fair.

Collective redress can deal with a wide range of issues, from dangerous or defective goods to bad financial advice, from flight delays to personal data protection.

Collective redress available in every EU country would be a huge step forward for consumers who have been waiting thirty years for this opportunity. Until now, the Commission had only recommended non-binding action in this area, and it is only in the wake of the Volkswagen scandal that it took the matter into its own hands and proposed compulsory legislation.

Completing an injunction procedure, which is where a court orders an activity by a trader to cease, before a procedure for collective redress can be launched, would allow consumer organisations and public bodies that comply with criteria on independence and their non-profit character, to bring collective cases to court on behalf of consumers.

Member States can choose whether they want the system to function on an opt-in (requires an active declaration from consumers that they are part of the group action) or opt-out basis (all consumers affected are automatically included in the claims for damages). From our practical experience, it is the opt-out system we should go for in Slovakia.

Consumers from several countries should be able to join a case launched in one country and the following safeguards should be in place:

– Only specified non-profit groups, such as consumer groups, can initiate a collective redress case.
– It should be possible to seek damages beyond the actual detriment suffered by consumers; this could deter companies from repeating this behaviour.
– The 'loser pays' principle would apply. This means that, unlike in the US, whichever party loses the court case ends up having to pay the winning side's legal costs.

EU law should set minimum requirements that countries must meet to allow group actions; however, it should be possible for countries to go beyond those requirements if they already have a system that is more developed (minimum harmonisation tool).

It should not be left to the courts to decide whether collective redress is possible, just because a case might be complex or because it might be difficult to calculate the damage award. These are precisely those cases in which consumers need the most help. In all likelihood, the Volkswagen scandal would fall into this category. Collective redress should be possible in all cases, regardless of their complexity.

The scope of the laws, a breach of which could trigger a collective redress case, should be as broad as possible. It must include passenger rights and the data protection framework, too.

The requirement that consumers should first get a final injunction order before filing a claim for collective redress means the process could take years and carries the risk that consumers lose evidence and interest in the case. It should be possible to introduce claims for injunction and for redress at the same time, without waiting for the finality of the injunction order.

10 Collective redress in consumer cases – how to launch it in practice in Poland

Kamil Pluskwa-Dąbrowski

10.1 Introduction

Consumer protection in Poland is based mostly on European Union Law, as in a majority of EU member states. The harmonisation of legal protection rules goes wide and deep, at least in material, civil law. However, every consumer right is as strong as the possibility of asserting it in practice. The enforcement of consumer rights in Poland is administered by a mix of procedures, administrative and civil, at the same time operated by various competent bodies – public and private, from the justice system and the administration. All the procedures in aggregate try to provide horizontal cover for the needs of consumer redress, but the overall effect is still not satisfactory. Below is a short summary of the enforcement, with focus on collective mechanisms, from the perspective of the biggest and the most experienced Polish consumer organisation, Federacja Konsumentów (hereinafter: FK).

10.2 Regular court proceeding individually – most common threats

Consumer redress issues seem to be a civil law matter. Therefore, in the event of an infringement, the fundamental right of the consumer is to go to court. Civil courts stay the most common and obvious "last link" in the consumer protection chain. The traditional way of enforcing consumer rights is, however, rather expensive, long, difficult and risky. The reasons are very complex, but there are some common factors we can diagnose on the basis of the Polish legal system and experience of FK.

– Costs: the consumer filing a case before the court has to pay the initial fee, sometimes an advance for experts' costs and also has to take into consideration the opponent lawyers' fees in case he loses. Those costs are disproportionate in all cases where the value of the subject of the dispute is relatively low. From FK research conducted

in 2017, this obstacle is recognised by consumers in almost all cases where the value of the claim is below EUR 150.
- Time: even in simple cases, the average time from court claim to final decision takes around 3 years. Some of cases even last 8 years!
- Difficulty: a majority of consumers are afraid to go to court without a lawyer (accordingly to our research, over 85%). The main reasons for that, according to surveys, are imbalance (the defendant company will hire professionals), formal issues (I will lose the case without an examination of the evidence because of formal tricks and traps) and the complexity of the court forms.
- Risk: the burden of proof, generally leaning on the consumer, despite the reversed burden of proof mechanism in some situations, seems to be the worst enemy of consumers considering court proceedings. In fact, the documentation and, additional evidence (such as bills and records from phone calls) are easily available to companies, but not for consumers – they trust their service providers too much to archive or record every single paper or conversation.

From the above picture, we can see that consumer redress is not easy for consumers. In some cases, they need assistance; sometimes they need somebody to conduct the whole procedure instead of them. Sometimes, finally, they need to be protected before their rights are really abused or violated.

10.3 Public enforcement and redress issues

Public enforcement can play a significant role in many consumer cases. To define “public”, it is worth pointing out that in Poland it mostly involves administrative bodies, such as government agendas and inspections. With regard to the justice system, namely the courts, it can only play a role in public enforcement as an appeal body. The administrative route of enforcement is based on several legal acts, described below.

At this point it is worth mentioning that the common factor for all public procedures is that the consumer, group of consumers or even consumer organisation cannot initiate or participate in such a procedure. We have public administration on one side and the business entity (potentially infringing the law) on the other. It means that there is no control over the responsible administrative body in case of inactivity or failure to pursue the action. This was especially visible in cases such as Amber Gold (financial pyramid, 12,000 consumers affected, PLN 650 million (EUR 150 million) of total damage) or Dieselgate (no data, no proceedings at all). This is a key weakness of the public enforcement system in Poland.

The second issue is a lack of connection between general, public enforcement and individual consumer interest, which obstructs the effectiveness of enforcement. Administrative bodies conduct (when they wish, if they wish) procedures against unfair companies, but always in the general interest. For individual consumers, affected by the market practice used by companies, there is no simple “bridge” to have such general administrative decisions made

in their individual cases. This means that the only punishment for unfair business behaviour is a fine, usually a ridiculously low one (the last was PLN 35,000 (EUR 8,000) for a company using very aggressive telemarketing and without the consumer's permission to use their private phone numbers). There is no compensation. Such decisions have no benefit for consumers themselves, even if they suffered a real financial lose.

As such, public enforcement schemes are not sufficient to ensure the effective enforcement of consumer rights and individual redress. To illustrate this, some specific schemes are described below.

10.3.1 Injunctions

The injunction system is regulated as administrative procedure. At the first stage, only the Office for Competition and Consumer Protection (hereinafter: OCCP, in Polish: UOKiK) can initiate it. The consumer organisation can inform the regulator of the breach, but we have no influence on what happens next. NGOs are not a party in such a procedure. The administrative body decides on all aspects, starting from whether to initiate the procedure or not, issue a decision or not and impose eventual sanctions or not. Collective remedy decisions are fully at the discretion of the OCCP, and the consumer organisation has no avenue of appeal.

At the end of the administrative decision, if it results in the declaration of a breach and / or financial penalty, the business party can appeal to the dedicated court. The second stage, in front of the court, usually takes around two years to reach a final decision. Therefore, the entire procedure is very slow, usually taking three or more years until a final, legally binding decision. Compared to the terms of prescription in civil law in consumer cases, this is extremely long. To avoid the claims from losing effect, the consumer has to act blindly, without a final decision. This raises a greater risk of loss.

Administrative decisions are usually published. However, the scope of dissemination is very limited – only the OCCP's webpage. For individual consumers, it is completely unrealistic that they should gain such knowledge, even if they could make use of it.

It is worth to remarking that, in the opinion of consumer organisations, it should be possible to initiate the injunction procedure not only through an *ex officio* decision, but also with the participation of public interest organisations, especially if the decision can imply a collective redress effect. At the moment it is not possible, and consumer redress has limited applicability.

The second weakness of the injunction procedure concerning redress is even more significant. There is no mechanism for following up an administrative injunction procedure. In particular, even if the decision stated that the payments collected by a company from consumers were illegal, this not automatically means that consumers will get their money back. They usually have to sue the company individually for redress. There are two mechanisms implemented to fill this gap and unfortunately neither is effective.

The first is that individual consumers can apply to the OCCP for a "significant opinion in the case". If the case is exactly the same as the scope of the administrative decision and the same company is sued, the OCCP can issue an opinion, which will be very useful before court. There are serious difficulties in using this tool in individual redress – the first is that consumer must know of the decision and to apply to the OCCP. Moreover, it is at the full discretion of the OCCP whether they will present such an opinion or not.

10.3.2 Public decision on general compensation

The second solution to "bridge" the administrative decision and consumer redress is a decision on public compensation. As part of the injunction procedure, the OCCP is entitled to oblige the company to restore the lawful order – by a specific obligation or payment of a certain amount of money to each consumer affected by its unfair behaviour. This obligation can be "in nature", such as a free-of-charge service, discount for future payments or simply in money of precise amount. This administrative tool, having effect in civil matters, can be seen as collective redress reached through administrative procedure. The tool is quite new and so far all such decisions were appealed against. There has been no legally binding decision from the court in favour of consumers, but there are already some negative ones. The future of this instrument is therefore a big question mark.

Theoretically, public compensation for individual consumers, imposed in an administrative procedure seems to be good solution – easy, not engaging, and free of costs for consumers. However, there are two weaknesses in this way of collective redress. First, what about collective damage in cases that were not pursued by the OCCP in an injunction (or any other) procedure? Second, how can it be ensured that the decision was correctly implemented? In particular, who can demand compensation if it is not given automatically and how? What rules should apply? Administrative (compliance with the decision) or civil (execution after an enforcement clause)? These questions show that public compensation for consumers does not align with Polish civil procedure and therefore the usefulness of this tool is doubtful. In fact, all participants in the law environment feel that the collective redress should in fact be conducted in a civil procedure, before a court.

10.4 Court-based redress vs. ADR schemes

Bearing the above two sections in mind – individual court case and public enforcement – one can say that neither is effective in the event of a massive breach, low dispute value or need for a quick solution. Some of those needs are addressed by various ADR schemes. In fact, ADR should be the solution for the inexpensive, short and relatively informal resolution of consumer disputes. How is it in real life? There are 11 registered ADR tribunals in Poland, some of them with long tradition (such as the Trade Inspectorate) and some completely new (like the Electronic Commerce ADR). The main failure of almost all of them is that companies refuse to participate in an amicable procedure. The vast majority of applications from consumers never

go to arbitration for this reason. The next barrier is that the majority of them offer mediation, not arbitration, which means that every dispute can end without a resolution.

Last, but not least, there is no ADR tribunal in Poland that admits collective disputes. As such, ADRs at present are not a solution in cases of mass harm or to support the collective interests of consumers.

10.5 Collective redress schemes in Poland

Collective redress is regulated in Poland by the Act on pursuing claims in group proceedings of 2009.

10.5.1 Formal difficulties

The main rules for initiating this procedure are:

- The claim can only be raised in specific cases (the majority of consumer claims are included);
- The group has to be a minimum of 10 consumers under an opt-in rule;
- The claim has to be identical for all members of the group (the same amount);
- The group selects a representative (group member or consumer ombudsman; no consumer organisation here);
- The court evaluates if the case can be judged collectively and other formal aspects of the case;
- The deadline for other consumers to join the group is announced by the court.

As we can see, this is not a class action, but a group action of very limited scope. From the above list of duties and stages of group formation and evaluation, each of them can be a basis for the defendant to question.

The claim – a majority of consumer disputes are included. However, the rule that claim must be the same for each group member makes the procedure inadmissible in the case of financial claims of varying amounts. In this situation, the solution is to claim the invalidity of the contract in whole or to unify the value of the claim for all group members, but in many situations, neither is possible.

Group formation – at the beginning the group must have at least 10 members. Other consumers can join. However, each time a new member joins the group, there is a risk that some formal conditions are not met (i.e. the group of consumers is joined by an individual who signed the contract as an entrepreneur). In such a situation, the whole group is not entitled to act together in collective proceedings.

The opt-in system used for group proceedings has significant disadvantages. First, the most important is that for small individual claims (say EUR 10-20), there is no interest from the

consumer's side in being involved in a long, complicated procedure. Even if a group is gathered, the costs of participation (written declaration, postal costs, etc.) are higher than the potential gain, which makes the entire procedure useless in such a case. The second important aspect is that the final decision of the court is binding only upon the participants – i.e. the company and the group. No other consumers can benefit from it. In practice, because of opt-in system, the procedure can be appropriate in specific cases, such as 20 consumers, spending a holiday in one place, in one period and with one tour operator and bringing the action against the same travel company, claiming a refund of part of the money because of non-performance of part of the contract. However, in real mass harm cases, which are common in telecoms, financial services and insurance, group actions are very risky and complicated.

Consumer organisations cannot act as representatives. It means that consumer associations, constituted to represent consumers, are excluded. Of course, it is still possible for NGOs to support the group, but campaigning to gather the group is much more complicated and less effective in this scenario.

Another serious obstacle to launching a group action in practice is the duration of the procedure. As can be seen from the statistics of the Ministry of Justice, in 2010-2015 only about 38% of group proceedings cases went to an evaluation on the merits. The majority of cases were at the formal stage (evaluation of the applicability of group proceedings, the group and the shape of the claim) for over three years! How can consumers be encouraged to join such a case?

10.5.2 Changes in the Law

Some changes in the law have been implemented since 2017. In general, they are a step in the right direction, but still not sufficient. The changes included an extension of those cases that can be recognised in group proceedings. Before the amendment, there were claims in consumer protection cases for damages caused by the use of a dangerous product and torts, though not claims for the protection of personal rights. At present, the catalogue has been expanded to include cases related to non-performance or improper performance of the contract, due to unjust enrichment, and in other issues relating to consumer protection.

A few changes should speed up the recognition of cases. From now on, the court decides on the admissibility of group proceedings in closed session, not at the hearing [Article 10 (1)]. In broad terms, the judge writes the decision in his office alone, without the previous presence of parties in the courtroom. It was also imposed on the defendant to submit a response to the claim [Article 10 (1a)]. In this way, the court becomes acquainted with the position of both parties and will be able to rule more effectively. In addition, if the defendant complains about the composition of the group, his appeal will not stop the substantive examination of the case – and, as a consequence, the court may take further action [Article 17 (2a)]. In practice, the most formal stage will not stop the course of proceedings as drastically as before.

Subsequent changes will improve practice by establishing certain rigid frames. After the decision on recognising the case in the group, proceedings become final (i.e. the court decides that the

case may be continued in this mode); the admissibility of the proceedings will no longer be examined (Article 10a). In addition, the Supreme Court, having regard to a cassation appeal against a decision to reject an application due to inadmissibility, may order the lower court order to annul it and order recognition of the case in group proceedings (Article 10b). This provision settles the earlier doubts of courts and scholars. In addition, after the amendment, a procedural provision may be applied that states the court will award the appropriate amount according to its assessment, after considering the circumstances of the case [Article 20a (1)]. However, the court may make use of such freedom only when it considers that it is impossible or extremely difficult to prove the exact amount of the claim, although in the group proceedings, the court will be bound by the joint application of the parties with regard to the amount to be paid [Article 20a (3)]. The court must first hear the parties' views, but it can do so in closed session [Article 20a (2)], which should again improve the proceedings.

The amendment introduces one list of group proceedings conducted throughout the country (Article 11a). It is run by the Minister of Justice in the Public Information Bulletin. This list will enable victims to obtain information on whether group proceedings are currently being conducted in which they may be able to participate as members of the group. Courts are required to send information after the announcement of the initiation of group proceedings, that is, after the formal examination of the admissibility of a class action.

In order to show that group lawsuits are not a commonly used tool in spite of these changes, it suffices to point out that, according to the list of ongoing group proceedings, currently only three such proceedings are conducted in Poland. Only one of them is a consumer dispute.

10.6 Group/class actions – most relevant questions

What, from the point of view of the consumer organisation, should be changed so that collective proceedings begin to work in practice? There are a few simple obstacles that should be removed and also a few cardinal assumptions that should change.

The opt-in/opt-out system debate has carried on since the beginning of implementing group actions. European consumers do not need American-style class actions, where law firms are the main beneficiaries. On the other hand, we need tools that can be used also when vast numbers of consumers are affected and collecting a group of thousands of consumers is extremely expensive or even impossible. No organisation has the resources to muster all consumers affected by Dieselgate. Accordingly, in the experience of the consumer organisation, we need to implement a smart mix of both. In general, the opt-in system should stay. However, opt-out should be implemented in two situations – when the number of consumers potentially affected is very high (over 1,000) and when the damage per person is relatively low (below EUR 50). In such a case, the group action should be possible in the general interest and all affected consumers should be included (as long as they are not going to act individually). In effect, the court decision in a group case could include the

statement that a certain practice or behaviour by the company was unfair and that each person affected shall be compensated. If the amount of claim will be not the same for all consumers, they would have only to prove two things: that they are part of the group (on the objective criteria) and the value of their claim, if non-standard. Such a mixed system could allow real collective redress to be implemented in consumer cases.

Court fees and representation fees are a very important issue in this topic. It is strongly recommended that consumer organisations, being public benefit bodies, should be included in the system. Instead of huge salaries for law firms (as in the US), European legislation should support consumer organisations. Those NGOs should be exempt from court fees in group actions, and the court should have the possibility to grant a salary for them in return for defending consumer rights. Contrary to the US, it should not be the consumers but the unfair company that should cover the costs of compiling and administration of the group, legal representation etc. In a simple example, we can cite the practice of a telecom company. In the case, EUR 10 per person was unfairly added to the invoices of 300,000 people. In above scenario, an opt out system with a remuneration of 10% for the consumer organisation would allow 300,000 consumers to retrieve their money (in total EUR 3 million) and to finance the action with EUR 300,000 (including legal and administrative costs), even if the case would last 3 years. The added value of such a solution is that the company would pay back all it unfairly gained. In the system we have now, the motivation to take small sums from thousands of people is high, because the risk of action against such a practice is close to zero.

To ensure that there is no wild competition between consumer organisations and avoid the risk of “who’s first” practices, there should be a dedicated court for opt-out actions. This court should have a list of public benefit consumer organisations, allowed to take actions in the public interest. Such a list should definitely not be operated by administrative bodies, which, as we can see now, are not interested in real collective redress, but focus on their own, administrative procedures. The one national court would also ensure that final decisions would be coherent, without the risk of variety of possible judgments, depending on region, city or single court.

10.7 New Deal for consumers

Some of recommended changes are in line with the European proposal on representative actions, included in the package named the New Deal for Consumers. This legislative initiative must be, in general, positively evaluated. The idea of entitled representatives, empowering the consumer movement and combining the general decisions with individual claims is very positive. We need a real bridge between preventing violations of collective interests and removing the damage in the individual dimension. However, the proposals presented by the Commission should be sealed by some changes. Opt-out in mass infringement, remuneration for consumer organisations representing consumers and the definition of entitled representatives, followed by the list of such bodies, governed by the court, independent from government – these corrections seem to be the most important.

COLLECTIVE REDRESS IN ENVIRONMENTAL PROTECTION

11 Collective redress mechanisms in the environmental field: Introductory reflections from the EU law perspective

Gyula Bándi

Principle 10 of the Rio Declaration[183] constitutes, on the one hand, a firm basis for reference for citizens to exercise their environment-related rights and, on the other hand, contains a direct obligation towards states to develop their regulatory regime in accordance with principle 10:

> "*Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."*

These three plus one elements or – as commonly used – pillars are articulated in the Aarhus Convention,[184] among others, in its preamble:

> *"Considering that, to be able to assert this right and observe this duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters, and acknowledging in this regard that citizens may need assistance in order to exercise their rights."*

[183] Available at: <http://www.unesco.org/education/pdf/RIO_E.PDF>.

[184] Convention On Access To Information, Public Participation In Decision-Making And Access To Justice In Environmental Matters, done at Aarhus, Denmark, on 25 June 1998, available at: <http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf >.

This is also connected to the concept of environmental justice. The EPA, in the most popular outline of the issue,[185] says: "Environmental Justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies." The EPA paper also defines the meaningful involvement:

"*Meaningful Involvement* means that:

1. *people have an opportunity to participate in decisions about activities that may affect their environment and/or health;*
2. *the public's contribution can influence the regulatory agency's decision;*
3. *their concerns will be considered in the decision making process; and*
4. *the decision makers seek out and facilitate the involvement of those potentially affected."*

The above list is very close to the major content of public participation, but access to information and access to justice are not mentioned.

If we have a closer look at Europe and the most important legal basis for access to justice, all the reports and papers agree that the following provisions must always be mentioned:

1. The most general is the Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 1950[186], two articles of which shall be considered here:

– Article 6.1. – Right to a fair trial ("In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...") and
– Article 13 – Right to an effective remedy ("Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.").

2. The EU-specific reference may be found in the Lisbon Treaty, again under two articles:

– Article 19 TEU, within (1) ("...Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.") and
– The Charter of Fundamental Rights, Title VI, Justice, Article 47, Right to an effective remedy and to a fair trial ("Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

[185] Available at: <http://www.epa.gov/environmentaljustice/basics/index.html>.
[186] Available at: <http://conventions.coe.int/treaty/Commun/QueVoulezVous.asp?NT=005&CL=ENG>.

– Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.
– Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.").

In the Implementation Guide of the Aarhus Convention, some explanations are also given:[187]

"Access to justice under the Convention means access for the public to procedures where legal review of alleged violations of the Convention and national laws relating to the environment can be requested. ... The provisions on access to justice essentially apply to all matters of environmental law, but a distinction is made in the Convention between three categories of decisions, acts and omissions:

– *Refusals and inadequate handling by public authorities of requests for environmental information.*
– *Decisions, acts and omissions by public authorities concerning permits, permit procedures and decision-making for specific activities.*
– *All other kinds of acts and omissions by private persons and public authorities that may have contravened national law relating to the environment.*

(...) As far as court or court-like bodies are concerned, Parties have flexibility in deciding how to structure their appeal systems. ..."

The EU signed and ratified the Aarhus Convention, and, just after this, a proposal for a Directive on access to justice in environmental matters was even presented by the Commission in October 2003[188]. The best way to introduce the proposal is to use its own language. The proposal summarises the major needs and elements as follows:

"....the lack of enforcement of environmental law is too frequently due to the fact that legal standing is limited to persons directly affected by the infringement. A way of improving enforcement is hence to ensure that representative associations seeking to protect the environment have access to administrative or judicial procedures in environmental matters. Practical experience gained from granting legal standing to environmental non-governmental organisations indicates that this can enhance the implementation of environmental law."

Several studies and authors mention the Janecek judgment[189] as one of the first signs of the more active involvement of the ECJ in giving life to access to justice requirements within the

[187] United Nations Economic Commission for Europe. *The Aarhus Convention: An Implementation Guide*. United Nations, 2014, p. 193–194, available at: <http://www.unece.org/index.php?id=35869>.
[188] Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters COM/2003/0624 final – COD 2003/0246.
[189] Judgment of the Court of Justice of 25 July 2008, *Dieter Janecek v Freistaat Bayern* (C-237/07, ECLI:EU:C:2008:447).

European legal environment. The given case confirmed that a private person has the right to require the authorities to undertake their obligations:

> *"39. ... the natural or legal persons directly concerned by a risk that the limit values or alert thresholds may be exceeded must be in a position to require the competent authorities to draw up an action plan where such a risk exists, if necessary by bringing an action before the competent courts."*

The Commission itself agrees with the above evaluations in the preparatory assessment of the proposal for the 7th EAP[190]:

> *"CJEU case-law has moved in a direction of confirming an entitlement to access – see in particular Case C-237/07, Janecek, where the Court recognised a citizen's entitlement to challenge the absence of an air quality management plan (despite German law considering that the citizen had no standing to bring such a case) and Case C-240/09, Slovak Bears, where the Court found that Article 9(3) of Aarhus had no direct effect but that Member States courts must nevertheless facilitate access by NGOs."*

The next case, focusing mostly on access to a review procedure and its conditions, is the *Djurgården* case[191], where the major issue at stake was the right of the public to have access to justice, supported by EU legislation:

> *"33. Article 10a of Directive 85/337, taking account of the amendments introduced by Directive 2003/35 which is intended to implement the Aarhus Convention, provides for members of the public concerned who fulfil certain conditions to have access to a review procedure before a court of law or another independent body in order to challenge the substantive or procedural legality of decisions, acts or omissions which fall within its scope."*

The opinion of Advocate General Sharpston[192] related to the importance and specific status of NGOs has also been quoted above, but we have to add those parts of her argument which, beside their general characteristics, are closely associated with access to justice. Above we could learn that NGOs "promoting environmental protection give expression to the collective interest", but in theory this could result in much unnecessary litigation or other review procedures. Sharpston's opinion is a clear denial of this belief, when she stated:

> *"62. ... By encouraging people to channel environmental disputes through non-governmental organisations promoting environmental protection, the Aarhus Convention*

[190] Commission Staff Working Document Impact Assessment Accompanying the document*:* Proposal for a Decision of the European Parliament and of the Council on a General Union Environment Action Programme to 2020 „Living well, within the limits of our planet" COM(2012) 710 final; SWD(2012) 397 final, Brussels, 29.11.2012 SWD(2012) 398 final, Annex 6, p. 120.

[191] Judgment of the Court of Justice of 15 October 2009, *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd* (C263/08, ECLI:EU:C:2009:631).

[192] Opinion of Advocate General Sharpston delivered on 2 July 2009, *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd* (C263/08, ECLI:EU:C:2009:421).

and Directive 85/337, as amended, recognise that these organisations do not overload or paralyse the courts. Rather, they bring together the claims of many individuals in a single action. Although it is true that nothing prevents members of a non-governmental organisation also taking part in proceedings on an individual basis, the overall result of this policy is to create a filter which, in the long run, assists the work of the courts. In addition, as I have just indicated, these associations often have technical knowledge that individuals generally lack. Bringing this technical information into the process is advantageous, because it puts the court in a better position to decide the case."

She also says:

"63. Thirdly, it is important to emphasise that the Aarhus Convention and Directive 85/337, as amended, rejected introducing an actio popularis for environmental matters. Although Member States can opt to make such a procedure available in their domestic legal orders, neither international nor Community law has chosen in this instance to do so. However, it seems to me that, precisely because that course was rejected, the authors of the Aarhus Convention decided to strengthen the role of non-governmental organisations promoting environmental protection. That formula was adopted in an attempt to steer a middle course between the maximalist approach of the actio popularis and the minimalist idea of a right of individual action available only to parties having a direct interest at stake. Giving special standing to non-governmental organisations reconciles these two positions. It seems to me to be a very sensible compromise."

A controversial but far-reaching interpretation of access to justice rights may be found in the *Slovak Brown Bear* case[193], where an additional element was also raised – namely the likely direct effect of the Aarhus Convention on access to justice provisions. The Court, as the legal basis of its supervisory function in the given topic, underlined that

"30. The Aarhus Convention was signed by the Community and subsequently approved by Decision 2005/370. Therefore, according to settled case-law, the provisions of that convention now form an integral part of the legal order of the European Union ... (39) 'the legal instruments in force do not cover fully the implementation of the obligations resulting from Article 9 (3) of the Convention'. The consequence of this statement is that "its Member States are responsible for the performance of these obligations, until the Community law does not cover the implementation of the obligations."

Thus, while Member States have relative freedom in implementing the international obligations of this kind, they are also obliged to put these provisions into operation.

[193] Judgment of the Court of Justice of 8 March 2011, *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* (C240/09, ECLI:EU:C:2011:125).

The Court decided in the interest of environmental democracy:

> *"52. ... Article 9 (3) of the Aarhus Convention does not have direct effect in EU law. It is, however, for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9 (3) of that Convention and the objective of effective judicial protection of the rights conferred by EU law, in order to enable an environmental protection organisation, such as the Zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law."*

The Advocate General,[194] in her opinion, also recommended that the Court should not use the direct effect doctrine, as it would go beyond the powers of judicial interpretation and most likely also the intent of the Convention:

> *"89. In the absence of these express limitations, the potential scope of Article 9 (3) would be very wide. Attributing direct effect to Article 9 (3), thus bypassing the possibility for Member States to lay down the criteria triggering its application, would be tantamount to establishing an actio popularis by judicial fiat rather than legislative action. The fact that the proposal for a directive remains unadopted indicates that, in this particular context, such a step would indeed be inappropriate."*

Parallel to the Slovak Brown Bear case, the Court also decided in a similar access to justice dispute, this time in Germany – the *Trianel* case[195], in connection with environmental impact assessment. As we could already see above in *Djurgården*, the interpretation of the ECJ is somewhat broad, and this is reiterated in the present judgment:

> *"42. It follows that, whichever option a Member State chooses for the admissibility of an action, environmental protection organisations are entitled, pursuant to Article 10a of Directive 85/337, to have access to a review procedure before a court of law or another independent and impartial body established by law, to challenge the substantive or procedural legality of decisions, acts or omissions covered by that article."*

Advocate General Sharpston[196] repeated her arguments, presented in the *Djurgården* case, in connection with the specific role NGOs play in promoting environmental protection interests, for example in point 51. "*An environmental NGO gives expression to the collective interest and may possess a level of technical expertise that an individual may not enjoy."* However, Sharpston also extended the argument to incorporate general

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[194] Opinion of Advocate General Sharpston delivered on 15 July 2010, *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* (Case C240/09, ECLI:EU:C:2010:436).

[195] Judgment of the Court of Justice of 12 May 2011, *Bund für Umwelt und Naturschutz Deutschland, Landesverband NordrheinWestfalen eV v Bezirksregierung Arnsberg* (C115/09, ECLI:EU:C:2011:289).

[196] Opinion of Advocate General Sharpston delivered on 16 December 2010, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg* (C-115/09, ECLI:EU:C:2010:773).

domestic legal grounds being also met with the inclusion of NGOs in the protection of environmental rights:

> *"67. In my view the correct interpretation is therefore that, in a Member State which applies criterion (b) in the first paragraph of Article 10a, the third paragraph of that article means that the Member State must ensure that environmental NGOs can 'maintain the impairment of a right', and thus that the national system must recognise that they have 'a right' capable of being impaired, even if that right is fictitious in a national legal system that would otherwise only recognise the impairment of substantive individual rights."*

This is a valuable additional element to the logic of access rights.

Some months later, the access of justice provisions of the same EIA directive again served as the core legal basis in a similar case (actually four joined cases) – the *Boxus* case[197]. Since we are discussing access to justice problems here, we do not enter into those questions connected with the EIA procedure itself, such as the real meaning of the legislative act in making EIA decisions, although it has a consequence for access to justice. If the project is adopted by the decision of the legislative body – so constitutes a legal norm or act – and not by a decision of a public authority, the access to justice rights would definitely be different. In this case the judicial review is only limited to the question whether the legislative act satisfies the conditions of Article 1 (5) of the EIA directive.

Public participation is a must under the EIA directive, as clearly stated by the Advocate General[198], when she underlines:

> *"55. (...) In other words, the EIA Directive promotes direct public participation in administrative decision-making processes concerning the environment within a Member State."*

Here the main difference between the decision of the public administration and the legislative act is obvious:

> *"56. Where a decision is reached by a legislative process, however, such public participation already exists. The legislature itself is composed of democratically-elected*

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[197] Judgment of the Court of Justice of 18 October 2011, *joint cases Antoine Boxus, Willy Roua (C-128/09), Guido Durlet and Others (C-129/09), Paul Fastrez, Henriette Fastrez (C-130/09), Philippe Daras (C-131/09), Association des riverains et habitants des communes proches de l'aéroport BSCA (Brussels South Charleroi Airport) (ARACh) (C-134/09 and C-135/09), Bernard Page (C-134/09), Léon L'Hoir, Nadine Dartois (C-135/09) v Région wallonne* (Joint Cases C128/09 to C131/09, C134/09 and C135/09, ECLI:EU:C:2011:667).

[198] Opinion of Advocate General Sharpston delivered on 19 May 2011, *Antoine Boxus and Willy Roua (C-128/09), Guido Durlet and Others (C-129/09), Paul Fastrez and Henriette Fastrez (C-130/09), Philippe Daras (C-131/09), Association des riverains et habitants des communes proches de l'aéroport BSCA (Brussels South Charleroi Airport) (ARACh) (C-134/09 and C-135/09), Bernard Page (C-134/09) and Léon L'Hoir and Nadine Dartois (C-135/09) v Région wallonne* (Joined Cases C128/09, C129/09, C130/09, C131/09, C134/09 and C135/09; ECLI:EU:C:2011:319).

representatives of the public. When the decision-making process takes place within such a body, it benefits from indirect, but nevertheless representative, public participation."

That is why it is essential to have a clear and correct picture in respect of the essence of legislative act. If the legislative act (88)

"merely provides the formal rubber-stamp for an earlier administrative process which has effectively already taken the relevant decisions will not provide the same safeguards as those required by the EIA Directive."

The same article of the EIA directive was the central element of a UK related judgment,[199] within which the Advocate General[200] was eager to point to the fundamental values of public participation as follows – the second remark may even be taken as a motto of access to justice:

"40. Legal protection in environmental matters, on the other hand, generally serves not only the individual interests of claimants, but also, or even exclusively, the public. This public interest has great importance in the European Union, since a high level of protection of the environment is one of the European Union's aims under Article 191(2) TFEU and Article 37 of the Charter of Fundamental Rights. (...)

42. However, the environment cannot defend itself before a court, but needs to be represented, for example by active citizens or non-governmental organisations. (...)

48. As regards the level of permissible costs, it is lastly significant that provisions of the Convention on judicial proceedings are to be interpreted with the aim of ensuring 'wide access to justice'."

The Court underlined:

"31. As is expressly stated in the third paragraph of Article 10a of Directive 85/337 and the third paragraph of Article 15a of Directive 96/61, the objective of the European Union legislature is to give the public concerned 'wide access to justice'.

32. That objective pertains, more broadly, to the desire of the European Union legislature to preserve, protect and improve the quality of the environment and to ensure that, to that end, the public plays an active role."

[199] Judgment of the Court of Justice of 11 April 2013, *The Queen, on the application of David Edwards, Lilian Pallikaropoulos v Environment Agency and others* (C260/11, ECLI:EU:C:2013:221).

[200] Opinion of Advocate General Kokott delivered on 18 October 2012, *The Queen, on the application of David Edwards, Lilian Pallikaropoulos v Environment Agency and others* (C260/11, ECLI:EU:C:2012:645).

12 To the bitter end: the limits to the CJEU's interpretation of *locus standi* in environmental matters

Vojtěch Vomáčka

This chapter provides an insight to the current *status quo* of the CJEU's interpretation of *locus standi* in environmental matters, a brief analysis of implementing the requirements of the Aarhus Convention and outlook into possible future shaping of the access to justice at the EU level. It summarises the explanatory notes for the contribution presented in Prague on 23 November 2018 at the international conference *Efficient collective redress mechanisms in Visegrad 4 countries: an achievable target?* The author concludes that there are several options for the EU to meet the requirements of access to justice in environmental matters that would strengthen public interest litigation at the EU level. However, assuming the CJEU does not change its approach to the interpretation of Article 263 TFEU, the only option open to the Commission to remedy the current violation of international law by the EU is to propose an amendment of the so-called Aarhus Regulation.

12.1 Introduction

Access to justice in environmental matters has been a topic attracting increasing legal discourse. Due to the current debates over collective redress mechanisms, it is gaining momentum, fuelled by the high hopes of individuals across the EU. The proposal for a new Directive on representative actions for the protection of the collective interests of consumers, introduced in 2018,[201] targets environmental issues and even makes a direct reference to the Aarhus Convention.[202] However, the Proposal limits collective actions to compensation for

[201] Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC. 11. 4. 2018. COM(2018) 184 final.

[202] Ibid., Recital 43.

damage to victims of corporate harm. Such a restrictive approach does not seem to reflect the specific needs of environmental protection and the principles of the EU environmental policy enshrined in Art. 191 (2) of the TFEU; in particular, the precautionary principle and that preventive action should be taken. In environmental matters, the public concerned needs to reach the courts as soon as possible to prevent or mitigate the threats which have not yet materialised, or to reduce the effect of harm which has not yet reached the threshold of an industrial accidents. For this reason, the Aarhus Convention emphasises that

> *"effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced"*.[203]

Indeed, the objective of the Proposal was not meant to be overly ambitious or all-embracing, but it seems legitimate to ask whether the collective redress mechanism may serve its complementary function, taking the current limits of public interest litigation in environmental matters into account. Effective litigation means that, in principle, the public concerned should be able to challenge the weak or illegal regulation which may result in excessive environmental harm or accidents. However, a deficit in environmental democracy has been identified at the EU level, since access to EU Courts is very limited for individuals and NGOs alike. At first sight, EU Courts do not seem to be a proper forum for environmental protection litigation. Individuals and NGOs do not fit into the system of the EU judiciary, which was not created to protect anything other than economic rights and public interests. In its core, it remains very common-market oriented. There is also an evident fear that opening the gates to the EU Courts for the sake of one public interest, even though significant, would threaten the traditions of the EU legal order as we know it.

At second sight, however, public interest litigation in environmental matters at the EU level makes a lot of sense. From the legal point of view, broad access to justice is required by the Aarhus Convention. Moreover, as it will be explained, the national courts can hardly provide effective protection in all important environmental matters on their own. The Convention does not seek to guarantee a right to live in an suitable environment for one's health and wellbeing; its focus is rather on conferring certain procedural rights that will enable individuals and NGOs to serve as watchdogs, to access the important information regarding the quality of the environment and to request that at least the national (or EU) standards of environmental protection are met.

