

CLASS MEMBERS IN COLLECTIVE PROCEEDINGS: SEARCHING FOR AN OPTIMUM MODEL OF CLASS MEMBERS' PARTICIPATION¹

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Abstract: This paper focuses on the important topic of collective actions, namely the participation of class members in the collective proceedings. The article essentially asks whether class members should express their consent to take part in the collective action, whether such consent shall be explicit and when should it be given. In the first part, the article analyses the different aspects of class members' status, setting out the different options and elaborating on their advantages and disadvantages. The paper focuses primarily on the methods of opt-in and opt-out. This is followed by an analysis of EU law, the law of selected European jurisdictions and also Model European Rules on Civil Procedure. In the following chapter, the article describes the development of this issue in the Czech legislation, focusing on the current proposal for the collective proceedings act. The last chapter contains the final recommendation as to what the author believes the optimal method should look like. The author suggests there should be a differentiated approach to injunctive and redress measures since each of these measures requires different optimal solution.

Keywords: collective action, collective proceedings, class member, opt-in, opt-out

1. INTRODUCTION

In 2020, EU enacted a legislative document which obliges all EU Member States to adopt collective actions for the protection of consumers. The Directive on representative actions for the protection of the collective interests of consumers (hereinafter referred to as 'Representative Actions Directive')² calls for major changes in civil procedure of Member States including the Czech Republic,³ mainly since the Directive involves not only injunctive, but also redress measures.

The Representative Actions Directive respects to some extend procedural autonomy of the Member States, leaving many procedural questions and details up to the national law.⁴ The effectiveness of the national collective procedure thus depends largely on the decisions taken by the national legislator during the implementation of the Directive. One of these questions also includes the role and method of participation of the affected consumers, or more generally speaking the so-called class members. For instance, it is fully upon the discretion of the national law, whether in purely national cases, the collective procedure employs opt-in, opt-out or both of them.⁵

The Representative Actions Directive does not come out of the blue. Many Member States have already had a long experience with collective actions at the national level.

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² Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC.

³ In majority of the EU Member States, there has already been an existing mechanism for collective redress procedure for quite a while (for instance Portugal, France, Denmark, Belgium, Italy, Poland or Sweden).

⁴ See also recital 12 of the Preamble to the Representative Actions Directive.

⁵ For the definitions of opt-in and opt-out, see for instance BALARIN, J. *Kolektivní ochrana práv v civilním soudním řízení*. Praha: Eva Rozkotová, 2011, p. 17.

What is more, there are also recommendations and soft-law documents that tackle this issue as well.

In the paper at hand, I would like to look deeper into the question of class members' participation, aiming primarily, but not only on the methods of opt-in and opt-out. First, I wish to assess attributes of various participation models, focusing on their advantages and disadvantages. I will also analyse the possibilities which are given by the Representative Actions Directive and consider also comparative and soft-law context. All of these aspects will provide for a valuable insight into the variants at hand. Finally, I will try to come up with an optimal model of class members' involvement. By doing that I will offer arguments why I consider this model to be the most suitable to achieve efficient and cost-effective functioning of the collective process in the continental law.

2. POSSIBLE LEGISLATIVE CHOICES

2.1 Different aspects of class members' status in collective proceedings

When it comes to the role and rights of class members in any collective procedure, there are various questions to be tackled.⁶ In order to clarify the topic of this paper more specifically, it is thus firstly useful to make a theoretical introduction into the possible issues that need to be addressed by the national law on collective actions.

In my opinion, it is possible to divide those issues in accordance with the timeline of the collective process,⁷ namely

- (i) the initiation of the proceedings,
- (ii) the participation in the proceedings,
- (iii) the rights and duties of the class members during the proceedings and
- (iv) the extent and limits of the binding effect of the ruling which was issued in the collective proceedings.

With regard to the initiation of the proceedings, the question arises whether the national law allows for class members to initiate collective proceedings in the first place, or in case the legal standing is granted only to qualified claimants, whether the national legislation requires that certain amount of class members give their consent before the qualified claimant is entitled to file the action on their behalf.⁸

As for the participation in collective proceedings, probably one of the most common and largely discussed topics come into play – the methods of 'opt-in' and 'opt-out'. Nevertheless, as will be further demonstrated, these two possibilities are not the only ones to be taken into account.

Another rather complex topic is the class members' status in the on-going proceedings, i.e. whether they are parties to the proceedings or, albeit not being a party to the proceed-

⁶ Ibid, p. 53.

⁷ See also article 7 para 6 and article 9 para 2 of the Representative Actions Directive.

⁸ ELI – UNIDROIT Model European Rules of Civil Procedure, pp. 371–372. In: *European Law Institute-UNIDROIT* [online]. 2021 [2023-06-10]. Available at: <<https://www.unidroit.org/english/principles/civilprocedure/eli-unidroit-rules/200925-eli-unidroit-rules-e.pdf>>.

ings, if they at least possess some procedural rights (apart from a right to opt in or opt out of a collective procedure).⁹

Lastly, it is important to decide on the extent of the binding effect of the court ruling, especially what class members may benefit from a positive final decision.¹⁰

Whereas the issues no. (i) and (iii) are rather disconnected from the others, the issues on participation and effect of *res iudicata* are strongly interlinked, since the class members are generally bound by a decision on merits rendered in the collective proceedings in which such class members have opted in or refrained from opting out.¹¹ In other words, the method of class members' participation in essence anticipates the question of whom the final decision is formally binding for. The paper at hand will further elaborate on the latter, focussing the main attention on the opt-in and opt-out methods.

