INSTITUTE OF STATE AND LAW
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Collective Redress Project

Progress in Collective Redress Mechanisms in Environmental and Consumer Mass Harm Situations

Context to the project topic

Our project is quite narrowly focused on the "ex-post" mechanisms of collective redress in consumer protection issues, and collective claims in the environmental protection area. The role of the NGOs that take part in applying legal tools in environmental and consumer protection will be payed particular attention. In both environmental and consumer protection areas, **violations of laws** established at the EU and national level **affect a large number of individuals and may cause material damages or harm persons' health and wellbeing.** This contrasts with the fact **that the access of the affected individuals and their collectives to justice is only limited.** Examples of numerous unsuccessful claims for damages or injunction from the Czech Republic (the Ostrava air pollution case and the Prague highway traffic noise case) or of the impossibility to collect dozens of individual claims in Hungary (the Ajka alumina sludge spill case) illustrate well the environmental problem field, while the affair of thousands of persons impaired within the foreign currency mortgage contracts in Hungary or Poland may demonstrate the weaknesses of the collective redresses in the consumer protection area.

At present, measures against violations of the environmental rights on the one side and the consumer rights on the other side distinguish strongly in the V4 countries. In the field of **environmental protection**, the remedial instruments are entrusted almost entirely to the public enforcement, covering punishments for violations and cessation of illegal activities. Individual claims under the civil law regime are possible, but they usually enable compensations for material damages of one's property only (which is not much suitable for the environment) and are rarely used by individuals. Private enforcement tools of a collective nature are missing in both environmental law and practice. In contrast, in the **consumer protection sphere**, private enforcement of consumer rights' infringements is possible, as an addition to the public enforcement. Certain types of individual claims enabling private enforcement have been enacted in all V4 countries. As for collective mechanisms, just Poland introduced collective actions in 2009, and Hungary improved the *"actio popularis"* rules in 2012. However, the frequency and efficiency of these collective claim types are low, and compensatory collective redress mechanisms are still incomplete or missing. Moreover, individuals are usually reluctant to enforce less severe violations on their own (rational apathy regarding the cost and risk analyses of individual enforcement.)

In sum, there seems to be a serious **gap in the system of compensatory and injunctive relief**, **neglecting private collective redress mechanisms**. These mechanisms do not at all exist in the environmental area; in consumer protection, certain collective instruments exist but their efficiency is questionable. We see this situation as a gap in the access to justice and thus as a problem that calls for solution. There are legal and practical reasons

why in both consumer and environmental protection area, the collective redress instruments should be present. Firstly, according to international and EU law, the instruments such as injunction, class action including participation of NGOs or participation of NGOs in other types of applicable claims should have already been introduced by all EU Member States, based on the Injunction Directive 2009/22/EC, on Article 9 (3) of 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).[1] But according to the study of the European Commission "Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union" and to the "Fitness check of consumer law", the implementation of these commitments is insufficient in all the V4 countries (in fact, in almost all Member States). Secondly, the private collective redress mechanisms are in fact very well suitable to supplement and support the public enforcement in prevention and shutdown of unlawful operations or practices and to ensure individual compensations for persons harmed. Such mechanisms have been already proved as effective in certain other areas, such as the unfair competition e.g Volkswagen Clean Diesel Cars lawsuit in USA[2] or misleading advertising[3]. In mass harm situations, collective claims certainly constitute better means of access to justice than the individual ones. The participation of environmental and consumer protection organizations behind a mass harm occasion could be the key element in the efficient and affordable enforcement of protected rights granted under the EU law.

In our project, we decided to connect the environmental and consumer fields, which are not commonly treated together. One of the main parts of our planned project is aimed to explore and develop legal **mechanisms of the "ex-post" control**. For lawyers engaged in environmental law, this is a new and not much known or utilized area of law but it has the potential to strengthen the environmental protection. The involvement of the potentially affected members of civil society in prevention – i.e. **"ex-ante" mechanisms** are relatively well developed in the field of environmental protection, including the environmental impact assessment, the system of environmental permitting, the public participation in environmental decision-making, the judicial review of administrative decisions etc. On the contrary, solving situations like ecological accidents, spills of hazardous substances, or just exceeding environmental limits set by law, which all cause harm to many persons and the environment,

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1 This Recommendation requires that all Member States should have collective redress mechanisms in order to facilitate the access to justice at the national level for both injunctive and compensatory relief in both (consumer and environmental) fields. Connecting consumer and environmental protection together in one EU document is something novel, which is worth noticing here.