In recent years, the CJEU has followed this logic and continually emphasises the role of environmental NGOs in the protection of public interest. According to the CJEU, "*the rules of EU environmental law, for the most part, address the public interest and not merely the protection of the interests of individuals as such*".[204] The CJEU has also recognised that members of the public and associations are required to play an active role in defending the

[203] The UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention).

[204] Judgment of the Court of Justice of 12 May 2011, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen* (C-115/09, ECLI:EU:C:2011:289, paragraph 46).

environment,[205] and Advocate General Sharpston added that the environmental NGOs *"give expression to the collective and public interest, which no one else would otherwise be able to defend. They bring together the claims of many individuals in a single action, act as a filter and contribute their specialised knowledge, thereby putting the courts in a better position to decide the case."*[206] Also notable is her reference to the European Court of Human Rights case law on the position of the NGOs as social "watchdogs".[207]

This protective role of the public concerned as the guardian of the environment seems to gather importance. Foremost, it is the ever-growing decision-making at EU level that necessitates a proper judicial review of the decisions adopted by EU institutions. At the moment, there are over 1500 EU implementing decisions more or less related to environmental protection. In practice, decisions that have been challenged at the EU courts very often represent various market authorisations[208] or standards of protection[209] and in principle may have a significant impact on EU citizens and the environment. Actions against these decisions, nevertheless, have mostly been initiated by the producers, not by the public concerned. The public concerned is not granted access to justice at the EU level because the CJEU holds to its strict interpretation of *locus standi*.

Paradoxically, the CJEU asks national courts to interpret the national law in a way that was consistent 'to the fullest extent possible' with the objectives of the Aarhus Convention's provisions.[210] Currently, the CJEU imposes strict requirements on Member States when implementing the Aarhus Convention within their powers but remains unmoved by the fact that the same provisions apply to access to justice at the EU level. This tension has led to proceedings at the Aarhus Convention Compliance Committee (ACCC), which found the EU in breach of its international obligations – and sets the playing field for any discussions regarding access to justice at EU level.

This chapter provides an insight into the current *status quo* of CJEU's interpretation of *locus standi* in environmental matters, a short analysis of the implementation of requirements of the Aarhus Convention and an outlook for the possible future shape of access to justice at the EU level.

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[205] See Judgment of the Court of Justice of 11 April 2013, *Edwards and Pallikaropoulos* (C-260/11, ECLI:EU:C:2013:221, paragraph 40).

[206] Opinion of Advocate General Sharpston delivered on 2 July 2009, *Djurgården-Lilla Värtans Miljöskyddsförening* (C-263/08, ECLI:EU:C:2009:421, paragraphs 59 – 65).

[207] Opinion of Advocate General Sharpston delivered on 12 October 2017, *Protect Natur-, Arten- und Landschaftschutz Umweltorganisation* (C-664/15, ECLI:EU:C:2017:760, paragraph 82).

[208] For example, extension of authorisation for glyphosate, market authorisation of genetically modified soybeans, regulation fixing maximum residue levels for guazatine, inclusion of chromium trioxide in the list of substances subject to authorisation, placing of hydrofluorocarbons on the market.

[209] Calculation of greenhouse gas emissions, allocation of emission allowances, conditions to be complied with by national laws on hunting, no extension of the transitory measure concerning aquaculture animals, criteria for the award of the EU Ecolabel, adding rolls, tubes and cylinders, with the exception of those for industrial use, to the list of examples of packaging.

[210] See Judgment of the Court of Justice of 8 March 2011, *Lesoochranárske zoskupenie* (C-240/09, ECLI:EU:C:2011:125, paragraph 50).

12.2 General requirements of *locus standi*: The *Plaumann* heritage

In general, natural or legal persons may bring a direct action against an institution, body, agency or office of the EU. The action for annulment (Article 263 TFEU) is aimed at requesting the annulment of a measure by an institution, body, agency or office of the EU that produces legal effects *vis-à-vis* third parties. The action for failure to act (Article 265 TFEU) addresses the lack of action by an institution, office, agency or body of the EU in situations in which it was obliged to act. The action for non-contractual liability of the EU (Article 340 TFEU) is aimed at making good any damage caused to an individual by EU institutions or its servants.

An individual may challenge the legality of a (regulatory) act before the General Court under the provisions of Article 263 TFEU on the grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers, with a right of appeal on a point of law to the Court of Justice.

In practice, however, the standing of natural and legal persons (i.e. so-called "non-privileged applicants") has been undermined by the CJEU's restrictive interpretation of the requirement of "individual and direct concern" under Article 263 (4) TFEU. According to the CJEU, a measure is of direct concern only if it affects the applicant's legal position directly and at the same time leaves no discretion to the addressees of the measure who are entrusted with its implementation.[211] This effectively excludes EU directives from the judicial review.[212] The interpretation of the requirement of "individual concern" has not changed since the *Plaumann* case[213] despite the relative openness of the CJEU to protect economic rights and the acceptance of a less strict interpretation of individual concern in specific economic policy fields. The *Plaumann* test implies that the applicants must show that the decision

> *"affects them because of certain attributes which are peculiar to them or because of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed".*[214]

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[211] See Judgment of the Court of Justice of 3 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council* [C-583/11 P, ECLI:EU:C:2013:625, (40)]; or Judgment of the Court of Justice of 2 May 2006, *Regione Siciliana v Commission* (C-417/04 P, ECLI:EU:C:2006:282, paragraph 28).

[212] See Order of the Court of First Instance (Fifth Chamber) of 10 September 2002, *Japan Tobacco and JT International v Parliament and Council* (T-223/01, ECLI:EU:T:2002:205, paragraphs 45 – 50); or Judgment of the Court of First Instance (Third Chamber) of 27 June 2000, *Salamander v Parliament and Council* (T-172/98, T-175/98 to T-177/98, ECLI:EU:T:2000:168, paragraph 54: *"It must be recalled here that a directive cannot of itself impose obligations on an individual and may therefore not be relied on as such against him (Marshall, paragraph 48, Case 80/86 Kolpinghuis Nijmegen [1987] ECR 3969, paragraph 9, Faccini Dori, paragraph 25, and Case C-192/94 El Corte Inglés v Blázquez Rivero [1996] ECR I-1281, paragraph 15). It follows that a directive which, as in the present case, requires the Member States to impose obligations on economic operators is not of itself, before the adoption of the national transposition measures and independently of them, such as to affect directly the legal situation of those economic operators within the meaning of the fourth paragraph of Article 173 of the Treaty."*).

[213] Judgment of the Court of Justice of 15 July 1963, *Plaumann v Commission of the ECC* (C-25/62, ECLI:EU:C:1963:17).

[214] Ibid., paragraph 107.

This condition has been interpreted in a way that the applicant has to show that when the decision was adopted, he belonged to a so-called "closed class", who are differently affected by the EU measure than all other persons.

Article 263 TFEU was amended by the Treaty of Lisbon to introduce less stringent conditions in the case of actions for annulment of the so-called "regulatory" acts which are of direct concern to the applicant and do not require implementing measures. Currently, it is possible to divide Article 263 TFEU into three sub-proceedings: actions by a natural or legal person a) against an "act" addressed to that person or, b) that is of direct and individual concern to them, and c) against a regulatory act that is of direct concern to them and does not entail implementing measures.

While the TFEU makes a clear distinction between legislative and non-legislative acts, with legislative acts comprising regulations, directives and decisions,[215] and non-legislative acts being delegated and implementing acts,[216] it does not provide any definition of the term 'regulatory act'. In 2013, the CJEU concluded that a 'regulatory act' should be defined as *"an act of general application which is not a legislative act"*.[217] Later on, the General Court confirmed this approach.[218] This causes a major obstacle to access to justice because legislative regulatory acts present considerable effects in environmental protection. An EU Regulation that sets basic standards stands outside of judicial review under Article 263 TFEU; meanwhile, for example, the implementing regulation made by the Commission alone, filling in the details not dealt with in the primary Regulation, could be challenged under Article 263 (4) TFEU if of direct concern.

It is still questionable whether the *Plaumann test* is applicable even as regards action against regulatory acts. The findings of the CJEU in C-456/13 P (*T & L Sugars and Sidul Açúcares v Commission*)[219] suggest that the Court will tend to apply strict criteria even with respect to direct concern regarding regulatory acts. In this case, the applicants were two cane sugar refiners that brought an action seeking the annulment of authorisation to market a limited quantity of sugar and isoglucose in excess of the domestic production quota and creating a tariff quota allowing any economic operator concerned to import a limited amount of sugar. The Court concluded:

> *"It appears from the foregoing considerations that, as regards Regulation No 222/2011 and Implementing Regulation No 293/2011, since the appellants do not have the status of producers of sugar and their legal situation is not directly affected by those*

[215] See Article 289 TFEU.
[216] See Articles 290 – 291 TFEU.
[217] Judgment of the Court of Justice of 3 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council* (C-583/11 P, ECLI:EU:C:2013:625, paragraph 56).
[218] See Judgment of the General Court (Fourth Chamber, Extended Composition) of 25 October 2011, *Microban International and Microban (Europe) v Commission* (T-262/10, ECLI:EU:T:2011:623, paragraph 21).
[219] Judgment of the Court of Justice of 28 April 2015, *T & L Sugars and Sidul Açúcares v Commission* (C-456/13 P, ECLI:EU:C:2015:284).

regulations, those regulations are not of direct concern to them within the meaning of the final limb of the fourth paragraph of Article 263 TFEU".[220]

However, the Court went further to examine whether the regulation at stake was also of individual concern to the applicants,[221] which does not seem to be in line with the new conditions on the review of regulatory acts under Article 263 TFEU. As a consequence, it is difficult to conclude that the amendment has changed the *status quo* for public interest litigation, especially provided that there are not yet relevant cases to test the approach of the Court.

Similarly, an action brought by a national or legal person for failure to act can only be admissible if it relates to failure to adopt an act which has a direct influence on that person's legal position. As a result, actions for failure to take measures of general application are held as inadmissible[222] and have not reached the EU Courts in recent years.

The strict application of the *Plaumann* test in the environmental field has led to NGOs and other public interest groups[223] always being denied individual concern. Not only are the NGOs unable to challenge EU measures allegedly taken in violation of EU environmental law directly, but, due to the CJEU's case-law, they are also unable to intervene in the action for annulment proceedings. The very nature of the claim based on the protection of goods or interests, which belong to the collective in general, renders access to justice impossible. The same conclusions apply to any large group of litigants that would like to reach the CJEU. An action for annulment would be equally unsuccessful because it would be impossible for the applicant to pass the hurdle of "individual concern", since the very fact that a large number of litigants are affected signifies that none of them is actually affected in a way that differentiates him/her from all other persons possibly affected by a challenged measure.

One such example is the case T-585/93 (*Greenpeace*),[224] in which a Commission decision to disburse financial assistance to Spain provided by the European Regional Development Fund for the construction of two power stations in the Canary Islands (Gran Canaria and Tenerife) was challenged. The Tribunal concluded that:

"The applicants are 16 private individuals who rely either on their objective status as 'local resident', 'fisherman' or 'farmer' or on their position as persons concerned by the consequences which the building of two power stations might have on local tourism, on

[220] Ibid., paragraph 37.
[221] Ibid., paragraph 62.
[222] See for example Judgment of the Court of Justice of 15 January 1974, *Holtz & Willemsen GmbH v Council and Commission* (C-134/73, ECLI:EU:C:1974:1, paragraph 5); Order of the Court of Justice of 30 March 1990, *Emrich v Commission* (C-371/89, ECLI:EU:C:1990:158, paragraph 6); or Order of the Court of First Instance (First Chamber) of 27 May 1994, *J v Commission* (T-5/94, ECLI:EU:T:1994:58, paragraph 16).
[223] According to the CJEU case-law, it is in principle the national law which determines whether the applicant has legal personality. See for example Judgment of the Court of Justice of 27 November 1984, *Bensider and Others v Commission* (C-50/84, ECLI:EU:C:1984:3651, paragraph 7).
[224] Order of the Court of First Instance (First Chamber) of 9 August 1995, *Greenpeace and Others v Commission* (T-585/93, ECLI:EU:T:1995:147).

the health of Canary Island residents and on the environment. They do not, therefore, rely on any attribute substantially distinct from those of all the people who live or pursue an activity in the areas concerned and so for them the contested decision, in so far as it grants financial assistance for the construction of two power stations on Gran Canaria and Tenerife, is a measure whose effects are likely to impinge on, objectively, generally and in the abstract, various categories of person and in fact any person residing or staying temporarily in the areas concerned. The applicants thus cannot be affected by the contested decision other than in the same manner as any other local resident, fisherman, farmer or tourist who is, or might be in the future, in the same situation (Case 231/82 Spijker, cited above, paragraph 9, and Case T-117/94 Associazione Agricoltori della Provincia di Rovigo and Others v Commission, order of 21 February 1995, not yet published in the ECR, paragraph 25)."[225]

Van Wolferen provides a perfect description of the case:

"Although the facts of the case are problematic, it is clear that the Commission's act under the European Structural Fund has no personal scope in relation to specific inhabitants or economic operators, it is equally clear that the nature of the act is not within the domain of the legislative measures traditionally cordoned off from judicial interference. The Greenpeace case was a clarion call that awakened the different actors to the fact that the European project had evolved to such an extent that public interest litigation had a possible place in it."[226]

When individual concern could be dispensed with, i.e. in cases of "regulatory acts", there could be a possibility for multi-party litigation, given the definition of the regulatory act as a measure of general application not adopted using the ordinary legislative procedure. By dropping the individual concern test, this type of procedure opens up the conditions for bringing direct actions. However, the direct concern would still have to be shown by the applicants, and the same procedure as in "normal" actions for annulment would have to be followed. Action for failure to act would most probably not be admissible because it would be impossible in such a situation to show that an EU institution, body, agency or office failed to address an act specifically to each of the applicants.

12.3 The Aarhus Regulation: A revolution undone

The Aarhus Convention[227] entered into force on 30 October 2001. The European Union signed the Convention on 25 June 1998 along with 35 states, including most of the current

[225] Ibid., paragraphs 54–55.

[226] VAN WOLFEREN, M. The Limits to the CJEU's Interpretation of Locus Standi, a Theoretical Framework. *Journal of Contemporary European Research*. 2016, n. 4, p. 924–925.

[227] UNECE Convention on Access to Information, Public Participation in Decision-Making and access to Justice in Environmental Matters (1998).

Member States, and ratified the Convention on 17 February 2005. Before this date, EU institutions were not legally obliged by the provisions of the Convention.[228] The only piece of legislation concerning public participation in environmental matters that was already in place was Regulation EC/1049/2001 regarding public access to European Parliament, Council and Commission documents,[229] which had entered into force in December 2001. To meet the requirements of the Aarhus Convention, the so-called *Aarhus Regulation* (1367/2006/EC) was adopted in September 2006. The EU intended to adopt an instrument that would deal with all three pillars of the Convention in one piece of legislation, as it would

> "*contribute to rationalising legislation and increasing transparency of the implementation measures taken with regard to institutions and bodies"*.[230]

Since then, it has been questioned on numerous occasions whether the EU actually complies with all the requirements stemming from the Convention. The debates concluded that not only does the EU legislation lack coherence and clarity but also that the combined provisions breach the Convention in some key respects.[231] The most potent compliance issue arose about the lack of an effective judicial remedy, which, however, cannot be conceived separately from the other two pillars of the Convention. To a large extent, Aarhus' third pillar is an outcome of the previous pillars: without knowledge and participation, decision-making grievances are irreconcilable. It seems plausible to argue that, with the development of the Internet and information-sharing technologies, access to justice has taken over the first two pillars in importance as the last haven of the public concerned. In many cases, the national courts were able to resist political pressure and to protect the right to an effective remedy and to a fair trial, which, unlike the right to participate in the decision-making, has deep roots in international law and national constitutional law.

As it is complicated for individuals to reach the CJEU and to have legal acts of the EU institutions reviewed, the Aarhus Regulation introduced a specific mechanism of internal review. Essentially, under its provisions, an environmental NGO[232] can bring an application for an internal review of administrative acts to EU institutions, in particular, the Commission (Article 10), and appeal to the Court of Justice under certain circumstances (Article 12): where the EU institution or body fails to act following Article 10 of the Regulation, the NGO may institute proceedings before the Court of Justice in accordance with the relevant

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[228] See Judgment of the Court of First Instance (Fourth Chamber) of 25 April 2007, *WWF European Policy Programme v Council* (T-264/04, ECLI:EU:T:2007:114, paragraph 72: *"That conclusion cannot be affected by the applicant's argument that the principle of access to information in environmental matters is applicable on the basis of the Aarhus Convention since, at the time when the contested decision was adopted, neither the Aarhus Convention nor the regulation implementing it was in force."*).

[229] Regulation 1367/2006/EC of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community Institutions and Bodies, available at: <http://data.europa.eu/eli/reg/2006/1367/oj>.

[230] Aarhus Regulation, Recital 5.

[231] See WOLF, S. Access to EU environmental information: EU compliance with Aarhus Convention. *ERA Forum*. 2013, n. 14, p. 476.

[232] Article 11 of the Aarhus Regulation requires the not-for-profit nature of the NGO, its duration and relevant specialized objective.

provisions of the TFEU. If the written response given by the Commission under Article 10 is considered unsatisfactory, the NGO can institute proceedings before the General Court and, in the event of a further appeal, take matters to the Court of Justice.

The deficiencies of the Regulation from the Aarhus perspective are apparent. First, the Court deals with the written response of the Commission. The annulment of the written response on procedural grounds does not automatically entail the cancellation of the act or omission at issue, which makes the review procedure cumbersome at least. Moreover, the individuals concerned are completely omitted by the Regulation and can only bring an application provided they form an NGO. This is clearly not in compliance with Article 9 (3) of the Aarhus Convention, which grants the right of access to justice to members of the public with no further restriction.[233] The term "members of the public" in the Convention includes NGOs but is not limited to them and, without a doubt, there is a crucial difference between access to justice of NGOs and that of individuals. Within most of the jurisdictions, NGOs act on behalf of the protected public interest, not the individuals themselves.

A significant drawback of the Aarhus Regulation, which effectively undermines the whole concept of the administrative review, is a restrictive definition of administrative acts, which covers measures of *individual* scope under environmental law.[234] In a narrow reading, the wording of the stipulation resembles the interpretation of those acts causing 'individual concern' under Article 263 (3) TFEU. A broader reading of the definition is also possible, but is clearly not supported by the Regulation and was denied by the CJEU.

In two cases decided in 2012 on the same day, the General Court was prepared to review the legality of Article 10 (1) of the Aarhus Regulation in the light of Article 9 (3) of the Aarhus Convention. In the first case (T-396/09),[235] a Commission decision that granted the Netherlands a temporary exemption from the obligations on ambient air quality and cleaner air for Europe, as laid down in Directive 2008/50/EC14, was challenged. The Commission argued that the Air Quality Decision was a measure of general application, even though it was only addressed to one single Member State, and thus was not an administrative act and not subject to internal review under Art.10 (1) of the Aarhus Regulation. The request for an internal review of the Air Quality Decision was therefore rejected.[236] In the second case (T-338/08),[237] the subject of a request for internal review was a regulation establishing EU maximum residue levels of pesticides in or on food and feed of plant and animal origin.[238]

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[233] See WENNERÅS, P. *The Enforcement of EC Environmental Law*. Oxford: Oxford University Press, 2007, p. 228.

[234] See Article 2 (1) (g) of the Aarhus Regulation.

[235] Judgment of the General Court (Seventh Chamber) of 14 June 2012, *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht v Commission* (T-396/09, ECLI:EU:T:2012:301).

[236] Commission Decision of 28 July 2009, C (2009) 6121.

[237] Judgment of the General Court (Seventh Chamber), 14 June 2012, *Stichting Natuur en Milieu and Pesticide Action Network Europe v Commission* (T-338/08, ECLI:EU:T:2012:300).

[238] Commission Regulation (EC) No 149/2008 of 29 January 2008 amending Regulation (EC) No 396/2005 of the European Parliament and of the Council by establishing Annexes II, III and IV setting maximum residue levels for products covered by Annex I thereto, available at: <http://data.europa.eu/eli/reg/2008/149/oj>.

The General Court ruled in both cases that Article 10 (1) of the Aarhus Regulation is not compatible with Article 9 (3) of the Convention, as it limits the concept of 'acts' in Article 9 (3) of the Convention to administrative acts, *"since acts adopted in the field of the environment are mostly acts of general application."*[239] Both cases have been appealed, and the CJEU took a different point of view.[240] The Court insisted on not reviewing the relevant EU secondary law in the light of Article 9 (3) of the Aarhus Convention, simply because the Aarhus requirements are not directly applicable in EU law, although the primacy of international agreements over EU secondary law requires that the latter has to be interpreted in conformity with the former.[241] Only after a consistent interpretation does not resolve a problem is the effect of international legal obligations to be considered. The conclusions of the Court were adopted in strong contrast to the suggestions of the Advocate General Jääskinen, who emphasised that:

> *"it is important to note the tension which exists between the refusal to recognise the possibility of relying directly on Article 9 (3) of the Aarhus Convention, justified by the need to adopt implementing measures, and the will to guarantee effective judicial protection compatible with the requirements of the convention"*[242] and that *"the need to establish, in the case-law of the Court, a distinction between the issue of the possibility of relying directly on a provision of an agreement and the possibility of reviewing the validity of a provision of secondary law in the light of international law has been raised in numerous analyses in legal literature and pointed out by various advocates general. It has thus been submitted, quite rightly, that the theory of the possibility of direct reliance should be reworked independently."*[243]

12.4 How not to bend the knee before the Aarhus requirements. Yet.

In March 2017, the ACCC found the EU to be breaching the Aarhus Convention.[244] It was long after the complaint was filed in 2008, since the EU was given an extensive amount of

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239 Judgment of the General Court (Seventh Chamber) of 14 June 2012, *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht v Commission* (T-396/09, ECLI:EU:T:2012:301, paragraph 65).

240 Judgment of the Court of Justice of 13 January 2015, *Council and Others v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht* (C-401/12 P to C-403/12 P, ECLI:EU:C:2015:4); Judgment of the Court of Justice of 13 January 2015, *Council and Commission v Stichting Natuur en Milieu and Pesticide Action Network Europe* (C-404/12 P and C-405/12 P, ECLI:EU:C:2015:5).

241 Judgment of the Court of Justice of 26 April 1972, *Interfood GmbH v Hauptzollamt Hamburg Ericus* (C-92/71, ECLI:EU:C:1972:30, paragraph 6).

242 Opinion of Advocate General Jääskinen delivered on 8 May 2014, *Council and Others v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht* (C-401/12 P to C-403/12 P, ECLI:EU:C:2014:310, paragraph 69).

243 Ibid., paragraph 82.

244 ACCC. Findings and recommendations of the Compliance Committee with regard to communication ACCC/C/2008/32, Part II, 17 March 2017.

time to adjust its approach to access to justice and also proper guidance by the ACCC in the form of partial conclusions adopted in 2011.[245]

The Committee did not assess in detail every possible form of challengeable decision-making by the EU institutions, nor did it consider all applicable EU law that purports to implement the Convention. Instead, it focuses on the most important allegations. At the centre of the critique was the established practice of the EU Courts and the ACCC agreed as to the failure of Article 10 (1) of the Aarhus Regulation to implement Article 9 (3), and concluded that there is no reason to construe the concept of "acts" as covering only acts of individual scope.[246] The Committee recommended implementing the requirements on access to justice via new or amended legislation or through the jurisprudence of the CJEU.

The Commission proposed to reject the findings. The Council has dismissed this proposal but at the Meeting of the Parties, adopted a decision to merely "take note" of the findings, rather than endorse them. Following international outrage and pressure by the European Parliament, the Council decided to address a request to the Commission, using Article 241 TFEU, to prepare a study which will set out options for improving access to justice for the public and NGOs in environmental matters, including a possible review of the relevant EU legislation. The Commission has until 30 September 2019 to complete the study. If changes to the Aarhus Regulation are considered appropriate, the EU executive must prepare a proposal for an amendment by 30 September 2020.[247] France, Italy, Luxembourg and Spain, with the support of Latvia, have issued a joint statement expressing their disappointment over a watered-down agreement.[248]

Recently, there have been only two similar requests of the Council based on Article 241 TFEU. In 2015, the Council asked for a legislative proposal to amend the Union legal framework in accordance with the Marrakesh Treaty (Protection of the blind, visually impaired, or otherwise print disabled). In 2010, it requested one for the report on Article 10 of Annex XI to the Staff Regulations.

In the latter case, the Council decided not to adopt the proposal prepared by the Commission because, *inter alia*, the documents submitted by the Commission provides for an accurate and comprehensive reflection of the current economic and social situation within the Union. The dispute between the Commission and the Council ended up at the CJEU in two cases:

[245] ACCC. Findings and recommendations with regard to communication ACCC/C/2008/32 (Part I) concerning compliance by the European Union, 24 August 2011, ACCC. ECE/MP.PP/C.1/2011/4/Add.1.

[246] Ibid., paragraphs 52–53.

[247] Council Decision (EU) 2018/881 of 18 June 2018 requesting the Commission to submit a study on the Union's options for addressing the findings of the Aarhus Convention Compliance Committee in case ACCC/C/2008/32, and, if appropriate in view of the outcomes of the study, a proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1367/2006. ST/9422/2018/INIT, available at: <http://data.europa.eu/eli/dec/2018/881/oj>.

[248] Joint statement by the French, Luxembourg, Italian and Spanish delegations, supported by the Latvian delegation, 4 June 2018, 9649/18 ADD 1.

C-62/12 (Council v. Commission) and C-63/12 (Commission v. Council). In C-63/12, the CJEU shed more light on balancing powers between the Council and the Commission:

> *"In the light of the conclusion in paragraph 77 of this judgment, that it is the task of the Council, at that stage of the procedure, to determine whether there is a deterioration within the meaning of Article 10 of Annex XI to the Staff Regulations, making it possible to trigger the procedure laid down in that article, the Commission cannot claim to have a discretion in relation to that determination which it is for the Council to make."*

It is therefore evident that the Commission cannot easily dispute the opinion of the Council and present its own take on the situation.

In the meantime, the conditions for *locus standi* did not shatter. In case T-12/17 (*Mellifera v Commission*),[249] the General Court reviewed a decision of the Commission which rejected an internal review of glyphosate approval on the ground that the contested decision was not of "individual scope". The General Court referred to the case C-401/12 P to C-403/12 P and refused to take the findings of the ACCC into account, as it is "a simple draft" because they were not yet formally adopted by the Meeting of the Parties to the Convention.

12.5 Option zero: Change of the course of the EU Courts

To comply with the Aarhus Convention, the CJEU should "easily" consider environmental NGOs that fulfil the 'criteria for entitlement' under Article 11 of the Aarhus Regulation to be individually concerned to bring an annulment action against EU measures affecting the environment.

This seems to be the preferred solution by the ACCC and a reason for the ACCC to be waiting for a long time whether the CJEU would adjust to the Aarhus requirements. All relevant EU institutions within their competence should take steps to overcome the shortcomings reflected in the jurisprudence of the EU Courts in providing the public concerned with access to justice in environmental matters – and the CJEU is the institution which can reflect the shortcomings instantly.

It does not seem realistic that the CJEU would change its existing approach regarding the interpretation of Article 263 TFEU without a legislative push. It is of a clear opinion that any reform of access to justice has to come from Treaty revision rather than from judicial decision-making,[250] and it already had many opportunities to change its interpretation of

[249] Judgment of the General Court (Fifth Chamber) of 27 September 2018, *Mellifera eV, Vereinigung für wesensgemäße Bienenhaltung v European Commission* (T-12/17, ECLI:EU:T:2018:616).

[250] Judgment of the Court of Justice of 25 July 2002, Unión de Pequeños Agricultores v Council (C-50/00 P, ECLI:EU:C:2002:462, paragraph 45: „While it is, admittedly, possible to envisage a system of judicial review

the *locus standi* criteria. Most notably, the appropriateness of the CJEU's approach was dramatically called into question by Advocate General Jacobs in the C-50/00 P (*Union de Pequeños Agricultores*) case[251] and, at the same time, by the Court of First Instance in the T-177/01 (*Jégo-Quéré*) case.[252] To avoid depriving the applicants of their right to effective judicial protection, Advocate General Jacobs proposed more relaxed tests of individual concern, according to which a person could

> "*be regarded as individually concerned by a Community measure where, by reason of his particular circumstances, the measure has, or is liable to have, a substantial adverse effect on his interests"*.[253]

In this context, the Advocate General also highlighted the perverse effects of the Plaumann test, that the greater the number of persons affected by a measure, the less likely an action would succeed. The CJEU, however, decided to maintain the traditional interpretation of the "individual concern" test, because even the principle of effective judicial protection

> *"cannot have the effect of setting aside the condition in question, expressly laid down in the Treaty. The Community Courts would otherwise go beyond the jurisdiction conferred by the Treaty"*.[254]

However, there still seem to be some leeway for interpretation regarding *locus standi* in proceedings against regulatory acts under Article 263 TFEU. As mentioned, the CJEU did not have an opportunity to explore the provision in relation to the Aarhus right of access to justice fully.

Soon, the General Court will deal with the questions of admissibility in T-330/18 (*Carvalho and Others v Parliament and Council*)[255] case. Thirty-six individuals and a youth organisation have filed an application for annulment with the EU's General Court, claiming that EU legislation on greenhouse gas emissions is unlawful because it fails to prevent climate change. The application suggests that the *Plaumann* formula is inapposite and should not

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of the legality of Community measures of general application different from that established by the founding Treaty and never amended as to its principles, it is for the Member States, if necessary, in accordance with Article 48 EU, to reform the system currently in force.").

[251] Opinion of Advocate General Jacobs delivered on 21 March 2002, *Unión de Pequeños Agricultores v Council* (C-50/00 P, ECLI:EU:C:2002:197).

[252] Judgment of the Court of First Instance (First Chamber), 3 May 2002, Jégo-Quéré v Commission (T-177/01, ECLI:EU:T:2002:112, paragraph 51: *"In the light of the foregoing, and in order to ensure effective judicial protection for individuals, a natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him. The number and position of other persons who are likewise affected by the measure, or who may be so, are of no relevance in that regard."*).

[253] Opinion of Advocate General Jacobs delivered on 21 March 2002, *Unión de Pequeños Agricultores v Council* (C-50/00 P, ECLI:EU:C:2002:197, paragraph 60).

[254] Judgment of the Court of Justice of 1 April 2004, *Commission v Jégo-Quéré* (C-263/02 P, ECLI:EU:C:2004:210, paragraph 36).

[255] Action brought on 23 May 2018, *Carvalho and Others v Parliament and Council* (Case T-330/18, 2018/C 285/51).

be followed in this case, because *inter alia* it is not itself based in the text of Article 263 TFEU, has perverse results that lead to an obvious gap in judicial protection (reminiscent of AG Jacobs), ignores requirements of the Aarhus Convention and denies effective remedies of rights conferred by Article 47 of the Charter.[256] Alternatively, it attempts to persuade the Court that all the conditions are met in this case for two main reasons. Each applicant complains of a breach of fundamental individual rights:

> *"While all persons may in principle each enjoy the same right (such as the right to life, or the right to an occupation) the effects of climate change (to which the EU Emissions Acts under challenge contribute) and hence the infringement of rights is distinctive and different for each individual."*[257]

12.6 Option one: Preliminary ruling procedure and the helping hand of the national courts

The Commission became a strong defendant of the strict conditions of *locus sta*ndi before the CJEU. Two of the main arguments can be summarised as follows: first, Parties to the Convention have a margin of appreciation as to how they implement Article 9 (3), into their national legal orders, and the EU institutions have exercised this margin in the context of the Aarhus Regulation;[258] second, since the EU has not adopted specific legislation intended to implement Article 9 (3), of the Convention, it remains the responsibility of the EU Member States to implement their obligations under Article 9 of the Convention.[259] This position is supported by the case law of the CJEU. As Pirker correctly points out:

> *"Under the Court's approach, it appears that the EU institutions can exempt themselves from scrutiny when implementation happens at both EU and Member State level. At the same time, this does not mean that there must in all cases be access to justice at EU level and the national level; sometimes, the latter may do."*[260]

The EU may therefore still try to rely to a certain extent on national courts as the appropriate forum for cases in which the validity of EU legislation is in question. The CJEU has, on several occasions, justified this restrictive approach to the standing of private applicants in annulment actions by referring to the idea of a "complete system of remedies" created by

[256] Ibid., paragraphs 84–96.
[257] Ibid., paragraph 81.
[258] Observations by the European Union to the communicant's commentary on the judgments by the Court of Justice, 11 June 2015, paragraph 21.
[259] Ibid., paragraph 26.
[260] PIRKER, B. Access to Justice in Environmental Matters and the Aarhus Convention's Effects in the EU Legal Order: No Room for Nuanced Self-executing Effect? *Review of European Community & International Environmental Law*. 2016, n. 1, p. 89.

the TFEU.[261] In the Court's view, this system is complete because an EU measure may be challenged either through a direct action under Article 263 TFEU or through the preliminary ruling procedure according to Article 267 TFEU.

There are already examples of the preliminary ruling procedure used to challenge the validity of the EU acts concerning environmental matters directly or indirectly. For example, in case C-293/97 (*Standley*),[262] the national court asked on the validity of the Nitrates Directive; in joined Cases C-313/15 and C-530/15 (*Eco-Emballages*),[263] the French court asked whether the Commission had exceeded its implementing powers by including roll-cores as packaging in the specific Commission Directive; and in C-281/16 (*Vereniging Hoekschewaards Landschap*),[264] the Dutch Council of State asked the Court to rule on the validity of a Commission implementing decision under the Habitats Directive (92/43/EEC). The CJEU found that the Commission had exceeded its discretion.

Even when applicants can gain access to national courts, it is doubtful whether the preliminary reference procedure effectively guarantees the right to access to justice. The ACCC stated that:

> *"While the system of judicial review in the national courts of the EU member States, including the possibility to request a preliminary ruling, is a significant element for ensuring consistent application and proper implementation of EU law in its member States, it cannot be a basis for generally denying members of the public access to the EU Courts to challenge decisions, acts and omissions by EU institutions and bodies; nor does the system of preliminary review amount to an appellate system with regard to decisions, acts and omissions by the EU institutions and bodies. Thus, with respect to decisions, acts and omissions of EU institutions and bodies, the system of preliminary ruling neither in itself meets the requirements of access to justice in Article 9 of the Convention, nor compensates for the strict jurisprudence of the EU Courts, examined …above".*[265]

The ACCC has also pointed out that the CJEU itself has held that the system of the preliminary ruling does not constitute a means of redress available to the parties to a case pending before a national court or tribunal.[266] It seems, however, that this position of the CJEU has slightly changed recently. In case C-416/17 (*Commission v France*),[267] the Court emphasised the importance of the national courts giving effect to Article 267 TFEU, which

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[261] See Judgment of the Court of Justice of 23 April 1986, *Les Verts v Parliament* (C-294/83, ECLI:EU:C:1986:166, paragraph 23).

[262] Judgment of the Court of Justice of 29 April 1999, *The Queen v Minister of Agriculture, Fisheries and Food, ex parte Standley and Others* (C-293/97, ECLI:EU:C:1999:215).

[263] Judgment of the Court of Justice of 10 November 2016, *Eco-Emballages* (C-313/15, ECLI:EU:C:2016:859).

[264] Judgment of the Court of Justice of 19 October 2017, *Vereniging Hoekschewaards Landschap* (C-281/16, ECLI:EU:C:2017:774).

[265] ACCC. Findings and recommendations with regard to communication ACCC/C/2008/32 (Part I) concerning compliance by the European Union, 24 August 2011, ACCC. ECE/MP.PP/C.1/2011/4/Add.1, paragraph 90.

[266] Findings and recommendations of the Compliance Committee with regard to communication ACCC/C/2008/32, paragraph 59. With reference to Judgment of the Court of Justice of 6 October 1982, *CILFIT v Ministero della Sanità* (C-283/81, ECLI:EU:C:1982:335).

[267] Judgment of the Court of Justice of 4 October 2018, *Commission v France (Précompte mobilier)* (C-416/17, ECLI:EU:C:2018:811).

can eventually be interpreted as an obligation. In this particular case, the Commission *inter alia* successfully challenged the failure by the French Council of State to make a preliminary reference in a taxation matter.