2.2 The methods of participation in the class action

In the previous chapter, I have shortly outlined various legal aspects of the status of class members vis-à-vis the collective action and further stated, what I want to primarily focus on. Before diving deeper into the main topic of this paper, I believe it is necessary to define possible methods of class members 'participation' in the collective proceedings.

Firstly, in line with the principle of party disposition, class members may take part in the collective procedure by expressing their will to join a class action – or, in more traditional words, by 'opting in' the proceedings.¹²

Conversely, it is also possible that all the class members concerned are automatically part of the class action, unless they explicitly refuse to be included¹³ – or, in other words, unless they 'opt out' from collective proceedings.¹⁴

These two methods are the most famous and they often stir up the debate. Nevertheless, there are also other options that I should not forget to mention. These further options strongly relate to the abovementioned issue of *res iudicata* – i. e. who is bound by and may benefit from the final court decision.

Especially when it comes to injunction, declaratory or interim judgements, the so called 'late opt-in' may be a good choice. This method essentially allows for a collective proceeding without the class members' participation. The class members wait for the final court ruling on the class action and only afterwards decide whether they want to be bound by the outcome of the proceedings or not.¹⁵ This method of participation may also be combined with the plain opt-in, as will be further demonstrated below.

By contrast, the national law may also employ the 'late opt-out'. In this model, the class members are not required to express their will before the end of the proceedings and yet

⁹ Rec. 36 of the Preamble to the Representative Actions Directive.

¹⁰ DVOŘÁK, B. Kolektivní ochrana práv a procesní legitimace. *Acta Iuridica Olomucensia*. 2016, Vol. 11, No. 1, p. 63.

¹¹ BALARIN, J. *Kolektivní ochrana práv v civilním soudním řízení*. p. 62.

¹² Ibid., p. 54.

¹³ MARCUS, S., KOELTL, J. C. et al. *Manual for Complex Litigation*, Fourth. Eagan: Thomson West, 2004, p. 298.

¹⁴ Ibid.

¹⁵ ELI – UNIDROIT Model European Rules of Civil Procedure, p. 369. In: *European Law Institute-UNIDROIT* [online]. 2021 [2023-06-10]. Available at: <<https://www.unidroit.org/english/principles/civilprocedure/eli-unidroit-rules/200925-eli-unidroit-rules-e.pdf>>.

they are automatically bound by the final judgement. However, if they disagree with the outcome, including in cases of dismissal, they may file for a late opt-out thereby eliminating *res iudicata* effect towards themselves.

Lastly, it is possible to extend the binding effect of the court ruling on the whole class, albeit its members are not asked to give their consent during the procedure itself, nor afterwards. This model is sometimes called as ‘mandatory class action’.¹⁶ On the other side of the spectrum of this ‘no choice’ model, I should mention a subtype of the action where the decision of the court is not binding on the class members. Nevertheless, in my point of view, this type of an actions should not be considered as a collective action at all.

Table summarising possible methods of the class members’ participation

Method of participation	Consent	The relevant time for expressing the consent	Extend of <i>res iudicata</i> effect
OPT IN	Explicit	Before or during the proceedings	class members who have opted in before the final judgement
OPT OUT	Tacit	During the proceedings	all class members apart from those who have opted out before the final judgement
LATE OPT IN	Explicit	After the final judgement was delivered	class members who have opted in after the final judgement
LATE OPT OUT	Tacit	After the final judgement was delivered	all class members apart from those who have opted out after the final judgement
NO CHOICE	Not required		a) all class members (<i>mandatory class action</i>) b) no class member (<i>individual action</i>)

2.3 Advantages and drawbacks of an opt-in

The opt-in is generally considered to be the overwhelming principle on the European continent.¹⁷ At least this is the impression in the Czech Republic, which is highly influenced by the German and Austrian jurisprudence.¹⁸ I would like to take a closer look

¹⁶ HAMULÁKOVÁ, K. Opt-Out Systems in Collective Redress. EU Perspectives and Present Situation in the Czech Republic. *Hungarian Journal of Legal Studies*. 2018, Vol. 59, No. 1, p. 96.

¹⁷ Ibid., p. 102.