2 U.S. District Judge Charles Breyer in San Francisco signed on 26.10.2016 off on VW's settlement with federal and California regulators and the owners of the 475,000 polluting diesel vehicles in a pivotal moment (15-MD-2672-CRB (JSC). The settlement was reached with the U.S. Justice Department, Federal Trade Commission, the state of California and vehicle owners who had filed a class action lawsuit against VW. Volkswagen has admitted to misleading regulators and still faces an ongoing criminal investigation. It represented the largest civil settlement worldwide ever reached with an automaker accused of misconduct. http://www.cand.uscourts.gov/crb/vwmdl .

3 In January 2017 thousands of British motorists have launched a lawsuit against Volkswagen over the "Dieselgate" emissions scandal, in a claim that could end up costing the carmaker billions of pounds. See https://www.theguardian.com/business/2017/jan/09/dieselgate-volkswagen-uk-motorists-class-action-suit .

depend almost only on the public enforcement mechanisms (criminal or administrative sanctions, remedies, environmental liability / environmental damage regime etc.), i.e. on the capacity and activity of public authorities. There may be some possibilities of individual claims in the V4 countries but their efficiency is low. The mechanisms for collective claiming in these situations are missing.

In this aspect, the situation in the environmental protection field differs from the consumer protection area. In that area, there are in fact no preventive tools eligible for either consumers or their organizations (no proceedings with participation) before e.g. a product is placed on the market. On the contrary, the main focus of the consumer organizations lies in the "ex-post" mechanisms (e.g. a dangerous product has been placed on the market, an operator has charged the clients in an illegal way etc.). In the consumer protection area, there are some redress mechanisms established by the EU law (esp. based on the Directive 2009/22/EC on injunctions for the protection of consumers). However, according to the recent "Fitness check of consumer law" led by the European Commission[4], the results of these redress mechanisms are deeply under the expectations.

Firstly, many criticisms were 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, then the procedure may take too long. Due to this, the process is ineffective, as often by the time the decision is published, it is too late to fully reverse the negative effect of a concluded contract for consumers. In some countries, like Czech Republic the publication of the decision itself could be also problematical. Impediments to the effective protection of collective consumers' interests are also created by insufficient material and personal sources of the consumer organizations. Regarding the litigation risk and costs should be mentioned that a lost suit can even cause insolvency of the suing organisation, because to pay the legal costs of the attorney hired by a bank or other major firm can be very expensive. The competence of regular courts is also problematic, like in Czech Republic where the Prague City Court 4 rejected an injunction claim because of lack of competence concerning sector specific contract conditions, like telecommunications contract terms.[5] In Slovakia, procedural provisions were missing for the collective redress mechanism until July 2016 although the Slovak Civil Procedure Act and the Commercial Code (in relation to unfair competition) presupposed the possibility of injunction actions.[6] Nevertheless, it should be noted that some Regional Courts, like the Regional Court in Prešov, were able to resolve the legislative gap, and established interim measures in favour of consumers also before 2016.

Secondly, the lack of possibility of consumer organisations to file **financial claims** for unjustified enrichment, damages or financial compensation in favour of consumers in cases of unfair competition is furthermore controversial. The common argument, e.g. in Slovakia, is

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4 http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332 .

5 District court of Prague 4, C 196/2016-48. In telecommunication contracts, regarding B2C [business-to-consumer] disputes, the Czech Telecommunication Office has exclusive competence instead of the court under § 129 (5) of Act 127/2005 Coll. But injunction cases do not fall under these types of disputes, because there is a missing contractual relationship between the organisation and the telecommunication provider. The legal justification for an injunction action is based on different rules, on § 25 (2) Act 634/1992 Coll. in conjunction with § 83 (2) b) Act 99/1963 Coll., on Civil Procedure, but the Court failed a competence-suit at the Higher Administrative Court.

6 These legislative deficiencies were eliminated just in 2016 by the CDPC (Civil Dispute Procedure Code), which introduced an abstract control mechanism in consumer affairs in general. Regarding the new act, the courts can review the unfairness not just of contract terms but also of commercial practices, irrespective of the circumstances of the individual case. However, a link between an abstract control of unfair contract conditions and individual consumer damage claims is still missing.

that the consumer organisation is not allowed to claim consumer damages because the organisation is not a representative of the consumers, but a party of a legal proceeding who didn´t suffer harm. However, such argumentation is not persuasive in our opinion and there are examples of other related fields that it can be overcome.[7] Only in Hungary was the link solved between an injunction action and compensation in 2012.[8] According to § 38 and 39 Act CLV of 1997, the rules of a public interest action and public interest enforcement allow a simplified follow-up damage claim combined with a declaratory judgement in public interest proceedings. In the additional process an injured consumer in an affected group identified by the declaratory judgement only needs to prove the causal link between the infringement and their damage, and the amount of damages suffered. The public interest enforcement, which requires a prior administrative decision that has established the infringement, even goes beyond this link. The public interest enforcement action may also include a claim for damages or specific performance provided in one action if the amount of damages or the content of performance can be clearly determined at the time of submission in general terms. (That means without having regard to the individual circumstances of every affected consumer). A condition for both types of public actions is that there is a large number of consumers affected by the infringement, the scope of which can be determined at the time of submitting the claim. For instance, after the "yellow cheque case"[9] in Hungary the affected consumer just needed to ask for compensation from Hungarian Telekom based on a judgement, without a separate compensation claim.

