Collective Actions for Infringement of Competition Law

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Summary: This article deals with the legal instrument of collective actions for competition law infringements. The text touches upon the pros but also cons of this concept interpreted usually as the boost needed for private enforcement of competition law, yet bringing also risks of selective protection of competition and even bullying competitors. The article provides illustration of the struggle between the effort to make collective actions and thus the private enforcement of competition law in general more attractive in the light of the blooming U.S. model and the concurrent legislators´ will to refrain from the most negative features of the model mentioned. An insight into the hitherto soft and hard law initiatives in the area of collective actions in the EU and the Czech Republic and their interplay with competition law is offered.

Keywords: competition law, damages, class action, collective action, representative action, court, European Commission, cartel, private enforcement, abuse of dominant position, Directive on representative actions for the protection of the collective interests of consumers, Commission's Recommendation on common principles for collective redress mechanisms, Directive on actions for damages for infringements of the competition law, opt-in, opt-out

1. Introduction to collective actions for infringement of competition law in the European Union

Private enforcement of competition law by means of civil claims and the unsatisfactory conditions for it throughout the European Union have been an evergreen of the EU competition law discourse since at least the beginning of the

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millennium. So far, the private enforcement of competition law in the EU has been associated especially with individual claims by individual companies that suffered damage resulting from competition law infringements. No overhaul in this respect came with the milestone 2014 EU Directive facilitating the conditions for civil actions for damages resulting from competition law infringement[1], which has brought about improvement of position of individual claimants but left out the possibility of collective claims[2][3]. Thus still nowadays, with the Directive having been implemented into the EU countries´ legal orders, the damages typically need to be large enough in order to be worth pursuing at a court and the individual claimant – typically a corporate company – needs to possess sufficient evidence usually demanding also a costly economic analysis – now under the Directive rules arguably available also from competition authorities – and significant resources for conducting a multiple-year dispute. Accordingly, possible smaller yet non-negligible claims by especially indirect purchasers, usually consumers, of the goods affected in terms of price or quality by competition law infringement, may remain non-effectuated.[4]

A completely different story of collective redress has been narrated in the United States of America[5], however, for a price unacceptable to the EU representatives. As a Joint Note on Collective Redress[6] puts it: *"[The U.S.] form of collective redress contains strong economic incentives for parties to bring a case to court even if, on the merits, it is not well founded. These incentives are the result of a combination of several factors, in particular, the availability of punitive damages, the absence of limitations as regards standing (virtually anybody can bring an action on behalf of an open class of injured parties) the possibility*

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1 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, p. 1–19.

2 See recital 13 of the Directive: *"This Directive should not require Member States to introduce collective redress mechanisms for the enforcement of Articles 101 and 102 TFEU".*

3 For overview of the topic of collective actions see WRBKA, S., VAN UYTSEL, S., SIEMS, M. *Collective Actions: Enhancing Access to Justice and Reconciling Multilayer Interests?* Cambridge University Press, 2012.

4 For analysis of obstacles to effective compensation of victims of competition infringements, types of victims and losses, and need for enhanced private competition law enforcement in the EU see ŞAHIN, E. Collective Redress and EU Competition Law Routledge, 2018.

5 For more details on the U.S. system and the procedural aspects of collective actions as a whole see WINTEROVÁ, A. Hromadné žaloby (procesualistický pohled). *Bulletin advokacie*, 2008, č. 10, p. 21.

6 Towards a Coherent European Approach to Collective Redress: Next Steps, Joint information note by Vice-President Viviane Reding, Vice-President Joaquín Almunia and Commissioner John Dalli, SEC(2010) 1192.

of contingency fees for attorneys and the wide-ranging discovery procedure for procuring evidence. Because of the increased risk of abusive litigation resulting from these combined incentives, we believe that these features are not compatible with the European legal tradition. We therefore firmly oppose introducing "class actions" along the US model into the EU legal order."