¹⁸ MELLER-HANNICH, C. et al. *Kollektiver Rechtsschutz im Zivilprozess: Hallesches Symposium zum Zivilverfahrensrecht am 6. Oktober 2007*. Baden-Baden: Nomos-Verl.-Ges., 2008, pp. 111–112.

on this traditional principle and try to define what are its advantages and disadvantages.¹⁹

First of all, the opt-in model fully respects the principle of party disposition and the right of access to justice and to a fair trial (or even more generally, the freedom of will of the class members). If a person has a right to decide whether they want to bring their case before court, they should also be fully empowered to choose whether they want to be part of a collective action or not.²⁰ Bearing that in mind, only an opt-in model may fully guarantee that such a free decision had been made by the class members before they formally joined collective proceedings.²¹

What is more, I believe that opt in model is procedurally easier and more understandable for countries where only individual actions were traditionally possible and class actions should introduce a new method of law enforcement. If the national law is based on an opt-in, it is much easier for the judges to adopt the new model, for instance when it comes to the final ruling where the judge must ascertain individual claims for damages.

On the other hand, I would like to point out to several drawbacks of an opt-in. These drawbacks generally stem from the fact, that class members join the proceedings only after giving an explicit consent and naturally not all class members express their will to become part of the class action. On the contrary, usually only a rather small part of the whole group opts in while the rest remains outside the collective process.²² By way of example, this is apparent in *Volkswagen Dieselgate* case in Europe. In the Czech Republic, it was only around 4 to 5 % of the affected car owners who choosed to opt in.²³ For instance, in UK, only 8 % of the potential claimants decided to file for an individual action.²⁴ Similar situation was elsewhere in Europe where there is no opt-out regime put in place.²⁵

As already emphasized in the opening chapter, civil procedure may largely benefit from the introduction of collective action. The enforcement of mass harm situations may be much more effective and cheaper for the parties and the state, it may reduce number of cases before courts and lead to a better consistency of judicial decision-making, consequently strengthening the trust in judicial system. Finally, it may strongly boost law enforcement in certain areas, such as consumer protection or competition law.²⁶ This in turn may motivate parties to obey the material law, protect those respecting the principles of

¹⁹ See also BALARIN, J., JANOUŠKOVÁ, A. K fenoménu hromadné žaloby. *Právní rozhledy*. 2019, Vol. 27, No. 13–14, pp. 491–492.

²⁰ ŠVEŘEPOVÁ, K. Fenomén hromadné žaloby jako projev proměny vnímání role práva v moderní společnosti. *Bulletin advokacie*. 2019, Vol. 25, No. 4, p. 21. Similarly BĚLOHLÁVEK, A. Účast na řízeních o hromadných žalobách v zahraničí a uznání a výkon rozsudků v těchto věcech v jiných zemích. *Právní rozhledy*. 2016, Vol. 24, No. 13–14, p. 467.

²¹ BALARIN, J. *Kolektivní ochrana práv v civilním soudním řízení*. p. 55.

²² See also HAMULÁKOVÁ, K. *Opt-Out Systems in Collective Redress. EU Perspectives and Present Situation in the Czech Republic*. pp. 108–110.

²³ Only around 7 000 car owners joined a quasi “class action” while the number of affected cars was estimated to 165 000. In: *idnes.cz* [online]. 26. 7. 2023 [2023-06-10]. Available at: <https://www.idnes.cz/ekonomika/domaci/dieselgate-odvolaci-soud-zaloba-volkswagen.A230726_092432_ekonomika_ijan>.

²⁴ Even though in total, this was 95 000 of consumers. Nevertheless, the total number of affected cars was 1,2 million. See STADLER, A. et al. *Collective and mass litigation in Europe: model rules for effective dispute resolution*. Cheltenham: Edward Elgar Publishing, 2020, p. 326.

²⁵ Ibid.

²⁶ See to that end also recitals 1, 2, 7, 8 and 9 of the Representative Actions Directive.

good faith and fair dealing. However, opt-in model is in my point of view unable to exploit the full potential of these benefits of collective proceedings.

Besides, the opt-in negatively affects the collective procedure as such. If one of the main ideas behind class action is to overcome the factual inequality between the parties before court and provided generally only a small part of the group joins the collective action, opt-in model is not capable of reaching that goal. Also, opt-in does not motivate the defendant to end proceedings quickly by entering into a settlement. If most of the class members wait outside, early termination of the proceedings and positive settlement could be used by those class members in subsequent individual actions. As a matter of fact, the defendant is rather motivated to prolong the proceedings as much as possible and discouraged from amicable resolution of the dispute.²⁷

I believe that the above-mentioned drawbacks of opt-in come forward especially in cases where the individual claim is low.²⁸

2.4 Advantages and drawbacks of an opt-out

Most of the advantages and disadvantages of opt-in and opt-out are in opposition, i.e. pluses of opt-in define the minuses of opt-out and vice versa.