Nevertheless, there first has to be a case concerning the application of the EU act that would reach the national court and consequently the CJEU. This rules out the abstract review of the act as such and basically forces the public concerned to initiate administrative proceedings, often criminal one, to access the court. It has been considered by the scholars that it is theoretically possible that the applicants would rely on the invalidity of this measure in domestic proceedings, but it cannot be sustained in a Union based on the rule of law.[268] As Advocate General Jacobs suggests, when the EU measure does not require any implementing act at the national level, the CJEU's reliance on preliminary ruling proceedings results in a lack of judicial protection.[269] Moreover, it seems to be very difficult for the national courts to review acts adopted by the EU institutions, considering the relaxed requirements of the CJEU on the statement of reasons for these acts. According to the CJEU, although the statement of reasons must show clearly the reasoning of the authority that adopted the contested measure, it is not required to go into every relevant point of fact and law.[270] Furthermore, the obligation to provide a statement of reasons must be assessed with reference not only to the wording of the measure but also to its context and the whole body of legal rules governing the matter in question.[271] And the reasons given for a measure are sufficient if that measure was adopted in a context that was known to the institution concerned, which enables it to understand the scope of the measure adopted.[272]

Currently, the CJEU not only continues to rely on preliminary ruling proceedings but it has also drawn the line between the Article 263 proceedings and Article 267 proceedings in cases C-456/13 P (*T & L Sugars and Sidul Açúcares v Commission*)[273] and C-274/12 P (*Telefónica v Commission*),[274] somewhat reflecting the opinion of AG Jacobs. It concluded that:

> *"Where a regulatory act directly affects the legal situation of a natural or legal person without requiring implementing measures, that person could be denied effective*

[268] See for example KOCH, C. Locus Standi of private applicants under the EU constitution: Preserving gaps in the protection of individual's right to an effective remedy. *European Law Review*. 2005, n. 4, p. 511 – 527.

[269] See Opinion of Advocate General Jacobs delivered on 21 March 2002, *Unión de Pequeños Agricultores v Council* (C-50/00 P, ECLI:EU:C:2002:197).

[270] See Judgment of the Court of Justice of 12 July 2005, *Alliance for Natural Health and Others* (C-154/04 and C-155/04, ECLI:EU:C:2005:449, paragraph 133).

[271] See Judgment of the Court of Justice of 29 February 1996, *Commission v Council* (C-122/94, ECLI:EU:C:1996:68, paragraph 29); Judgment of the Court of Justice of 12 December 2006, *Germany v Parliament and Council* (C-380/03, ECLI:EU:C:2006:772, paragraph 108); Judgment of the Court of Justice of 12 July 2005, *Alliance for Natural Health and Others* (C-154/04 and C-155/04, ECLI:EU:C:2005:449, paragraph 134).

[272] See Judgment of the Court of Justice of 29 October 1981, *Arning v Commission* (C-125/80, ECLI:EU:C:1981:248, paragraph 13); Judgment of the Court of Justice of 22 June 2004, *Portugal v Commission* (C-42/01, ECLI:EU:C:2004:379, paragraphs 69–70); Judgment of the Court of Justice of 15 November 2012, *Council v Bamba* (C-417/11 P, ECLI:EU:C:2012:718, paragraph 54).

[273] Judgment of the Court of Justice of 28 April 2015, *T & L Sugars and Sidul Açúcares v Commission* (C-456/13 P, ECLI:EU:C:2015:284).

[274] Judgment of the Court of Justice of 19 December 2013, *Telefónica v Commission* (C-274/12 P, ECLI:EU:C:2013:852).

judicial protection if he did not have a direct legal remedy before the European Union judicature for the purpose of challenging the legality of the regulatory act. (…) Where that implementation is a matter for the Member States, those persons may plead the invalidity of the basic act at issue before the national courts and tribunals and cause the latter to request a preliminary ruling from the Court of Justice, pursuant to Article 267 TFEU".[275]

Individuals can therefore only reach the EU Courts if there are no implementing measures whatsoever. Even where the implementation by the national authorities is mechanical, that still counts as an implementing measure. The mechanical nature of the measure

"is irrelevant in ascertaining whether those regulations entail implementing measures within the meaning of the final limb of the fourth paragraph of Article 263."[276]

On the other hand, criminal proceedings cannot be considered implementing measures, because according to the CJEU,

"the fourth paragraph of Article 263 TFEU must be interpreted in the light of the objective of that provision, which is, as is apparent from its drafting history, to ensure that individuals do not have to break the law in order to have access to a court."[277]

This means that only Article 263 provides access to justice if there are no other ways to reach the national court except breaking the law. At the same time, it confirms that the CJEU considers the procedures under Articles 263 and 267 to complement each other.

12.7 Option two: Legislative amendments

Should the CJEU not change its current interpretation of the notion of individual concern, a paragraph could also be added to Article 263 TFEU by way of a Treaty revision, to the effect that NGOs that fulfil the requirements of Article 11 of the Aarhus Regulation do not need to prove an individual concern. Pursuant to Article 257 TFEU, it would be even possible to create a specialised court attached to the General Court that would deal with matters falling within the scope of the Aarhus Convention.

[275] Judgment of the Court of Justice of 28 April 2015, *T & L Sugars and Sidul Açúcares v Commission* (C-456/13 P, ECLI:EU:C:2015:284, paragraphs 29 – 31); see also Judgment of the Court of Justice of 19 December 2013, *Telefónica v Commission* (C-274/12 P, ECLI:EU:C:2013:852, paragraphs 27–29).

[276] Judgment of the Court of Justice of 28 April 2015, *T & L Sugars and Sidul Açúcares v Commission* (C-456/13 P, ECLI:EU:C:2015:284, paragraph 42).

[277] Ibid., paragraph 29.

Access to justice at the national level would certainly benefit from harmonised rules as well, should the EU decide to put a greater workload onto the national courts. Some efforts have been made in this respect utilising legislation. Most notably, the Commission has presented a Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters, which has, however, been stalled in the Council for several years[278] and finally withdrawn by the Commission in 2014 as obsolete with no further explanation.[279] The Proposal introduced a common frame for harmonised access to justice at national level and did not deal with judicial protection at the EU level. The reasons for a new directive are nevertheless interesting:

> *"In the light of the very uneven situation in Member States as concerns compliance with environmental law and the disparate state of enforcement, the need for action at Community level to guarantee the objectives of the Århus Convention becomes evident. An action at Community level is also required because of the transboundary dimension of environmental problems. Only Community action can guarantee the uniform application of environmental law. These aspects will increase in importance with the enlargement of the European Union."*[280]

It does not seem plausible to think that the national courts would be able to enforce the EU law (instead of the EU Courts) effectively if there are already noticeable shortcomings in controlling the application of environmental law at the moment. Especially where breaches of EU law do trigger multiple individual lawsuits, the procedural laws of many Member States often leave the courts ill-equipped to deal with the caseload efficiently and without unreasonable delay.

12.8 Option three: Non-contractual liability of the EU

The deterrent effect of possible compensation is of crucial importance in environmental protection, which frequently has to be balanced with economic interests. The mere possibility of claiming damages is a pivotal feature of the class action, which can mobilise large groups of individuals and put pressure on both polluters and political representatives. In effect, naturally, they are a major reason that class actions are not widespread in environmental matters. The individuals who persevere and reach the courts in low numbers can hardy present an economic burden, even if successful with their liability claim. NGOs usually cannot claim compensation for damage to human health or damage to the environment.

[278] Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters /COM/2003/0624 final – COD 2003/0246/.
[279] Withdrawal of obsolete Commission proposals. OJ C 153, 21. 5. 2014, p. 3–7.
[280] Ibid., paragraph 3.3.

As regards *locus standi* in an action for non-contractual liability of the EU, the strict *Plaumann* test does not apply. As Advocate General Jacobs noticed,

> *"there are no restrictions on the standing of individuals to bring actions for damages under Articles 235 EC and 288 EC. The class of individuals capable of seeking damages for loss caused by Community measures is thus unlimited."*[281]

However, the claims regarding moral damage cannot be too general, which means the damage can be felt by everyone at any time. In case C-337/15 P (*European Ombudsman v Staelen*),[282] the CJEU stated that

> *"any loss of confidence in the office of the Ombudsman that may result from actions taken in the course of the Ombudsman's inquiries is likely to affect, indiscriminately, everyone entitled to lodge a complaint with the Ombudsman at any time."*[283]

This condition differs from the requirement of individual concern, as it only sets outer limits of the claim (not to be too vague) and so far applies to moral damage exclusively. In any event, the plaintiff must establish that the injury affects him personally.[284]

Three cumulative conditions must be met for the EU to be held liable: (1) an EU institution must have acted unlawfully by committing a sufficiently serious breach of the rule of law intended to confer rights on individuals; (2) the harm alleged must actually exist; and (3) there must be a causal link between the EU's conduct and the damage.[285] As a consequence, the Court deals with the validity of the act that allegedly caused damage to the applicant. Nevertheless, it does not have to provide an answer on all three of the above points if one of the conditions is not fulfilled.[286]

A recent General Court judgment in case T-197/17 (*Abel and Others v Commission*)[287] provides a good example. The Court had to deal with a claim by 1439 applicants alleging that the Commission made errors during the adoption of Commission Regulation (EU) 2016/646 as regards emissions from light passenger and commercial vehicles. Harm was allegedly sustained in the form of material damage, linked to the deterioration of the quality of the air that they breathe and the resultant deterioration of their health, and that it has also caused

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[281] Opinion of Advocate General Jacobs delivered on 21 March 2002, *Unión de Pequeños Agricultores v Council* (C-50/00 P, ECLI:EU:C:2002:197, paragraph 72).

[282] Judgment of the Court of Justice of 4 April 2017, *European Ombudsman v Staelen* (C-337/15 P, ECLI:EU:C:2017:256).

[283] Ibid., paragraph 94.

[284] See Judgment of the Court of Justice of 9 November 1989, *Briantex and Di Domenico v EEC and Commission* (C-353/88, ECLI:EU:C:1989:415, paragraph 6).

[285] See for example Judgment of the Court of Justice of 8 May 2003, *T. Port v Commission* (C-122/01 P, ECLI:EU:C:2003:259, paragraph 54).

[286] See Judgment of the Court of Justice of 14 October 1999, *Atlanta v European Community* (C-104/97 P, ECLI:EU:C:1999:498, paragraph 65); Judgment of the Court of First Instance (Third Chamber) of 28 November 2002, *Scan Office Design v Commission* (T-40/01, ECLI:EU:T:2002:288, paragraph 18).

[287] Order of the General Court (Ninth Chamber) of 4 May 2018, *Abel and Others v Commission* (T-197/17, ECLI:EU:T:2018:258).

them non-material damage linked to their fears in that regard, for themselves and those close to them, and their fears resulting from their loss of confidence in the EU institutions' action to combat environmental degradation. Each of those individuals sought a symbolic sum of EUR 1 as compensation for material damage and EUR 1,000 as compensation for non-material damages.

The General Court dismissed the action, as it concluded that the existence of the damage claimed by the individuals had not been proved to the requisite standard insofar as only a very unspecific and general assessment of the additional pollutant emissions caused by the provisions at issue could be attempted, if necessary after a certain time, with only very inconclusive results. For this reason, it did not deal with the other two conditions of liability.

While it is not hard to agree with the conclusions of the Court, it would be useful if it went further in its reasoning, because some arguments put forward by the Commission seem to raise controversy. Most notably, the Commission disputed the admissibility of the application, since its compensatory aspect was allegedly artificial and sought only to circumvent the impossibility for each of the applicants to bring an action for annulment of the Regulation in question.[288] It would be overly simplistic and not in compliance with Article 340 TFEU to rule on inadmissibility because the *Plaumann* criteria are not fulfilled.

Furthermore, one might expect the Commission to be extremely cautious with this sort of argument regarding possible damage caused by emissions, especially considering the air quality in some parts of the EU and the hesitance of the Commission itself to deal with the situation.

Nevertheless, the case shows why the action for non-contractual liability of the EU complements but cannot easily replace the action for annulment or action for failure to act. First of all, it does not serve to annul the unlawful EU measure, even though damages will be granted only if the measure is found unlawful. Furthermore, it is necessary for the applicant to prove damage for which compensation is sought. The damage has to be identified with sufficient certainty, even if symbolic compensation is requested. In this respect, the Court refers to its case law from the 1970s.[289] Besides, not *any breach* but a *sufficiently serious breach* of EU law is required for the action to succeed,[290] which does not set a higher threshold of liability than many of the national legal regimes and effectively limits the review of the legality of the EU acts under Article 340 TFEU.

[288] Ibid., paragraph 22.

[289] For example Judgment of the Court of Justice of 2 June 1976, *Kampffmeyer v Council and Commission* (C-56/74, ECLI:EU:C:1976:78); Judgment of the Court of Justice of 21 May 1976, *Roquette Frères v Commission* (C-26/74, ECLI:EU:C:1976:69).

[290] See Judgment of the Court of Justice of 5 March 1996, *Brasserie du pêcheur v Bundesrepublik Deutschland and The Queen / Secretary of State for Transport, ex parte Factortame and Others* (C-46/93 and C-48/93, ECLI:EU:C:1996:79).

12.9 Conclusions and recommendations

The *locus standi* in environmental matters provided by the TFEU and interpreted by the CJEU does not fulfil the requirements of the Aarhus Convention, although EU decision-making covers a considerable number of acts that may affect the lives of individuals and affect the environment. The application of the *Plaumann* test ignores the fact that *"the environment has no legal interest defender."*[291]

There is no doubt that the judicial protection in environmental matters is provided mainly at the national level by the courts of the Member States. This was indeed reflected by the EU, which – upon approval of the Aarhus Convention – declared that

> *"the legal instruments in force do not cover fully the implementation of the obligations resulting from Article 9 (3) of the Convention as they relate to administrative and judicial procedures to challenge acts and omissions by private persons and public authorities other than the institutions of the European Community as covered by Article 2 (2) (d) of the Convention, and that, consequently, its Member States are responsible for the performance of these obligations at the time of approval of the Convention by the European Community and will remain so unless and until the Community, in the exercise of its powers under the EC Treaty, adopts provisions of Community law covering the implementation of those obligations."*

It seems, however, that the national courts cannot cooperate with the EU Courts to compensate for all of the deficiencies in direct access to the EU Courts. The validity of the EU act can be reviewed within the preliminary question procedure, but such a solution seems too cumbersome to be effective, and the rules on *locus standi* should be clear in the first place to ensure wide and effective access to justice. Preliminary rulings do not satisfy the *lacuna* inherent in self-executing general acts. In this respect, individuals and environmental NGOs should continue to target a more generous interpretation of Article 263 TFEU in actions against regulatory acts.

The case law of the CJEU is not likely to change without a legislative amendment and the only reasonable option open to the Commission to remedy the violation of international law is to propose a revision of the Aarhus Regulation.

Apparently, the question of access to the EU Courts in environmental matters has hit politically sensitive issues. At a more conceptual level, the CJEU is confronted with the need to find a balance between the EU's commitment to respect for international law and the protection of its autonomy and the values underlying the latter. The autonomy is represented by the Commission and the broad discretion it enjoys as regards the means

[291] DETTE, B. Access to Justice in Environmental Matters; A Fundamental Democratic Right. In: ONIDA, M. (ed.). *Europe and the Environment. Legal Essays in Honour of Ludwig Krämer*. Groningen: Europa Law Publishing, 2004, p. 7.

and methods to achieve the high level of protection of the environment as envisaged in Art. 191 (2) TFEU. While the protective role of the public concerned as the guardians of the environment seems to gather importance, it is clearly not compatible with the role of the Commission as the sole guardian of the Treaties. In other words, the Commission may lose its relative comfort in setting standards of environmental protection once its considerations are fully reviewed by the EU Courts.

The stubborn position of the EU towards effective access to justice at the EU level threatens the much-needed consistent application of the Aarhus Convention. As Lidbetter and Depani note:

> *"The significance of the Convention does not end with those provisions which are legally binding or the decisions of the Compliance Committee; as it becomes an increasingly established part of the legal landscape, it is also developing an indirect influence."*[292]

As Weaver points out, *"Aarhus' cosmopolitanism, yielding a moderating influence on sovereignty, will not emerge without a stable framework in which states institutionalise it."*[293] He also notices that the Aarhus headway is "*tentative, but this is welcomed as evolutionary reform coheres with the persistence of sovereign statehood*."[294] In practice, it seems that there is an inevitable tension between the effective participation of the public concerned and the interests of the sovereign state or its representatives, which always resist their hand being tightened by transparency and the requirements of balancing public interests. Without a stable framework of all three pillars of the Aarhus Convention at all levels of decision-making, the concept of effective public participation will be flawed. Needless to say, the Aarhus Convention is considered to be a *"driving force for environmental democracy"*[295] in Europe, and *"at the forefront"* of developing the legal framework in this respect worldwide.[296] However, it was also noted that a strong compliance mechanism, assuring equally serious treatment of the obligations stemming from the Convention, was the driving force for its acceptance.[297]

It is possible to argue that the approach of the EU effectively undermines the enforcement of Aarhus rights in the Member States, especially considering that the

> "*assumption regarding 'vigorous enforcement' of the Convention by the European Court of Justice (or now the Court of Justice of the European Union) has not yet proved to be the case."*[298]

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[292] LIDBETTER, A. – DEPANI, N. The Aarhus Convention and Judicial Review. *Judicial Review*. 2014, n. 1, p. 38.
[293] WEAVER, D. The Aarhus convention and process cosmopolitanism. *International Environmental Agreements*. 2018, vol. 18, p. 199.
[294] Ibid.
[295] WATES, J. The Aarhus Convention: a Driving Force for Environmental Democracy. *Journal for European Environmental & Planning Law*. 2005, n. 1, p. 2 – 11.
[296] EBBESON, J. Public participation. In: BODANSKY, D. – BRUNNEE, J. – HEY, E. *The Oxford Handbook of International Environmental Law.* Oxford: Oxford University Press, 2007, p. 686.
[297] JENDROŚKA, J. Aarhus Convention and Community Law: the Interplay. *Journal for European Environmental & Planning Law.* 2005, n. 1, p. 15.
[298] JENDROŚKA, J. Aarhus Convention Compliance Committee: Origins, Status and Activities. *Journal for European Environmental & Planning Law*. 2011, n. 4, p. 304.

As the Commission itself concluded in 2003,[299]

> *"Community inaction in relation to the implementation of the 'access to justice' pillar means that it will not be able to comply with its international obligations. It would prevent the Community from ratifying the Århus Convention, with a resulting lack of credibility at international level. In this way, the credibility of the Community with respect to good governance would also be at stake."*[300]

[299] Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters /COM/2003/0624 final – COD 2003/0246/.

[300] Ibid., paragraph 3.4.

13 The Czech initiative on collective actions in environmental matters: Destined to fail

Vojtěch Vomáčka

This chapter provides a brief introduction to the environmental aspects of the latest Czech initiative, which should introduce a coherent collective redress mechanism. To identify the weaknesses of the Draft Proposal of the Act on Collective Actions, the limits of collective access to the courts are analysed in more detail, covering both civil and administrative judiciary. Furthermore, the available civil actions and regimes of civil liability are explored on the basis of the recent case law of the Czech civil courts. The author concludes that the proposed legislation – if adopted – will introduce several legal instruments that will help to compensate for damage caused by industrial accidents. However, the pitfall of the initiative seems to lie in the legislator's ignorance of the differences between consumer protection and the environmental protection. It neither attempts to solve the problems in the current legislation, nor does it address the most destructive cases of violation of environmental law that cause mass harm to thousands of individuals.

13.1 Introduction

The Czech Republic is one of the few EU Member States that has yet to adopt a comprehensive class action system. Although there have been a few attempts to introduce quasi-collective actions in the past, none of them succeeded. At the moment, concepts of public litigation and *actio popularis* are very much absent in the Czech legal system, at least when it comes to environmental matters. In contrast, the protective norm theory (*Schutznormtheorie*) is traditionally applied, which means that in order to be allowed to bring a case to the court, the applicant has to show that his individual rights have been affected.

Recently, legislative work has emerged after The Ministry of Justice published its proposal to introduce a collective redress mechanism in 2017,[301] but a specific legislative bill has not

[301] Draft of the material intent of the Collective Actions Act (Návrh věcného záměru zákona o hromadných žalobách), available at: <https://apps.odok.cz/attachment/-/down/KORNAVPF7NOI>.

been finished yet. This latest legislative initiative focuses on consumer protection but covers environmental aspects as well.

A tragic scenario with sudden loss of life would probably accelerate legislative work on collective remedies. However, the Czech Republic has fortunately not witnessed any major industrial accidents, which would cause widespread harm and render a large group of individuals affected by the negative consequences of the accident. In the last twenty years, there have been a few accidents, but none with severe consequences. For example, in 2005, the employees and seven neighbours were evacuated after ammonia escaped from a fish processing system in Šišma near Přerov. The ammonia cloud was destroyed by sputtering with no serious effects. In 2010, almost two hundred kilograms of chloride leaked into the air from Spolana, a chemical factory located next to the Elbe in Neratovice. Fortunately, no injuries or damage were recorded. In 2013, ammonia leaked from the Paramo factory in Kolín but again caused no damage. The locals were notified in time and instructed not to leave their homes. The Czech Environmental Inspectorate deals annually with several cases of environmental damage caused by leaks of hazardous substances, explosions and fires. In 2017, eight significant accidents occurred. The operators reported the accidents to the respective regional authorities and the Inspectorate. The same year, 22 decisions adopted by the Inspectorate resulted in halting or restricting the operation of a facility or part of one. Some facilities were operating without the necessary permits from the official authorities; their activity caused excessive air pollution and was the subject of repeated complaints.[302] These cases mostly concern the discharge of heavily polluted wastewater. Only in exceptional circumstances did these accidents cause material damage to owners of neighbouring land.

In the absence of industrial accidents, what environmental issues should the new legislation target? I believe a collective redress mechanism would be helpful as regards two types of long-term severe environmental burden, which affect the life of the population in specific regions on a day-to-day basis, noise and air pollution. While many reports maintain that some environmental aspects continued to improve in the last decades, including water quality and canalisation, bad air quality and excessive noise are still found to be significant problems.

According to the European Environmental Agency country fact sheet,[303] many people in the Czech Republic are exposed to road, rail, aircraft and industrial noise, particularly in towns and cities, both during the day and at night. In Prague, for example, 71% of the population are exposed to high noise levels caused by road traffic during daytime, and 41.4 are exposed to the same problem at night. There is a similar situation, though with slightly lower proportions, in other large cities in the Czech Republic. In comparison, high noise levels from other sources affects a much smaller number of people, but in practice presents

[302] Czech Environmental Inspectorate. *Annual Report 2017*. Available at: <http://www.cizp.cz/file/jl8/vyrocni-zprava-CIZP-2017-eng.pdf>.

[303] European Environmental Agency. Czech Republic noise fact sheet 2018, available at: <https://www.eea.europa.eu/themes/human/noise/noise-fact-sheets/noise-country-fact-sheets-2018/czech-republic>.

serious local problems, depending on the particular source of noise (for example airports or factories). Outside urban areas, a high level of noise emitted by road and rail traffic remains the most severe problem.

As regards air pollution, a large number of Czechs are exposed to above-average levels of the toxic chemical benzopyrene. Many cities suffer from smog, while heating plants and local heating were found to account for a massive amount of small dust particles being inhaled by the population. The EU Commission sent a Letter of Formal Notice to the Czech Republic in 2010 and has attempted to deal with the issue ever since. In 2018, the Czech government even received 'final warnings' from the Commission and was given a last opportunity to submit a set of credible, timely and effective measures to tackle the problem. It is estimated that around 11,000 Czechs suffer premature death every year due to exposure to excessive amounts of $PM_{2.5}$, NO_2 and 0_3.[304]

It is usually lone individuals who access the courts for a remedy in environmental cases. However, the attempts to tackle air pollution and excessive noise have often brought multiple plaintiffs to the courtrooms, and environmental rights advocates and NGO activists have become rather creative and flexible in making use of the available legal remedies. Even without a proper procedural framework for collective litigation, the media nation-wide have not hesitated to label several cases as class actions. The first such case, concerning the noise of the traffic on a highway that runs through the city centre of Prague (see below), dates back to 2006. At the moment, there are two examples of collective litigation discussed in the media, an initiative against excessive noise emitted by the racing circuit located in Most, northwest of Prague,[305] and civil actions of a similar pattern against air pollution in Moravia-Silesia, which is one of the most polluted regions in Europe, due to the heavy industry located on both sides of the Czech-Polish border.[306]

13.2 The environmental bells and whistles of the draft proposal

All the lively debates surrounding the preparations for the Act on Collective Actions imply that the new law is anticipated with high expectations. Is it, however, possible to assume that it will introduce provisions that, if implemented in the context of legal challenges in environmental matters, would significantly improve access to justice?

[304] European Environmental Agency. Air quality in Europe – 2018 report, p. 63, available at: <https://www.eea.europa.eu/publications/air-quality-in-europe-2018>.

[305] See Český rozhlas. *Spor kvůli nadměrnému hluku mezi mosteckým autodromem a spolkem Zdraví pro Most pokračuje*. 2018, available at: <https://sever.rozhlas.cz/spor-kvuli-nadmernemu-hluku-mezi-mosteckym-autodromem-a-spolkem-zdravi-pro-most-7159355>.

[306] See Radio Praha. *Woman with cancer suing Czech Republic over air-pollution*. 2019, available at: <https://www.radio.cz/en/section/news/woman-with-cancer-suing-czech-republic-over-air-pollution>.

The Draft Proposal does not provide a satisfactory answer. It merely deals with environmental aspects as complementary to consumer protection, which suggests that the claims concerning compensation for damage caused by the violation of environmental legislation were not given particular attention.

The Draft Proposal adopts a narrow view of environmental claims. These are conceived as a harmful by-product of economic development[307] and, even more narrowly, as a consequence of the industrial accidents. Even though the Draft Proposal refers to irreversible damage on the environment following the Deepwater Horizon oil spill accident and the nuclear disaster at the Fukushima Daiichi power plant,[308] it does not propose the public concerned should be provided with a right to claim damages in such situations. It restricts the scope of class actions to environmental claims based on damage caused to individuals within the current framework of civil liability. In this respect, environmental claims share the same fate as consumer protection.[309] The Draft Proposal notices that

> *"there are small claims, claims that it can be difficult to prove or claims that are too many and have the same or similar factual and legal basis. Turning to the court individually can be very psychologically challenging, time-consuming and expensive for the person concerned. In most cases, people affected by ecological interventions refrain from court protection, giving the apparent signal to the polluter that its actions do not matter. However, interference with the environment typically affects hundreds, thousands or tens of thousands of individuals, generating overall harm to a large extent."*[310]

In contrast, as a part of the final assessment, the Draft Proposal adds that class actions will serve individuals to seek protection against the illegal activity of the polluter and consequently, to claim damages.[311] This, however, does not correspond to the main points of the Draft Proposal, which focus exclusively on compensation for damages.

The lack of enforcement is called a matter for civil law in the first place, with public law regulation and activities of the NGOs labelled as alternative solutions, which eventually fail.[312] While this might be true in consumer protection, such a statement barely corresponds to the actual prevention and elimination of the consequences of damaging the environment.

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[307] Draft of the material intent of the Collective Actions Act (Návrh věcného záměru zákona o hromadných žalobách), chapter 1.1, p. 8,: *"As can be seen, the negative externalities of progress, the acceleration of life and the rise of the living standards of the population are an indisputable fact that the Czech Republic and other countries in the world have to face. Even if the phenomenon is unintentional or even natural, it is not possible to ignore its consideration in the form of adequate legal regulation.",* available at: <https://apps.odok.cz/attachment/-/down/KORNAVPF7NOI>.

[308] Ibid.

[309] Ibid., chapter 2.2, p. 22: *"The law on class actions will cover all claims that can be claimed at the moment according to the general regulations of the civil court proceedings, except those specifically excluded. (…) The purpose is to provide sufficient protection for areas, such as consumer or environmental protection, medical and employment law."*.

[310] Ibid., chapter 3.3, p. 29.

[311] Ibid., chapter 6.1.4, p. 119.

[312] Ibid., chapter 1.3, p. 10.

I will attempt to elaborate this point in a sub-chapter focused on the current limits to collective access to the courts.

Nevertheless, certain proposed features of the new collective redress mechanism may contribute to the effective protection of both individuals affected by an accident and the environment itself.

Most notably, the collective redress mechanism is intended to be based on the opt-out regime. Everyone with a similar claim would automatically become a party to the action unless they explicitly opted out. The court could decide in the initial certification phase of the proceedings that an opt-in basis would apply instead where appropriate (for example, if the individual claims were for substantial amounts).

The opt-out regime seems to be a preferred option from the perspective of environmental claims for three simple and somewhat related reasons. First, industrial activities and other potential sources of danger are usually placed in locations prone to poverty and social instability. Although this is not always the case, one cannot reasonably expect all the individuals affected by accident to defend their rights effectively at the court. Second, the consequences of the environmental disaster may not only deprive the individuals of their health and property but also of their ability to deal with the liability issues in the time required. In connection with environmental damage, the Draft even emphasises that it is:

> *"…advisable to spread leaflets among the affected individuals or send a letter to their address, which is easily identifiable according to the place where the accident occurred. The plaintiff will also publish important information on the court proceedings on a dedicated website."*[313]

Third, unlike consumer protection cases, environmental damage is, as a rule, closely associated with a particular geographic area. Naturally, this is often the area where the polluter's employees and their families live. In my opinion, the opt-in regime creates a sort of barrier the locals have to cross in order to protect their rights, whereas the opt-out scheme creates a safe haven first, which is more suitable for any negotiations, similar to an industrial dispute.

It is planned that class action disputes will be dealt with by specialised courts or specialised departments of courts, which may speed up the proceedings. The action would be financed by the claimants' legal representative, such as an NGO, who would be entitled to a percentage of the amount awarded if the action succeeded and liable to pay the defendant's legal fees if the action failed. The Draft Proposal does not exclude the possibility of a third party funding the action. This option may gather interest in environmental claims and help to fund the evidence-gathering necessary to prove the extent of the damage and to establish the causal link between the harmful activity and the damage. This is important since the Draft Proposal

[313] Ibid., chapter 4.2.5, p. 52.

does not ease or move the burden of proof that lies on the claimants. As a consequence, the introduction of class actions may level the playing field in environmental litigation and eventually contribute to equity of arms between the operator of a hazardous activity and those individuals suffering from its adverse outcomes. I will attempt to elaborate this point regarding the evidence in a sub-chapter focused on the rules on establishing the causal link in environmental matters.

On the other hand, the Draft Proposal suggests that the court fee should be high, in order to discourage claimants from abusing their procedural rights.[314] It is also somewhat disappointing that the Draft Proposal makes a direct reference to the 2013 Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms,[315] but does not follow many suggestions that aim to ensure effective judicial protection, such as the introduction of expedited procedures for claims for injunctive orders.[316]

13.3 The current limits of collective access to the courts

There are in principle no limitations on the standing of natural or legal persons in proceedings concerning damage claims before the civil courts. The Code of Civil Procedure provides against other proceedings in the same case from being conducted before a court against the same defendant (with a corresponding rule on *res iudicata*), but that rule only applies to the restricted list of types of proceedings that cover neither general claims for damages nor remedies in environmental matters.[317]

If there are several actors or defendants in one case, each of them shall act in the proceedings only for himself. However, if the case concerns such joint rights or duties where the judgment has to apply to all participants acting on one side, the acts of one of them shall also apply to the others. A change of the petition, its withdrawal, admission of the claim and conclusion of the settlement require the consent of all participants acting on one side.[318] Consequently, if several participants are required to pay a court fee, they are jointly and severally liable[319] – and pay only a single fee.[320]

[314] Ibid., chapter 1.5, p. 18.
[315] 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, available at: <http://data.europa.eu/eli/reco/2013/396/oj>.
[316] Ibid., paragraph 19.
[317] Section 83 (2) of Act No. 99/1963 Coll., Civil Procedure Code.
[318] Section 91 of Act No. 99/1963 Coll., Civil Procedure Code.
[319] Section 2 (8) of Act. No. 549/1991 Coll., on Court Fees.
[320] See Judgment of the Constitutional Court of 10 June 2010, No. II. Ús 1198/10.

Nevertheless, it is rare that the plaintiffs meet the requirement of joint rights in compensation claims (for example, the spouses as joint tenants of a flat in proceedings for the annulment of a joint lease notice or heirs in dispute with third parties until the final decision of the court). More often, the defendants share a joint obligation, for example if the debtor and the guarantor are jointly sued.

The law on joint participation in court proceedings does not serve as a collective redress mechanism, which is evident from the case law of both civil and administrative courts. According to the Code of Administrative Justice,

> *"unless otherwise provided for by this Act, provisions of the first and third parts of the Code of Civil Procedure shall be applied accordingly in administrative justice proceedings."*[321]

Therefore, at first sight, the rules on joint participation seem to be applicable to the proceedings of administrative judiciary. The administrative courts, however, concluded that joint participation is, in principle, excluded in administrative matters, since administrative justice protects the individual public-law rights of both natural persons and legal entities.[322] For example, in a case that reached the Supreme Administrative Court, 39 plaintiffs challenged new parking regulations, which approved paid parking zones for several areas in Prague. They suggested they should only pay a single court fee, but the Court ruled otherwise because, among other things,

> "…*each of the plaintiffs defends their own public right. Proceedings may continue even if one of the claimants takes back his proposal; the cessation of proceedings against one of the applicants or the rejection of his application by the court does not prevent the continuation of the proceedings with the other applicants."*[323]

The Draft Proposal of the Act on Collective Actions aims to strengthen the position of the public affected exclusively in civil disputes. It states that

> *"…the lack of civil remedies is evident in the field of environmental protection as regards small claims, claims that can be difficult to prove or claims that are many and have the same or similar factual and legal basis."*[324]

It does not specify the exact size of the group of individuals who may file a class action, but stipulates that it would be at the discretion of the court to consider whether the size of the group of applicants is appropriate for the particular procedure such that the process of individual claims would be impractical (*numerosity condition*). This may work pretty well as

[321] Section 64 of Act No. 150/2002 Coll., Code of Administrative Justice.
[322] See Judgment of the Supreme Administrative Court of 10 August 2011, no. 1 As 74/2011 – 251.
[323] Judgment of the Supreme Administrative Court of 12 January 2017, No. 7 As 318/2016 – 59.
[324] Draft of the material intent of the Collective Actions Act (Návrh věcného záměru zákona o hromadných žalobách), paragraph 3.3 ii b), available at: <https://apps.odok.cz/attachment/-/down/KORNAVPF7NOI>.

regards damage claims in an environmental matter, because it is frequent that a large group of individuals is affected and, for the whole group, matters of fact and law are common (*a commonality condition*).

Nevertheless, it seems that the Draft does not sufficiently reflect the inherent continuity of public and private law, which requires equally effective remedies in both fields of law. In other words, without collective access to administrative courts, the first effective remedy comes with a civil class action. From this perspective, the victims of environmental damage are conceived narrowly by the Draft, as being close to consumers. This does not seem to be in line with the principles of prevention and precautionary principles, the basic tenets of environmental law. Unlike consumers, the public concerned in environmental matters should be allowed to participate effectively in the decision-making and have access to court as soon as possible to affect the impact of the plans and projects on the environment, including the danger of potential accidents. For this reason, the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, usually known as the Aarhus Convention, puts much emphasis on participation in the environmental impact assessment procedure and also makes a direct reference to the Convention on the Transboundary Effects of Industrial Accidents. In this respect, the Czech courts have repeatedly emphasised that

> *"…public law protection should act more pro futuro and should prevent or limit the emergence of possible future emissions, while private law protection is usually used to resolve immissions that have already occurred."*[325]

The trend towards collective access to the administrative courts is quite evident. In cases that involved some much-debated issues, multiple plaintiffs asked for their rights to be protected.

For example, in 2011, 14 municipalities and 13 individuals (one an Austrian resident) challenged the Spatial Plan of the South Moravian Region. The Plan was adopted in the form of a measure of a general scope and, as such, could be reviewed by the administrative courts. The plaintiffs had all been represented by the same attorney and had to pay the court fees individually (approx. EUR 120 for the one-step court proceedings), even though they basically shared the complaints. They argued, *inter alia*, that the Plan did not sufficiently address the poor air quality in the region and excessive amounts of traffic emissions but, on the contrary, would contribute to their increase and would also increase noise pollution, reduce the locals' quality of life and also decrease the market value of real estate. The Supreme Administrative Court ("SAC") quashed the Plan, as it concluded that the SEA procedure and assessment of impacts on Natura 2000 sites had not been carried out correctly.[326]

[325] See, for example, Judgment of the Supreme Administrative Court of 29 September 2017, No. 8 As 17/2016-154.
[326] See Judgment of the Supreme Administrative Court of 21 June 2012, No. 1 Ao 7/2011 – 526.