Along these lines, several EU initiatives have been undertaken in the area of collective or representative actions (i.e. actions brought by a member of a group of claimants on their behalf or actions brought on behalf of the group of claimants by a specialised entity different from the claimants) in attempt to boost private enforcement of competition law in the European Union by attracting groups of claimants to the court in pursuit of damages resulting from an identical mass infringement of law, which has so far seemed unworthy of claimants´ time, money and effort required.[7] No individual EU legal regulation has been exclusively dedicated to collective actions for the breach of competition law area so far, with consumer protection rules being the most usual source of collective claims´ rules in the EU member countries.[8] However, competition law has been regularly mentioned among the areas suitable for this solution. A brief overview of the Commission´s initiatives in the area of collective claims for breach of competition law follows, including main elements suggested and safeguards against their abuse crucial from the business point of view.

2. EU Commission´s initiatives on collective actions for competition law infringements

2.1. White Paper on damages actions for breaches of the EC antitrust rules[9]

Following a 2004 study on the conditions for antitrust damage claims in the member states commissioned[10] by DG Competition and its reflection in DG Competition´s 2005 Green paper on damages actions for breach of the EC antitrust

[7] For analysis of the „European model" of collective actions see NAGY, C. I. Collective actions in Europe.Springer Bruefs in Law, 2019.

[8] For comprehensive overview of EU member states´initiatives in the area of collective actions see ASHTON, D. *Competition Damages Actions in the EU: Law and Practice*. Edward Elgar Publishing, 2018, 11.115-11.223; RODGER, B. J. *Competition Law, Comparative Private Enforcement and Collective Redress Across the EU*. Kluwer Law International, 2014.

[9] COM(2008) 165 final.

[10] https://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf

rules[11], the Commission in its White Paper *suggested a combination of two complementary mechanisms of collective redress to address effectively [the absence of a mechanisms allowing aggregation of the individual claims of victims of antitrust infringements]:*

- Representative actions, which are brought by qualified entities, such as consumer associations, state bodies or trade associations, on behalf of identified or, in rather restricted cases, identifiable victims[...]; and
- Opt-in collective actions, in which victims expressly decide to combine their individual claims for harm they suffered into one single action (as opposed to the opt-out actions[12] dominant in the U.S. system where the alleged victims must take active steps to leave the group represented with no need for their permission by a collective action)[13].

Commission added among others that *safeguards should be put in place to avoid that the same harm is compensated more than once.*

2.2. Joint Information Note on Collective Redress

As a follow-up to several documents by individual EU Commission´s Directorates General touching upon collective redress especially from the protection of consumer perspective, the 2010 Joint Note points out that the enlargement of the EU brings about a need for support to the system of public enforcement of EU competition law, namely for introduction of its private enforcement. The Note interprets the notion of collective redress as "*a broad concept encompassing any mechanism that may accomplish the cessation or prevention of unlawful business practices which affect a multitude of claimants or the compensation for the harm caused by such practices. There are two main forms of collective redress: by way of injunctive relief [and] compensatory relief[...]".* The Note summarized the then up-to-date position of key stakeholders towards collective claims which does seem to have changed over time: "*[M]ost consumer organisations are in favour of EU-wide judicial compensatory collective redress schemes, whereas many representatives of industry fear the risks of abusive litigation. Stakeholders also warned against an inconsistency between the different Commission initiatives on collective redress, which pleads for the development of a more coherent*

[11] COM(2005) 672.

[12] Opt-out systems in collective redress: EU perspectives and present situation in the Czech Republic are dealt with in the Article of the same name by HAMUĽÁKOVÁ, K. *Hungarian Journal of Legal Studies*, 2018, vol. 59, No.1, p. 95–117.