That being said, contrary to opt-in, opt-out ensures that added value of collective actions is fully utilized in the national procedural law. Taking into account that only a small number of class members usually leave proceedings, opt out leads to a thorough concentration of litigation into a single proceeding and prevents from parallel individual actions. By doing that, opt out is better placed to improve procedural efficiency, reduce case workload and contribute to consistency in judicial case-law.²⁹ As already stated above, this potential of opt-out can be illustrated on the enforcement of individual claims in Volkswagen Dieselgate case.³⁰

What is more, opt out effectively improves enforcement of mass harm cases in certain areas of law, which may dissuade potential wrongdoers from unlawful practise. It is thus a better option to mitigate negative effect of rational apathy of class members.³¹

From a procedural perspective, opt-out creates a fair certainty on the number of class members who will be taking part in the action. In vast majority of cases, both parties may rely on the fact that the whole group will participate in the collective procedure. This produces a strong incentive for both parties to enter negotiations and settle since there is no one waiting outside for the outcome of the case. If the court delivers final ruling or the parties decide to settle, the dispute is once and for all over. Opt out therefore reduces rapidly the risk of subsequent individual actions of those class members who stayed outside and waited for the outcome of collective proceedings.³²

²⁷ BALARIN, J., JANOUŠKOVÁ, A. *K fenoménu hromadné žaloby*. Právní rozhledy. 2019, Vol. 27, No. 13-14, pp. 491–492.

²⁸ Draft White Paper on Collective Actions pp. 43–46. In: *odok.cz* [online]. 2017 [2023-06-10]. Available at: <<https://odok.cz/portal/veklep/materiál/ALBSARKE8ZPJ/>>.

²⁹ BALARIN, J., JANOUŠKOVÁ, A. *K fenoménu hromadné žaloby*. pp. 491–492.

³⁰ In Australia, the class action was commenced on behalf of all potential claims of 100 000 consumers given that the Australian system is based on an opt-out. STADLER, A. et al. *Collective and mass litigation in Europe: model rules for effective dispute resolution*. p. 326.

³¹ HAMULÁKOVÁ, K. *Opt-Out Systems in Collective Redress. EU Perspectives and Present Situation in the Czech Republic*. pp. 108–109.

³² BALARIN, J., JANOUŠKOVÁ, A. *K fenoménu hromadné žaloby*. pp. 491–492.

Nevertheless, there are also shortcomings of opt out. First and foremost, traditional procedural jurisprudence in the region of Central Europe tends to be rather distrustful of opt out. There are serious objections arguing that opt out contradicts fundamental principles of civil procedure, in particular the right of access to justice and the principle of party disposition.³³ Opt out is sometimes even questioned in light of its possible unconstitutionality. This is the case in Germany, where the jurisprudence traditionally challenges the model by referring to the constitutionally guaranteed right of access to the justice and the principle of party disposition.³⁴ However, even in Germany, opt out method is considered constitutional under certain circumstances.³⁵

What is more, opt out may create some procedural challenges, especially when the group is indefinite and individual claims of its members differ. It might be difficult to define the number of class members, to determine the aggregate damages or to establish the extend and limits of *lis pendens* or *res iudicata*.³⁶ Given the fact that all members are usually not identified, the identification must be sometimes carried out in enforcement proceedings. The issue of unclaimed funds that have been awarded to the class by the court and subsequently transferred by the defendant to a predetermined account but which were not in the end distributed among class members is also frequently addressed.³⁷

2.5 Evaluation of the remaining participation methods

Apart from standard methods of opt in and opt out, there are also other principles that could be employed in collective procedure. All of these alternatives are united by one common starting point, namely that consumers do not make the decision whether to join the action before finishing the procedure on merits. Class members are expected to take the decision only after the court has delivered the final decision in collective proceedings. In essence, it always relates to a matter of the extend of the binding effect of the court ruling – which class members are bound by the court ruling or, if being positive, which of them may benefit from such a ruling.

In case of 'late opt-in', class members are expected to wait until the end of collective proceedings and only afterwards they are invited to explicitly choose whether they wish to be bound by the court decision. If they do not opt in, they are not bound by the final ruling and are still allowed to proceed with their claim individually.

In case of 'late opt-out', the principle is reversed. All of the class members are bound by the court ruling apart from those who have expressed their will not to be part of the group.

³³ ŠVEŘEPOVÁ, K. *Fenomén hromadné žaloby jako projev proměny vnitřní role práva v moderní společnosti*. p. 21. Similarly BĚLOHLÁVEK, A. Účast na řízeních o hromadných žalobách v zahraničí a uznání a výkon rozsudků v těchto věcech v jiných zemích. *Právní rozhledy*. 2016, Vol. 24, No. 13–14, p. 467.

³⁴ BRÖNNEKE, T. et al. *Kollektiver Rechtsschutz im Zivilprozeßrecht. Gruppenklagen, Verbandsmusterklagen, Verbandsklagebefugnis und Kosten des kollektiven Rechtsschutzes*. Baden-Baden: Nomos-Verl.-Ges., 2001, pp. 16–18.

³⁵ This is the case when it is possible to inform all the class members concerned by the action about the commencement of the proceedings and notify them that they have a right to opt out. See CAULFIELD, P. *Kollektive Verbraucherrechtsdurchsetzung im Bereich der Streuschäden: zivilprozeßuale Verfahrensinstrumente zur effektiven Durchsetzung geringwertiger Ansprüche*. Remscheid: Gardez Verlag, 2022, p. 220.

³⁶ ELI – UNIDROIT Model European Rules of Civil Procedure, p. 387. In: *European Law Institute – UNIDROIT* [online]. 2021 [2023-06-10]. Available at: <<https://www.unidroit.org/english/principles/civilprocedure/eli-unidroit-rules/200925-eli-unidroit-rules-e.pdf>>.