In 2014, the movement against amendments to the Urban Plan of Brno raised about EUR 150,000 via a dedicated online funding platform for legal assistance. The action, which was filed by fifteen individuals, ended in a victory for the plaintiffs – the court quashed the amendment to a large extent.[327]

Recently, in a series of similar cases, individuals aided by NGOs challenged the air quality management plans adopted for several highly polluted regions – the Ústí nad Labem region and agglomerations of Prague, Brno and Ostrava. The courts quashed the plans (or parts of them) because they did not provide effective measures, contrary to the EU Directive 2008/50/EC on ambient air quality and cleaner air for Europe, and the Czech Air Protection Act, which both require that the plans ensure the achievement of the legal air pollution limits *"in the shortest time possible"*. The courts held that the plans should not only contain measures contributing to better air quality, but also the timeframe for their implementation, which should guarantee that the plans meet their goals in a given time. According to the courts, the plans should also contain the methods for evaluating the individual measures and to quantify their contribution to air quality improvement.[328]

It is not always individuals who reach the administrative courts. In 2015, in a case concerning the enlargement of the Václav Havel Airport in Prague, a corresponding part of the Spatial Plan of the Prague Region was challenged by five municipality districts, two individuals and four institutes of the Academy of Sciences of the Czech Republic.[329]

The scenarios mentioned above are not typical of the complaints against decisions made in the sphere of public administration. These are usually filed by a single plaintiff, very often a neighbour or an NGO. The administrative courts in the Czech Republic deal with a considerably higher number of actions filed by environmental NGOs than courts in other Member States. Between 2012 and 2018, this number reached 200, which also suggests that there is a considerable need to represent collective interests at court. However, the NGOs cannot in principle claim compensation for environmental damage or raise a claim pursuant to Act No. 82/1998 Coll., on liability for damage caused within the exercise of public authority by a decision or incorrect administrative procedure, because it does not possess any rights that can be violated by unlawful act or omission.[330] As a result, even if the NGO wins the court case, it is only entitled to reimbursement of the court fee and legal representation costs.

Furthermore, NGOs do not equally represent all the regions affected by pollution or danger of hazardous activities. In Prague, civil society is much more active than elsewhere, and not only because the central administrative authorities are located in the capital city. The

[327] Judgment of the Regional Administrative Court in Brno of 23 January 2015, No. 67 A 15/2014 – 551.

[328] See in particular Judgment of the Czech Supreme Administrative Court of 20 December 2017, No. 6 As 288/2016-146.

[329] Judgment of the Supreme Administrative Court of 21 November 2018, No. 2 As 81/2016 – 156.

[330] The Draft of the material intent of the Collective Actions Act explicitly excludes these claims from the material scope of the future collective redress regulations, available at: <https://apps.odok.cz/attachment/-/down/KORNAVPF7NOI>.

public concerned is relatively well-situated, educated and easier to activate here. As a consequence, Prague and Brno, the two largest cities, account for approx. two-thirds of all environmental cases brought by the NGOs. On the contrary, the administrative court in the industrial region of Silesia, which ranks among the most polluted in the whole EU, has so far dealt only with a few environmental cases concerning the situation in the region.

A class action is not available before the criminal courts. The victim (injured party) in criminal proceedings may claim compensation for damage from the offender in the civil proceedings but may also join the claim for compensation for damage to the criminal prosecution of the offender (in the 'adhesion proceedings'). Without a qualified motion of the injured party, the court in the criminal proceedings cannot decide on compensation for damages. If the claim is not proved, the court will forward the victim to the civil judiciary.

13.4 Available civil actions

Disputes between the private actors in environmental matters are usually solved based on the provisions protecting the rights of neighbours (Section 1013 of the Civil Code). According to these, the person affected may ask the court to order the owner to refrain from anything that would cause emissions and which are disproportionate to the local circumstances and substantially restrict the regular use of the tract of land. This kind of protection is preferred in cases of nuisance because the court fee is low (approx. EUR 80) and the plaintiff does not have to wait until the damage materialises. The claimant may also ask the civil court to issue a preliminary injunction to fix the conditions provisionally or if there is a risk that the enforcement of the (subsequent) court decision could be threatened.

The neighbours can, therefore, bring a case against a private operator of an industrial facility, but can only succeed if the emissions are disproportionate to the local circumstances. In their consideration, the courts also take into account whether the source of emissions servers public interest. In 2015, the Supreme Court ruled that

> *"In assessing whether (exceptionally) protection can be granted even against the interference arising from an officially authorised activity, it needs to be considered whether the plaintiff was able to raise objections to the operation in question during the administrative procedure. It is furthermore necessary to consider the general usefulness of the activity from which the interference originates and the social consequences of the possible ban thereof. This does not, of course, mean that individuals can be denied protection against apparently unlawful interference only for reasons of the overriding public interest. The significance of the activity should be a decisive factor in the border situations, as well as in considerations on the corresponding time limits, so that the defendant has a real possibility to take the necessary measures."*[331]

[331] Judgment of the Supreme Court of 28 January 2015, No. 22 Cdo 636/2014.

The plaintiff requested protection from excessive noise caused at night by the operation of the ArcelorMittal plant in Ostrava (metallurgical and steel production). The court ultimately denied the claim, quashed the decisions of the lower courts and concluded that

> *"it is necessary to compare the activity of the industrial plant with other sites in which similar facilities are operated. If the site is operated on the basis of the respective official permits, the "proportionality to the local circumstances" cannot be compared with the places where such production is not carried out."*[332]

Furthermore, the courts take into consideration the period over which the source of the emissions was already active. According to the case law, the chances of neighbours are significantly reduced. In this respect, a series of cases concerning traffic noise in Prague may serve as a good illustration. In 2006, a group of plaintiffs, around 3,000 individuals in total (twenty individuals, eight associations of unit owners, two cooperative apartments) asked the civil court for protection from noise emitted by the North-South Highway, which runs through the city centre of Prague and is one of the busiest links in the city, with the daily traffic intensity reaching up to 100,000 vehicles. Initially, the case was decided in favour of the plaintiffs living in the flats along the road. Later on, however, the Constitutional Court stepped in and took a different approach,[333] with an emphasis on the broader context of the problem:

> *"The condition of the local highway in question, including traffic on it, is the result of many years of development that could have already been known to many of the interveners at the time of their ownership. The plaintiffs themselves are very likely to enjoy the advantages of the road in question because they use it to reach and service the properties in their possession."*

Moreover, the Court added towards the requirement for traffic restrictions that

> *"it is necessary to consider the feasibility of such a step, taking into account the actual possibilities of the compulsory subject (especially if it is the owner of a public road), including its functional and financial options."*

Naturally, it is the traffic and industrial plants that have operated for many years which produce a large emission load and their contribution to general well-being might be identified as public interest compliant with state policies.[334] Moreover, the Civil Code adopted in 2012 introduced an additional rule: If emission is the result of the operation of an enterprise or a similar facility which has been officially approved, a neighbour only has the right to compensation for harm in money, even where the harm was caused by circumstances

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[332] Ibid.

[333] Judgment of the Constitutional Court of 11 January 2015, No. IV. ÚS 451/11.

[334] According to the judgment of the Supreme Administrative Court of 19 November 2014, No. 5 As 10/2013 – 38, *"the existence or intensity of public interest is often a matter of political extrapolation that cannot be completely separated from politics"*.

which had not been taken into account during the official proceedings. This does not apply if the operation exceeds the extent to which it has been officially approved.[335] As a result, the neighbours enjoy a considerably better position in cases of nuisance caused by minor activities which do not require an official permit. If industrial activities are involved, the individuals affected have to opt for another remedy.

Besides the protection of ownership rights, the Civil Code introduced the protection of the right to a favourable environment within the scope of personality rights.[336] Such a guarantee may play an essential role in filling the gap between protecting traditional rights, such as the right to life and health, and the protection provided for ownership rights, but it has not yet been directly invoked before the civil courts. There seems to be one case, though, which took a similar course. In 2012, an individual requested compensation for 37 trees that had been cut on his land without his consent. In addition to the price of the harvested timber, he also claimed compensation for environmental damage. The civil courts concluded that only the State is entitled to compensation for environmental damage under Act. No. 167/2008 Coll., Environmental Liability Act, which implements the EU Directive on environmental liability.[337] The Supreme Court, which dismissed a recourse against the decision of a regional court in 2016,[338] concluded that the claim could be only raised by the State under the jurisdiction of the administrative courts.

There is no doubt that the Court arrived at the correct interpretation of environmental damage, conceived as a specific concept of public law environmental protection and promoted by European Union law. On the other hand, such a description seems overly restrictive, since it does not entirely follow the rationale behind the claim in this particular case: The plaintiff evidently asked to be compensated for the ecological value the trees had beyond the price of the wood. Perhaps he could have been successful if he made his reasoning more precise and described the harm as non-material damage to his personal rights.

13.5 Regimes of civil liability and costs of proceedings

As regards liability regimes, a specific strict liability is established for the damage resulting from operating activities. Section 2924 of the Civil Code stipulates that a person who operates an enterprise or another facility intended for gainful activities shall provide compensation for the damage resulting from the operations, whether it was caused by the actual operating activities, by a thing used in these activities or by the impact of the

[335] Section 2013 (2) of Act. No. 89/2012 Coll., the Civil Code.
[336] Section 81 (2) of Act. No. 89/2012 Coll., the Civil Code.
[337] Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, available at: <http://data.europa.eu/eli/dir/2004/35/oj>.
[338] Ruling of the Supreme Court of 30 March 2016, No. 25 Cdo 2466/2014.

activities on the environment. The person is released from this duty if he proves that he has exercised all care that can be reasonably requested to prevent the damage. This type of liability cannot be avoided by an argument that the operator fulfils his obligation to pay fees for emitting the harmful substances.[339]

Culpability is not required. The damage must be caused by the operation of an enterprise or a facility,[340] which is not always easy to determine. For example, in the judgment of 25 November 2009, No. 25 Cdo 2429/2007, the Supreme Court dealt with a case of a wall that collapsed during the construction of a department store. The Court quashed the decisions of the lower courts because it was not evident whether the accident was a consequence of the industrial activity or it resulted from a different cause. On the other hand, in a judgment of 25 February 2011, No. 25 Cdo 1117/2008, the Supreme Court concluded that a person operating a campsite for cars is liable in the strict liability regime for damage caused by branches falling from the trees located in the camp because those trees are part of the facility. The fact that the branches broke in a strong wind would be considered an extenuating circumstance.

Even more stringent conditions are laid down if the possibility of severe damage cannot be reasonably excluded in advance even by exercising due care. Such an operation is labelled particularly hazardous, and the operation is presumed to fall into this category if it is carried out in a factory-like manner or if explosive or similarly hazardous substances are used or handled in it. Factories and power plants are often considered particularly dangerous unless the operator demonstrates that the damage in question was not caused by the action of a particularly dangerous natural force, raw material, equipment, product, activity etc.

A person who operates an enterprise or another facility that is particularly hazardous must compensate the damage caused by the source of the increased danger. Otherwise, the person is released from the duty if he proves that the damage was caused by *force majeure* or by the very acts of the victim or unavoidable acts of a third person. If other grounds for the release from the duty have been stipulated, they are disregarded.[341] Furthermore, if circumstances clearly indicate that the operation has significantly increased the risk of damage, although other possible causes can be legitimately referred to, a court shall order the operator to provide compensation for the damage to the extent that corresponds to the probability of the damage having been caused by the operation.[342] In this respect, the legislation follows recommendations on alternative clauses provided by PETL.[343]

In practice, however, strict conditions on liability do not result in a plethora of civil cases. The reason is probably threefold: the potentially high costs of the proceedings, the burden of

[339] Judgment of the Supreme Court of 16 July 2008, no. 25 Cdo 769/2006.
[340] Judgment of the Regional Court in Pilsen of 23 March 2016, no. 25 Co 394/2015.
[341] Section 2925 (1) and 2925 (3) of Act. No. 89/2012 Coll., the Civil Code.
[342] Section 2925 (2) of Act. No. 89/2012 Coll., the Civil Code.
[343] Section Art. 3:103 (1) Principles of European Tort Law.

proof, which lies on the plaintiff, and the fact that the damage is often minor and widespread among a large number of affected individuals.

As regards the cost of the proceedings, the party ordered by the court to pay the costs is in principle the losing party.[344] The court has discretionary power, and provided a party was successful only in part; it is up to the court to decide on the distribution of fees. Costs of the proceedings comprise the cash expenses of the parties and their attorneys, including court fees and loss of earnings of the parties, as well as their attorneys, costs of gathering and presenting evidence and interpreter's fees.

In disputes concerning environmental aspects, the evidence-related costs may present a significant share of the costs of proceedings. However, it is usually the costs of legal representation that reach high amounts because of the specific nature and complexity of such cases. Furthermore, the proceedings tend to last a long time and the activity of attorneys is required throughout.

The court fees vary according to the type of proceedings. Fixed fees apply in some cases; in others, the fee payable is calculated as a percentage. Reimbursement of the costs of representation by counsel is typically adjudicated in the court decision by fixed tariffs laid out in law. The tariff is based on a non-contractual fee rate per legal act and based on the number of legal acts performed by the attorney in the case.[345]

The base of the percentage court fee is principally the price of the subject-matter of the proceedings expressed in a sum of money. In claims for compensation, the court fee is CZK 1,000 (ca. EUR 40) for claims under CZK 20,000 (approx. EUR 800), 5% for claims between CZK 20,000 and CZK 40 million, CZK 2 million and 1% for claims over CZK 40 million with a maximum court fee of CZK 4.1 million.[346] As regards claims for non-material damages, the plaintiffs are released from the obligation to pay the court fee in proceedings for compensation for personal injury or injury caused by killing, including compensation for damages in connection with injuries caused by injury or death and reimbursement of the costs of treatment.[347] The plaintiff may ask for the exemption from court fees and also for the appointment of an attorney, provided he proves a lack of financial resources.

The Draft Proposal suggests that plaintiffs (their representative) should have to pay a court fee of CZK 25,000 (ca. EUR 1,000) for all types of class action. After that, the court considers whether the action does serve its purpose and does not, in fact, present an abuse of rights. After that, the plaintiffs have to pay 2% of the claim as the court fee, with a maximum of CZK 5 million.[348] It is not expected that the plaintiffs may ask for any exemption from the court fees and appointment of an attorney.

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344 Section 142 (1) of the Act No. 99/1963 Coll., Code of Civil Procedure.
345 See Regulation of the Ministry of Justice No. 177/1996 Coll.
346 Section 2 (8) of Act. No. 549/1991 Coll., on Court Fees.
347 Ibid.
348 The Draft of the material intent of the Collective Actions Act (Návrh věcného záměru zákona o hromadných žalobách), chapter 4.2.10, p. 63 – 64, available at: <https://apps.odok.cz/attachment/-/down/KORNAVPF7NOI>.

13.6 Establishing the causal link

Establishing a causal link between the activity and the damage is difficult if the cause of the damage is not *prima facie* identified. For example, in a case before the District Court in Jihlava,[349] a plaintiff failed to establish a causal link between the activity of the professional cleaning company and dirt patches of construction glue that continuously appeared on the floor in his apartment, even after treatment repeatedly performed by the cleaning company. The court concluded that the person liable for the damage was not sufficiently identified, since there could be another cause of the problem. The plaintiff claimed CZK 69,659 (EUR 2,700) and was ordered to pay CZK 35,850 (EUR 1,400) for the costs of proceedings.

The treatment of causation has been particularly inconsistent in environmental cases, both public and civil ones. Before administrative courts, it is predominantly considered as a component of *locus standi*. Meanwhile, civil courts focus on whether the plaintiff has presented sufficient evidence on causation after standing has been established (or presumed). The differences can also be attributed to the specific circumstances of each particular case. It seems that the courts are more willing to recognise a causal link if damage to property is involved than regarding claims for compensation for non-material damage. Furthermore, science may develop over time and provide more effective methods to track (or exclude) the actual cause of the damage in multiple-emitter environmental cases. Because of the nature of the substances generally involved, the harms due to exposure are often not discovered until long after an incident occurred.

Under Czech law, the parties must identify the evidence they rely on in their allegations. The court subsequently decides which of the evidence adduced shall be taken. Nevertheless, the court may (or must, in fact) also take evidence other than adduced by the parties where it is required to ascertain the facts of the case and where they follow from the contents of the file.[350] Courts generally allow evidence from epidemiological or toxicological studies that establish a likely causal relationship between exposure and harm. These studies, however, must be presented or at least proposed by the plaintiffs with reasons for their relevance. Epidemiological studies, for example, which examine existing populations for an association between a disease or condition and a factor suspected of causing that disease or condition, are increasingly indispensable in tort cases concerning toxicity where specific causation studies are lacking. However, the plaintiff has to invest money in such expertise if there is nothing that would provide useful conclusions tailored to the specific circumstances. Even though it is not required that the truth is established with absolute certainty, a great degree of probability of the relevant facts neighbouring on virtual certainty is nevertheless required.[351] This problem alone asks for a different approach to class actions in environmental matters compared to consumer protection.

[349] Judgment of District Court in Jihlava of 7 August 2015, no. 4 C 184/2009-174.
[350] Section 120 (2) of the Act No. 99/1963 Coll., the Code of Civil Procedure.
[351] Judgment the Supreme Court of 8 January 2014, No. 28 Cdo 3459/2013.

To provide an example, a number of court decisions have been adopted by the Czech courts with regards to damage to forests. The usual plaintiff, Lesy ČR, a state company responsible for management of state-owned forests, frequently claimed damages caused by toxic pollutants emitted by nearby industrial operations (heat and power plants). For a long time, the courts considered the causal link sufficiently established.[352] Many cases even reached the Constitutional Court with the same result: All constitutional complaints have been dismissed as manifestly unfounded.[353] The courts based their decision on the argument that the complainant cannot successfully protect itself, pointing out that the discharged emissions were spreading in the area in a direction that the operator could not influence, as well as the fact that the emissions were deposited on the earth's surface. To support its findings,[354] the Constitutional Court even referred to the case law of the CJEU on environmental liability, according to which the EU directive

> *"…does not preclude national legislation that allows the competent authority acting within the framework of the directive to operate on the presumption, also in cases involving diffuse pollution, that there is a causal link between operators and the pollution found on account of the fact that the operators' installations are located close to the polluted area"*,[355]

and the case law of European Court of Human Rights regarding general interest on protection of environment.[356]

However, the above approach seems to have changed recently. To depart from the settled case law, the courts rely on the provisions of the (still rather new) Civil Code and any substantial change in the circumstances on the side of the polluters. They conclude that, due to the massive investment in the greening of incineration processes carried out in the 1990s, operating activities are so marginal compared to other factors affecting forest health that the adequate causal link is pretty much absent.[357] For the owners of the forests, this translates to a sudden deficit of millions of Euros annually.

The compensation for damage to forests is subject to rules set out partially in a specific public law regulation;[358] the principles of civil liability are applicable nonetheless. The conclusions of

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[352] See Judgments of the Supreme Court of 28 August 2003, No. 25 Cdo 325/2002, of 24 April 2013, No. 25 Cdo 4346/2011, or resolutions of 29 November 2010, No. 25 Cdo 2745/2009, of 24 April 2013, No. 25 Cdo 4346/2011.

[353] See resolutions of the Constitutional Court of January 2009 file no. II ÚS 3089/08, of 5 May 2008 file No. IV 509/08, of 24 October 2013 file no. III Ú Ú 3375/12 and of 21. November 2013 file No. III ÚS 1211/13.

[354] Resolution of the Constitutional Court of 12 November 2017, No. I. ÚS 1821/16.

[355] Judgment of the Court of Justice of 9 March 2010, *ERG and Others* (C-378/08, ECLI:EU:C:2010:126).

[356] Judgments of the European Court of Human Rights of 29 November 1991, *Pine Valley Developments Ltd and others v. Ireland* (Application no. 12742/87); and Judgment of the European Court of Human Rights of 29 March 2000, *Depalle v. France* (Application no. 34044/02); and Judgments of the European Court of Human Rights of 21 March 2006, *Valico S. r. l. v. Italy* (Application no. 70074/01).

[357] See for example judgment of the District Court of Prague 4 of 17 July 2018, No. 55 C 114/2008-1257.

[358] Decree of the Ministry of Agriculture No. 55/199, on the method of calculating the amount of damage or damage caused by forests, and Section 21 (1) of the Act No. 289/1995 Coll., the Forest Act: *"Legal entities and individuals who, in their activities, use or produce matters damaging the forest, shall be obliged to take measures to avoid or reduce their harmful impact."*.

the case law can, therefore, illustrate how the courts would probably deal with class actions in environmental matters. At the same time, it is hard to imagine individuals who would avail of the funds needed for scientific expertise in the complex issues in disputes concerning minor health issues or minor damage on the property. It is therefore not surprising that, of the few similar cases dealing with damage caused by industrial activity, small claims are rare. The courts have dealt, for example, with damage to crops over 392.5 hectares caused by SO_2 emitted by power plants[359] or accidents at work that resulted in death.[360] In these cases, the causal link had been established.

13.7 Conclusions and recommendations

There is no doubt that the lack of class action or *actio popularis* renders any defence against complex environmental damage difficult, even though the system of judicial protection is deemed accessible. The Czech Draft Proposal of the Act on Collective Actions aims to introduce several legal instruments that will help to compensate for the damage caused by industrial accidents. Most notably, environmental cases may gain attractiveness among commercial lawyers, and the affected individuals could finally coordinate their steps in single court proceedings. To be admissible, the collective action must meet various conditions, including *numerosity* and *commonality*, and must be the best possible procedural way of dealing with the claims.

It is my belief that more disputes on compensation will be settled consensually or out-of-court, both at the pre-trial stage and during the civil trial, even purely because of the class action's existence. The operators will calculate the risks of losing the case and the costs of negative publicity accordingly.

However, the pitfall of the Draft Proposal seems to lie in the ignorance of the differences between consumer protection and environmental protection. The same mistake watered down the ambitions of the 2013 EU Recommendation on tackling the environmental issues. The 2018 report on the Recommendation[361] shows that collective redress in the environmental field is pretty much non-existent in the EU, even though several Member States introduced a corresponding system of representative action.

In consumer disputes, the defective products usually do not differ one from another. The criteria for liability and for the successful claim are therefore met simultaneously towards

[359] Judgment of the Supreme Court of 18 October 2005, No. 25 Cdo 2749/2004.

[360] Judgments of the Supreme Court of 10 November 2015, No. 21 Cdo 1161/2014, of 18 February 2015, No. 25 Cdo 1641/2014.

[361] Report from the Commission to the European Parliament, the Council and the European economic and social committee on the implementation of the 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 (2013/396/EU), 2018, COM/2018/040 final, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2018:0040:FIN>.

the whole group (class) of consumers. In environmental cases, the class of affected individuals is not homogenous. Its identification is a serious task on which the victims, the polluter and the official authorities have to cooperate. The evidence may provide a proof of an association which is in principle not equivalent to causation. Rather, there is a certain degree of statistical significance between events and variables with regard to each particular claim. As a result, environmental cases deserve a specific approach.

The most important problem with the Draft Proposal, however, lies in the narrow concept of environmental damage. A class action in environmental matters is conceived as a tool to collect compensation after an industrial accident. Nowadays, this is a very *niche* scenario that does not reflect the most destructive cases of mass harm. In the Czech Republic, these include excessive noise and air pollution, unauthorised use of pesticides and polluted groundwater. These problems need to be addressed, not only because they expose gaps in the enforcement of environmental law but also because they create thousands of victims who are continuously overlooked at both the national and the EU level.[362]

In conclusion, I would like to put forward a few recommendations for the new legislation on the collective redress mechanism as regards compensation in environmental matters. To become an effective legal tool, it should:

– stick to the opt-out regime, which seems to be a preferred option from the aspect of environmental claims;
– broaden the scope of the new legislation beyond damage caused by industrial accidents;
– target actual environmental issues that affect the life of the population on a day-to-day basis;
– strengthen the position of multiple plaintiffs in disputes before administrative courts, in line with the principle of prevention and the precautionary principle;
– introduce specific rules on the identification of the individuals entitled to compensation and evidence on the causal link between the harmful activity and the damage.

[362] There are exceptions. For example, in its resolution of 26 October 2017 on the application of Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage (the 'ELD') [(2016/2251(INI)], the European Parliament emphasises that EU law demands that European citizens are guaranteed effective and timely access to justice, and, thus, urges *"the Commission to assess the possibility of introducing collective redress mechanisms for breaches of the Union's environmental law"*.

14 Environmental collective redress mechanisms in Hungary: Legal considerations

Gyula Bándi

14.1 Introduction: Hungarian constitutional provisions and their consequences

The right to a heathy environment as a potential human right first emerged in Hungary in 1976 in the first environmental act – Act II of 1976 on the Protection of the Human Environment, section 2 (2). It reads: 'Every citizen has the right to live in an environment worthy of man.'

The amended Constitution – the original 1949 constitution had been amended in 1989 in order to prepare for the coming political change – provided for environmental rights in two different articles:

- Section 18: 'The Hungarian Republic recognises and implements everybody's right to a healthy environment.'
- In Article 70/D, environmental protection was also mentioned in paragraph 2 as an instrument for safeguarding the right – as prescribed in Article 1 – to the highest level of mental and physical health and not as a standalone right. Environmental protection was mentioned beside healthy working conditions, management of the health care system and ensuring regular physical training.

Due to the general phrasing, this article had to be interpreted first, in order to be implemented. The only authorised interpreter of a constitutional provision, whose analysis is also binding, is the Constitutional Court. The first and most important of the several similar cases within which the Court provided an explanation of the concept of the right was the decision no. 28/1994 (V.20.) of the Hungarian Constitutional Court. The case in question was an appeal against the constitutionality of the provisions of an act that might lead to the curtailment of nature conservation areas and also to the degradation of natural assets,

through opening up the possibility of privatising nature protection areas without giving any balancing obligation or limitation. The court stated that although the private property of nature conservation areas was legal *per se*, a set of obligations and limitations on the use of this property was missing.

The major argument came from the environmental rights. In this decision, the court interpreted the constitutional right to a healthy environment, as appears in both of the above articles of the constitution. The decision states that the right to a healthy environment constitutes an obligation for the state to establish and maintain the specific system of institutions to protect this right. These legal and organisational institutions are necessary for the implementation of this right, but a mere statement is far from enough. The decision also emphasises that the specificity of the right to a healthy environment is based on the fact that the real subjects of the right should be humanity and nature.

This first judgment also stresses that the level of protection is not at the discretion of the state, as it constitutes the foundations of human life and the harm to the environment is usually irreparable. The need for a certain level of protection leads to a strict regime of security. Thus, the state is free to choose from the means and methods of protection, but has no freedom in allowing any form or even admitting the risk of degradation.

One paragraph of the decision explains that prevention has priority over sanctions in the field of environmental protection. Prevention as a requirement can only be effective if the legal framework for effective protection is made. Moreover, it is not allowed to limit or risk the given level of protection with unclear privatisation rules and property relations and without a system of preventive measures. This is also taken as the prohibition of setback or step backwards (non-retrogression principle).

There were several other similar judgments by the Constitutional Court – see, for example judgment 48/1997. (X. 6.) AB or 48/1998. (XI. 23.) AB, while some Constitutional Court decisions discussed the problems of conflicting human rights, such as the conflict between property rights and the right to a healthy environment (e.g. 106/2007 (XII.20.) AB, within which the Court underlined the need to have a proportionality/necessity test in each and every case where there is a likelihood of some limitation of a human right. The only possible constitutional reason could be the need to protect a different basic human right or to serve a constitutional objective. As to the limitation of property rights, the Court said “not as an absolute right, as it may proportionately be limited, if it is needed due to public interests” (64/1993 (XII.22.) AB).

The new Constitution (adopted on 25 April 2011), known as the Fundamental Law, is divided into the following parts, each represented by a different way of numbering:

– National Avowal, acting as a long preamble;
– Foundation, covering several really basic rules and also procedural elements;
– Freedom and Responsibility – the human rights;
– The State, including the budgetary or defence issues.

The National Avowal also contains environmental elements, embodied in a larger context: “We commit ourselves to promote and safeguard our heritage, our unique language, the Hungarian culture, the languages and cultures of nationalities living in Hungary, along with all man-made and natural assets of the Carpathian Basin. We bear responsibility for our descendants; therefore, we shall protect the living conditions of future generations by making prudent use of our material, intellectual and natural resources.”

There are three major concepts, essential from the point of view of the environment:

(1) National assets or national heritage, extended not only for assets within the boundaries of Hungary, but also in the whole Carpathian basin, which, according to some critics, is an unreasonably nationalistic approach, but for others is a normal reflection of the ‘Pannon ecoregion’ approach (this is reflected in the ecoregion distribution of the Natura 2000 system). We may also refer to the concepts of the “common heritage of mankind” or “common concern for humanity” as similar arguments.

(2) The mention of future generations may also be taken as an important element, mostly along with the emphasis on resources, which together may also be taken as constituents of sustainable development.

(3) Finally there is human dignity, a third value raised by the Preamble: ‘We hold that human existence is based on human dignity.’ Human dignity may best be protected together with the natural environment and environmental protection in a wider context. One cannot separate human dignity from the fact that humanity is part of nature.

The most important general basic requirements and statements are covered in the Foundation, as Article P), being a very complex summary of heritage, using the definition in a broad context and referring to future generations again: “All natural resources, especially arable land, forests and drinking water supplies, biodiversity – in particular native plant and animal species – and cultural assets shall form part of the nation’s common heritage, and the State and every person shall be obliged to protect, sustain and preserve them for future generations.” This Article provides a list of elements of common heritage, without being exclusive, thus allowing the extension of the list. A vital point here is the focus on obligations and not only the mere reference to rights.

Freedom and Responsibility is the actual human rights chapter of the Fundamental Law, which contains all the general human/citizens’ rights, among which there are two articles focusing on the right to a healthy environment in a way that reminds us of the provisions of the previous Constitution, first Article 70/D (public health), second Article 18 (environment).

Article XX of the Fundamental Law is the more indirect, connecting environment protection to public health, where environmental protection is taken as a means of safeguarding public health: “(1) Every person shall have the right to physical and mental health.” In (2) some specific constituents of the right are mentioned, among others environmental protection.

Article XXI is the specific article on environmental rights, the first paragraph of which has been the major legal basis for interpretation before the Constitutional Court until recently: "(1) Hungary shall recognise and enforce the right of every person to a healthy environment." (2) is a narrow understanding of the polluter pays principle, while (3) is a rudimentary reference to the transboundary movement of waste.

The Constitutional Court, while somewhat hesitant in certain other issues, is relatively active in interpreting the cases in connection with the right to a healthy environment and is widening its approach to cover even more aspects than earlier. The first in the list is Constitutional Court decision No. (28/2017 (X. 25.) AB), connected with nature conservation, more specifically with Natura 2000 protection versus agricultural uses. Some new provisions of agricultural uses – according to the Court – limited the chances and efficiency of nature conservation, while it was not a necessary condition or prerequisite to protect any other human right or constitutional value. The verdict did not intervene directly in the regulatory process, but only stated that the legislator made an omission. Fortunately, the Court listed some very important basic requirements, which could be used for any further legal arguments. It underlined the importance of biodiversity and the special use of Natura 2000 sites, referred to the common heritage of the nation – which is closely connected to the common heritage of mankind – and emphasised again the non-regression (or non-derogation) principle. According to the Court, while environmental protection is everyone's obligation, the responsibility of the state is even greater, as the state must plan for effective environmental protection.

In this decision, the Court also interpreted the obligations towards future generations, as it has been articulated by Article P) of the Fundamental Law. This encompasses a threefold obligation: (1) to provide the chance for selection; (2) to maintain the quality of the environment; and (3) to provide the opportunity for access. All three must be used in a way that protects the interests of future generations. In the given case, it means that a purely economic vision in connection with the utilisation of Natura 2000 sites may not be acceptable.

We must take this set of obligations into consideration when arguing in connection with any class or any kind of collective litigation. Consequently, if one refers to the interests of future generations, the last element from the above mentioned three might better be taken as a likely conceptual basis of supporting access rights and develop tools for it.

Finally, the Court clearly stated that the state, when making various decisions in connection with nature conservation, must keep in mind the precautionary principle. The precautionary principle has been taken as part of the constitutional right to a healthy environment.

A further judgment (3223/2017 (IX. 25.) AB), while rejecting the motion, interpreted the principle of non-derogation, which must cover both the regulatory steps and the individual decision of the authorities. It also stated the requirement to carry out a necessity assessment and proportionality test when making such decisions.

The most recent judgment (13/2018 (IX. 4.) AB) is based upon the constitutionality initiative of the President of the Republic, using the arguments of the Ombudsman for Future Generations to a large extent. The main issue is water management, more specifically, the unlimited drilling and use of groundwater wells, down to the level of 80 metres. This judgment combines the references to future generations and the right to a healthy environment with the questions of state property or even more national assets (Article 38 of the Fundamental Law) – water resources belong to this scope. The non-regression principle is underlined again, as being based on the provisions of Fundamental Law, and it is combined with the precautionary principle, also distinctly referred to. In both cases the necessity-proportionality test must be used, comparing the protection of the environment to the protection of various other human rights. As the proposed law aims to eliminate the permitting or notification requirements with regard to the given wells without replacing them with any other guarantees, the Court could not accept this regression of protection interests.

If we now look at the chances of legal action, the major constitutional source of any such action is Article XXVIII of the Fundamental Law – within the chapter on human rights – which provided the framework for administrative and judicial review in a broad approach:

> *"(7) Every person shall have the right to seek legal remedy against any court, administrative or other official decision which violates his or her rights or lawful interests."*

This provision had not been part of the previous constitutional language, so we might take it as another major general step forward, although these provisions have already been implemented in the different procedural regulations and in practice; as such, the current wording is only a repetition of the legislative situation.

14.2 The Hungarian Environmental Act and access to justice

As to the conditions of access to court and class action provisions, we shall make a distinction between the environmental provisions and the general procedural ones. The first group of provisions has not been changed over the past 20 years, while the latter are brand new; all entered into force in January 2018, so it is too early to provide any realistic comments on the practicability of these rules.

Chapter VIII of the Environmental Act (Act LIII of 1995 on the General Rules of Environmental Protection) begins in section 97 by providing a general outline for public participation in procedures, emphasising that the different legal regulations and the Act itself describe different rights.

There is a general right, open to everybody, to draw the attention of the operator and of the authorities if there is hazard to the environment, or a risk of environmental pollution or

environmental damage. The authorities shall provide a response to written notifications. Unfortunately, that is the end of the story, as there is no action by the authority; this 'answer' may not be taken as a decision, not even a kind of warrant, which may be questioned in court. That is the main reason that we do not meet those requirements of the Aarhus Convention, which have also been emphasised in the recent judgments of the CJEU,[363] namely to have access to justice in the event of omissions.

Section 98 (1) stipulates that environmental associations – if they are not considered political parties or interest representation organs – in their respective geographical area may act as a client in environmental administrative procedures. To decide whether an association may be taken as an environmental association, is also similar, thus its articles of association determine the field of activity. If environmental protection is listed in its articles and consequently this may also be found in the register of associations, the given body shall be taken as an environmental NGO. There are no professional conditions mentioned, nor is there any requirement related to a minimum period of operation or to a minimum number of members. There is one question, left open: what does the term 'environmental administrative procedure' mean? We come back to this later.

Act CLXXV of 2011 on the Freedom of Association, the Public Benefit Status and the Operation and Support of Civil Society Organisations provides some explanations. The essential paragraph in this respect is Section 3 (4), which reads: "On the basis of the right of association, civil organisations may be established for the purpose of any activities that are in harmony with the Fundamental Law and are not prohibited by an act." The real limits are thus nothing more than the limits of legitimacy. Consequently, if the organisation claims that it is established to protect environmental interests, it depends on its own decision and competence.

The act specifies also the classes of geographical scope, determined by its articles, too. Section 2, on the definitions in point 13, lists four options: local, regional, national or international civil organisations may be founded. When the right to court access is the clue, it is again the articles and the register that decide. As such, those associations that claim that they are national may participate in any proceedings in Hungary, while those that only refer to local interests may not participate in proceedings outside their geographical scope. There is no restriction on taking any association national or even international.

Environmental NGOs, according to Section 99 (1), may take action in the interest of environmental protection in the event of a risk to the environment, environmental pollution or environmental damage and may:

a) request the public administration or the local government to take the necessary measures; or

[363] See, for example the 'Slovak bear' case, Judgment of the Court of Justice of 8 March 2011, *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* (C 240/09ECLI:EU:C:2011:125).

b) file a case against the operator, asking the court either to stop the wrongful activity or to oblige the operator to take the necessary preventive measures. This may also be taken as a kind of *actio popularis*.

In connection with point (a) we again have to remember that there appears to be no second step towards a second instance or a court, if the public organ does not take any measures. If we examine the above provision carefully, point (b) may also be the next step.

From the above conditions, the term 'environmental administrative procedure' must be discussed in detail. Until 2004, when the Supreme Court first issued a Legal Uniformity Decision, there were different interpretations. The 1/2004 Decision has been repealed and replaced by a new Legal Uniformity Decision in 2010 – this is the 4/2010 Decision – in order to further clarify the problem. The major parts of the new and the old Decision are similar: all those cases within which the environmental authority has decision-making competence and within which the participation of the environmental authority as a specific or consent giving authority is prescribed by a legal regulation shall be taken as environmental administrative cases. This latter condition does not necessarily mean that the environmental authority is participating in the given case, but it is sufficient if this opportunity is prescribed in law, as it would mean that there is a greater chance of an environmental context.

Environmental interest representation also means a slight limitation in judicial proceedings in those cases where the focus is not on environmental issues. Access to justice is not open-ended, so the interests represented by environmental NGOs must be environmental interests and may not go beyond this right. There is one more important statement in the Decision, which opens the door for easier access to justice: the given NGO may intervene in the judicial proceedings even if it did not participate in the administrative procedure.