Thirdly, as regards **private collective redress mechanisms** in consumer protection, they have been introduced only in Poland from among the V4 countries. The Polish Act on Pursuing Claims in Group Proceedings came into force in July 2010.[10] The act provided for an opt-in type of collective consumer claims, product liability claims and tort liability claims, but with a very limited scope of application. Under the act, claims for the protection of personal interests (e.g. health, dignity, image, home etc.) were excluded. A further obstacle was that group litigation of monetary claims was possible only if the amount claimed by each group member was the same. The problems of this redress mechanism became apparent very early. In 2011 the Warsaw District Court refused to certify a class action of victims of the collapse of International Trade Hall in Katowice, and another court dismissed the case of flood victims in the Sandomierz area. Although more than 100 class action suits have been brought since July 2010 before the Polish courts, many were rejected because of formal deficiencies or because of the failure to satisfy substantive requirements for class action certification. A very small number have gotten through the first certification hurdle. Many criticisms were raised against the Act besides the limited scope of application; inter alia the problem of identifying the representative person of the class members, the lack of specific procedural mechanisms and missing tools for the courts to facilitate smooth handling of the procedure. A short time ago, in March 2017 the Polish Parliament announced its intention to simplify the procedure and contribute to the growth of class action in Poland.

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7 In this regard, e.g. a Czech Constitutional Court judgement of 30 May 2014 (No. I. ÚS 59/14) should be referred to**.** In this decision, which is ground-breaking for the Czech environmental case-law, the Constitutional Justices commented that it would not be correct to deny the environmental NGOs the chance to defend the environment with the argumentation that they as legal persons do not hold the constitutional right to environment (which is interpreted as belonging to individuals only). The judgement stressed that these NGOs are created by individuals in order to protect their own right to a favourable environment, and thus the NGOs have standing in proceedings to defend the right to environment of their members.

8 Act LV of 2012 on amendments to Act CLV of 1997 on the protection of consumers.

9 Decision no. 14. Gf. 40.605/2013/7.

10 Drafted by the Ministry of Justice on 17 December 2009. The Act was published in the Official Journal of 18 January 2010.

In the environmental protection area, we can view the mass harm situations and their legal approaching by the public affected as closely connected to **Article 9 (3) of the Aarhus Convention**. It states that "each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment." The European Commission was preparing a draft Directive on access to justice in environmental matters since 2003 (COM(2003) 624) that had been intended as legislation implementing the third pillar of the Aarhus Convention. However, the proposal was finally withdrawn as "obsolete" in 2014.[11] In this situation we are turning our attention to 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).[12] This recommendation explicitly counts both fields – the environmental and consumer protection areas, to the fields in which Member States should establish collective redress mechanisms covering both compensatory and injunctive redress. Thus, we can see the targets of the Recommendation as establishing the same legal tools for the two different areas, which gives us an opportunity to build interlinkages between them. The Recommendation requires setting up legal mechanisms that ensure a possibility to collectively claim cessation of illegal behaviour and/or compensation for persons claiming to have been harmed in a mass harm situation resulting from an illegal activity of one or more natural or legal persons, in both consumer and environmental area. As for the latter, the recommendation refers to Article 9 (3) of the Aarhus Convention, too, and builds the whole mechanisms on entrusting the standing to bring an action to so called "representative entities";[13] in our view, the ecological NGOs could play a role of such representative entities in the environmental protection, and the consumer organizations in the consumer protection, if fulfilling the set criteria. That is the reason why we would like to engage the representatives of the both types of NGOs in the project too.

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[11] Withdrawal of obsolete Commission proposals (2014/C 153/03), see http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2014:153:FULL&from=EN. A compliance procedure was led before the Aarhus Convention Compliance Committee in this case (ACCC/C/2014/123). However, the finding of the Committee from May 2017 states that the EU did not contravene the Aarhus Convention by not adopting the said Directive.

[12] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013H0396,

[13] See part III, point 4 of the Recommendation.