³⁷ Art. 9 para 7 Representative Actions Directive.

Both of these methods have some strong positive features. The collective proceedings as such is not burdened by administratively difficult opting in or opting out, it is procedurally simple and hence will be probably more efficient, than the abovementioned models. From class members' perspective, it is also very beneficial. The class members are asked to take the decision whether to be bound by the final ruling at a point when the outcome of the proceedings is already known.

On the other hand, these models have two serious weaknesses. Firstly, it seems to be unfair that the class members may make their mind after the final court ruling. Obviously, if the outcome of the dispute is positive for the plaintiff, class members will probably choose to be bound by the final court decision. On the other hand, if the court rules in favour of the defendant and dismisses the case on merits, class members will rather stay outside. Both models thus raise some serious concerns as regards the principle of party equality and the right to a fair trial of the defendant. As opposed to others, late opt in and late opt out may cause a 'Stowaway effect'.

What is more, the 'late' methods postpone the determination of class members into a phase after the court decision which may take form of a *sui generis* procedure, an enforcement procedure or subsequent individual disputes. This in turn calls into question the effectiveness of the procedure which I have above identified as an alleged advantage of these models.

Lastly, there may be also mechanism where class members do not have a choice to opt-in or opt-out at any time of the procedure. With regard to the extend of *res iudicata* effect, there are two options available.

First, a court decision does not formally bind any class member. This is a model which may be understood as a form of individual action. Given the fact that class members do not participate in the action and they are not bound by the final court ruling, this model is not addressed in this paper into much detail because it should not be considered as collective action.

Second, a court decision binds all the class members. This option offers some tempting pros – for instance, from start to finish, both parties have a clear idea about the size of the group and collective procedure is simple. Nevertheless, in my opinion, it may raise some serious concerns with regard to the right to a fair trial and right of access to justice of the class members who are not enabled to have their say whether they wish to participate in the action and be bound by the final decision of the court.³⁸

3. COMPARATIVE AND EU LAW PERSPECTIVE

3.1 Development in the EU law

When discussing the issues of opt-in, opt-out or other possible forms of class members' participation, three main documents of the European Union law should be taken into account:

³⁸ See also DVOŘÁK, B. Kolektivní ochrana práv a procesní legitimace. *Acta Iuridica Olomucensia*. 2016, Vol. 11, No. 1, p. 65, BALARIN, J. Consumer collective redress in the Czech Republic: Current situation and perspectives. In: Rita Simon – Hana Müllerová (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, pp. 58–59.

- Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests³⁹ (hereinafter referred to as 'Injunctions Directive')
- 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 Law⁴⁰ (hereinafter referred to as 'Commission Recommendation')
- Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC⁴¹ (hereinafter referred to as 'Representative Actions Directive')

Generally, Injunctions Directive is a very short legal instrument. It is based on the procedural autonomy of Member States, leaving most of the procedural questions up to the national law.⁴² This applies also to the method of participation of consumers. The directive as such does not prescribe or recommend any of the above-mentioned models. The only relevant information may be found in the Preamble of the Directive – in the last sentence of the recital 3, which reads as follows: *'Current mechanisms available for ensuring compliance with those Directives, both at national and at Community level, do not always allow infringements harmful to the collective interests of consumers to be terminated in good time. Collective interests means interests which do not include the cumulation of interests of individuals who have been harmed by an infringement. This is without prejudice to individual actions brought by individuals who have been harmed by an infringement.'*⁴³

Taking into account the relevant recital and the overall conception of the mechanism according to the Injunctions Directive, best fitted to reach the goal is either a late opt in model or a 'no choice' model based on individual action in which the class members are not allowed to express consent with the action and the final ruling is not formally binding on them.

Let us now look at the Commission Recommendation. This document calls for the introduction of both injunctive as well as compensatory relief. However, most of the articles focus on the redress measures, which includes also the rule on participation of class members. Commission Recommendation regulates this matter only for the purposes of the compensatory collective redress. As a principle, the claimant party should be formed on the basis of express consent of the class members ('opt-in').⁴⁴ Exceptions are allowed provided it is *duly* justified by reasons of sound administration of justice.⁴⁵ Taking into ac-

³⁹ In: *EUR-Lex* [online]. 2009 [2023-06-10]. Available at: <<https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32009L0022>>.

⁴⁰ In: *EUR-Lex* [online]. 2013 [2023-06-10]. Available at: <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013H0396>>.

⁴¹ In: *EUR-Lex* [online]. 2020 [2023-06-10]. Available at: <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32020L1828>>.

⁴² Art. 7 of the Injunctions Directive.

⁴³ Rec. 3 of the Injunctions Directive.

⁴⁴ See point 21 of the Commission Recommendation.

count following rules, namely that class members may leave or join the collective action at any time before the final judgement,⁴⁶ it is clear that the Commission Recommendation favours standard opt-in. Other methods (especially opt-out) are possible, but it must be duly justified.