We might also add that the Nature Conservation Act (Act LIII of 1996 on the Protection of the Natural Environment) in its section 65 (1) stipulates options similar to that introduced by the general entitlement of the above Environmental Act, namely the same kind of quasi *actio popularis* is provided for. This provision gives the right to NGOs with a nature conservation interest that, in case of damage to or endangering nature conservation areas and assets, the association may:

a) require the public administration or the local government to take the necessary measures; or
b) file a case against the one causing the damage or endangering the protected nature conservation areas or assets, asking the court either to stop the wrongful activity or to oblige the operator to take the necessary preventive measures.

This is a somewhat narrower concept, limited to nature conservation interests and, in the event of judicial action, only to protected areas and species.

We come back at the end to the omissions in public administration.

It is also stated in the Environmental Act, in section 109 (3), that the prosecutor (attorney general) may also file a lawsuit in order to prohibit the environmentally dangerous activity or to make the polluter pay compensation for the damage.

14.3 Procedural provisions

The Act on the General Provisions of Administrative Procedure from 2004 (Act CXL of 2004 – Ket.) – valid till 2017 – prescribed in its standing rules a wide interpretation who can be a client of administrative procedure, covering many elements of environmental interests. In the previous Act on Civil Procedure (Act III of 1952) there were also some general conditions. In civil law procedures, only those who may prove their direct legal interest may be parties to the case, according to Article 48 (1) of the former Act on Civil Procedure, those who may have rights and duties based on the Civil Code, thus there is no specific additional requirement. The second option, access to justice, is directly connected with the opportunity of being a party in public law procedures. This may also be open to environmental NGOs as discussed above.

The conditions of intervention into a judicial supervisory procedure of an administrative decision have also been included in the above mentioned Legal Uniformity Decision. Section 54 (1) of the Act on Civil Procedure of 1952 required a legal interest for the intervention. This legal interest – according to the Decision – may be decided solely on the basis of geographical scope and the field of activity. The geographical scope and the impact area should correspond with each other. Thus, everything is decided by the NGO itself, in its articles of association – is it a national or a local association, is it interested in environmental protection or not. The Legal Uniformity Decision clearly underlines that

> *"The legal interest is an objective category, meaning the specific impact area concerned and should not depend upon the exact participation within the given procedure, thus it is not dependent upon the exact use of the right to be a client."*

The civil procedure also covered the possibility of participating jointly in judicial proceedings, if the rights and duties are common or are based on the same legal relationship, and also if they are not common but similar and the same court is involved. (Articles 51–53 of the Act on Civil Procedure of 1952).

Practically everything changed after 1 January 2018, both the administrative procedure and the civil procedure, plus a new act on the procedure of administrative litigation could come into the scene. We simply do not have any practical information on the changes, evidently.

14.3.1 The Act on Administrative Procedure (Act CL of 2016)

The provisions related to the client/party of the procedure have also changed, simplified in a way and they do not refer to impact area as before (section 10). According to the official reasoning, this does not really mean a change, as everybody whose rights and lawful interests are affected is regarded as a party to the procedure and the reference to those living or having property at the impact area shall be taken as interested parties. The practice shall decide in this respect.

Section 10 (2) refers again to other persons or organisations, that have a legal status of a party according to a specific act or government decree as it is the case of the environmental act. The client is the one whose rights and lawful interests are affected, whose data is present in public registers, or who is under a monitoring process on behalf of the authorities. An act of a government decree may also add other conditions open to define the client – as in environmental proceedings, where environmental NGOs have the right to participate as clients in them. This means that there is a slightly narrower concept of the client than before, namely those interested persons living in the impact area are not taken automatically as clients of the case.

There are several options open for the parties of a public administrative procedure to challenge the decisions, inside or outside public administration. The first and the least complicated in the Act on Administrative Procedure is correcting and supplementing the decision – section 90 therein. Correction means here the reparation of a mistake related to the mistakes made by the authority within the decision – misspelling the name, erratum of a number or calculation – that does not influence the merits of the case. Supplementing is to insert those necessary elements into the decision, required by lay but missing from the decision. There are some time limitations on completion; for example it may not be performed after one year from the decision entering into force of or it may hurt others' rights. The list of remedies in administrative procedures makes a distinction between remedies commenced by the party and *ex officio* remedies:

(1) remedies commenced by the party are:

– judicial review (we do not discuss judicial review here but in subchapter 14.3.2 below; and
– appeal.

(2) *ex officio* remedies might be:

– commenced by the decision-making authority by its own motion, meaning the withdrawal or modification of the decision;
– a supervisory or oversight procedure; and
– a consequence of the intervention of the prosecutor.

Section 114 covers the judicial control conditions, without any innovations, thus it is strictly connected to the term of the client. Under the current legal situation, the major remedy

against administrative authority decisions is a judicial review, while the appeal is a secondary issue. Even if there is an appeal within the administrative procedure, there must always be a chance to go to court, and in cases, where there is no appeal available, the consequence is to have a two-instance judicial procedure.

14.3.2 Code of Administrative Court Procedure (Act I of 2017)

The judicial review of administrative decisions is regulated by a new act – Act I of 2017 on the Code of Administrative Court Procedure (*közigazgatási perrendtartás*), the main aim of which is to prepare the creation of an independent administrative court system. Most kinds of administrative decision might be taken to court. Under normal conditions, the first instance court is the administrative and labour court – still within the general system of the judiciary – while the regional courts and the Curia might sometimes also have first instance functions, they usually act as the appeal level. The most important change in the system is that the court is entitled to review the lawfulness of the administrative activity [Section 85 (1)], so it might also modify the decision – the details are in Section 90 of the Act – or if the conditions are not met, the right to appeal to a higher court is always open. The right to amend a verdict or order is open if the nature of the case makes it possible, the facts are clarified and there is enough data to make a final judgment.

The judgment of the court is obligatory in its entirety (both the main part and the reasoning); the public authorities shall only adopt decisions meeting the conditions of the judgment. If the court has adopted a decision on the merits of the case, new proceedings may not be opened before the same authority in the same case, on the same grounds, except if new proceedings were ordered by the court of jurisdiction for administrative actions (Art. 97). The authority shall also be bound by the operative part of the decision and the statement of reasons adopted by the court and shall proceed accordingly in the new proceedings and when adopting a decision.

In the Code of Administrative Court Procedure there are four questions to be discussed:

(1) who has the right to file a case under civil law;
(2) who has the right to file a case under public law – access to justice;
(3) who is the defendant; and
(4) who may be taken as having a right to intervene in a case.

Ad 1) According to section 17 of the Code, the following are entitled to bring an action:

(a) the person, whose rights or lawful interests are directly affected by the administrative activity;
(b) the prosecutor or the organ exercising the supervision of legality;

(c) an administrative organ that did not participate in the preceding administrative procedure as an authority or specialist authority but whose powers are affected by the administrative activity, and the administrative organ that is a party to the administrative contract (contracting administrative organ);
(d) the NGO, if an act of government decree allows, and if their activity, according to their by-laws covers the protection of fundamental rights or public interests, and already undertakes the given activity in more than a year; and
(e) an interest representation organ or a statutory professional body, if an act so provides.

Ad 2) The second option, of wide access to justice is directly connected with the opportunity to be a party in public law procedures. This may also be open to environmental NGOs, as discussed above. There is a slight difference regarding access to justice – in the judicial phase we face an actual administrative decision, consequently the mere opportunity to invite the environmental authority as a consent-giving authority (which in theory is a solid basis for public administration procedures) is not enough, the literal participation of the environmental authority is taken as a prerequisite. This is not a limitation of rights, but the realisation of the opportunity in a specific situation. This has also been decided by the 4/2010 Legal Uniformity Decision. The defendant in these public administration supervision cases is the authority that adopted the contested decision.

Ad 3) The conditions of intervention in a judicial supervisory procedure of an administrative decision as an interested party have also been included in the Code (Section 20–21). Those whose rights or lawful interests are affected by the administrative procedure may be taken as interested parties. The Legal Uniformity Decision clearly underlines that

> *"The legal interest is an objective category, meaning the specific impact area concerned, and should not depend upon the exact participation within the given procedure, thus it is not dependent upon the exact use of the right to be a client."*

The procedure also covers the possibility to participate jointly in an action, if the rights and duties are common or are based on the same legal relationship, and also if they are not common but similar and the same court is involved (Section 19).

Finally, we have to mention a special innovation of the Code of Administrative Court Procedure, and that is the 'model action' (Section 33), which is made to simplify the decision-making of similar actions. It means that if there are at least ten practically identical cases before the court – identical means here that the legal and factual grounds are the same – this court may decide that only one sample case will be decided first while all the others are suspended.

14.3.3 Code of Civil Procedure (Act CXXX of 2016)[364]

Part 8 covers the conditions of litigation of a collective character, within which collective interests are taken as the basis of litigation. Chapter XLII is the one focusing on public interest litigation, while Chapter XLIII is the one on joint litigation.

The claim to protect public interests shall be based upon a special entitlement by a different act. Those who are entitled by an act may initiate a case and file a suit, while those who might be affected must prove their interest, namely why they belong to the group of interested parties.

Those, in whose name the action was brought will not be litigants, but

> *"the plaintiff shall name the entitled persons in his claim and the way of proof they could justify they are members of the class so the provisions of judgment are applicable to them. This practically means the definition of those circumstances upon which members of the class can be identified. The society of entitled persons necessarily means those with a common right to be enforced and facts establishing this right."*[365]

As such, the plaintiff and those entitled by the judgment shall be different and this type of case does not exclude an individual from filing a standalone lawsuit, which means that the collective judgment does not refer to his/her rights. The defendant, if loses, shall be obliged to undertake some remedial act.

At the moment, there is no reference to use the above option in environmental cases.

Collective litigation has particular relevance for environmental interests. It requires at least 10 plaintiffs, a representative right (similar in all cases), representative facts (the factual basis is similar), and finally the permission of the court. Chapter XLIII, Section 583 (2) (c) states that an associated action can be brought to enforce claims or claims for compensation for damage arising from any damage to health directly caused by the unforeseeable pollution of the environment due to human activity or omission The would-be plaintiffs must have a preliminary contract – Section 586 – which settles all the details among the claimants. It is also possible to join to the group later.

Section 591 is titled "The relationship between actions having identical subject matter". If a public interest litigation prevails, the associated action is suspended until the former is decided with final and binding effect.

[364] The summary of the history of the given procedural questions and a short evaluation might be read in TÓTH, B. Collective Redress as New Institution of Civil Procedure Code and Its Applicability to Protect Environment. *Journal of Agricultural and Environmental Law*. 2017, Vol. 23.

[365] Ibid., p. 186.

14.3.4 Mediation

Civil procedural law contains provisions for the instrument of *mediation*. In civil law cases, the idea is to avoid litigation. The parties may select a mediator to assist them in finding a solution, acceptable to all the parties. There may be cases where mediation is compulsory prior to litigation. The mediation is also open according to the Code of Administrative Court Procedure in Section 69. The Act itself also addresses the need to come to an agreement between the parties, thus mediation might be a useful tool in this direction.

14.3.5 Omissions of administration

There is one more important problem, worth to be discussed – omissions by public administration. Article 9 (3) of the Aarhus Convention speaks of challenging acts and omissions *"by private persons and public authorities which contravene provisions of its national law relating to the environment"* in an administrative or judicial procedure. We could already discuss the options to challenge administrative decisions and actions by private persons under civil law, the role of NGOs or the prosecutor, representing public interests, to sue the operator, etc. These are all related to a positive action-based approach, but what about negative behaviour, an omission, or no action on behalf of private persons or, most importantly, of public authorities.

When presenting the possibilities of the Environmental Act that are open for NGOs, we already pointed to the missing link: in subparagraph (a) of Section 99 (1), the association may require the authority to take action, and in subparagraph (b) the same association may go to court against the operator. Something is clearly missing, and the clear message of the provision is that if the given public organ does not make any steps, we have to do it ourselves.

The provisions on the silence of administration in the Act on Administrative Procedure are clearly connected with the initiation of an administrative procedure, either by the client or *ex officio*. This means that, within the given procedure, the authority does not take the next steps in time, or does not finish in time. If the authority in a given case simply answers that the request is not addressing a public administrative issue; it is not taken as a refusal, but only as information on the lack of competence regarding any other conditions of action on behalf of the authority.

According to Section 7 (1) of Act CL of 2016 on the Code of General Administrative Procedure, the authority shall apply the provisions of this Act in administrative cases falling under the scope of this Act, as well as in the course of administrative audits. Paragraph 2 of the same states that a case means the process in the course of the administration of which the authority, in making its decision, establishes the rights or obligations of the party, adjudicates his legal dispute, establishes his violation of rights, verifies a fact, status or data, or operates a register, as well as enforces decisions concerning these. If these conditions

are not met, the act on administrative procedure does not apply. The no-action or omission alternative is not really included.

This is the weakest point in the Hungarian legal system in connection with public participation. The general right to file a complaint, etc. also does not answer the needs as there are no decisions and at the end, the claimant shall only be informed. Information or notices may not be appealed. If it is a question of normative decision-making – order, decree, normative decision (as opposed to a decision in an individual case) – the legality/constitutionality may be challenged by a limited number of applicants, but the missing norm may not.

14.3.6 Costs

As usual, litigations costs may mean a limitation on the willingness of parties to go to court in matters of environmental administration. There is no general personal or material exemption of such costs. The judicial cost is not excessive, but there might be a substantial legal cost for the attorneys of the other party – usually investors and business organizations – and, if the action fails, they claim these costs from the losing side. We should not forget the costs of expert witnesses either.

14.4 Conclusions and recommendations

There are several elements of access rights – from access to information, through decision-making to justice – that have been in use from the middle of the 1990s in the Hungarian legal system. Similarly, the possibilities of different collective redress mechanisms from basic mediation to class action are widening everywhere. The most important conceptual foundation in the field of environmental protection may also be detected easily – the fundamental right to a healthy environment, as presented in the different constitutional provisions. While it is relatively hard to find this concept in international conventions (the EU Fundamental Rights Charter, Art. 37 is an exception), there are many national constitutions with some direct or indirect references to the right to a healthy environment. The distinct reference to the rights of future generations, as an additional argument, shall also be mentioned, which – together with the understanding of the right to a healthy environment itself – received a clear legal interpretation by the Hungarian Constitutional Court. These conceptual issues may also be taken into consideration when any improvement of access rights – class action type or others – is projected. These are essential for the establishment of procedural rights.

Although the different access rights have already formed a part of the Environmental Act of 1995, reinforced with the ratification of the Aarhus Convention, there are often substantial changes in the corresponding general procedural rules, having a direct effect on these access rights and not necessarily in a positive direction. A good – or it is better to say: ‘bad’ – example is the Act on General Administrative Procedure, limiting the scope of the

party or client in administrative procedures in the most recent legislation. Certain changes in the structure of environmental administration also limit access rights, as they led to dissolving the former unitary environmental authority and integrating it into the general public administration offices, providing a more remote relationship to access rights.

There are some missing links within access rights and some recent changes that need substantial improvement in this respect:

1. Omissions of public administration, that is failure to give the appropriate answer or to react in due course to environmental threats or harm, shall be challenged in front of the judiciary. A good example is Section 99 (1) of the Environmental Act, according to which environmental NGOs may file a lawsuit against the operator asking for the intervention of the court. This may easily be copied as an access to court against the omissions or failure to act of public authorities. It is better to keep the scope of the plaintiff in a smaller circle and therefore to refer to environmental NGOs only.
2. It would be necessary to use the former definition of the client in the general administrative procedure, covering again the land owners and local governments of the impact area. This new-old version could use the provisions of the judicial administrative procedure as a good model.
3. The 'model litigation' of the administrative court procedure should really be used as a model, without having to wait for 10 similar procedures to be filed in order to understand that there is a need for a general interpretation of a legal problem that must be solved along the same lines in the different cases. It is not the number of the parties that counts but the legal quest.
4. There should be a clear legal reference or entitlement setting out that one specific example of the public interest claim or litigation is the protection of environmental interests. It should also be clearly stated that the protection of public interests is more than simply gathering several potential plaintiffs in a kind of assembly; the public interest might also be protected through representations of interests, which in the field of environmental protection could also mean environmental associations or a prosecutor or ombudsperson.
5. With regard to collective litigation, the current Section 583 (2) (c) is far from being sufficient. On the one hand, it is not enough to cover situations within which damage to human health or material damage occurs, but also the danger of any such damage must be enough to litigate, in order to prevent the damage from occurring. On the other hand, it is not enough to refer to unforeseeable environmental load or burden, which is a serious and unnecessary limitation of possible harmful activities. Everyday infringements should also serve as the basis for action.

15 Using collective redress mechanisms to protect the right to a healthy environment in Poland: An achievable goal in the near future?

Karolina Karpus

15.1 Introduction: methodology and scope of the assessment

The attempt to assess the legal possibilities of using injunctive and compensatory collective redress mechanisms in the Member States of the EU concerning violations of rights granted under EU law from the perspective of the environmental law should be based on three basic methodological assumptions.

First, it should be assumed that the analysis will in the first place include measures within civil law, whereas, the measures within administrative law (part of which is also environmental law) can mainly be referred to for comparative objectives. Moreover, the elaboration of civil law measures must be conducted with a breakdown per legal measure, strictly directed at environmental protection and general civil law measures, which can indirectly serve environmental protection.

Second, the solutions concerning the issue of legal liability within environmental law should be assessed by taking the existence and consequences of the general principle of environmental law into consideration – the preventive principle that "requires action to be taken at an early stage and, if possible, before damage has actually occurred".[366] Thus, injunctive collective redress mechanism thoroughly serves to fulfil the objectives of this principle above all. According to this principle, compensatory collective redress mechanisms

[366] SANDS, P. *Principles of international environmental law*. Cambridge: Cambridge University Press, 2003, p. 247.

should be treated as a necessary solution but, due to its nature as being subsidiary to basic legal measures of environmental law. The preventive principle is, therefore, the most important criterion of the assessment of legal measures in the analysed scope and then the justification for demands *de lege ferenda*.

Third, the issues of "legal interest" as the condition for obtaining legal protection must be specified, taking the motivation of members of a society while making decisions on active involvement in environmental protection into consideration. Within this scope, B. Iwanska suggests a useful motivation classification, which can be presented in two groups: 1) egoistic motivations, 2) altruistic motivations. In the first case, the willingness of a given entity to obtain specific individual benefit may be at the same time connected with the aspiration to protect the environment as a common good. Here, the private ("egoistic") interest connects with public (environmental protection) interest. According to B. Iwanska, the example of such a connection between legal interests is the area of human rights, directly dependent on the possibility of life in a high-quality environment. Whereas, in the second case, i.e. altruistic motivations, B. Iwanska points to the following legal instruments that enable the members of society to take actions within environmental protection: 1) *actio popularis*, 2) the actions of associations (e.g. environmental organisations) as a legal form of social activity, 3) institution of the environmental ombudsman.[367]

The above presented action motivation classification of individual entities will be used in this analysis while describing Polish legal regulations *de lege lata* and also in the description of proposed recommendations. It is also a good starting point for distinguishing the categories of possible civil proceedings. Hence, the following should be distinguished: 1) environmental cases: a) initiated by an entity seeking the protection of its own legal interest and at the same time of environmental protection ("egoistic motivation"); b) initiated by an entity exclusively seeking the protection of the environment ("altruistic motivation"/"purely environmental case"); and 2) non-environmental cases (initiated by an entity exclusively seeking the protection of private interests). The scope of this assessment is limited only to thus identified "environmental cases".

From the formal point of view, the analysis of Polish provisions within the objectives of European Commission Recommendation 2013/396/EU[368] should include the review of two groups of legal acts. In the first place, it will include adequate legal measures defined in the following normative acts: Act of 27 April 2001 on Environmental Law (hereinafter: ELA);[369] Act of 13 April 2007 on prevention of and remedying environmental damage[370] and Act of 3 October 2008 on access to environmental information, public participation in

[367] IWAŃSKA, B. *Koncepcja „skargi zbiorowej" w prawie ochrony środowiska*. Warszawa: Wolters Kluwer, 2013, p. 190–191, and p. 262–263.

[368] 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 (2013/396/EU), p. 60–65.

[369] Journal of Laws of 2018 item 799 with amendments.

[370] Journal of Laws of 2018 item 954 with amendments.

decision-making in environmental matters and EIA (hereinafter: 2008 Act).[371] The second group will include the Civil Code of 23 April 1964 (hereinafter: Civile Code),[372] and the Act of 17 December 2009 on class action lawsuits.[373]

It should also be pointed out that, from the point of view of environmental law, to correctly assess the issues included in EC Recommendation 2013/396/EU it is necessary to combine them in the context of the principle of sustainable development, above all with the Aarhus Convention,[374] and, consequently, also with the EU law acts implementing the resolutions of the Convention (horizontal and sectoral).

15.2 Implementation of Article 9 (3) of the Aarhus Convention in Poland

15.2.1 Access to justice (III Aarhus pillar) and its challenges for the national legislator

The Polish legislator implemented the Aarhus Convention and the relevant EU laws into the Polish law by the 2008 Act. With regard to both substantive rights provided by the Convention – under Article 4 (access to environmental information) and Article 6 (public participation in decisions on specific activities) – access to justice indicated in Article 9 (1) and in Article 9 (2) is ensured on general principals, including the right to appeal to an administrative body of second instance and the right to make a complaint to an administrative court. However, by applying those solutions, the Polish legislator did not make an effort, either in administrative law or civil law, to implement Article 9 (3) at the same time in an independent and well-thought-out way. It should be indicated that, also at the level of the EU law, Article 9 (3) was not fully implemented.[375] In 2017, the European Commission made an attempt to summarise the CJEU judicature and the experiences of the Member States in its "Notice on access to justice in environmental matters", stating directly that the scope of this act *"is limited to access to justice in relation to decisions, acts and omissions by public*

[371] Journal of Laws of 2018 item 2081 with amendments.
[372] Journal of Laws of 2018 item 1025 with amendments.
[373] Journal of Laws of 2018 item 573 with amendments.
[374] UNECE Convention on Access to Information, Public Participation in Decision-Making and access to Justice in Environmental Matters (1998), Journal of Laws of 2003 No. 78, item 706.
[375] See the European Commission's unsuccessful Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters, (COM/2003/0624 final – COD 2003/0246), available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2003:0624:FIN>; EBBESSON, J. Access to justice at the National Level. Impact of the Aarhus Convention and European Union Law. In: PALLEMAERTS, M. (ed.). *The Aarhus Convention at ten: interactions and tensions between conventional international law and EU environmental law*. Groningen: Europa Law Publishing, 2011, p. 262–265; KNADE-PLASKACZ, A. Dostęp do wymiaru sprawiedliwości w sprawach dotyczących środowiska – transpozycja trzeciego filaru konwencji z Aarhus do prawa Unii Europejskiej. *Przegląd Prawa Ochrony Środowiska*. 2014, no. 1, p. 227–229.

authorities of the Member States. It does not address environmental litigation between private parties".[376]

Two of the most important issues that would require amendments and consideration in the light of Article 9 (3) of the Aarhus Convention are "environmental damage" (damage to natural resources) and the right to a clean environment. They have, without doubt, fundamental meaning for collective redress mechanisms from the civil law perspective. It results from the basic fact that the main aim of collective redress mechanisms is to facilitate access to justice in "mass harm situations", defined as *"a situation where two or more natural or legal persons claim to have suffered harm causing damage resulting from the same illegal activity of one or more natural or legal persons"*.[377] Thus, in a situation when a given "mass harm situation" results from an incident being "environmental damage" then, at the same time, it results in a breach of the right to a clean environment, to which all exposed or harmed people are entitled. This case, assessed not only in the context that had already occurred but also in the situation of a direct threat of its occurrence, is a type of "environmental case", in which the entities search for legal protection while being guided by egoistic motivation in relation to environmental protection.

There are no signs that the Polish legislator finds the need to review current civil law regulations to adapt them even minimally to Article 9 (3) of the Aarhus Convention. Obviously, the Polish legislator thinks that there is still no need to amend Article 415 of the Civil Code on account of the concept of "environmental damage". Within "damage," Article 415 of the Civil Code includes in principle "harm to property" and "harm to the person", whereas "harm to the environment" as an independent structure still remains mainly as a postulate in the discussion on future law amendments.[378] While, taking into consideration the protection postulated with regard to "mass harm situations" resulting from EC Recommendation 2013/396/EU, it should be added that, in the case of the Act of 17 December 2009 on class action lawsuits, it was indicated from the beginning that none of *"the private law forms of consumer interest protection guarantees the protection of the interests of many entities who suffered harm as a result of one incident"*.[379] It may also be added in the context of the right to a clean environment as one of the human rights and included in Article 23 of the Civil Code's types of "personal interests" of a human being, protected by civil law measures that, also in this context, the Polish legislator accepts that there is still no need to detail those

[376] Commission Notice on access to justice in environmental matters (2017/C 275/01), available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2017.275.01.0001.01.ENG>, p. 4.

[377] Point 3 (b) of the 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 (2013/396/EU).

[378] RAKOCZY, B. *Szkoda w środowisku a szkoda wyrządzona oddziaływaniem na środowisko*. In: RAKOCZY, B. – PCHAŁEK, M. (eds.). *Wybrane problemy prawa ochrony środowiska.* Warszawa: Wolters Kluwer, 2010, p. 330–338; CZECH, E. K. *Szkoda w obszarze środowiska i wina: jako determinanty odpowiedzialności administracyjnej za tę szkodę*. Białystok: Trans Humana, 2008; RADECKI, W. *Odpowiedzialność cywilna w ochronie środowiska. Studium prawnoporównawcze.* Wrocław: Ossolineum, 1987; LONGCHAMPS, M., *Odpowiedzialność za szkodę ekologiczną.* Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego, 1986.

[379] SIERADZKA, M. *Dochodzenie roszczeń w postępowaniu grupowym: komentarz*. Warszawa: Wolters Kluwer, 2015, p. 26.

provisions by taking recent developments in environmental law and human rights law into account.

15.2.2 Legal protection measures aimed at environmental protection – civil law

Within a short review of legal protection measures aiming at public interests, namely environmental protection, the following groups should be indicated. In the group of civil law measures directly aimed at environmental protection, including those that assume the possibility of using of a civil injunctive action, as well as action for damage, the following measures may be pointed out: 1) Article 323 (1) of the ELA[380] and Article 57 (1) of the Act of 22 June 2001 on microorganisms and genetically modified organisms;[381] 2) Article 323 (2) of the ELA[382] and Article 57 (2) of the Act of 22 June 2001 on microorganisms and genetically modified organisms. In the group of civil law measures that may indirectly fulfil the aims of environmental protection, the following may be counted among the most important in the Civil Code: 1) Article 23 (Protection of personal interests) in conjunction with Article 24 (Means of protection) and Article 448 (Infringement of personal interests); 2) Article 144 (Immissions) in conjunction with Article 222 (2) (*Actio negatoria*); 3) Article 415 (Fault-based liability for delicts); 4) Article 417 (State Treasury liability for unlawful action or omission) and Article 417 (Damage arising from a legislative act); 5) Article 435 (Risk-based liability of person running an enterprise); and 6) Article 439 (Preventing damage).[383]

As already pointed out above, the Polish legislator has not so far proposed solutions adapting the civil structure of "damage" to challenges resulting from the need for efficient legal protection of the environment and in connection with collective redress mechanisms. It may be noticed in this context that, for instance, in the French law the issue underwent interesting changes that could be an inspiration for the Polish legislator. In *Nomenclature des préjudices liés au dommage environnemental*[384] presented in 2012, the division of "environmental damage" into two categories, i.e. "harms to environment" and "harms to

[380] "Every person who is directly threatened by damage or has suffered damage as a result of illegal impact on the environment may demand that the entity responsible for this threat or violation should restore the state complying with the law and take preventive measures, in particular by putting in place an installation or equipment to protect against the threat or violation; where this is impossible or too difficult, the person may demand that the activity causing the threat or disturbance be stopped"; ("egoistic motivation").

[381] Journal of Laws of 2017 item 2134 with amendments.

[382] "Where the threat or violation affects the environment as a common good, the claim referred to in paragraph 1 may be brought by the State Treasury, a unit of local/regional administration as well as an environmental organisation"; ("altruistic motivation").

[383] Article 439 of the Civil Code: "Whoever is threatened by a direct damage resulting from the behaviour of another person, in particular from the absence of the due supervision over the enterprise or establishment run by that person or the condition of a building or other facilities possessed by that person, is threatened by a direct damage, may demand that person to undertake measures indispensable for averting the imminent danger, and if necessary also to give an appropriate security".

[384] NEYRET, L. – MARTIN, G. J., (eds.). *Nomenclature des préjudices environnementaux*. Paris: LGDJ Lextenso éditions, 2012, p. 15–22.

humans" was suggested. Within the second one, "collective harms" and "individual harms", suffered by a human due to a harm to the environment, were distinguished. From this perspective, "collective harms" were defined as "the breach of human interests which exceed the total of individual interests and have an impact on the collective benefits of the environment or environmental protection in its various aspects". It was also explicitly noted that the environment is the source of ecosystem services,[385] the beneficiary of which are humans. In the context of such understood "collective harms" and taking the category of ecosystem services into consideration,[386] one may see the chance to develop legal regulations that will make it easier to gain legal protection in "environmental cases", also within collective redress mechanisms.[387]

Within the scope of the above review, the relationship between "personal interests of a human being" and right to a clean environment[388] should be pointed out. Article 23 of the Civil Code, among the "personal interests of a human being," enumerates "health, freedom, dignity, freedom of conscience, name or pseudonym, image, privacy of correspondence, inviolability of their home, and scientific, artistic, inventive or improvement achievements". It is only a sample catalogue of values protected in civil law. "Clean environment" may be connected in this aspect as an element included in such "personal interests" as "health" or "freedom" and "dignity". However, the question if it is high time to indicate directly in Article 23 an independent type of "personal interest" which is "good quality environment" arises. The problem in this scope is that, in principle, "environment" is classified as a "public good" or "common good", whereas the aim of Article 23 of the Civil Code is to protect "personal interests", i.e. "individual goods". Even so, one can see a new legal argumentation in the example of civil cases concerning air quality due to the threat resulting from smog, which gives a chance to amend the interpretation of law in this context.

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385 In France, Article 1247 of the French Civil Code has indicated since 2016 that *"le préjudice écologique consistant en une atteinte non négligeable aux éléments ou aux fonctions des écosystèmes ou aux bénéfices collectifs tirés par l'homme de l'environnement"*; available at: <https://www.legifrance.gouv.fr>.

386 See SALZMAN, J. – THOMPSON, B. H. – DAILY, G. C. Protecting Ecosystem Services: Science, Economics, and Law. *Stanford Environ. Law J.* 2001, n. 2, p. 309–332; MONTEDURO, M. Environmental Law and Agroecology. Transdisciplinary Approach to Public Ecosystem Services as a New Challenge for Environmental Legal Doctrine. *European Energy and Environmental Law Review.* 2013, n. 1, p. 2–11; STĘPNIEWSKA, M. – ZWIERZCHOWSKA, I. – MIZGAJSKI, A. Capability of the Polish legal system to introduce the ecosystem services approach into environmental management. *Ecosystem Services*. 2018, vol. 29, p. 271–281.

387 NEYRET, L. *Le préjudice collectif né du dommage environnemental*. In: NEYRET, L. – MARTIN, G. J., (eds.). *Nomenclature des préjudices environnementaux*. Paris: LGDJ Lextenso éditions, 2012, p. 195–196, p. 215–217.

388 URBAŃSKA, K. *Prawo podmiotowe do dobrego środowiska w prawie międzynarodowym i polskim*. Poznań: Ars boni et aequi, 2015, p. 200–221; WEREŚNIAK-MASRI, I. Prawo do czystego środowiska i prawo do czystego powietrza jako dobra osobiste. *Monitor Prawniczy*. 2018, no. 18, p. 937–945.

15.3 Air pollution ("smog") and the right to breathe clean air – recent developments

15.3.1 "Air quality plans" before the administrative courts

The Polish Supreme Audit Office directly states that the results of the audit concerning air protection in Poland presented in the report of 2014,[389] as well as, in the 2018 report *"clearly show that the actions taken were not sufficient for the scale and the gravity of the problems connected to in adequate air quality in Poland"*.[390] The data of the Chief Inspectorate of Environmental Protection for 2010-2016 show that he most common cause of exceeding permissible levels of particulate matter PM_{10} (24-hour average) was the emission connected to individual heating of buildings (the cause was indicated in 82.2% to 94.0% of all reported cases of excess). With regard to benzopyrene, the results were between 94.1% and 100%.

In Poland, the transposition of the provisions of Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe (hereinafter: CAFE Directive or Directive 2008/50/EC),[391] took place by amending the ELA in 2012.[392] The preparation and implementation of "air quality plans", indicated in Article 23 (1) of the Directive, may be recognised as one of the most important obligations of the Member States. According to the CJEU, the "air quality plans" adopted by a Member State under this Article, whether at national or regional level, should include an express reference to the requirement that those plans have to make it possible to limit exceedances of limit values to the shortest possible period.[393]

At the same time, in the context of individual entities' rights correlated with "air quality plans," in case C-404/13394 the CJEU expressly stated that

> *"the natural or legal persons directly concerned by the limit values being exceeded after 1 January 2010 must be in a position to require the competent authorities, if necessary by bringing an action before the courts having jurisdiction, to establish an air quality plan*

[389] Najwyższa Izba Kontroli [The Supreme Audit Office]. *Informacja o wynikach kontroli – ochrona powietrza przed zanieczyszczeniami*. Warszawa: NIK, 2014, available at: <https://www.nik.gov.pl/plik/id,7764,vp,9732.pdf>.

[390] Najwyższa Izba Kontroli [The Supreme Audit Office]. *Informacja o wynikach kontroli – ochrona powietrza przed zanieczyszczeniami*. Warszawa: NIK, 2018, p. 29; available at: <https://www.nik.gov.pl/kontrole/wyniki-kontroli-nik/kontrole,18513.html>.

[391] Available at: <http://data.europa.eu/eli/dir/2008/50/oj>, p. 1–44.

[392] Act of 13 April 2012 on the revision of ELA and certain other Acts, Journal of Laws of 2012 item 460.

[393] Judgment of the Court of Justice of 22 February 2018, *European Commission* v *Republic of Poland* (C-336/16 ECLI:EU:C:2018:94, paragraph 122); see also: Judgment of the Court of Justice of 5 April 2017 *European Commission* v *Republic of Bulgaria* (C-488/15 ECLI:EU:C:2017:267).

[394] Judgment of the Court of Justice of 19 November 2014, *The Queen, on the application of: ClientEarth* v *The Secretary of State for the Environment, Food and Rural Affairs* (C-404/13 ECLI:EU:C:2014:2382, paragraph 56); Judgment of the Court of Justice of 25 July 2008 *Dieter Janecek* v *Freistaat Bayern* (C-237/07 ECLI:EU:C:2008:447, paragraph 39).

which complies with the second subparagraph of Article 23 (1) of Directive 2008/50/EC, where a Member State has failed to secure compliance with the requirements of the second subparagraph of Article 13 (1) of Directive 2008/50/EC and has not applied for a postponement of the deadline as provided for by Article 22 of the directive".

The issues of "air quality plans", implemented as resolutions of voivodship sejmiks, have already occupied the attention of Polish administrative courts. However, the available judicature is not very extensive. The legal nature of those programmes and, consequently, the admissible level of specifying the solutions (tasks and obligations) included in the act were the prime legal issues assessed in those cases. The litigation in this context was conducted from the opposing directions by two groups of entities, 1) those thinking that a given plan interferes too much with their rights and obligations;[395] 2) those believing that the plan does not guarantee the appropriate level of environmental protection.

The second group consists of individual entities who want the "air quality plans" to be a really effective legal instrument, which will quickly result in the improvement of air quality in a given area. In this basic sense, the plan should be an instrument fulfilling the right to live in a high-quality environment.[396] In the administrative proceedings, individual entities usually use the complaint resulting from Article 90 (1) of the Act on voivodship self-government[397] for the purpose of challenging "air quality plans":

"Anyone, whose legal interest or right was breached by the local legal act, issued in the case within public administration, may appeal against the provision to the administrative court".

In order to satisfy this requirement, the entity claims that its right to a clean environment is breached because the "air quality plan" is environmentally inadequate in the light of Directive 2008/50/EC. However, in such cases so far, the administrative courts have usually questioned the right to appear in court (*locus standi*) of the suing entity under Article 90 (1) and accordingly rejected the complaints.[398]

Polish administrative courts, in principle, think that complaints resulting from Article 90 (1) of the Act have no nature of *actio popularis*; therefore, there are no grounds to try to use this complaint as *actio popularis* in cases concerning general questioning of the environmental effectiveness of "air quality plans". In its ruling of 2018, the Supreme Administrative Court explicitly stated that

[395] The group does not only consists of entrepreneurs, but also of e.g. gminas (communes) – the litigation between the city of Poznan of Wielkopolskie Voivodship (the judgment of the Voivodship Administrative Court in Poznan of 29 November 2019, the case II SA/Po 660/13, CBOSA).