[13] Possibilities of joining the persons concerned to the group proceedings are comprehensively described in HAMUĽÁKOVÁ, K. Možnosti zapojení dotčených osob do skupinového soudního řízení. *Acta Iuridica Olomucensia*, 2017, Vol. 12, No. 2, p. 9–21.

approach." The Note also warned against abusive claims: "*A European collective redress scheme should not give any economic incentives to bring abusive claims. In addition, effective safeguards to avoid abusive collective actions should be defined. This should be inspired by the existing national judicial redress systems[,...for instance the 'loser pays' principle. The judge*[14] *could also be given a prominent role in the process[,...]assessing the admissibility of the collective actions or verifying if a representative entity bringing the action respects a number of strict criteria."*

2.3. Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms[15]

The 2013 Recommendation remains until these days the most complex Commission´s attempt to regulate collective actions for infringement of competition law. It is a complement to the below mentioned Directive on actions for damages for infringements of competition law[16] and enumerates competition law among the areas „*where the supplementary private enforcement of rights granted under Union law in the form of collective redress is of value"* together with consumer protection, environment protection, protection of personal data, financial services legislation and investor protection*, „but also any other areas where collective claims for injunctions or damages in respect of violations of the rights granted under Union law would be relevant"*[17].

The Recommendation introduced among others definition of *'mass harm situation'* appropriate for cartel agreement or abuse of dominance scenarios, meaning *"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".*

Recommendation refused the pillars of the U.S. system such as punitive damages, intrusive pre-trial discovery procedures and jury awards, declaring them foreign to the legal traditions of most EU Member States. It also proposed elementary prevention of abusing the collective actions in competitive

[14] Role of the judge in collective redress is comprehensively dealt with in the Article of the same name by PETROV KŘIVÁČKOVÁ, J. *Acta Iuridica Olomucensia*, 2017, Vol. 12, No. 2, p. 22–37.

[15] 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.

[16] See https://ec.europa.eu/commission/presscorner/detail/en/IP_13_524

[17] See recital (7) of the Recommendation.

struggle by establishing a prohibition to a third party 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; there should be no incentive in the form of excessive contingency fees for leading legal disputes. Accordingly, the Recommendation supports the principle of "loser pays" and explicitly supports the opt-in principle "*The claimant party should be formed on the basis of express consent of the natural or legal persons claiming to have been harmed ('opt-in' principle). Any exception to this principle, by law or by court order, should be duly justified by reasons of sound administration of justice."*

Overall, as regards harmonisation of conditions for collective redress in the EU member states, the Recommendation´s impact has been limited, obviously due to its non-binding nature and perhaps also due to simultaneous focus on a highly sensitive area from the perspective of national states and businesses. However, the principles established have resonated in the later documents on collective claims, including EU and national legislation.

2.4. Directive 2014/104/EU[18]

The Directive itself being rather a minimalistic compromise version of the originally proposed conditions supporting private enforcement of competition law did not go as far as to include yet another possibly controversial instrument, that is the collective actions. Still, the tools of the Directive, e.g. binding effect of decisions by national competition authorities, enabling better access to their documents and presumption of damage caused by cartel, remain available in EU countries with national regulation of collective actions in the area of competition law[19]. Essential conditions for collective actions potentially using the framework of the Directive have been embodied in the second part of the package, the above-mentioned Recommendation.

[18] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

[19] Relationship between individual court proceedings and collective court proceedings is analysed in the article HAMUĽÁKOVÁ, K. Vztah individuálního soudního řízení a kolektivního soudního řízení. In IVANČO, M. (ed.). *Mechanizmus uplatňovania kolektívnych nárokov v podmienkach SR*. Univerzita Komenského v Bratislave, Právnická fakulta, 2018.

3. Draft Directive on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC[20]

The most developed, complex, and prospectively binding EU legislative proposal to date dealing with collective actions leaves competition law out of its scope without prejudice to existing national systems for collective redress in the area of competition law. In the framework of its "New deal for consumers" package seeking among others to improve equilibrium in protection of consumer rights resulting from the EU internal market vis-a-vis the rights of undertakings, the European Commission had introduced in 2018 the above-mentioned draft, which as of July 2020 reached the stage of agreed compromise text to be approved by the EU Council and Parliament. The final draft, establishing so far the closest (yet still explicitly distinguished) parallel to U.S. class actions includes e.g. the following instruments aimed, among others, at contributing to fairer competition on the EU internal market[21]:

- At least one representative action procedure for injunction and redress measures should be available to consumers in every member state, allowing representative action at national and EU level;
- Qualified entities (organisations or a public bodies) will be empowered and financially supported to launch actions for injunction and redress on behalf of groups of consumers and will guarantee consumers' access to justice;
- The rules strike a balance between access to justice and protecting businesses from abusive lawsuits through the Parliament's introduction of the ***"loser pays principle"***, which ensures that the defeated party pays the costs of the proceedings of the successful party;
- In order to ensure sound administration of justice and to avoid irreconcilable judgments, an opt-in mechanism should be required regarding a representative action for redress when the consumers affected by an infringement do not habitually reside in the Member State of the court or administrative authority before which the representative action is brought[22].

[20] COM(2018) 184 final.

[21] See e.g. https://www.europarl.europa.eu/news/en/press-room/20200619IPR81613/new-rules-allow-eu-consumers-to-defend-their-rights-collectively

[22] https://www.consilium.europa.eu/media/44766/st09223-en20.pdf

4. Draft Czech Act on Collective Proceedings[23]

In situation when one third of EU member states does not operate any form of legal remedy available to victims of mass harm[24]the Czech Government went on further to improve existing national legislation[25] by means of a draft Act on collective proceedings reflecting many of the instruments discussed above. Heading to reading in the Czech Parliament as of July 2020, the draft aims at consolidating the shattered regulation of collective claims in several areas of Czech legislation[26] and creating an effective tool for resolving smaller claims, both from the perspective of the courts and the claimants. The negotiation on the draft coincides with the EU institutions 'negotiation on the Representative Actions Directive with possible substantial overlap in scope. At the same time, and unlike the draft Directive, the Explanatory Memorandum (hereinafter "the Memorandum")[27] to the draft Act explicitly refers to utilisation of the Act also in the area of competition law infringement claims. Therefore, it is still uncertain what impact the Directive may have on the final version of the Act. With prospect of the Directive being adopted before the end of 2020, it may seem advisable to wait until the approval in the EU Council and Parliament in order to avoid possible discrepancies in implementation of the Directive.

As regards relation of the draft Act to competition law, the Memorandum claims that "*the representative actions could contribute to levelling of competition, reducing anticompetitive behaviour and contributing to improvement of business climate in favour of fair entrepreneurs and ultimately final consumers. Especially relevant should be the claims resulting from the CZ Act on damages in the area of competition law."* Among the conditions for explicitly preferred opt-in representative proceeding pursuant to the Draft Act there is *one stipulating that a representative action shall not be filed with manifestly abusive intent, especially with the aim of causing harm to a group or illegally cause harm to the defendant or an entity taking part in economic competition.* It is furthermore explicitly acknowledged by the Memorandum that the representative actions do

[23] For more details see HAMUĽÁKOVÁ, K., PETROV KŘIVÁČKOVÁ, J. Kolektivní ochrana práv v nově navrhované úpravě. *Bulletin advokacie*, 2018, Vol. 2008, No.12, p. 17–22.

[24] See e.g. https://www.europarl.europa.eu/news/de/press-room/20190321IPR32135/new-rules-to-help-consumers-join-forces-to-seek-compensation

[25] A comprehensive overview of current regulation of representative actions in the Czech Republic is provided by PETROV KŘIVÁČKOVÁ, J., HAMUĽÁKOVÁ, K. Reprezentativní žaloba v českém civilním procesu. *Acta Iuridica Olomucensia*, 2016, Vol. 11, No. 1, p. 51–60.

[26] For complex overview see HAMUĽÁKOVÁ, K. Kolektivní ochrana práv v České republice: současnost a perspektivy. In *Pocta Aleně Winterové k 80. Narozeninám*, Všehrd, spolek českých právníků, 2018, p.130–142.