Similarly to Commission Recommendation, Representative Actions Directive provides for both injunction and redress measures. The issue of class members' participation is directly addressed only in case of the redress measure. We can see a shift from opt-in preference to a rather flexible approach. In purely national cases, Representative Actions Directive leaves it open to the discretion of the Member States whether the consumers will be expressing their wish to be represented or not by the qualified entity 'explicitly or tacitly'.⁴⁷ As further explained in the Preamble, Member States are free to choose opt-in, opt-out or their combination.⁴⁸ Nevertheless, because of the sound administration of justice, if the consumers have residence in Member State other than that, where collective procedure takes place, those consumers should always be obliged to opt-in.⁴⁹ The Directive thus generally allows for opt-in, opt-out or their combination. On the other hand, other methods are clearly excluded.⁵⁰

In case of injunctive measure, the situation is different. It is clear that with regard to injunctions, Representative Actions Directive follows the rationale of the previous Directive from the year 2009. Therefore, as opposed to redress measure, the consent of the consumers is not necessary.⁵¹ However, Member States are obliged to ensure, that the consumers concerned by the representative action shall be entitled to benefit from the measure, including injunctive measure.⁵² These two rules in my opinion lead to a conclusion, that either late opt-in or late opt-out should be applied. Yet, a 'no choice' model of a mandatory class action where consumers would be able to benefit from the outcome (i.e. they would be bound by the decision of the court) is also possible. The question remains unclear whether the Representative Actions Directive allows also for traditional methods of opt-in or opt-out, since the Directive may also be understood as permitting national legislation which requires such prior consent (while the consent of consumers is not necessary, it is neither prohibited).

3.2 Model European Rules of Civil Procedure

The previous chapter focused on the EU law *acquis*. However, we should not forget ELI – UNIDROIT Model European Rules of Civil Procedure (hereinafter referred to as 'Model

⁴⁵ Ibid.

⁴⁶ See points 22 and 23 of the Commission Recommendation.

⁴⁷ See Art. 9 para 2 of the Representative Actions Directive.

⁴⁸ See Recital 43 of the Representative Actions Directive.

⁴⁹ See Art. 9 para 3 and Recital 45 of the Representative Actions Directive.

⁵⁰ As follows from Art. 9 para 2, the decision of consumers should be taken before the final judgement, because they give consent to be represented by the qualified entity in the representative action and to be bound by the outcome.

⁵¹ See Art. 8 para 3: 'In order for a qualified entity to seek an injunctive measure, individual consumers shall not be required to express their wish to be represented by that qualified entity.'

⁵² See Art. 7 para 6 last sentence of the Representative Actions Directive.

Rules').⁵³ Although the Model Rules are soft law, they are the result of many years of work by ELI/ UNIDROIT experts and for this reason they should not be omitted here.

In line with previous instruments, also Model Rules differentiate between injunction and redress measures. Whereas the former are regulated as 'Collective Interest Injunctions', the latter are called 'Collective Proceedings'.

As for collective interest injunctions, it is clear that Model Rules do not recommend to employ opt-in or opt-out. The qualified claimant should be able to proceed with the action without the class members' participation.⁵⁴ However, class members should be able to benefit from the positive decision of the court as the Model Rules set forth that the injunction issued by the court binds the defendant in all future proceedings,⁵⁵ without formally extending the effect of *res iudicata*.⁵⁶

On the other hand, the redress measures shall be based primarily on opt-in or alternatively opt-out. According to the Model Rules, as a principle, collective proceedings shall operate on an opt-in basis. However, the court should be allowed to order that opt-out is applied in the respective proceedings. The court should order opt-out if two conditions are met. First, the class members' claims are too small so that they cannot be made in individual actions, and second, a significant number of group members would not opt-in to the collective proceeding. The choice between opt-in and opt-out is thus entrusted to court which should base its decision on an estimation whether the class members have sufficient incentives to opt-in.⁵⁷

3.3 Selected models of European countries

In the following chapter, I would like to bring forward a comparative perspective of the issue. Since most of the countries have several models of collective procedure, a comprehensive and full comparative analysis for the purposes of this paper would be unfeasible. As a consequence, the following chapter focuses solely on the 'main' collective action in each of the selected countries, namely the action which allows also redress measure.

First, let us have a look at our neighbouring countries. Germany and Austria are both traditionally very sceptical towards opt-out, and they therefore prefer opt-in.⁵⁸ This

⁵³ ELI – UNIDROIT Model European Rules of Civil Procedure. In: *European Law Institute – UNIDROIT* [online]. 2021 [2023-06-10]. Available at: <<https://www.unidroit.org/english/principles/civilprocedure/eli-unidroit-rules/200925-eli-unidroit-rules-e.pdf>>.

⁵⁴ Rule 205 of Model Rules.

⁵⁵ Rule 206 of Model Rules.

⁵⁶ See relevant reasoning of rule 206 in ELI – UNIDROIT Model European Rules of Civil Procedure, pp. 368–369. In: *European Law Institute – UNIDROIT* [online]. 2021 [2023-06-10]. Available at: <<https://www.unidroit.org/english/principles/civilprocedure/eli-unidroit-rules/200925-eli-unidroit-rules-e.pdf>>.