[396] KARSKI, L. Prawa człowieka i środowisko. *Studia Ecologiae et Bioethicae*. 2006, no. 4, p. 309–310; GIORGETTA, S. The Right to a Healthy Environment, Human Rights and Sustainable Development. *International Environmental Agreements: Politics, Law and Economics*. 2002, no. 2, p. 177–181.

[397] The Act of 5 June 1998 on voivodship self-government, Journal of Laws of 2019, item 512 with amendments.

[398] The Judgment of the Voivodship Administrative Court in Szczecin of 1 February 2012, case II SA/Sz 1298/11, CBOSA; Resolution of the Voivodship Administrative Court in Krakow of 6 July 2016, case II SA/Kr 573/16, CBOSA; Resolution of the Voivodship Administrative Court in Gliwice of 15 September 2017, case II SA/Gl 639/17, CBOSA.

"the content of the CAFE Directive does not result in the obligation of the Member State to give the possibility of appeal against air quality plans by every inhabitant of the area under the plan. The CJEU sees indirectly the usefulness of such a solution in its ruling cited in the appeal against sentence, which, however (…) may not be the ground for an inadmissible extension of the scope of applying Article 90 (1) of the Act on voivodship self-government".[399]

15.3.2 Air quality (right to a clean environment) and Article 23 of the Civil Code (protection of personal interests)

To illustrate the issue of assessing the usefulness of Article 23 of the Civil Code for the objectives of legal environmental protection, including collective redress mechanisms, two cases that have recently caught public attention in Poland, should be pointed out. They were of a similar factual situation ("Rybnik case" and "Grazyna Wolszczak case") and adjudicated in two District Courts but the verdicts were completely different.

In October 2015, the plaintiff (an inhabitant of the town of Rybnik) sued the State Treasury (represented by the Minister of the Environment and the Minister of Energy) to award PLN 50,000 in compensation for the breach of his personal interests (case no. II C 1295/15). The plaintiff claimed, referring to the obligations of the Polish state resulting from Directive 2008/50/EC and the adequate Polish law, that the responsibility of the state for the results of unlawful negligence of fulfilling binding air quality standards, i.e. for the damage resulting from the breach of the plaintiff's personal interests is justified. The plaintiff also claimed that the breach of personal interests to his person had taken place for many years and had not changed. This situation had an unfavourable impact on everyday life, especially in winter months and has resulted in a justified strong fear for his own health and life. Because of significant air pollution in the town, the plaintiff found that he experienced serious limitations in using his house for its intended purpose, had limited freedom of movement and also his rights, to live in a clean environment and to a particularly protected personal interest, i.e. health, have been breached.

In its judgment of 30 May 2018, the District Court in Rybnik in case II C 1259/15[400] dismissed the plaint, finding that

"the compensation resulting from Article 488 of the Civil Code in conjunction with Article 24 (1) of the Civil Code is due only in the situation of the breach of personal interest, i.e. in the case of bodily injury or health disorder; it is not due [however] with regard

[399] The order of the Supreme Administrative Court of 23 January 2018 case II OSK 3218/17, CBOSA.

[400] The Judgment of the District Court in Rybnik of 30 May 2018, Case II C 1259/15, available at: <https://www.saos.org.pl/judgments/content/361462>.

to a threat of a breach of the interest. Therefore, there are no grounds to claim as a personal interest (...) some unclearly defined damage not connected to [real] bodily injury or health disorder. In the meantime, the plaintiff did not show a bodily injury, health disorder or anything else being the result of smog".

At the same time the, District Court in Rybnik questioned the concept of placing the right to live in a clean environment in the personal interest catalogue in Article 23 of the Civil Code. Assessing the argument on breaching his right to health, the District Court in Rybnik found that the plaintiff did not show sufficient evidence confirming the impact of smog on his health and additionally stated that *"the plaintiff and his family have been living in Rybnik of their own free will. If he does not agree with the state of affairs, he may change his place of residence"*.

The inhabitant of Rybnik made an appeal against the sentence to the Regional Court in Gliwice (case no. III Ca 1548/18, still pending). In November 2018, the Polish Commissioner for Human Rights joined the proceedings,[401] having found all the arguments of the inhabitant of Rybnik indicated in the appeal legitimate, including above all those implying a breach of the right to respect for private and family life and living, as well as the right to freedom of movement, on account of air pollution. Simultaneously, the Commissioner for Human Rights criticised in particular the position of the District Court in Rybnik, which questioned the right to live in an unspoilt environment as a category of personal interests.

The new interpretation of Article 23 of the Civil Code took place in the sentence of 24 January 2019 of the District Court in Warsaw in case VI C 1043/18.[402] In the case, the plaintiff (a Polish actress Grazyna Wolszczak[403]) filed to adjudge for the breach of her personal interests from the defendants: the city of Warsaw and the State Treasury (represented by the Minister of the Environment and the Minister of Energy) PLN 5,000 plus statutory interest for an organisation chosen by her. The actress, having cited *inter alia* the CJEU judgment in case C-336/16 and the Polish Supreme Audit Office report of 2014, indicated that public authorities despite legal obligations regarding good quality air in Poland had been ineffective and had either not taken adequate action or they did so with a delay, which led to the situation that, for many years in Poland (including Warsaw), the quality of air had been bad and harmful to the health and life of people. Having indicated Article 23 of the Civil Code (protection of personal interests) as the legal basis for her claim, the actress justified that because of poor air quality in Poland she could not pursue her passions and interests, as she often felt mental and emotional discomfort. As a result, the negligence of the Polish public authorities had led to the breach of her personal interests, such as the possibility to use the attributes of an unspoiled environment, the right to protect her personal life and the right to freedom, privacy and respect for her place of residence. The arguments of the

[401] Polish Commissioner for Human Rights – Pleading of 30 November 2018 on joining the case, the case III Ca 1548/18, available at: <https://www.rpo.gov.pl/sites/default/files/pismo%20procesowe%20RPO%20ws%20smogu%20w%20Rybniku%2C%2030.11.2018.pdf>.

[402] The Judgment of the District Court for Warsaw-Śródmieście in Warsaw of 24 January 2019, Case VI C 1043/18, available at: <https://www.saos.org.pl/judgments/371572>.

[403] *Rzeczpospolita* (24.01.2019), available at: <https://www.rp.pl/Dobra-osobiste/301249966-Sad-smog-narusza-dobra-osobiste-Wyrok-z-powodztwa-aktorki-Grazyny-Wolszczak.html>.

remaining part of her claim were based on the case law of the European Court of Human Rights concerning, in particular, the right to life and right to respect for one's private and family life and home.

In the justification for the sentence in favour of the actress, the District Court assessed that:

> *"There is no doubt that for years the state of environmental pollution and the lack of effective actions on the side of public authorities have had an unfavourable impact on people's health and life, including the plaintiff's. This state may lead to the breach of personal interests, which happened in the case of the plaintiff".*

In response to the statement of the State Treasury that there is no such category of personal interests as *"the right to use the attributes of an unspoiled environment,"* the District Court pointed out that

> *"the plaintiff does not cite in the proceedings the breach of her right to use the attributes of unspoiled environment in the sense defined by the State Treasury, i.e. an environment completely free of any pollution. The plaintiff cites, however, the breach of her right to live in an environment and use of air fulfilling at least the norms and values defined in the EU legislation (permissible norms limiting the negative impact of a polluted environment on health), that is the air quality standard (...)".*

Confirming in this way the existence of the category of "environmental" personal interest, the District Court stated that

> *"serious environmental pollution is a breach of the right to respect for home and the right to privacy due to the negligence of public authorities in the issue of undertaking preventive actions".*

The sentences in the "Rybnik case" and "Grazyna Wolszczak case" show the following divergences. In the first case, the District Court in Rybnik only allowed the possibility to realise the legal interest in the context of protecting personal interests within compensatory action (a personal injury claim), whereas the District Court in Warsaw, in the second case, accepted the fact that the protection of legal interests may be sought at an earlier stage, coming nearer in its preventive essence to claims for injunctive orders.

However, it should not be forgotten that both judgments were reached in cases settled in the first instance by District Courts, which means they have not yet been subject to the final decisions of higher instance courts. Even so, after the sentence in the Grazyna Wolszczak case, the legal firm[404] representing the actress initiated together with a group of "ambassadors"

[404] The firm (available at: <http://gorski-radcaprawny.pl>) conducts parallel activities concerning the initiation of group proceedings against the State Treasury on settling the liability of the State Treasury for harm suffered by borrowers on account of concluding an agreement connected to foreign exchange rates ("credits nominated in CHF"); available at: <http://zjednoczenikredytobiorcy.pl/>.

(famous Polish artists) the campaign "pozywamsmog".[405] Generally speaking, it (currently at an early stage, admitting entries from people interested in participating in the project until 31 March 2019) aims to submit a collective redress action against the Polish State Treasury on the subject of "establishing the liability of the State Treasury for the harm and damage of the group participants (already suffered or which may occur in the future) and resulting from negligence by organisational units of the State Treasury while exercising public authority. The lawsuit is based on the assumption that the State Treasury did not fulfil the obligation to adjust the quality of air in Poland to the norms resulting from the legal provisions and therefore is liable to the group participants (the State Treasury tort)". It is difficult to assess those declarations explicitly, but it seems that the aim of the project is to initiate, within the battle against smog in Poland, proceedings classified as "compensatory collective redress".

15.4 Conclusions and recommendations

The methodology of this assessment was based on the following general assumptions. Within its scope, applying Article 9 (3) of the Aarhus Convention, a group of cases could be designated, classified as "environmental cases". Then, in comparison with this group, the civil law measures could be assessed, paying special attention to the motivation of entities making claims (altruistic and egoistic motivations). The conclusions formulated as a result of this overview in the reality of the Polish civil law with regard to individual claims reflect at the same time the reality of the effectiveness of using collective redress mechanisms as proceedings enabling access to justice in environmental matters. The example cases concerning the quality of air and the threat of smog show the existing barriers to access to justice, both in the administrative cases ("air quality plans") and in civil cases (Article 23 of the Civil Code and the right to a clean environment).

Taking the above observations into account, the most important recommendations for the Polish legislator are:

1. to modernise the civil concept of "damage" in a way that directly and explicitly considers the existence of harm to the environment next to harm to persons and harm to property, including a broader reflection of the notion of "ecosystem services" and its usefulness for the definition of damage;
2. to implement the concept of ecosystem services into the Polish legal system to provide grounds for a more environment-friendly interpretation of "legal interest" as a condition for assessing the right to make a claim for legal protection in "environmental cases" in which an entity is guided by egoistic motivation (the combination of individual interest with public interest, i.e. environmental protection);
3. to align the civil law concept of the protection of personal interests (Article 23 of the Civil Code) with the achievements of human rights law and environmental law with regard to

[405] See, available at: <https://pozywamsmog.eu> ["wesuethesmog"].

the right to a clean environment, and subsequently to introduce the outcome of such an alignment in a proposal for legislative action.

The chances by the Polish legislator using a legal measure such as *actio popularis* (assuming the "altruistic" motivation of the plaintiff) to ensure access to justice in environmental matters remain minimal. Because of that, the main direction of change must concern the new notion of "legal interest" of an entity searching for legal protection. In this regard, greater attention should be paid to the concept of "environmental damage" and the perception of the environment as both a "public good" and as a source of personal benefits ("ecosystem services") from the perspective of individual rights (right to a clean environment). Only those changes will allow the usefulness of collective redress mechanisms (injunctive and compensatory) to be assessed more broadly in future in the interest of access to justice in environmental matters.

16 Environmental harm cases in the Czech Republic: experiences of Arnika, a non-governmental association

Vendula Záhumenská

16.1 Introduction

Very few legal instruments are available in the Czech Republic to allow for real enforceability of liability for environmental damage. Citizens and their organisations dealing with environmental issues therefore tend to be more involved in decision-making than in addressing the negative impacts of operators' activities already inflicting harm on air, water, soil, plants and animals. We also have this tendency at Arnika. Arnika is a Czech non-profit organisation that brings together people who strive for a better environment. We try to protect nature and a healthy environment for future generations in the Czech Republic and around the world. Our long-term goal is to reduce waste and hazardous substances. We also advocate maintaining the rights of citizens to decide on their own environment.

Arnika is divided into three parts (Subsidiaries): Toxic Substances, Centre for Citizens' Support, and Nature Conservation. In this paper, I will summarize our experience of applying legal responsibility in the field of environmental protection. Previously, we also worked on solving individual cases, where we provided comprehensive advice to citizens in serious cases. Today, however, because of limited funds, we are forced to abandon more extensive counselling and advocacy activities and deal with systemic problems, such as the Prague land use plan, adaptation measures, and problems related to tree felling. Counselling is only provided at a basic level and we organise regular training sessions for citizens and delegates, and we also issue professional manuals available to active citizens on the Web. We also work further abroad, especially in post-Soviet developing countries, such as Kazakhstan, Bosnia and Herzegovina, and Ukraine.[406] Arnika is a member of the

[406] See Arnika. *Annual reports*, available at: <https://english.arnika.org/about-us/annual-reports>.

International POPs Elimination Network (IPEN), which is a global network of more than 700 public interest non-governmental organizations working together for the elimination of persistent organic pollutants, on an expedited yet socially equitable basis.

Experts at Arnika also deal with issues related to permitting waste incinerators. In these cases, Arnika (the association) is directly involved in specific proceedings. Our employees also work on the issue of weirs on the Elbe near Děčín. We are directly involved in various processes of tree felling in individual Czech cities. In Prague, we are essentially devoted to spatial planning in the strict sense of the word; we follow the prepared and approved changes to the existing land use plan. Special attention is then focused on the Metropolitan Plan (Prague Territorial Plan).

16.2 Arnika's involvement in cases of environmental damage

Between 2008 and 2017, Arnika took part in resolving dozens of cases. In more than twenty of them, the issue was also dealt with in court. Several of them concerned felling trees; an example of the more important ones concerned dozens of trees in Ostrava – Poruba. In Prague we also dealt with felling trees (at the Břevnov monastery and in Thakurova Street) and we also, for example, tabled proposals for the abolition of several measures of a general scope (changes to the existing land use plan).[407] One of the most important cases concerning the territorial development of Prague was the court decision on the zoning decision concerning skyscrapers on the Pankrác Plain (2012). Although the construction of the Epoque skyscraper has been prevented, citizens have not been successful regarding another building – the "V Tower". The skyscraper is now built and has become the subject of further complaints addressed to UNESCO. In addition, the construction of other buildings is planned. Central Group intends to build new residential housing in Pankrác. However, the project exceeds the limits set by UNESCO, which are intended to protect the world's cultural heritage – a unique panorama of Prague. Due to the violation of the rules, Prague may be deleted from the UNESCO list.

Furthermore, Arnika's activities have steadily focused on dealing with waste management issues. Arnika has, in several cases, been involved in permit procedures (including integrated permits) for waste incinerators (e.g. the Cheb incinerator and Rybitvi incinerator).

Our experience can be presented through the aforementioned case of tree felling in Ostrava-Poruba in Kopecký and Čs. Exilu Streets. In October 2008, a decision was made by Ostrava City Council to cut down 153 trees and 927 m^2 of shrubs (two administrative decisions).

[407] Measure of a general scope ("opatření obecné povahy") is a specific type of legal tool enacted in Czech administrative law since 2005. With its specified sphere of regulation but indefinite scope of recipients it sits between regulation as a general act, and decisions as an individual act. Examples are territorial plans, visiting rules of national parks, and delimitating flood areas with limitations of use.

Arnika participated in the process of permitting felling, pursuant to Act No. 114/19992 Coll. against the decision to authorise the felling; the association appealed, considering both decisions unlawful. It is necessary to emphasise at this point that a permit for felling trees can only be issued by law for serious reasons that outweigh the public interest in protecting the environment. In my opinion, the creation of parking spaces planned by the city hall could not be such a serious reason. In addition, it would have been technically possible to combine the construction of parking spaces with preserving woodland species.

The Regional Authority of the Moravian-Silesian Region confirmed the decision of the Ostrava City Hall in the appeal proceedings; therefore, Arnika initiated a lawsuit against the administrative decision in 2008. The administrative authorities of both degrees did not investigate the specific trees that had been proposed for felling to ascertain whether there was a serious reason for their felling that related to their functional and aesthetic significance. The value of the trees was not assessed individually, but the office offered various reasons for cutting down all the trees at one time. The office did not evaluate the importance of the trees, although this is required by law. In addition, it was allowed to fell even those trees that were in good health condition and of far from negligible value. We should add that this whole case took place in a city that has an air quality that is among the worst in the Czech Republic. Trees have an irreplaceable hygienic, aesthetic, and ecological function in the city. Serious justifications for felling them were definitely not given in this case.

In 2011, the court ruled in favour of Arnika. However, the Regional Authority of the Moravian-Silesian Region appealed and the matter went to the Supreme Administrative Court. The court ruled on the cassation complaint of the Regional Authority of the Moravian-Silesian Region. However, the Supreme Administrative Court confirmed the decision of the court of first instance.

According to the information provided by the City of Ostrava, the City Council decided to use new technology and significantly reduce the number of trees felled (only two linden trees were cut down). Street repairs began in 2014, with a significant delay resulting from the erroneous decisions of the municipality and the regional office. Finally, more lindens were cut down than was originally promised. There was also partial replacement planting. Other avenues of trees in Ostrava-Poruba continue to be cut down. Such an approach on the part of the city, however, conflicts with modern attitudes to town planning and contradicts with new strategy of the city of Ostrava, which involves so-called adaptation measures. These measures are targeted to allow people to adapt to the effects of climate change and include greening the city.

16.3 Involvement in cases addressed by the Czech Environmental Inspectorate and in tree felling cases

The Czech Environmental Inspectorate (hereinafter the "Inspectorate") is one of the bodies which the Czech Republic entrusts with the task of observing environmental legislation. It also oversees compliance with environmental decision making by environmental authorities. We have dealt with the Czech Environmental Inspectorate in particular cases of felling trees, for example the felling of trees alongside roads (for example, in 2018 in connection with the felling of the avenue in Kardašova Řečice; the Road and Motorways Directorate imposed a fine of CZK 100,000 for non-compliance). In previous years, we have also been to the Czech Environmental Inspectorate in other types of cases, especially because of toxic substances. The Czech Environmental Inspectorate acts punitively, rather than preventively, because of the nature of its powers. It usually only acts when environmental damage has occurred. This is also evident from the news that it publishes regularly on its website and the annual reports of its office. In our area of activity, the Inspectorate only intervenes when trees have been already cut down or at least a final decision has been issued to permit it. However, we rarely encounter cases where the Inspectorate prevented trees from being cut down.

In our experience, the procedures of individual inspectorates differ (the Inspectorate has several separate workplaces in individual regions of the Czech Republic). At the same time, some inspectorates are overloaded with a number of complaints and are unable to respond flexibly to individual cases. These complaints may not only be directed towards nature conservation, but also be aimed at harming a particular person. However, the inspectorate must also deal with such notifications from the public. The specific experience of the functioning of the Inspectorate is one of Arnika's cases. In December 2014, trees began to be cut down along the first-class road No. 24 between Lomnice and Veselí nad Lužnicí. Similarly, trees were felled in 2016 between the villages of Kardašova Řečice and Pleš. The Road and Motorway Directorate and Administration made a number of mistakes. Arnika requested information from the competent nature conservation authorities as well as the Road Administration of the South Bohemian Region. At the same time, we filed a complaint addressed to the Inspectorate in České Budějovice. At a joint meeting with the Road and Motorway Directorate of the Czech Republic, at the beginning of 2015, the road owners were looking for a way to at least partially remedy the resulting environmental damage. We promised that we would look for adequate replacement planting for the felled trees. Subsequently, the Administration of the Třeboňsko Protected Landscape Area reversed the decision of the Municipal Office of Frahelž. By that decision, the Authority permitted trees to be cut down without compensation. Afterwards, the municipality of Frahelž issued a new decision, for felling 35 trees this time; a replacement planting of 80 trees was prescribed.

The Czech Environmental Inspectorate imposed a fine of CZK 200,000 on the Road and Motorway Directorate. In addition, it ordered the investor to implement alternative

measures to remedy the ecological damage caused by the felling, which consisted of the replacement planting of 80 trees in the village of Ponědrážka. What did the Road and Motorway Directorate do? Six trees were felled without a permit for felling in the village of Ponědrážka and the landscape was disturbed by the cutting down of 74 trees without the consent of the competent nature conservation authority. According to the Inspectorate, by March 2015, 148 trees (mainly linden trees) along the roads in the Třeboňsko protected landscape area had been cut down. According to the information provided by the Road and Motorways Directorate, by the end of 2017 a total of 160 trees had been planted along the I/24 road near the villages of Frahelz and Ponědrážka. (This was the state of the case in March 2018).

16.4 Criminal proceedings in environmental cases

Responsibility for environmental damage can also have a criminal law dimension. However, only a narrow set of offences, such as poaching or animal abuse, are usually dealt with in this area (one such exception is cases of illegal wildlife trade but these are specific and are not directly connected with healthy environment). Other environmental offences are dealt with only sporadically. Although the legislation exists, filing a criminal complaint often does not aim to punish the culprits. Courts rarely condemn a person for harming the environment. Statistical data for 2017 show that environmental offences constitute only a minor fraction of those committed. In particular, we can say that the total number of crimes comprised 1,344,606 cases in 2017 (808,676 were cleared up). There were 156 cases of criminal offences (registered offences) related to environmental threats (both negligent and deliberate), and only 46 were cleared up. Similar figures apply to other years.

Examining the causes of this state of affairs goes beyond the scope of this article. Arnika does not deal with criminal law and does not often deal with criminal law issues. Our practical experience in the application of criminal law in protecting the environment is therefore limited to a few cases. We are pleased to note that, according to official information, the Czech Police are aware of the deficiencies associated with investigating environmental offences, which is why police officers are trained and cooperate with the Inspectorate.

What is our practical experience of the criminal law and its use in environmental protection? Can criminal responsibility for environmental damage be enforced by the public, including environmental associations? One of the older cases involving Arnika, in which we used the tools of criminal justice, was a landfill for hazardous waste in Libčany. The Hradec Králové Court imposed an eight-year prison sentence on an entrepreneur (the landfill operator) for illegally dumping hazardous waste in a landfill. The Supreme Court, however, then reduced the sentence to four and a half years. Why? The reason was the reclassification of the offence to one of negligence (general threats to the environment and illegal handling of hazardous waste).

The destruction of a lake where rare owls and frogs lived was a similar case. A businessman used this lake to deposit dangerous waste and severely damaged the habitat for rare animals there. The crime was committed continuously from 2000 to 2004. In 2004, the citizens of Mikulov drew attention to the crime. The entrepreneur Luděk Zahradník (the owner of Elzet Landfill) remained unpunished. In 2009 the District Court in Pardubice found the accused not guilty of the offence of environmental damage. According to the court, it was not proven that the perpetrator had exterminated protected animals.

16.5 Using "soft" tools

Based on Section 70 of the Nature and Landscape Protection Act (No. 114/1992 Coll.), environmental NGOs had been granted relatively wide access to various administrative proceedings in which nature and landscape interests could be affected. However, as a result of the 2017 amendment to that Act, associations cannot engage in environmental decision-making in such a wide scope any longer. Only a small part of the administrative proceedings opened under the 1992 Act remained so. In particular, NGOs no longer have an opportunity to participate in administrative proceedings concerning the nature and landscape under the Building Act (Act No. 183/2006 Coll.) although it is often in these proceedings that nature and landscape interests can be affected. There are not too many instruments nowadays that enable citizens to get involved in environmental decision-making. The opportunity to participate in the EIA process and consequent follow-up proceedings remained preserved. However, this cannot be used for medium and small construction projects. The opportunities for citizens to take part in environmental decisions are therefore significantly reduced. This is also due to the fact that the Czech legislation on liability for environmental damage does not comply with the requirements of Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage ("The Environmental Liability Directive"). Therefore (and for the above reasons), non-governmental organisations also use soft tools to provide information on environmental damage.

The Czech associations look for different creative ways to tackle environmental damage. For example, they often produce various statistics. They need to point out systemic problems and unresolved issues. For several years, Arnika has been creating statistics concerning the cutting down of avenues along roads. In these cases, the massive felling of tree species has often occurred, but the necessary replacement planting has often not been secured. At the national level, there are no comprehensive overviews of tree felling in avenues along roads. However, Arnika's data was incomplete in some cases. This was because the authorities did not have any methodologies for collecting and providing information on tree cutting. The authorities simply did not collect any evidence of how the trees along the roads were felled. Some road reports provided only partial data. Even at the nationwide level, there are no comprehensive overviews of how trees are felled along the roads. The only way to find out the numbers is to ask the road maintenance authorities. It was with this method that we created one of the first surveys in the Czech Republic.

A similar tool for highlighting environmental damage and operators' liability is what we call polluters ranking, which Arnika has been publishing since 2004. The output of our long-standing work is a web application called "Polluters under scrutiny" ("*Znečišťovatelé pod lupou*"). We use the data recorded in the Czech Integrated Pollution Register (IRZ) to complete the application. This data is published every year, but the official website is not very user-friendly. Our application helps citizens to get better knowledge of the degree of air pollution in their surroundings. It also provides information on which particular business premises are the source of this pollution. Arnika's main goal is to initiate action to reduce the amount of harmful substances in the environment through exerting pressure on the lawmaker and the public opinion. For the future, Arnika's main task is to prevent lobbyists from restricting or abolishing the Register. However, we also want to draw the attention of the public and the government to the need to extend IRZs to other harmful substances and tighten their limits.

As part of our activity, we often work on expert studies on major issues related to environmental pollution. An example (and our latest study from October 2018) is "TOXIC TRAP: Dangerous Substances in Recycled Products on the European Market". This study focuses on toys and other plastic consumer goods that are contaminated with toxic chemicals. The reason for this is using materials from waste electronics in new products. This is only possible because there are significant gaps in the EU legislation. Only the proper implementation of the Stockholm Convention on Persistent Organic Pollutants (POPs) and the setting of strict limits on waste contained therein will prevent hazardous waste from being exported and recycled. Arnika also presents these findings in international forums. It is a member of several international institutions (IPEN, for example).

16.6 Conclusions: evaluation of the Czech situation from the environmental NGO point of view and suggestions for the future

What would increase the level of responsibility for damage to the environment? What would help to protect the environment better? From our point of view, we could mention a whole range of facts. In this article, however, we will only describe the most important suggestions.

One of the most important is to return the provisions on public participation in administrative procedures related to nature and landscape protection in the Czech law in force. At present, a recodification of the building law in the Czech Republic is being prepared. However, the statements to date from the relevant ministries do not raise the hope that the public will be more involved than is the case in the current situation. Early public participation in decision making is, in many cases, able to prevent environmental damage, as shortcomings can be corrected in time.

Legislators should also take all necessary steps to process the legislation on environmental damage properly. The Environmental Liability Directive should be properly implemented in

the Czech legal order. The Czech Act No. 167/2008 Coll., on the Prevention of Environmental Damage and its Remedying, must, among other things, allow the procedure to be initiated even at the request of a non-governmental organisation. Czech law must not prefer the procedure initiated by the administrative body. An amendment of this Act that aims to change this is now being discussed in the legislative process in the Czech Parliament.

Furthermore, non-governmental organisations should be able to submit any observations on environmental damage to the competent authority. They must also be able to require the competent authority to take the measures required under the Directive.

The next step could be to introduce collective action in the field of environmental law. Environmental damage in a certain location often affects the rights of more than one person, usually a whole group of people (the community). By introducing a collective action, the costs of proceedings could be reduced for the plaintiffs, as would the cost to the state. Collective actions would also reduce the burden on the courts and accelerate proceedings. As regards our activities, we consider collective actions to be particularly beneficial in the areas of land-use planning and protection against toxic substances in consumer goods. A measure of a general scope often affects the interests of a large group; for example, in Prague there may be thousands of citizens who could join a collective claim instead of bringing individual actions. Collective actions could help citizens not only to reduce the costs incurred by defending their rights and interests (legal representation, court fees, expert opinions, etc.), but also eliminate stress and other negative factors associated with litigation. If an individual has to face an authority or an investor, it can lead them to choose not to defend their rights. The means for the collective defence of interests in relation to the protection of the environment are clearly lacking in the Czech legal order.

We find it inappropriate that the Czech courts keep not using the suspensive effect of actions in situations where it would be suitable, although the law in force provides such an opportunity. In our practice, we still encounter situations where the decision of the administrative body is reversed, but actual remedies can no longer be achieved. The consequence of such practice constitutes an ineffective approach to judicial protection in environmental matters in the Czech Republic.

The Czech environmental NGO Arnika thus recommends:

– On the basis of our experience, we believe that the introduction of collective actions in the field of environmental law could improve citizens' access to justice. If certain environmental damage affects the rights of several individuals living in a particular area, it will be easier for the citizens concerned to assert their rights. Citizens' status against large entrepreneurs and investors must be strengthened, so that the principle of responsibility for environmental damage can actually be enforced and enforceable.
– We believe that the new legislation should allow those citizens who are affected to join an action that has already been brought easily (opt-in). In our opinion, this approach is more appropriate and, moreover, is closer to the Czech legal system than the opt-out

system. We believe that an information system should be set up to collect data on the disputes that have been initiated. The citizens who are affected could easily join the dispute arising from the same situation as theirs.

- It would be appropriate for associations to have a specific role in protecting the public interests and interests of certain groups on the affected territory. Associations could sue whenever the public interest is being violated and could sue in situations where there is a mass violation of rights.
- In order to avoid abuse of the law, it would be appropriate to define restrictive rules for an association's standing (how long it has been in existence, number of members, geographical scope etc.).
- Associations that have been founded by the population affected (for example, 30 inhabitants living near an incinerator) should be able to act as a specific representative of the group (group representative).
- Associations could retain some of the money raised by the litigation procedure to develop further public interest protection activities (if they were group representatives). We believe that some of the funds raised by the litigation should be designated to improving the state of the environment because it is in the public interest and not a matter of the protection of purely individual interests. One of our recommendations is not about collective actions; it is aimed at restoring public participation in environmental decision-making.

17 Public interest environmental law office experiences in Hungary

Kiss Csaba

17.1 Introduction: Recent changes in the collective redress regulations

In Hungary, the regulation of collective redress mechanisms has undergone a significant change lately, with the adoption and entry into force of the new Code of Civil Procedure[408] (hereinafter: CCP).

The former legislation was symbolised by the 1952 Code of Civil Procedure, which contained no real collective redress mechanisms. The philosophy of regulation, as well as the actual provisions, represented a perception of the problem of mass harms as seen by an outdated legal policy approach. In that approach, the collective representation of claims was something not to be encouraged, or rather to be discouraged, also by regulatory means. The provisions of the 1952 Code only allowed multiple plaintiffs to be present in a lawsuit where their common rights could be adjudicated in a uniform manner and the decision would affect others without their being plaintiffs. The claims submitted to the court had to stem from the same legal relationship with the defendant. As a special and very rarely used opportunity, additional persons were entitled to join plaintiffs in a procedure already running; however, the conditions of this were identical to the conditions for starting a case with multiple plaintiffs, *mutatis mutandis*.

Joinder of Parties
Section 51

Two or more plaintiffs may unite in an action and two or more defendants may be jointly charged if:

a) the subject matter of the litigation is a common right or a common liability that can only be resolved in unity, or if the ruling would affect all defendants, even those not appearing in court;

[408] Act CXX of 2016 on Civil Procedure.

b) the claims under litigation originate from the same legal relationship;
c) the claims under litigation involve the same cause of action and legal basis, and the same court is recognized to have jurisdiction under Section 40 notwithstanding with respect to all defendants.

The new legislation, the CCP from 2016 that entered into force on 1 January 2018 totally re-regulates the situation. It establishes two types of class action proceedings, called public interest actions and collective actions.

17.1.1 The public interest action

A public interest action can be initiated for the protection of the public interest and the rules of the CCP of 2016 must be used if a separate law orders its application. In these cases, those whose rights are being represented have no legal standing in the actual procedure, so it is an indirect representation. No additional parties are allowed to join the case once initiated. The judgment made in public interest action cases must define those who are entitled by the judgment and how they have to prove it. When the judgment is made, the defendant must inform those potentially affected within 30 days from the delivery of the judgment.

17.1.2 The collective action

According to the Section 580 and following of the CCP of 2016, it is possible to initiate a collective lawsuit. A collective lawsuit can be started if there are at least 10 applicants whose rights are the same and if the facts establishing the representative right are in essence the same for each applicant. The case must be permitted by the court. Such a case can be initiated only in consumer protection, labour law cases and environmental matters. In the latter case, this must be a compensation claim arising out of damage to health or material damage, directly caused by an unforeseeable environmental emission caused by human activity or omission.

Neither of the collective redress proceedings prevents individual claims from being heard, except if there is a final judgment in a public interest case and the defendant informs the potential applicant (if no case has been started yet) or the actual applicant (if there is already a case running between the defendant and the applicant) within 30 days in writing of the final judgment. If the potential or actual applicant maintains the right to start or continue the individual claim, then the judgment made in the public interest case will not apply to the individual dispute.

As these new legal instruments were only introduced relatively recently into the legal system, there is no respective case law yet.

17.2 Public interest environmental law office experience

The Environmental Management and Law Association (EMLA), as a public interest environmental law NGO working as a specialised environmental legal aid association, has in its case law a number of cases where the use of collective redress mechanisms could have been applied appropriately. However, the cases of EMLA show only theoretical opportunities to represent a collective of clients, because the legal instruments available under the 1952 Code were inappropriate for the purpose of collective redress. Using only the legal mechanisms then available could not bring about the desired results. However, in retrospect, the following cases could have benefited from applying the real collective redress mechanisms.

17.2.1 Slaughterhouse case in Kiskunfélegyháza

There is a large food industrial facility in the town of Kiskunfélegyháza, in South-Eastern Hungary, where a company operates a slaughterhouse. The slaughterhouse has a permitted capacity of slaughtering 5,000 pigs per day. The operation of the facility gives rise to residents' complaints, and has been for many years the reason for administrative inspection procedures initiated by a number of local dwellers. Those living in the neighbourhood complained about the high level of noise originating from the cooling equipment and the traffic, with large cargo trucks entering and leaving the facility. Another reason for complaint was the odour emanating from the facility, especially when new trucks with live animals arrived at the reception area of the plant.

In the case at hand, at least 200 individuals are affected but due to the inadequate legal opportunities to represent collective interests, only four people are in fact intensely involved in the management of the case. EMLA has already been giving legal advice to citizens regarding the case for years. Part of the case (the issuing an environmental permit for the facility) was appealed, then later taken to the administrative court. The court annulled part of the permit that related to noise abatement. The citizens took this judgment to the Supreme Court, which annulled the environmental permit in its entirety. The permit process restarted and resulted in a newly issued and slightly modified permit. This permit was again taken to the court and the judicial procedure at the administrative court is now ongoing. Parallel to this, the citizens requested the local notary to appoint an environmental expert before filing a lawsuit against the company for damages. The expert opinion was prepared in 2018 and establishes that the company has introduced mitigation measures that now guarantee that its noise and air emissions are under the threshold; however, these emissions were most probably above the threshold before these measures were introduced. The citizens are preparing to start a tort case against the company.

17.2.2 Plywood factory case in Szombathely

There is a large wood-processing facility in the town of Szombathely, in Western Hungary, where a company operates a plywood factory. The factory has a permitted capacity of 875,000 cubic metres of plywood per year. The operation of the facility gives rise to citizen complaints, and for many years has been the reason for administrative inspection procedures initiated by a number of local dwellers. Those living in the neighbourhood complained about a high level of noise originating from the production equipment and traffic, with large cargo trucks entering and leaving the facility. A reason for complaint was also the dust emitted by the facility that was generated by the heating equipment's operation, which was also from time to time released with the filtering equipment bypassed.

In the case at hand, at least 500 individuals who live in a residential area adjacent to the facility are affected but, due to the inadequate legal opportunities to represent collective interests, it was only two people who were actually highly involved in the management of the case. EMLA has already been giving legal advice to the citizens in the case for years. EMLA represented a local NGO as plaintiff in a lawsuit against the environmental permit of the facility and also joined another case as friend of the defendant when the company disputed the limitation of its operations imposed by the defendant environmental authority. In both cases, the company won and so the facility has a valid environmental permit and the environmental authority is obliged to ease the limitations on the operation of the facility. A separate group of citizens initiated a private nuisance case against the company but EMLA is not involved in that.

17.2.3 Marina case in Siófok

There are plans to construct a relatively large marina to host 99 moorings for boats by a yacht club on Lake Balaton within the administrative territory of the town of Siófok. The planned development is expected to have significant landscape impacts, and would also have an effect on public beaches, thus altering the bathing habits of the affected population.

In the case at hand, at least 50 individuals are affected but due to the inadequacy of the legal opportunities to represent collective interests, only five people are actually highly involved in the management of the case. EMLA provides legal advice to two separate groups of citizens affected by the case. The permit request from the project developer had already been refused in two instances as not complying with the landscape requirements before the permit was finally issued. Citizens were planning to initiate the judicial review of the permit.