[27] https://apps.odok.cz/veklep-detail?pid=KORNBA9EXSST

have increased bullying and abusive potential and that it is appropriate for the court before issuing a certificate decision to deal with the question whether the action has not been filed solely for the purpose of defamation of third persons, harming a competitor or even for the purpose of competitors economic liquidation. Prevention of abusing representative actions is secured by regulation of the entities entitled to file a motion to commence a proceeding. For this purpose the right to initiate an opt-in representative proceeding is limited to persons directly harmed by the relevant infringement, i.e. to members of the represented group, while these members must acquire agreement of 10 other members of the group, or 100 members of the group in case of opt-out scenario where a higher tendency to submitting not completely founded claims due to limited material responsibility may occur, and also limited to non-profit entities, i.e. established and trustworthy non-governmental non-profit organisations. The draft Act distinguishes two phases of the proceeding on representative actions in order to exclude abusive attempts to file such actions.

In the first phase the court shall consider admissibility and reasonableness of the claim and decide on it by individual ruling allowing the proceeding to enter the second phase. An essential aspect of the assessment is also verification of the source of finance to be used by the entity financing the dispute[28], or in other words whether the financing entity has interest conflicting with the interests of the defendant or with the interest of the represented group, especially whether it is a competitor of the defendant on the relevant market. At the same time, if the defendant holds the opinion that the representative action is abusive or manifestly unfounded, she should lead the court to this conclusion.

For the sake of preventing the risk of abuse, the draft Act also limits the competences of courts exclusively to disputes concerning rights of consumers, who typically cannot be in position of competitors of defendants. Abusive filing of representative actions in general should be prevented by adequate fees in amount disincentivising abusive claims filings especially in connection with the condition of proving solvency correlating with the claimed performance.

Last, but not least, the draft Act deals with abusive publication of information on representative action, as the very publication of existence of representative proceeding and related negative publicity may act as deterrence of defendant who may be willing to back away and agree with an off-court settlement. In order to prevent this the burden of informing the entities concerned is primarily up to the plaintiff; information on conduct of a representative proceeding will

[28] Issues of Funding of Collective Actions are comprehensively dealt with in the Article of the same name by HAMUĽÁKOVÁ, K. *International and Comparative Law Review*, 2016, Vol. 16, No. 2, p. 127–144.

be published in a registry of collective proceedings only following certifications preventing publication of information on proceedings conducted on the basis of abusive actions; the information on proceedings in the relevant registry shall be limited to the minimum necessary.

5. Conclusion

Collective actions for infringements of competition law remain unregulated in a binding manner on the EU level, and the numerous safeguards against abuse outlined in the above-mentioned documents may be suggesting why it is so in the area where undertakings, and especially corporate companies, may attract attention of speculative claimants. Lengthy proceedings in antitrust cases not always easily embraced by national judges still bring a risk of protracted reputational damage, high costs and uncertain result. This may lead the defendants to seek settlement[29] also in non-self-evident cases and incentivize attempts to probe the preparedness of especially big companies, which may be victimized by selective enforcement of competition law and justice in general. It is therefore imperative to implement solutions enabling responsible and informed behaviour of claimants and not allowing use of persons that have allegedly suffered from possible infringement of competition law as a shield or an excuse for extortion of hypothetical wrongdoers or deterioration of their position on the market. At the same time, defendants in collective or any other proceedings should not become hostages of a pursuit of a general enforcement enhancement. For these reasons it seems appropriate that a possible future EU regulation of conditions for collective claims embodies all the safeguards presented above and give strong preference to the opt-in proceeding which supports informed and responsible approach to pursuing a claim and monitoring the activity of the representing entity and avoid malevolent use of collective actions. National regulation may offer some reverse inspiration as illustrated by the CZ draft Act on Collective proceedings incorporating number of principles expressed in the hitherto EU initiatives.

[29] See further HAMUĽÁKOVÁ, K., PETROV KŘIVÁČKOVÁ, J. Alternative Methods of Collective Disputes Resolution in the Czech Republic. *Baltic Journal of European studies,* 2016, Vol. 6, No. 2, pp. 96–116.

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