⁵⁷ Ibid, p. 386.

⁵⁸ For German model see the rules on Musterfeststellungsklage (sec. 606 Zivilprozeßordnung). In: *Bundesministerium der Justiz, Bundesamt für Justiz* [online]. 2021 [2023-06-10]. Available at: <<https://www.gesetze-im-internet.de/zpo/>>. For Austria see Class actions in Austria. In: *CMS* [online]. 2021 [2023-06-10]. Available at: <<https://cms.law/en/int/expert-guides/cms-expert-guide-to-european-class-actions/austria>>. See also MELLER-HANNICH, C. et al. *Kollektiver Rechtsschutz im Zivilprozess: Hallesches Symposium zum Zivilverfahrensrecht am 6. Oktober 2007*. pp. 111–112.

applies to previous models, as well as the new legislation which is transposing the Representative Actions Directive.⁵⁹ The same point of view prevails in Poland⁶⁰ and Slovakia⁶¹ where the national collective procedure also exclusively works with opt-in.

Similarly, Sweden has also been applying opt-in since it introduced its collective actions model in 2002.⁶²

The situation is somewhat different in the southern countries. Portugal has a very good long-lasting experience with collective redress dating back to 1990's which is based on the sole opt-out.⁶³ Spain applied a 'no choice' model based on a mandatory class action – it is an opt-out without the possibility to opt out. Nevertheless, this model should be changed in line with the Representative Actions Directive, being primarily based on an opt-out model with specific cases being reserved to opt-in.⁶⁴ Italy is on the other side of the spectrum as its collective procedure operates on an opt-in model.⁶⁵

France has collective procedure since 2014 and ever since, it has applied a specific type of a late opt-in model.⁶⁶ Yet, in accordance with the Representative Actions Directive, the French legislator is obliged to enact a classic model of opt-in, or at least in consumer disputes. It is worth mentioning that the French model of late opt-in did not prove to be very effective in practise.^{67, 68}

On the contrary, the Dutch model is considered to be one of the most effective in Europe. Since the new law 'WAMCA' which was introduced in 2020, the Netherlands applies

⁵⁹ Entwurf eines Gesetzes zur Umsetzung der Richtlinie (EU) 2020/1828 über Verbandsklagen zum Schutz der Kollektivinteressen der Verbraucher und zur Aufhebung der Richtlinie 2009/22/EG (Verbandsklagenrichtlinie-Numsetzungsgesetz). In: *Deutscher Bundestag* [online]. 24. 4. 2023 [2023-06-10]. Available at: <<https://dserver.bundestag.de/btd/20/065/2006520.pdf>>.

⁶⁰ JAGIELSKA, M. Collective redress and consumer enforcement in Poland – why doesn't it work? In: Rita Simon - Hana Müllerová (eds.). *Efficient Collective Redress Mechanisms in Visegrad 4 Countries: an Achievable Target?* p. 33.

⁶¹ Section 15 of Act No. 261/2023 on actions for the protection of collective interests of consumers (zákon č. 261/2023 Z. z., o žalobách na ochranu kolektívnych záujmov spotrebiteľov a o zmene a doplnení niektorých zákonov. In: *zakonypreldi.sk* [online]. 2023 [2023-09-03]. Available at: <<https://www.zakonypreldi.sk/zz/2023-261#cl1-casttretia>>.

⁶² Swedish Act on Group Proceedings – Lag (2002:599) om grupperättegång. In: *Sveriges Riksdag* [online]. 2023 [2023-06-10]. Available at: <https://www.riksdagen.se/sv/dokument-och-lagar/dokument/svensk-forfattnings-samling/lag-2002599-om-grupperattengang_sfs-2002-599/>.

⁶³ HAMULÁKOVÁ, K. *Opt-Out Systems in Collective Redress. EU Perspectives and Present Situation in the Czech Republic*. p. 106.

⁶⁴ The Class Actions Law Review: Spain. In: *The Law Reviews* [online]. 20. 4. 2023 [2023-06-10]. Available at: <<https://thelawreviews.co.uk/title/the-class-actions-law-review/spain>>.

⁶⁵ Art. 840-septies of the Italian Civil Procedural Code (Gazzetta Ufficiale n. 253 del 28-10-1940). In: *gazzettaufficiale.it* [online]. 2023 [2023-06-10]. Available at: <<https://www.gazzettaufficiale.it/sommario/codici/proceduraCivile>>.

⁶⁶ Class actions in France. In: *CMS* [online]. 2021 [2023-06-10]. Available at: <<https://cms.law/en/int/expert-guides/cms-expert-guide-to-european-class-actions/france>>.

⁶⁷ Collective Redress & Class Actions 2022. In: *practiceguides.chambers.com* [online]. 2022 [2023-06-10]. Available at: <<https://practiceguides.chambers.com/practice-guides/collective-redress-class-actions-2022/france/trends-and-developments>>.