17.2.4 Li-ion battery factory case in Göd

A giant multinational electronics company is operating a factory in the town of Göd, north of Budapest. The company is planning new facilities within its industrial estate, as well as a major extension of the estate to host a new production unit. Within the planned new facilities and buildings on the existing estate, there is a storage container that would contain 26 tons of electrolyte solution. This solution is needed for the production of large Lithium-ion batteries that would later be built into electric cars. The factory is already close to a residential area but the storage of the solution would be built on the edge of the factory that is closest to the houses of local citizens. As was proven during the permit procedure of the new facility, the solution is an explosive material and the citizens expressed their fear of the risk of explosion. Their fears were not dismissed by the so-called Safety Report produced by the company because of its alleged low quality and precision when discussing the risks of the electrolyte solution exploding.

In the case at hand, at least 200 individuals are affected but, due to the inadequacy of the legal opportunities to represent collective interests, it is not possible to start a collective redress case. However, 50 persons still expressed their strong commitment to start a legal case against the company; therefore – using the existing legal opportunities – this case may demonstrate how subsidiary legal instruments can work in practice and provide remedy to individuals. EMLA provides legal advice to the citizens affected by the planned developments. EMLA – after similar efforts by attorneys who previously worked in the case – approached the company with a suggestion for an amicable settlement of the case, which was brusquely rejected by the company. The citizens' next step will most probably be to initiate a private nuisance and/or tort case. In the meantime, the environmental authority rejected the legal standing of one citizen in a case relating to the construction permit of the planned developments. This was taken to court and proceedings are now ongoing.

17.2.5 Red Mud Slide case

The case of the 2010 Red Mud Slide was a landmark incident in the history of industrial accidents in Hungary. In October 2010, following a period of heavy rains, the red mud that was generated as a by-product of the production of alumina from bauxite, broke through the earthen dams and flooded nearby fields, forests and also villages. Huge material and human losses, including 10 deaths, followed this accident and naturally, legal procedures were initiated against the company operating the alumina factory. Although such a case would have been a perfect example of a collective action, it was not possible under the 1952 Code of Civil Procedure.

Instead, individual claims had to be enforced in individual lawsuits, and claims were collected into quasi collective lawsuits only by having the same attorney for a number of plaintiffs. Almost all cases ended up with compensation granted by the court, ranging from EUR 3,000 to EUR 20,000. The plaintiffs – given the lack of appropriate legal provisions – could not

enjoy the benefits of a collective lawsuit; moreover, the judgments diverged did not show consistent jurisprudence.

EMLA had no role in these cases whatsoever.

17.3 Critical remarks regarding the administrative and civil procedure legislation and practice

The primary difficulty in administrative judicial cases stems from their highly complex nature. In such instances, difficult scientific and technical issues are discussed and so there is a need for private or court-appointed experts. Such experts have very high fees, therefore those not having sufficient financial resources are in practice deprived of seeking redress this way because the plaintiff is the person who bears the burden of proof and thus has to pay for these expert opinions.

The primary difficulty in private law cases (nuisance, tort, etc.) is partly the same, i.e. the high cost of technical experts. In addition, there is a low level of willingness in the communities to show solidarity. In many instances, when a number of people are exposed to the same harmful environmental impact, contrary to what would be expected, these people do not unite their forces but – so to say – wait for each other, wait for someone to sacrifice resources and work for the community, without bearing his burdens. This is manifested in e.g. citizens living in the same area under the impact of air and noise emissions refusing to contribute money to be able to cover the attorney fees for their joint representation, even if that amount is very small (e.g. EUR 10 per person). This situation was made even worse in one case by the tactics (nevertheless legal) of the company causing the environmental harm, when it started to purchase the houses of affected citizens, one by one. This had an effect on the rest of the community, that in fact nobody dared to join any case against the company, being afraid that it would be him/her eventually whose house would not be bought by the company. All this resulted in situations where, although mass harm was suffered, only a few members of the community dared to go to court and the rest would not even testify and provide evidence.

In environmental cases, there is a clear need for specialised courts to hear such cases. If specialised judicial bodies were to hear these cases, it could apply its own system of criteria for expediting cases, for applying interim measures and for granting injunctions or fee waivers. If the body included technical experts, the need for court appointed technical experts could also be solved more easily, via applying in-house expertise.

In environmental matters, those claiming injunction mostly represent public interest against private interests. In such a dispute, in private law cases, private interests are balanced

against the public interest and sometimes private interests are found to be more legitimate because of a harm to the environment or nature seems hypothetical at the given stage of the process. If the applicant for injunction cannot prove that the harm caused by not issuing the injunction is greater than that from issuing it, the claim cannot be successful. If business interests are involved, the courts may make issuing an injunction conditional upon a bond or a cross undertaking in damages. In such cases, if the applicant is an NGO, the latter seldom has the financial means to pay the required bond.

17.4 Article 99 of the 1995 Environmental Protection Act

According to the Environmental Protection Act, there is a legal opportunity for environmental NGOs to request state or municipal authorities to take action in their competence. This is usually applied by our clients with varying degree of success in urging authorities to act. The fields where this is applied are diverse, ranging from water management through waste management to illegal tree felling. The competent authorities in most cases are ready to answer requests but do not involve NGOs in the management of the case. Competent authorities seldom actively interact with NGOs; they tend to respond only if an NGO has a suggestion or a proposal. The problem stems both from the legislation (which does not mention active partnerships between NGO and authority) and from the attitude of the administration (not willing to experiment with partnering with NGOs unless explicitly mentioned in the law).

However, in case that is not sufficient or the NGO would like to stand up on its own against an unlawful activity, there is a legal provision in the Act that is quite similar to a collective redress mechanism, although it is not a real redress mechanism in the strict sense. Pursuant to Section 99 of the Act, an environmental NGO active in the impact area may start a lawsuit against a polluter or someone using the environment as a resource. The possible claims that may be posed and the possible outcomes that the court can order are:

– Ceasing the polluting activity;
– Preventive measures to be taken by the polluter.

We can call it a representation of public interest with no actual beneficiary, since no party receives any compensation or individual redress, but the public interest may be promoted by a judgment that orders pollution to cease or preventive measures. However, this is quite a time consuming, energy consuming and costly procedure, mostly because the plaintiff NGO has to provide all evidence and, if it involves experts, the costs may be prohibitively expensive due to their high fees.

The currently prevailing quasi *actio popularis* by which NGOs may take polluters to court and ask the court to order the polluter to stop the unlawful operation and/or the introduction

of preventive measures should be complemented. Environmental NGOs should be able to claim compensation (financial or material) for harms done to the environment, in the public interest. Any such claim in practice mostly has practical (financial) barriers because initiating such a case requires the involvement of an expert, which requires ample financial resources. To overcome this barrier, cost capping mechanisms, a special state fund, reversal of the burden of proof, fee waiver for NGOs or similar instruments would be needed.

Given that NGOs cannot play any role in the compensatory relief procedure, we cannot be satisfied. According to Section 109 of the Environmental Protection Act, only the public prosecutor as a representative of public interest is entitled to initiate a case at court for compensation in the event of threatening damage to the environment. This however deprives civil society of the option to contribute to law enforcement with its specific means.

17.5 Conclusions

The legislation of Hungary has undoubtedly made a huge leap towards improvement by officially acknowledging collective redress mechanisms and inserting them into the Code of Civil Procedure. However, this change mostly affects the consumer protection field and will most probably have a lesser impact on the environmental matters.

To be able to start a public interest action, environmental NGOs would need an explicit entitlement to initiate such cases, and they would consequently be able to rely on the new rules of the Code of Civil Procedure now in force. As regards the other option, to be able to start a collective action, there is a need for an environmental emergency situation from which claims may originate and make it possible to refer plaintiffs to the new rules of the Code. Indeed, one cannot wish for such an incident to occur, therefore one hopes this legal instrument will remain only a theoretical option.

What is already available at the disposal of environmental NGOs seems to be a satisfactory legal tool to fight allegedly unlawful administrative decisions. The right of NGOs to sue polluting companies also provides some opportunities for citizen enforcement, but its characteristics (mostly the high expert fees) make it a tool that needs extreme care and consideration from the NGOs before use.

Finally, the awareness and related attitude of citizens will only improve to the extent that attorneys and legal professionals are knowledgeable in the newly available legal instruments; as such their education and training is essential for spreading knowledge on the amendments to the Code. Only by this will we be able to see in the long run the extent to which the positive legislative changes result in actual positive practical changes as well.

18 Polish class action and alternative lawsuits in environmental harm cases: The perspective of a Polish environmental law association

Magdalena Ukowska

18.1 Introduction

The aim of this chapter is to present the practical dimension of the regulation of class actions in Poland with regard to environmental issues, along with other legal options to tackle the problems relating to the environment.

The Polish class action procedure is determined in the Act on Pursuing Claims in Group Proceedings[409] (hereinafter the "Act on the Group Proceedings" or the "Act"). By legal definition, a class action or group proceedings are the civil judicial proceedings in which claims of one type, sharing the same[410] or identical[411] factual basis, are pursued by at least 10 persons. It has to be noted that the types of cases in which group proceedings can be initiated is restricted: the Act only applies to matters relating to liability for damage caused by dangerous products, tort claims, liability for non-performance or improper performance of contractual obligation claims, unjust enrichment claims, and other matters relating to claims for consumer protection. The environmental matters are not mentioned in this list. One of the characteristic features of the Polish class action is the fact that both pecuniary and non-pecuniary claims can be pursued, although with some restrictions concerning the pecuniary ones. According to Article 2 of the Act, group proceedings are applicable only when the value of a pecuniary claim has been standardised within a group. This provision was a subject of

[409] Act of 17 December 2009 on Pursuing Claims in the Group Proceedings (Ustawa z dnia 17 grudnia 2009 r. o dochodzeniu roszczeń w postępowaniu grupowym), Dz.U. 2010 nr 7 poz. 44 ze zm.

[410] Meaning exactly the very same factual basis e.g. there are 10 people injured simultaneously by the explosion of one dangerous product.

[411] Meaning alike in every way, but not the very same e.g. there are 10 people injured by 10 dangerous products of the same kind in different places in the country etc. The situations are identical but are not the very same.

a recent amendment to the Act,[412] which should contribute to the improvement of case handling in group proceedings.

A good incentive to initiate such proceedings are low court fees.[413] Still, due to the principle of mandatory representation of the plaintiff by an attorney-at-law for the purpose of litigation,[414] the costs of such proceedings are considerably higher. The initiation of the group proceedings does not preclude pursuing claims individually by persons who have not joined or who have left the group.

The Act on Group Proceedings introduces many procedural conditions that might hinder the effective use of a class action on many occasions, as they are both strict and hard to fulfil. The most noticeable one is the above-mentioned narrow (exhaustive) catalogue of circumstances in which proceedings can commence. It is to be seen as a significant drawback that neither personal rights nor environmental issues are envisaged in the Act. While personal rights are explicitly excluded from group proceedings,[415] environmental-related cases are barely possible to be the subject of a class action due to the limited catalogue. In the majority of environmental cases it would be a hopeless task to argue that the case can be pursued in group proceedings. However, the Polish legal system offers claimants other possible means to substitute for the lack (or at least ineffectiveness) of a class action with regard to environmental cases.

This report will present the perspective of an environmental non-governmental organisation pursuing claims in cases where environment, as a common good, is infringed.

18.2 Basic rules of participation by non-governmental organisations in key types of legal proceedings

The very limited possibility of conducting group proceedings in cases relating to the environment is compensated by a wide range of legal proceedings in which a non-governmental organisation may act to defend a public interest with regard to environmental issues. Although an

[412] See Act of 7 April 2017 on the Amendment of Certain Acts In Order to Facilitate Pursuing Pecuniary Claims (Ustawa z dnia 17 kwietnia 2017 r. o zmianie niektórych ustaw w celu ułatwienia dochodzenia wierzytelności), Dz.U. 2017 poz. 933 ze zm.

[413] Which is 2% of the value of the claim from the whole group compared to the 5% in the individual proceedings (see article 13.2 of the Act on the Court Costs in Civil Matters) and a fixed fee of PLN 600 in non-pecuniary claims (see article 26.1.7 of the Act on the Court Costs in Civil Matters).

[414] Article 4.4 of the Act on Group Proceedings: In group proceedings, the plaintiff is represented by an attorney-at-law, unless the plaintiff is an attorney-at-law.

[415] See Article 1.2a of the Act on Group Proceedings: Claims for the protection of personal rights shall be excluded from group proceedings, with the exception of claims arising out of bodily injury or health disorder, including claims to which the immediate family members of the injured party or the deceased are entitled as a result of bodily injury or health disorder.

NGO's participation in the proceedings might play a different role to that in a class action, the ultimate outcome, of having multiple interests respected and observed, would be identical.

The general provisions for the participation of NGOs in the proceedings vary, depending on its type. In the vast majority of cases, the existence of a public interest would be required; however, there is no legal definition of this premise. As such, it is subject to interpretation *in casu*. The uncertainty of the interpretation poses a degree of risk when initiating proceedings. In principle, standing is based on the statutory objectives of the NGO, which can be easily verified by the court or the administrative authority, as NGOs are registered in the *Krajowy Rejestr Sądowy* – National Court Register, where i.e. all societies are listed[416]. Deriving the legal standing from the statutory objectives might be assessed both as an interest-based and a rights-based approach by the legislator. There are no further obligations to register an NGO in a court or a ministry prior to bringing the cases to court, which can only be perceived as a reasonable solution, facilitating NGOs' activities in the legal proceedings. In some specific proceedings, there can be additional formal conditions for an NGO to fulfill, such as the profile of the organisation (e.g. ecological, animal welfare), some specific statutory objectives or adequate period of operation. There are also some further specifics, depending on the type of proceedings.

18.2.1 The civil procedure

In the civil procedure, an NGO can act before the court on its own accord or on behalf of a third party, after having received the written consent of this person. According to article 8 of the Polish Code of Civil Procedure,[417] non-governmental organisations whose statutory task is not to conduct any business activity may, for the protection of citizens' rights, initiate proceedings and take part in them. Article 61 of the Code enumerates the types of cases in which an NGO can bring an action before the court on behalf of a third person. Among others, the article names environmental protection. It is worth noting, that the provisions relating to the public prosecutor bringing an action in favour of a specified person apply, *mutatis mutandis*, to non-governmental organisations bringing actions in favour of natural persons.

Through its participation in civil proceedings, a non-governmental organisation protects three kinds of interest: its own, the interest of the particular citizens and the collective interest.[418]

[416] Krajowy Rejestr Sądowy is a public register managed by the Ministry of Justice, as well as certain district courts. It consists of the register of entrepreneurs, the register of associations, other social and professional organisations, foundations and independent public healthcare institutions, and the register of insolvent debtors. The register serves both information and legalisation.

[417] Ustawa z dnia 17 listopada 1964 r. – Kodeks postępowania cywilnego, Dz.U. 1964 nr 43 poz. 296 ze zm.

[418] SIERADZKA, M. Art. 4. in: SIERADZKA, M. *Dochodzenie roszczeń w postępowaniu grupowym. Komentarz*. Warszawa: Wolters Kluwer Polska, 2018.

18.2.2 The administrative proceedings

Administrative proceedings are even more easily accessible for an NGO than the civil ones. Not only the consent of the party is not needed, but also the administrative authority is obliged to inform the non-governmental organization about the initiated proceedings, whenever the authority considers that the organization might be interested in the participation for its statutory objectives and when there is an overriding public interest.[419] However NGO-friendly this provision might seem, it is extremely rarely applied in practice.

Just as in civil procedure, the NGO can request that proceedings are initiated on behalf of a third party or it can participate in the proceedings already underway. In the latter case, two additional conditions are to be met: the initiation or participation must be justified by the statutory objectives of the NGO and there has to be a public interest justifying this participation. Moreover, an NGO that does not participate in the case may present the authority with its opinion on it expressed in a resolution or in a statement by their duly authorised body.[420]

18.2.3 The criminal proceedings

The active involvement of the NGO is also possible within the scope of criminal proceedings. According to Article 90 (1) of the Code of Criminal Procedure,[421] participation in the court stage of the proceedings may be declared by a social organisation, if there is a need to protect the public interest or individual interest covered by the statutory tasks of this organisation, in particular, the protection of freedom and human rights. In principle, at least one party must consent to the NGO's participation; however, such an organization might be a participant regardless of the consent of the parties due to the interest of justice. Nonetheless, such an organisation is not a party to the proceedings and therefore its rights in them are very narrow – its representative can take part in a court hearing (as can every citizen in almost all criminal court cases) and make oral or written statements.[422] The organisation has no right to submit requests for evidence or appeal against the final judgment. In the literature, its position is described as a *"quasi-party"*.[423] It has to be noted that an NGO cannot be a party to the preparatory proceedings before the prosecutor.

[419] See Article 31 § 4 of the Code of Administrative Procedure (Ustawa z dnia 14 czerwca 1960 r. Kodeks postępowania administracyjnego), Dz.U. 1960 nr 30 poz. 168 ze zm.
[420] Article 31 § 5 of the Code of Administrative Proceedings.
[421] The Act of 6 June 1997– the Code of Criminal Procedure (Ustawa z dnia 6 czerwca 1997 r. Kodeks postępowania karnego), Dz.U. 2018poz. 1987 with amendments.
[422] See Article 91 of the Code of Criminal Procedure.
[423] EICHSTAEDT, K. Art. 90. in: ŚWIECKI, D. *Kodeks postępowania karnego. Tom I. Komentarz aktualizowany*. System Informacji Prawnej LEX, 2019.

18.2.4 The group proceedings

As already explained above under section 18.1, group proceedings fall under the civil procedure. However, because group proceedings have their irregularities, it is commonly stated that an NGO cannot file a lawsuit in such proceedings.[424] Moreover, an NGO cannot be the representative of the group. As indicated in the justification of the draft to the Act on Group Proceedings,

> *"the possibility of a social organisation to be the representative of a group was deliberately abandoned, as these organizations do not have sufficient experience and financial resources to manage such cases. However, if, in practice, granting such a privilege to non-governmental organisations turns out to be advisable, it will be possible to amend the project in order to enable these entities to file group actions"*.[425]

According to the currently binding Article 4.2 of the Act, the group of claimants can be represented either by one of them or by the municipal consumer advocate.[426]

18.3 Specific legal instruments of NGOs in environmental cases in the respective legal proceedings

18.3.1 An environmental NGO in the administrative proceedings

Even though the environment is not widely perceived as a personal right,[427] it is generally accepted as a common good. Hence, a wide range of possible legal steps towards its protection exists in the Polish legal order. The administrative law offers the useful tool of a request to take action based on the Article 241 of the Code of Administrative Procedure. Moreover, there is an environmental liability regime, based on the Environmental Liability Directive.[428] According to the Act on the Prevention and Remedying of Environmental Damage,[429] which transposes it,

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[424] SIERADZKA, M. Art. 4. in: SIERADZKA, M. *Dochodzenie roszczeń w postępowaniu grupowym. Komentarz*. Warszawa: Wolters Kluwer Polska, 2018.

[425] P. 16 of the Justification to the government bill on the pursuing claims in the group proceedings – Polish Uzasadnienie rządowego projektu ustawy o dochodzeniu roszczeń w postępowaniu grupowym. Available at: <http://orka.sejm.gov.pl/Druki6ka.nsf/wgdruku/1829>.

[426] Polish "powiatowy (miejski) rzecznik konsumentów".

[427] The idea will be developed in subchapter 18.4 below.

[428] Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage. Available at: <http://data.europa.eu/eli/dir/2004/35/2013-07-18>.

[429] Act on the Prevention and Remedying of Environmental Damage (Ustawa z dnia 13 kwietnia 2007 r. o zapobieganiu szkodom w środowisku i ich naprawie), Dz.U. 2007 nr 75 poz. 493 ze zm.

an NGO can inform the Regional Director for Environmental Protection of the environmental damage or a threat thereof. The environmental organisation making that notification has the right to participate in the procedure with the rights of a party.[430] This provision is a widely practiced legal tool aiming at the protection of the environment. The principle of environmental liability is based on "purely ecological damage" which is distinct from a civil liability system of damage to individual property, economic loss, or personal injury. This approach could be perceived as *actio popularis* with regard to environmental issues.

Due to the recent amendments to the Polish legal acts, participation by NGOs in some administrative proceedings has been severely limited. For instance, in water law and water management cases, the general principle of their participation has been excluded,[431] or the NGO is required to notify at least 12 months before attempting to participate in the proceedings.[432]

18.3.2 Environmental NGO in the criminal proceedings

When crimes or minor offences with regard to the environment occur, the role and rights of an environmental NGO are very limited. As described under section 18.2.3 above, an NGO cannot participate in the preparatory criminal proceedings. An NGO has a right to inform a public prosecutor of crimes[433] or notify the police of minor offences. Its further role in the proceedings is however restricted to the possibility of submitting a complaint against a decision of refusing to initiate an investigation (crimes[434] and minor offences[435]) or to file a motion for punishment (minor offences[436]). In particular, the organisation has no right to file a complaint against the decision to discontinue initiated proceedings[437] or to act as a subsidiary or private prosecutor.[438] It is also not treated as a party to the proceedings initiated as a result of its notification. This leads to a situation where the public prosecutor is in most cases the only person deciding on the entire criminal proceedings, because

[430] Article 24.6 of the Act on the Prevention and Remedying of Environmental Damage. It has to be underlined, however, that not all entitlements of a party are accessible by the NGO acting on the rights as a party.

[431] See Article 402 of the Water Law Act (Ustawa z dnia 20 lipca 2017 r. – Prawo wodne), Dz.U. z 2017 r. poz. 1566 ze zm.). The provisions of Article 31 of the Act of 14 June 1960 of the Code of Administrative Procedure shall not apply in proceedings concerning water law permits.

[432] See Article 44 of the Act on the Disclosure of Information Concerning the Environment and its Protection, the Participation of the Society in the Environmental Protection and the Environmental Impact Assessment (Ustawa z dnia 3 października 2008 r. o udostępnianiu informacji o środowisku i jego ochronie, udziale społeczeństwa w ochronie środowiska oraz o ocenach oddziaływania na środowisko), Dz.U. 2008 Nr 199, poz. 1227 ze zm.

[433] See Article 304 and 305 § 5 of the Act of 6 June1997– the Code of Criminal Procedure (Ustawa z dnia 6 czerwca 1997 r. Kodeks postępowania karnego), Dz. U. 2018 poz. 1987 with amendments.

[434] See Article 306 § 1 of the Code of Criminal Procedure.

[435] See Article 59 § 2 of the Act of 24 August 2001 of the Code of Procedure for Minor Offences (Ustawa z dnia 24 sierpnia 2001 r. Kodeks postępowania w sprawach o wykroczenia), Dz.U. 2018 poz. 475 with amendments.

[436] See Article 56a the Code of Procedure for Minor Offences.

[437] See Article 306 1a of the Code of Criminal Procedure.

[438] See Article 49, 53, 59 of the Code of Criminal Procedure, and Article 25 of the Code of Procedure for Minor Offences.

crimes against the environment[439] are usually crimes without victims. It means that, in such cases, there is neither social nor court oversight of the public prosecutor's conclusion to discontinue proceedings.[440]

18.3.3 Civil law-based tools for an environmental NGO

Civil law offers a very interesting legal basis for a claim with regard to an unlawful impact on the environment, which is regulated in Article 323 (1) of the Environmental Protection Act.[441] According to this provision, anyone upon whom the damage is inflicted, or there is a direct threat of the damage caused by an unlawful environmental impact, may require that the entity responsible for that threat or infringement restores the *status quo* and takes preventive measures, in particular by installing devices to prevent the threat or infringement; where this is impossible or excessively difficult, he or she may require the activities giving rise to the threat or infringement in question to cease. More interesting still is the provision of section 2 of this article, stating that if the threat or infringement concerns the environment as a common good, the claim referred to in section1 may be filed by the State Treasury, a local government unit or an environmental organisation. However, it is important to underline that the claims vested in the plaintiff by Article 323 of the Environmental Protection Act are solely of a reparative and preventive nature. A person seeking pecuniary damages has to resort to the general rules of the Civil Code.

This provision can be used to circumvent the inability to file class actions in environmental cases connected with pollution, noise and odour. By virtue of the claim, an NGO can pursue that the liable entity is obliged to restore the damage made to the environment, so that the lawful state is re-established, as well as the safety measures, including implementing the installation or devices securing this infringement or threat, are undertaken. The obstacle that can make this legal tool difficult to apply in practice is that proving the causal link between the unlawful activity affecting the environment and the damage might be problematic. The burden of proof lies, according to the general provisions of article 6 of the Civil Code,[442] on the claimant. An environmental NGO would frequently have to bear the costs of the expertise and studies proving the scope of the damage and the link between the damage and the activity of the liable entity.

However, the plaintiff's position is significantly improved by Article 327 of the Environmental Protection Act, which stipulates that

[439] See Chapter XXII of the Act of 6 June 1997 – the Criminal Code (Ustawa z dnia 6 czerwca 1997 r. Kodeks karny), Dz.U. 2018 poz. 1600 with amendments.
[440] For the possibilities of action by an environmental NGO in criminal proceedings before the court, see section 18.3.2.
[441] Ustawa z dnia 27 kwietnia 2001 r. Prawo ochrony środowiska, Dz.U. 2001 nr 62 poz. 627 ze zm.
[442] The Civil Code (Ustawa z dnia 23 kwietnia 1964 r. – Kodeks cywilny), Dz.U. 1964 nr 16 poz. 93 ze zm.

"anyone who submits a lawsuit for compensation for damage caused by environmental impact may demand that the court obliges the person/entity whose activity relates to the claim to provide all information necessary to determine the scope of such liability".

This provision grants plaintiff a very broad right to information, which may be a huge asset, especially for an environmental NGO, and may even be the main reason to initiate such litigation.

Although Article 323 section1 of the Environmental Protection Act makes liability dependent on the unlawfulness of the environmental impact, a further provision – Article 325 – stipulates that *"liability for damages caused by environmental impact is not excluded by the fact that activities causing damage are carried out on the basis of a decision and within its limits"*.

Moreover, there is strict (risk-based) civil law liability with regard to large installations and enterprises set in motion by the forces of nature (gas, steam, electricity, solid or liquid fuels).[443]

18.3.4 Civil law – imissions

Apart from the above provisions, there is another traditionally used legal tool that might be applied to cases concerning the environment. The most popular and well-established instrument would be a nuisance (imissions),[444] as described in Article 144 of the Civil Code. According to this provision, in exercising his right, a real estate owner shall refrain from actions that could disrupt the use of neighbouring real estate beyond a normal degree, arising from the social and economic purpose of the real estate and local conditions. This rule is a part of the neighbouring law. Nuisance constitutes action on one's own property, which has an indirect impact on the neighbouring land and buildings. This article should be interpreted in connection with the Article 140 of the Civil Code that states the owner may, within the limits specified by statutory law and the principles of community life and to the exclusion of other persons, use a thing in accordance with the socioeconomic purpose of his right, and in particular may collect the fruits and other incomes from that thing. The two rules constitute a general permission to act unrestrainedly on one's own premises and also influence the neighboring real estate by the activity performed on one's own real estate, as long as this does not exceed *"a normal level, arising from the social and economic purpose of the real estate and local conditions"*. The "normal level" (or else "normal use") is an open clause that is subject to interpretation, which should be performed by taking the social and economic purpose of the real estate and local relations into account. A distinction is made between a positive and a negative nuisance.[445] The nuisance that concerns the environment might be both positive and negative. For instance, penetration of certain particles, such as dust, gases, smells, pollutants, toxic substances, or forces such as tremors, noise, and electromagnetic waves into adjacent properties is considered a positive nuisance in

[443] See Article 435 (1) of the Civil Code.
[444] Polish „immisje".
[445] HABDAS, M. Art. 144. In: FRAS, M. – HABDAS, M. (eds.). *Kodeks cywilny. Komentarz. Tom II. Własność i inne prawa rzeczowe (art. 126–352)*. Warszawa: Wolters Kluwer Polska, 2018.

the sense that it relates to some activity. Negative nuisance, on the other hand, may be the impact on the neighbouring properties of a high, concrete wall depriving residents of access to daylight, sufficient aeration or view.

Nuisance-based claims are pursued in standard civil proceedings, in which the role that an NGO could play is the same as that described in subchapter 18.2 above: the non-governmental organisation may sue on behalf of the third party on whom the nuisance has been inflicted or it can participate in the proceedings that are already pending. Such a case would, however, result in the protection of the individual interest or interests but the environment would not be treated as a common good.

18.4 Clean environment as a personal right – air quality litigation

In 2015, the Frank Bold Foundation initiated one of the first air quality-related civil litigation cases in Poland. A Frank Bold attorney-at-law represented the plaintiff, who claimed punitive damages as compensation from the State Treasury for the violation of his personal rights caused by high levels of air pollution and the state authorities' failure to act against it. After three years of proceedings, the case was lost before the district court and an appeal to the regional court was submitted. The case gained significant media attention and helped to raise awareness of the problem of air pollution and its impact on the quality of life of millions of Polish citizens. As there was no opportunity to initiate group proceedings, common civil law measures, such as a personal rights claim, had to be applied.

Air quality is a widespread problem in Poland nowadays and would be a good example of a suitable issue to be addressed by a class action. The most significant obstacle would; however, be deciding who should be the defendant, as suing the State Treasury might be a controversial idea.

The breaking point in the case might be that the Polish Ombudsman joined the case and supported the plaintiff by requesting the regional court to amend the judgment under appeal and allow the plaintiff's claim. The Ombudsman stated that the complaints raised by the plaintiff in the appeal were correct and justified. Crucially, he considered not only the fact that personal rights, such as the right to respect for private and family life as well as housing and the right to freedom of movement, had been infringed, but also deliberated whether the right to (the use of) the environment classifies as a personal right and, in consequence, if this right had been violated. The significance of the Ombudsman's argumentation, indicating that the right to (the use of) the environment is indeed a personal right, is particularly significant as the district court had denied the existence of such a right despite the plaintiff's detailed reasoning in this matter. Doing so, the court recalled, as its main and only argument, the content of the Polish Supreme Court's judgment delivered almost 45 years ago, which had been criticised by the experts at the time of the ruling. At the same time, the district court did not recognise that the modern

judicature does accept the existence of the right to the environment as a personal right, even though it is not common and the designation differs in various judgments. Nevertheless, this right's content is identical and constitutes protection from the interfering activities (negligence) of another entity in the person's living environment. As the Ombudsman pointed out, the change in the judicature's views is not unusual and, in case of the right to a healthy environment, it is perfectly logical that social and technological changes influence the personal rights catalogue.

An exceptionally interesting issue is that the Ombudsman also refers to the Constitution of the Polish People's Republic[446] adopted under the communist rule. Its Article 71, which was introduced by the 1976 major amendment, stated that *"the citizens of the Republic of Poland have the right to use the value of the natural environment […]".* This statement, as the Constitutional Tribunal elaborated in its ruling, was meant to be interpreted as an environment of a quality compliant with the environmental standards of adequate quality and which guarantees the ecological balance. The current Polish Constitution,[447] however, does not include such a provision, which led the Ombudsman to consider whether this circumstance influences the existence of the right. The conclusions were fruitful: it would be hardly acceptable that introducing the new Constitution would entail the individual's rights and the protection of liberty regressing. What is more, there are numerous obligations set in the Constitution linked with the environment and subjective rights; as such, it should correspond with them. Finally, the right to the use of the environment has been guaranteed explicitly in the Environmental Protection Act and this right is subjectively wider than in the Constitution of the Polish People's Republic. Everyone is entitled to it, not only citizens; at the same time, it refers to natural persons as they exclusively fulfill the objective of having personal and household needs as described in the Environmental Protection Act. These arguments justify the ascertainment that the discussed right is indeed a personal right.

Last but not least, the Ombudsman considered the crucial matter of whether the activity (negligence) was, in fact, unlawful, as unlawfulness is one of the basic conditions for granting protection to the aggrieved party. As the Ombudsman proved, the State Treasury's default in fulfilling the obligations set out in the Directive on ambient air quality and cleaner air for Europe[448] is apparent. Moreover, the Ombudsman recalled the judgment of the Court of Justice of the European Union in Case C-336/16 of 22 February 2018, where it was decided that the Republic of Poland failed in fulfilling the aforementioned obligations of the CAFE Directive on the basis that between 2007 and 2015 the limit values applicable to PM_{10} concentrations in ambient air were exceeded.

In conclusion, the Ombudsman summarised that the plaintiff had proved the infringement of his various personal rights, including (the use of) the environment, existence of which

[446] The Constitution of the Polish People's Republic (Konstytucja Polskiej Rzeczypospolitej Ludowej, uchwalona przez Sejm Ustawodawczy w dniu 22 lipca 1952 r).

[447] The Constitution of the Polish Republic (Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.), Dz.U. Nr 78, poz. 483 ze zm.

[448] Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe, (CAFE Directive), p. 1–44, available at: <http://data.europa.eu/eli/dir/2008/50/oj>.

as a right had been determined despite the ruling of the district court. Furthermore, the defendant – the State Treasury – failed to determine the lack of unlawfulness, which is beyond doubt.

It is worth noting that the Ombudsman has the right to act in civil proceedings as does the public prosecutor; he can submit legal statements, produce or offer further evidence to support his arguments and appeal any verdict that can be appealed against. His participation in the proceedings is important for various reasons. Not only does he support the argumentation and reasoning of the plaintiff but he also draws significant public attention to the case, making it of general importance to society. Many are now looking forward to the judgment, which might inspire them to take similar legal steps. The case will be heard by the regional court in the upcoming months.

More interestingly still, on 24th January 2019, the district court in Warsaw issued an unprecedented judgment in which it declared that, due to the long-lasting infringements of the European law (namely the CAFE Directive), the State Treasury had violated the personal rights of the plaintiff, Mrs. Grażyna Wolszczak, a famous Polish actress. The court admitted that, as a result of the faulty implementation of the CAFE Directive, air quality standards have been breached in Poland on many occasions, throughout the whole country and for a lengthy period of time. Owing to this, the plaintiff was deprived of the possibilities of unrestrained physical activity outside the house and was mentally disturbed due to the realisation of the fact, that the air was heavily polluted. Not only did the court conclude that a personal right to a clean environment does exist but it also stated that the breach thereof is possible also when no physical damage to the person's health is inflicted. Despite the fact that the judgment is not yet final (as there is still the possibility of an appeal), it has caused a great public debate and might have a promising effect on the air quality litigation initiated by the Frank Bold Foundation.

18.5 Challenging Air quality plans

In March 2016, Frank Bold's lawyers, acting on behalf of an individual living in Zakopane – a popular mountain resort in southern Poland – submitted a complaint to the regional administrative court against the regional air quality plan (hereinafter: AQP).[449] We argued that it was inadequate and lacked the measures to ensure that the periods when legally binding air quality standards are exceeded are kept as short as possible.

However, under Polish law, it is difficult to prove sufficient legal standing to challenge acts of local or regional law, such as AQPs. The claimant has to prove that his legal interest or right is violated by the specific provisions of the challenged act. According to the well-established

[449] Adopted by the regional government, implementing art. 23 of the Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe (CAFE Directive).

jurisprudence, this violation must be direct, specific, real and current. In July 2016, the Regional Administrative Court in Krakow deemed the complaint inadmissible, arguing that the claimant failed to prove sufficient legal standing. According to the court, AQPs are addressed to administrative bodies, not to individuals and as such, they cannot violate the individual's legal interest. Moreover, the court underlined that the challenged act, even if it was indeed inadequate or faulty, could not violate the claimant's legal interest, as it did not cause air pollution, therefore it had no negative impact on the claimant's life.

We submitted an appeal (*skarga kasacyjna*) to the Supreme Administrative Court, arguing that the Court in Krakow failed to recognise and apply the relevant provisions of the Aarhus Convention (Art. 9 Section 3) and European Union law and jurisprudence,[450] according to which individuals living in the areas affected by air pollution should be able to initiate judicial control of AQPs. We therefore asked the Court to interpret the national law provisions on legal standing in accordance with the EU and international law. However, our appeal was dismissed. The Supreme Administrative Court fully upheld the first instance judgment.

The complainant subsequently submitted a constitutional complaint to the Constitutional Court, against the specific provisions of Polish law that severely limit individuals' and NGO's legal standing. The case has not yet been heard.

The case described above is a perfect example of several issues limiting access to justice in Polish administrative procedure – most importantly the very strict rules on legal standing with regard to acts of local law, as well as the conservative approach of Polish administrative courts, which tend to be reluctant to apply EU and international law, in particular the Aarhus Convention, adhering to the interpretation of law developed many years ago, before Poland's accession to the EU.

18.6 Thinking for the future – legal recommendations

18.6.1 Proper transposition of the Aarhus Convention

One of the most significant problems from the perspective of an environmental NGO in Poland is the lack of a proper transposition of the Aarhus Convention[451] to our legal system.

[450] Most notably landmark judgments of the CJEU are the Judgment of the Court of Justice of 25 July 2008, *Dieter Janecek v Freistaat Bayern* (C-237/07, ECLI:EU:C:2008:447); and Judgment of the Court of Justice of 19 November 2014, *The Queen, on the application of: ClientEarth* v *The Secretary of State for the Environment, Food and Rural Affairs* (C-404/13 ECLI:EU:C:2014:2382).

[451] The United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters adopted on 25 June 1998 in Aarhus (Århus) at the Fourth Ministerial Conference as part of the „Environment for Europe" process.

It is vital that no further restrictions on NGOs' participation in proceedings concerning the environment take place.

18.6.2 Changes in the Act on Group Proceedings

It is doubtful, if the environment itself should be included in the exhaustive catalogue of cases in which the Act on Group Proceedings is applicable. A much more important amendment to the Act would be to incorporate breaches of personal rights connected to the environment. It is a common problem that, due to the operation of an entity or an entrepreneur, certain personal rights of many people living in the same area are infringed. An example of such a case would be the odour-related problems inflicted by an entrepreneur. It is not unlikely that such a case would neither be a claim against a dangerous product nor a tort claim, liability for non-performance or improper performance of a contractual obligation claim, unjust enrichment, nor any other matter relating to claims for consumer protection. Currently, the Act on Group Proceedings would therefore not be applicable. For such cases, it would be recommended to enlarge the catalogue to include personal rights.

Another possibility worth considering would be a defendants' class action, in which the defendants make a group. In such proceedings, an NGO could potentially file a lawsuit against a group of entrepreneurs who inflict damage on the environment.

Moreover, it is a drawback that an NGO cannot currently be the representant of a group of claimants in the group proceedings. It is, nonetheless, discussed that the admission of non-governmental organisations as plaintiffs in class actions might be worth considering *de lege ferenda.*[452] Contradicting the justification for the Act on Group Proceedings, many non-governmental organisations possess both the knowledge and financial resources to be a competent representative of the group.

18.6.3 Emphasis on EU law and jurisprudence during the training of officials and judges

Moreover, we believe that a greater emphasis should be put on the EU law and jurisprudence, pro-EU interpretation of national law and the importance of the Aarhus Convention during the education and training of administrative officials and judges of administrative courts.

[452] SIERADZKA, M. Art. 4. in: SIERADZKA, M. *Dochodzenie roszczeń w postępowaniu grupowym. Komentarz*. Warszawa: Wolters Kluwer Polska, 2018.

18.6.4 Extension of entitlements of non-governmental organisations within criminal proceedings

As described above, a non-governmental organisation's scope of action during criminal proceedings concerning environmental issues is very limited. Therefore, in order to ensure a proper protection of the environment, the entitlements of non-governmental organisations should be broadened, so that they can duly represent the public interest in such cases. Such broadening should cover:

– introduction of the right – for entities notifying the commission of a crime – to appeal against the public prosecutor's decision to discontinue the criminal proceedings;[453]
– introduction of the right for environmental organisations to participate as a party to the court proceedings where environment as a common good is infringed, which in particular includes the right to present new evidence and appeal against court decisions.

18.6.5 Article 323 complaint more accessible

Broadening the catalogue of potential plaintiffs in Article 323 (2) of the Environmental Protection Act would be worth considering. Currently only the State Treasury, a local government unit or an environmental organisation can file a lawsuit based on the above-mentioned provision. Introducing a group of citizens (for instance 10 at least) could also make this legal tool more frequntly applied. Moreover, it would contribute to supporting grassroots initiatives. An application of the Act on Group Proceedings *mutatis mutandis* to such a group should be discussed.

[453] See KWIATKOWSKI, B. (ed.). *Basic analysis of the current situation in Poland regarding access to remedy in cases of business-related abuse.* Warszawa: Częstochowa, 2017, p. 26–27.

19 Conclusions: Consumer and environmental collective redress in the V4 countries

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19.1 The situation in the consumer area

As the previous chapters showed, the legal regulations in the Visegrad 4 countries deliver a variety for collective redress mechanism, which can be performed either on a civil law or an administrative law path. Not only the chosen enforcement path, but also the frequency of the mechanism applied by the consumer organisations varies markedly, not only in the context of countries, but also over time. As a summary, we will compile here these differences based on the country reports prepared by our legal scholars and the representatives of our partner NGOs. The main findings will be confirmed also by our statistics, which we collected from the main consumer protection organizations in the Visegrad 4 countries as part of this project. According to the questionnaires completed by our partner NGOs we can distinguish between five different collective enforcement mechanisms in the practice of the Visegrad 4 countries:

1. Injunction relief,
2. Requests or complaints to the competent authorities,
3. Public interest actions,
4. Class actions,
5. Compensatory relief.

We should note some other specific instrument, e.g. test-case proceedings. The next table summarises the most common proceedings initiated by the main consumer protection organisation in each country.

From the data, we can see that injunctions are very rarely used mechanisms by our partner NGOs in all four countries. In practice, we can observe that pure injunction actions were filed only in the Czech Republic, in three cases, but even there the consumer organisation tended to use other mechanisms. The Polish consumer organization Federacja Konsumentov specialises in individual test-case proceedings; the Slovak organisation Spoločnosť ochrany spotrebitelov SOS tended to request compensatory relief in individual cases, as interveners

Table no. 5 Types of actions launched by the main consumer protection organisations in the Visegrad 4 countries in the last 10 years

Action	Number of filed actions each year									
	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Injunction relief	0	0	0	0	2	0	0	0	1	0
Class action	No competence for NGOs in any of these countries, although available in Poland and Hungary									
Compensatory relief	0	0	0	0	0	0	17	6	0	0
Request or complaint to a competent authority	5	8	5	7	15	21	23 6	27 4	16 5	29 3
Public interest actions	1	0	2	0	3	2	2	2	0	3
Others, e.g. individual test-case proceedings	0	0	0	0	0	22	46	58	62	47
All Czech cases	5	8	5	7	17	21	23	27	17	29
All Slovak cases							17	6		
All Hungarian cases	1		2		3	2	2	2		3
All Polish cases						22	52	62	67	50
GRAND TOTAL	6	8	7		7	45	94	97	84	82

(The numbers are ordered by different colours according to the organisation: dTest, CR / SOS, SK / FEOSZ, HU / FK, PL)
Source: Progress in collective redress mechanisms in consumer mass harm situations – given answers for the Questionnaire, summarised by the author

in the proceedings; the Czech dTest mostly prepares requests to the competent authorities and the Hungarian FEOSZ takes up public enforcement actions, which are improved and widened injunctions with compensatory effect. In general, it can be summarised that the most favoured mechanism is submitting requests to the administrative authorities, but also other, non-classical instruments are often used, e.g. test-case proceedings.

19.1.1 Injunction reliefs

The injunction mechanism is a civil law enforcement instrument, which was implemented in legislation earlier in three countries; in Hungary in 1997, in Poland in 2000 and in the Czech Republic in 2002, but only in 2007 in Slovakia. The theoretical scope of such injunctions is broader in all four countries than in the 2009/22/EC Directive, because all these member states widened the scope of application to practically all fields wherein consumers have some protected rights. Interestingly, the legislators of Slovakia and Hungary also transplanted injunction-type claims for individual cases but with collective effect into their Civil Codes. If the court determinates the invalidity of unfair contractual terms, the court calls on the trader to eliminate the unfair term with *erga omnes* effect, towards all consumers. This is an individual unfairness-test with collective effect, but very similar to the approach used in the abstract control of unfair terms in consumer contract, which is available for all consumer organisations in the Visegrad area. However, while *erga omnes* bans could be an effective sanction for deterring traders from using unfair contract terms, several practical problems arise with implementing the decision. It seems to be most problematic in Slovakia, where the binding effect of the injunction decision has the greatest scope. This is because, according to the Slovakian Code of Civil Dispute Procedure, all unfair contract terms with the same meaning, as defined in the court decision, must be eliminated from all consumer contracts, even if the trader did not participate in the litigation. The strict wording of the concrete terms is often complicated, because every contract is unique in some sense. In Hungary, the *erga omnes* effect is not widely understood by the jurisdiction; it is binding only between those parties that are registered business entities. Although the elimination of specific unfair contract terms can have a deterrent effect on similar contract terms on the market, its effect depends heavily on how much businesses fear being accused by some individuals or if consumer organisation challenges the unfairness of other contract terms via injunction. Assuming that the number of injunction claims filed remains so low and that the consumer organisations will continue to lack the finances for numerous court proceedings, such a fear would be unrealistic.

Regarding the initiators of injunction procedures, we can see a wide variety in the Visegrad 4 countries. Those entitled to initiate injunction actions usually include consumers and consumer organizations, but in Hungary we can find a much wider claimant group, and a narrower one in Poland. In Hungary public prosecutors, and other institutions, such as ministers, administrative bodies and chambers, can also file injunction actions. Despite the wide entitlement, it should be noted that, between 2008 and 2013, public prosecutors became very important initiators of injunctions, filing most of the *actio popularis* suits to combat unfair contract terms in foreign currency mortgage contracts. On the other hand, in Poland, at the opposite extreme, injunction actions can be initiated exclusively by the President of the Competition Office, which makes injunctions an administrative rather than civil law procedure. While consumers, the consumer ombudsman and consumer organisations can petition it to launch injunction proceedings, the President of the Office does not however have an obligation to initiate an injunction procedure in response to such request, not even when the consumer ombudsman has made an announcement. The benefit

of the administrative procedure is that the length of the process is usually much shorter than court proceedings, and also that, with the possibility of sanctioning the violating business, the mechanism can have a greater deterrent effect. Direct compensation of the consumer would also be possible according to Polish law, but such measures have only recently been adopted by the Competition Office, and traders usually challenge this measure before court, which drastically prolongs the case.

To summarise, injunction actions are very rarely-used collective mechanisms in the Visegrad 4 countries due to the length, complexity and cost of the proceedings. A further problem, which makes this instrument impractical, is that there is rarely a possibility for direct compensation of consumers, although in Hungary a "*restitutio in integrum*" would be theoretically possible, but usually courts only state the unfairness of the contract term, without addressing the compensatory part of the claim.

19.1.2 Request or complaint to competent authorities

A general trend can be noted that after negative experiences with injunction actions, consumer protection organisations moved to making requests to the competent authorities, because, from the perspective of these organisations, it is a cheaper, easier and much quicker mechanism. The average time for such a procedure is no more than two months and consumer organisation are super-complaint institutions. Not just national Trade Inspectorates and Consumer Authorities have the obligation to respond to requests but also sector-specific authorities, such as Financial Surveillance, Telecommunication and Energy authorities. Even if not all authorities react in the same positive way to the complaints of a consumer organisation, the effects of a subsequent administrative procedure are very positive and can be a deterrent, due to its special features.

What makes this type of action so efficient is that the consumer protection organisation does not have to provide sufficient evidence to establish the burden of proof. In Slovakia, one condition is laid down for interim measures by the Slovak Trade Inspectorate, that the consumer organization must send the traders a "cease and desist notice" regarding their unlawful conduct. If the trader does not refrain from harming the collective interests of consumers within two weeks, the Trade Inspectorate may take further measures. The authority can also order, as an interim measure, the cessation of using abusive commercial practices or unfair contractual terms, which is also a similar measure to an injunction but much cheaper and quicker. The further reason that this procedure is more effective than the injunction – with the exception of the Polish injunction procedure, which is more similar to this administrative mechanism, is that the authority can impose fines on the trader when the procedure ends along with giving an infringement notice, though it should be added that the low value of the fines cannot have much deterrent effect on the market. The procedure is also more flexible, depending on the cooperation of the business or the seriousness of the violation, than an injunction.

The success of interim measures in stopping violations of collective consumer interest almost immediately is very remarkable, although public authority decisions cannot have the same impact as court rulings. The one thing missing with regard to interim measures is that they do not bring any compensation to harmed consumers, though follow-on compensation could easily be linked to the administrative procedure.

19.1.3 Public interest actions

A very interesting mechanism, first introduced in 1997 and broadened in 2012, are public interest claims, which can lead to a simplified enforcement of consumer interests. The precondition for applying these instruments is that the infringing conduct of the undertaking affects a wide range of consumers who are not identified individually but are easy to define. In this case, the consumer organisation and some other public organisations are entitled to bring two types of actions, public interest claims and public interest enforcement. A public interest claim can be filed by the NGO at a civil court, if the infringement has not already been ruled on by the Consumer Protection Authority. In this case, the consumer organisation can demand that the trader ceases the violation and compensates consumers. If the violation has already been stated by a final decision of the Consumer Protection Authority, a public interest enforcement notice can be issued. In this follow-on suit, the consumer organisation – or the Authority itself – can ask the court to determine the violation and for compensation to the harmed consumers. While both mechanisms could contribute to quick redress to the harmed consumers, the effectiveness of these instruments in practice is unfortunately not very convincing. According to the Hungarian NGOs, the main problem with the first type, public interest claims is that courts very rarely satisfy the compensatory claim itself, and only state the violation. The second, a public interest enforcement action, is rarely used by consumer organisations, because of the necessity of a prior final decision by the Consumer Protection Authority, which can prolong the whole action. A problem often raised concerns proving the involvement of a large number of consumers, especially if the defendant in question does not release information on his clients. Additional issues, which were already mentioned for injunction actions, such as the lack of funds for court cases, and the length of the procedure, are also valid for public interest actions. These shortcomings are similar to the problems of injunction actions.

In summary, it can be noted that public interest claims could be a really effective collective redress mechanism under two conditions, first, if courts were more willing to satisfy compensatory claims in favour of a wide consumer group, in the same procedure as ruling on the violation (one-shop-stop); second, if the administrative procedure of the Consumer Protection Authority was quicker, because follow-on court compensation would make sense only in that case.

19.1.4 Class actions

Class actions or similar group actions were first implemented in Poland in 2009 and in Hungary in 2016. Although, both the Czech and the Slovak legislatures are planning to introduce similar actions for managing mass harm cases, it can be presumed the Czech legislator will enact a law earlier, assuming the business lobby will not hinder the initiative.

When comparing class-action legislation in Poland and Hungary, it should be noted that both countries follow in some respects the American class-action model, but exclusively with an opt-in possibility to join the group; both laws also contain numerous safeguard elements to prevent vexatious litigation. In Hungary we can speak about a test-case type class action, because the main plaintiff lets the court "test" his claim and joining the claim will result for the opted-in claimants in *res judicata* for representative facts and legal issues. From the perspective of initiators, it should be added that non-profit organisations and authorities are excluded as plaintiffs in both countries. Only consumer ombudsmen can file a suit in Poland, in which case the plaintiffs are exempt from court fees. Consumer organisations cannot claim compensation through the court, thus providing them with a very inadequate redress mechanism.

Class actions triggered heated discussions in both countries. In Poland, more than 250 group actions were filed in the last 9 years, which demonstrates the relevance of this procedure; whereas in Hungary, due to the rigid rules of the new Code of Civil Procedure, joint litigation actions have still not been initiated after filing statements of claim. Several aspects of class actions are criticised, but the most frequent are their limited scope, which shows that the mechanism could be applied even in other fields. Another problem in the Polish legislation is the classification of different claims; in Hungary, the lax regulation of the litigation contract between the group leader and other group members and also with the representing lawyer is often raised.

In conclusion, it should be added that class actions could be an efficient mechanism for enforcing compensatory claims, and they could be very good if linked as a follow-on claim after injunction action or administrative decisions, which only state the infringement of the trader. Moreover, it would be very helpful if this measure could be brought to court by consumer organisations, or at least, if the organisation could be the group coordinator (similar to the Czech legislative draft Collective Actions Act). It should also be noted that opt-in mechanisms are more suitable when the consumer has suffered a relatively high level of financial loss, but consumers tend to stay in "rational apathy" regarding small-claims. As such, opt-out mechanisms for bagatelle harm cases should be available as well in future.

19.1.5 Compensatory relief

Compensatory relief is essential for the efficient enforcement of consumer rights; therefore, it is a very negative conclusion that such instruments hardly exist in practice. Both the Slovakian and Hungarian consumer organisations have attempted to file compensatory claims but the courts usually rejected them, in Slovakia due to the deficiencies in the legislation, and in Hungary due to the reluctance of the court. From November 2012, it seemed that consumer organisations in Slovakia were entitled to claim monetary compensation in favour of consumers, because of the wording of the Slovak Consumer Protection Act; however, a court decision emphasised that the existence of unjust enrichment cannot be hypothetical and consumer organisations, as parties to the suits, cannot claim compensation in favour of consumers, because they do not represent them. The Act was quickly amended in June 2013 by removing the rights of consumer organisations to file compensatory claims. In Hungary, consumer organisations have been entitled since 1997 to ask for the restoration of the situation prior to the violation (*in integrum restitutio*) in the injunction claim; but, according to the experiences of the consumer protection organisations, the courts usually ruled only on unlawfulness, but hesitated to uphold the compensatory claim. In the Czech Republic and Poland, consumer protection organizations are not entitled at all to file actions for compensation of consumers for damage suffered, though our Polish partner NGO is using individual test-case proceedings to achieve individual compensation, on which basis it could help in similar cases for harmed consumers. As a better example of a functioning compensation system, we can highlight the public compensation measures regarding unfair commercial practices and unlawful practices by the Polish Competition Authority; however, traders regularly appeal against compensatory measures at court, and to what results these appeals will lead, cannot be predicted yet.

Nevertheless, the question should be posed, why consumer organisations are not entitled to bring collective enforcement claims, if the violation was committed by the same trader; and if they are so entitled, as in Hungary, why these claims are unsuccessful. Procedural economy would support such resolutions.

To encapsulate our findings, the existing framework for enforcing consumer rights is not satisfactory in the Visegrad 4 countries. Due to the procedural complexity and lack of material resources of the consumer organisations, the most favoured type of actions in the Visegrad 4 countries are cheap and fast procedures, where the organisation does not have to provide sufficient evidence to establish the burden of proof. Injunctions are a very rarely used mechanism with unsatisfactory results. Compensatory relief fails to function, either already on paper because of legislative mistakes, or in practice because of the reluctance of the courts. However, without compensatory relief, which can ensure quick and efficient compensation for harmed consumers – regardless of its solution, whether in the same procedure as noting the violation or as a follow-on procedure – consumer rights cannot be enforced satisfactorily, and legislators still appear to do nothing except pay lip service to effective consumer redress.

19.2 The situation in the environmental area

Thanks to our Visegrad project research, the Czech environmental law scholarship launched, for the first time, a study of the legal mechanisms that individuals and associations may use for environmental protection in a close link to the mechanisms available to consumers, their groups and associations. For environmental lawyers, the opportunity for consumers enacted in both EU and national legislation to defend their common interest on a collective basis is rather attractive. It may be tempting to think that such provisions, if "copied" into the environmental legislation, would broaden the possibilities of the private enforcement of rights and duties in the environmental sector and thus help the environment, too. Our research has shown, though, that the task of introducing an effective environmental collective redress (and strenghtening the private enforcement in the field as well) is not straightforward at all.

In previous chapters of this book, the law researchers from the Czech Republic, Poland and Hungary have described the situation in environmental collective redress in their countries; the environmental NGOs' representatives have done the same from the practical perspective. This subchapter suggests a view on how to summarise and evaluate the V4 situation regarding environmental collective redress. A summary of the survey of the V4 countries' performance in the environmental collective redress will follow, based on reports by our project colleagues.

Only three of the V4 countries are included in this part; country reports were not available for the Slovak Republic. The structure of the survey covers the most frequent legal ways in which "some kind of" environmental collective redress is to be found and which usually include, in individual countries in a slightly different shape, the following categories:

1. Class action (or collective action, group proceedings etc.), enacted in special legislation;
2. Opportunities of joint litigation, group proceedings of other similar forms enacted in national civil procedure laws (apart from class actions);
3. Preferential position of NGOs within various types of environmental proceedings and review proceedings, emerging either from specific national environmental legislation (including the environmental liability regime) or from general national laws on administrative procedure and administrative judicial procedure;
4. Neighbourhood disputes (also called imission disputes) based on national civil codes;
5. Personality rights, if they also cover the right to live in a healthy environment in some form;
6. Special environmental procedural instruments such as quasi *actio popularis* and *environmental injunction*.

Table no. 6. Types of actions launched by the leading environmental protection organizations in the Visegrad 4 countries in the last 10 years

(The numbers are ordered by different colours according to the organization: dTest, CR / EMLA, HU (approximate numbers per year); the Polish Frank Bold association does not indicate any numbers of cases and no Slovak association joined the research, Therefore, unlike for consumer protection, the numbers of cases in the environmental field are very sparse and the chart is only of indicative value.)

Action	Number of actions filed each year									
	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Class action	0	0	0	0	0	0	0	0	0	0
Injunction	2–3 0	2–3 1	2–3 0	2–3 0	2–3 0	2–3 0	2–3 0	2–3 0	2–3 0	2–3 0
Compensatory relief	0–1	0–1	0–1	0–1	0–1	0–1	0–1	0–1	0–1	0–1
Environmental liability request	0–1	0–1	0–1	0–1	0–1	0–1	0–1	0–1	0–1	0–1
Request or complaint to a competent authority to take action	2–3	2–3 1	2–3	2–3	2–3	2–3	2–3	2–3	2–3 1	2–3
Public interest actions	0	0	0	0	0	0	0	0	0	0
Others, e.g. judicial review of administrative decision in environmental matters	5–6 5	5–6 2	5–6 0	5–6 3	5–6 3	5–6 0	5–6 6	5–6 2	5–6 1	5–6 1
All Czech cases	5	4	0	3	3	0	6	2	1	1
All Slovak cases										
All Hungarian cases	~14	~14	~14	~14	~14	~14	~14	~14	~14	~14
All Polish cases										
GRAND TOTAL										

Source: Progress in collective redress mechanisms in environmental mass harm situations – given answers for the Questionnaire, summarised by the author

19.2.1 Class action

Environmental collective redress can be sought, in the first place, by a special piece of national legislation regulating class actions. However, only Hungary has a law that explicitly enables environmental cases to be heard within one type of the class action enacted but there is not yet any case law in place, because there have been major changes in all the general civil and administrative procedural law in recent years, including the new Code of Civil Procedure, which entered into force on 1 January 2018. It introduced two types of litigation of a collective character, public interest litigation and collective litigation. One of the conditions for a public interest claim is a particular entitlement given by a special (other) act, and then those who are entitled by the special act may initiate a case, file a suit; those who might be affected must prove their interest, namely why they belong to the group of interested parties. The environmental interest is not explicitly mentioned as an example of a public interest (which is recommended to be changed in the future); any case law is missing so far. On the other hand, the collective (or joint) litigation brought by the same new Act has an explicit reference to environmental interests. The collective lawsuit can be filed by at least 10 applicants whose rights are the same and so are the facts establishing the representative right. Such a case can be initiated only in consumer protection, labour law and environmental matters. As for environmental litigation, only compensation claims are permitted, arising out of health damage or material damage, directly caused by an unforeseeable environmental emission caused by human activity or omission. This means that the scope of this type of collective litigation is rather narrow and limited in environmental cases. Moreover, the litigation requires authorisation by the court before being heard.

In Poland, the respective Act excludes the environment from the scope of collective litigation. The Polish Act on Class Actions (Group Proceedings) was adopted in 2009. Under the Act, class action or group proceedings are civil judicial proceedings, in which claims of the same type, sharing the same or identical factual basis, are pursued by at least 10 persons. However, the subject scope of the group proceedings is strictly limited to specific areas and the environment is not among them. It means that, according to the Act in force, environmental cases cannot be judged.

In the Czech Republic, the legislation on class actions is still under preparation. A Draft Proposal of the Collective Actions Act is now under preparation; however, there seems to be firm resistance by several groups of stakeholders in the Czech Republic to establishing class actions, so the future prospect of this Draft is not at all certain. The core of the Draft proposal lays collective action in the consumer area. Environmental harms are also covered but rather as a supplementary and minor agenda. Only a narrow view of environmental damage has therefore been projected in the Draft, conceived only as a consequence of an industrial accident. Moreover, only the damage caused to individuals (not to the environment as such) are planned to be covered, being subject to compensation within the framework of civil liability.

19.2.2 Joint litigation within the civil procedure

The civil procedure tools having a form of joint, collective or group litigation are seen as subsidiary help for environmental cases only, especially where the class action legislation is missing or is not applicable to the environment. These civil procedure provisions have diverse forms in the individual countries; they usually enable either NGOs or groups of individuals to initiate proceedings. However, these forms are usually seen as having lower importance and impact than the public law entitlements of NGOs.

In the Czech Republic, in civil proceedings concerning damages before the civil courts, there are in principle no limitations of the number of actors or defendants in one case. However, when there are more actors on one side of the litigation, each of them shall act in the proceedings only for himself. Only if the case concerns such joint rights or duties where the judgment has to apply to all participants acting on one side shall acts of one of them also apply to the others. A change in the petition, its withdrawal, admission of the claim and conclusion of the settlement require the consent of all participants acting on one side. Nevertheless, the law on joint participation in court proceedings does not serve as a collective redress mechanism. Only at first sight do the rules on joint participation seem to be applicable to the proceedings of administrative judiciary. The administrative courts concluded that joint participation is in principle excluded in administrative matters, since administrative justice protects the individual public-law rights of both natural persons and legal entities.

In Poland, non-profit nongovernmental organisations may, to protect citizens' rights, initiate proceedings and take part in the pending proceedings, including in environmental cases, within rules of civil procedure. They also may represent other (third) persons based on their written consent.

19.2.3 Preferential position of NGOs within various types of environmental proceedings

All countries within the research display a privileged status of environmental NGOs as a standard part of their procedural law. The environmental NGOs in all the countries, based on the Aarhus Convention and the relevant EU legislation, have participatory rights in various administrative proceedings and the associated review proceedings. The rules are set either in the relevant environmental protection acts, or in general administrative procedure legislation. However, some countries (the Czech Republic and Poland) have recently introduced amendments that restricted the participation of NGOs in certain areas (water law, territorial permits etc.); that trend is certainly a negative one, contradicting the ideas of the Aarhus Convention and the wide access to environmental justice. Nevertheless, the rules of NGOs' participation are predominately targeted at permits for future activities in a geographical area and only minimally do they solve the harms already caused or illegal

activities already practiced, except with regard to the environmental liability regime. As such, they are only partly relevant for our project the focal point of which is in the harms that have already occurred.

The Czech law provides, based on the relevant EU Directives and the Aarhus Convention, the environmental NGOs with a special status in various procedures in environmental matters, both as regards the right to participate in proceedings and the right of access to court. The examples are the environmental impact assessment area, territorial planning area, and most areas of environmental permits (however not all of them, e.g. the nuclear power plant permit and noise issues are excluded, and unfortunately there have been successful efforts recently to restrict the participation of the public in certain types of permit procedures, especially in the land-use permitting). Where the laws normally make access to the relevant proceedings dependent on an infringement of the person's own rights or interests, the provisions favouring the environmental NGOs stipulate that this condition is assumed to be fulfilled for them. Similarly, the Czech environmental liability regime provides environmental NGOs with certain additional entitlements in solving environmental mass harm cases: they may bring requests, complaints or comments to the competent authorities, which they must deal with.

In Hungary, the environmental legislation in force also enacts certain provisions giving preferential treatment to environmental NGOs. First, the environmental NGOs may participate (as "clients") in environmental administrative procedures within their geographical scope of activity. Under the new Code of General Administrative Procedure of 2016, the status of a party to the proceedings belongs to those whose rights or lawful interests are affected, and in environmental proceedings also to environmental NGOs. When compared to the previous regulation, those living in the affected area and local governments are among those no longer taken automatically as parties (clients) to the case. According to the new Code of Administrative Court Procedure of 2017, most administrative decisions may be taken to court. The court now has competence for full reformatory review, meaning that it can also modify the decision. Among those who may bring an administrative decision to court are also NGOs if a special act or decree supposes so; if their activity, according to their articles of association, covers the protection of fundamental rights or public interests; and if their activity in the field has lasted for more than a year. Furthermore, interest-representation organs and public bodies also have the right to bring an administrative action if a special act provides them with the right to protect the rights of their members or of the group represented by them. Finally, the wide access to justice is directly connected with the opportunity of being a party in a public law procedure, which includes the environmental NGOs. The proceedings before an administrative court may have the form of a joint judicial procedure, if the rights and duties are common or are based on the same legal relationship, and also if they are not common but similar and the same court is involved. If there are more than ten materially identical cases in front of the court, the proceedings may take the form of model litigation, in which the court may decide that only one sample case is going to be decided first, while all the others are suspended.

In Poland, the Act on Administrative Procedure provides the competent authority can be requested to take action. For environmental NGOs, administrative proceedings are more easily accessible than civil law procedures. The administrative authority is obliged to inform the non-governmental organisation of the initiated proceedings; the NGOs may request the initiation of proceedings on behalf of a third party or they can participate in the already pending procedure. However, due to recent amendments, environmental NGOs' participation in certain administrative proceedings has been severely limited. For instance, in water law and water management cases, the general principle of the NGO's participation has been excluded; in other fields, NGOs are required to have been active at for least 12 months before attempting to participate in the proceedings.

19.2.4 Imission disputes

Imission dispute procedures are seen as one of the possible legal instruments applicable in favour of the environment. In fact, neighbourhood environmental imissions can be seen as a private law version of environmental injunctions. However, as for the approved industrial facilities, their eligibility is lower than in "small" cases.

In the Czech Republic, legal disputes between private actors regarding environmental matters have often been based on the provisions protecting the rights of neighbours (or protection against imissions, as stipulated under Section 1013 of the Civil Code). Here, the affected person may ask the court to order the owner to refrain from anything that would cause emissions, which are disproportionate to the local circumstances and substantially restrict the regular use of the tract of land. This provision can be theoretically used against a private operator of an industrial facility or against noise from a highway but its success is not very likely, all the more since the new Czech Civil Code of 2012 introduced an additional rule stipulating that if the emissions result from an operation by an enterprise or a similar facility that has been officially approved (permitted by an authority), a neighbour only has the right to compensation for harm in money, even where the harm was caused by circumstances which had not been taken into account during the official proceedings. This does not apply if the operation exceeds the extent to which it has been officially approved. This means that, due to the new Civil Code, there is no more injunction redress against approved facilities.

In Poland, the regulation of the neighbourhood imissions that has been traditionally used in environmental cases is covered by the Civil Code as well. It orders landowners to refrain from actions which could disrupt the use of neighbouring real estate beyond a normal level, arising from the social and economic purpose of the real estate and local conditions. This provision can cover positive nuisances to the environment, such as penetration of dust, gases, smells, pollutants, toxic substances, or forces such as tremors, noises, electromagnetic waves; or negative nuisances such as depriving the neighbours of access to daylight, sufficient aeration or a view. Nuisance-based claims are pursued in a standard civil procedure; an NGO may also sue on behalf of a third person on whom the nuisance is inflicted.

19.2.5 Personality rights

Engaging personality rights in favour of the environment seems to be a promising new approach that has shown its first good results in Poland. However, these rights are usually related to individuals and not groups or NGOs, so their contribution to collective redress is debatable.

In the Czech Republic, the new Civil Code explicitly introduced the protection of the right to live in a favourable environment within the scope of personality rights. However, there has been no case law on that yet. Moreover, the personality rights are again predominantly rights of individuals; their collective application is thus also open to debate.

In the field of personality rights in Poland, the interpretation of protected values has been recently extended with certain environmental elements (contrary to the previous interpretation) in relation to a well-known air quality plans case opened by a Polish actress, Grazyna Wolszczak. Article 23 of the Civil Code that enumerates the rights of persons does not explicitly mention the environment. The plaintiff claimed that the bad air quality barred her from pursuing her passions and interests and made her often feel mental and emotional discomfort, which resulted in the breach of her personal interests, such as the possibility to use the attributes of an unspoiled environment, the right to protect personal life, the right to freedom, privacy and respect for her place of residence. The District Court recognised that the state of environmental pollution and the lack of effective actions on the side of public authorities have had an unfavourable impact on people's health and life, including the plaintiff's and that the rights under Article 23 include the right to live in an environment fulfilling at least the norms and values defined in the EU law. Not only did the court conclude that a personal right to a clean environment exists but it also stated that breaching it is possible also when no physical damage to the person's health is inflicted.

19.2.6 Special procedures

Environmental injunctions have been established in Poland and Hungary. However, there is not much experience of their application and there are some barriers to their wider usage (especially their financial costs and the plaintiff's burden of proof). Generally speaking, injunctions seem to be the most beneficial element of collective redress for environmental protection; therefore, they should be promoted and supported also in terms of their accessibility in practice, which is unfortunately not the case yet.

In Hungary, there is an instrument that can be considered as an *actio popularis* of some kind (or a *quasi actio popularis*): under Section 99 of the Act on the Environment, the environmental NGO may first take action in the interest of environmental protection in the event of endangering the environment, environmental pollution or environmental damage and may either require the public administration or the local government to take the necessary measures. Second, they may file a case against the operator, asking the

court to stop the wrongful activity or to oblige the operator to take the necessary preventive measures (*injunction*). However, effective use of this promising provision is said to be difficult, especially due to the high costs of proceedings because the suing NGO has to provide all evidence and, if it involves experts, they may be prohibitively expensive due to their high fees. It has therefore been recommended to overcome this financial barrier, e.g. by cost capping mechanisms, a special state fund, reversal of the burden of proof, fee waiver for NGOs or similar instruments; it has been recommended to also supplement the action with compensation claims. Moreover, the Nature Conservation Act provides nature conservation NGOs with a similar *quasi actio popularis* instrument as was described above, only narrowed down to nature preservation cases.

Under the Polish Environmental Protection Act, anyone who suffered damage or an imminent threat of damage caused by an unlawful environmental impact may require that the entity responsible for that threat or infringement takes the appropriate measures. It is also possible to require cessation of the activities giving rise to the threat or infringement in question (i.e. injunctive relief). Moreover, if the threat or infringement concerns the environment as a common good, the claim may be filed *inter alia* by an environmental organisation. The NGO can ask that the liable entity be obliged to restore the damage made to the environment. However, the burden of proof lying on the claimant may hinder filing these types of actions by NGOs, because the costs of expertise and studies proving the scope of the damage and the causal link between the damage and the activity of the liable entity may overstretch their financial abilities. On the other hand, the position of the plaintiff is significantly improved by a provision that *"anyone who submits a lawsuit for compensation for damage caused by environmental impact may demand that the court obliges the person/ entity whose activity relates to the claim to provide all information necessary to determine the scope of such liability".* This provision grants plaintiff a very broad right to information, which may be a huge asset, especially for an environmental NGO, and may even be the main reason to initiate such litigation.

Under the Polish Environmental Liability Act, an environmental NGO may inform the Regional Director for Environmental Protection of the environmental damage or a threat of the environmental damage. The environmental organisation making that notification then has the right to participate in the procedure as a party. These provisions are a broadly practiced legal tool aiming at the protection of the environment.

To summarise, the current situation in the environmental collective redress in the V4 countries within the research can be described as being very far from satisfactory. It may be said that there is a widely accessible and working collective redress mechanism for the environmental harm cases in place in none of the countries. Neither the EU Recommendation on common principles for injunctive and compensatory redress mechanisms nor Articles 9 (3) and 9 (4) of the Aarhus Convention have been sufficiently implemented within the region, and there seems to be no driving force "from above" that could change the situation. The procedural conditions for the access to justice in environmental matters still diverge and establish differing levels of protection in individual countries, with differing conditions and options for

participation. Similarly, the private enforcement of environmental law norms as enacted in legislation cannot at present make a substantial contribution to the overall enforcement of environmental law in any of the countries. Such a picture is the more dismal in the context of today's overall environmental crisis when any effort even from individual and associations should count.

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Prof. Dr. Sándor Udvary, Ph.D., is an associate professor at the Károli Reformed University, School of Law in Budapest and the head of Civil Procedure Department. Between 1998 and 2017 he worked at the Hungarian Constitutional Court as chief counsel and from 2006 as attorney of the court as well. He currently leads his bailiff's office in Győr as of today. He has been teaching civil procedure, media law and other various topics since 1998, mainly at the Károli University. He received his Ph.D. from the Károli University on Constitutional Media Law and his habilitation thesis concerned the class action and its introduction to the Hungarian legal system. He was member of the Codification Committee for the Civil Procedure, dealing with its general rules.

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Summary

The book *Efficient Collective Redress Mechanisms in Visegrad 4 Countries: An Achievable Target?* presents the findings of the research project **"Progress in collective redress mechanisms in environmental and consumer mass harm situations",** supported by the International Visegrad Fund´s Grant No. 21730099. For the first time in the V4 region, a project interlinked the study fields of consumer law and environmental law in their common topic of introducing and functioning of collective mechanisms of legal redress in mass harm situations or situations of violations of laws in both fields.

The book summarises the main findings of the analysis and comparison of the consumer and environmental collective redress mechanisms in the V4 countries: the Czech Republic, Slovakia, Hungary and Poland. For each country and each area, it brings together the results of theoretical studies of law experts, and the experience gained by civil associations in practical application of the relevant legal instruments. The explanation is set in the context of the recent development of the EU policy and law, and for the environmental area, also in the context of the implementation of the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters.

To encapsulate our findings, the existing framework for enforcing consumer rights is not satisfactory in the Visegrad 4 countries. Similarly, the private enforcement of environmental law norms as enacted in legislation cannot at present make a substantial contribution to the overall enforcement of environmental law in any of the countries. However, without compensatory relief, which can ensure quick and efficient compensation in mass harm situations, protected rights cannot be enforced satisfactorily. Legislators still appear to do nothing except pay lip service to effective redress mechanisms; this picture is the more dismal in the context of today's overall environmental crisis when any effort even from individual and associations should count.