⁶⁸ Between years 2014 and 2020 there were only 21 collective actions filed before French courts, i.e. approximately 3 collective actions per year; see Rapport d'information par la commission des lois constitutionnelles, de la législation et de l'administration générale de la république sur le bilan et les perspectives des actions de group. In: *Assemblée nationale* [online]. 11. 6. 2020 [2023-09-10]. Available at: <https://www.assemblee-nationale.fr/dyn/15/rapports/cion_lois/l15b3085_rapport-information.pdf>.

a very open and broad opt-out class action.⁶⁹ This model is believed to be a promising one. In only two years of its existence, 54 collective claims have been filed before Dutch courts.⁷⁰ Opt-out model is also used in Bulgaria.⁷¹

Many states in Europe make use of a combination of opt-in and opt-out, such as, for instance, Denmark, Belgium, United Kingdom, Norway or Slovenia.⁷² The decision whether to apply opt-in or opt-out in a class action is generally left to the judge hearing that action.⁷³

As the comparative analysis shows, countries may be divided into three groups – countries which prefer solely opt-in (including 'late opt-in'), countries that combine opt-in and opt-out and countries which are based on an opt-out. The table below summarizes the three groups and proves that there is no single model in Europe in place.

Country	Model
Germany	Opt-in
Austria	Opt-in
Slovakia	Opt-in
Poland	Opt-in
France	Opt-in
Italy	Opt-in
Sweden	Opt-in
United Kingdom	Combination
Belgium	Combination
Norway	Combination
Slovenia	Combination
Denmark	Combination
Spain	Opt-out + exceptionally opt-in
Portugal	Opt-out
Netherlands	Opt-out
Bulgaria	Opt-out

⁶⁹ The new model was introduced by the so called 'WAMCA' – Wet van 20 maart 2019 tot wijziging van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering teneinde de afwikkeling van massaschade in een collectieve actie mogelijk te maken. In: *overheid.nl* [online]. 2019 [2023-09-03]. Available at: <[https://zoek.officielebekendmakingen.nl/stb-2019-130.html](https://zoek.officielelebekendmakingen.nl/stb-2019-130.html)>.

⁷⁰ KLEIN, J. Two years of WAMCA - a quantitative analysis. In: *Lexology* [online]. 8. 3. 2022 [2023-09-03]. Available at: <<https://www.lexology.com/library/detail.aspx?g=c75ecc3-d1e3-458c-97b2-5539d4e2058f>>.

⁷¹ Class actions in Bulgaria. In: *CMS* [online]. 2021 [2023-06-10]. Available at: <<https://cms.law/en/int/expert-guides/cms-expert-guide-to-european-class-actions/bulgaria>>.

⁷² HAMULÁKOVÁ, K. *Opt-Out Systems in Collective Redress. EU Perspectives and Present Situation in the Czech Republic*. pp. 102–108.

⁷³ Závěrečná zpráva z hodnocení dopadů regulace (RIA) k věcnému záměru zákona o hromadných žalobách, pp. 49–60. In: *odok.cz* [online]. 2018 [2023-06-10]. Available at: <<https://odok.cz/portal/veklep/material/ALBSARKE8ZPJ/>>.

4. THE DEVELOPMENT OF CLASS MEMBERS' PARTICIPATION IN THE CZECH CONTEXT

4.1 Mandatory injunction pursuant to the Czech Civil Procedural Code

The Czech national legislation does not allow for collective actions for redress so far. However, the Czech Civil Procedural Code (Act No. 99/1963 Coll.) contains one collective element which is also linked to the transposition of the Injunctions Directive, namely to the right of a consumer association to file for an injunction on behalf of affected consumers pursuant to Sec. 25 of the Consumer Protection Act (Act No. 634/1992 Coll.).

This procedural right to file for a collective injunction has its counterparts in the Civil Procedural Code. If a consumer association submits an action to the court, this action creates an effect of *lis pendens* on any other similar claims of consumers derived from the same unlawful practise which was carried out by the same trader.⁷⁴ As a consequence, individual consumer cannot file for an individual action.⁷⁵ The final ruling of the courts subsequently binds not only the parties to the collective proceedings, but also the consumers (all of them), without giving them any possibility to opt-out.⁷⁶ This model of collective injunctions thus resembles a 'no choice' mandatory class action as described above. It is subject to a strong criticism.⁷⁷

Given its mandatory nature, the Czech Constitutional and Supreme court concluded in similar procedures that in order to safeguard class member's right of access to justice and to a fair trial, any follow-up individual action in the same matter needs to be considered as an *ex lege* accession to the collective proceedings.⁷⁸ In other words, if class member files for an action, it shall be considered as joining the collective proceedings and such class member is to be treated as a second plaintiff to the collective injunction.

4.2 Proposal for the Collective Actions Act from 2019

The Czech national law has long lacked a comprehensive collective mechanism on compensatory redress. Before the current proposal for the Collective Proceedings Act will be analysed, I would like to shortly present previous proposal.

In 2019, the Czech Ministry of Justice presented a Proposal for Collective Actions Act.⁷⁹ The main idea behind was to introduce a complex collective procedure in private

⁷⁴ See Sec. 83 (2) of the Czech Civil Procedural Code.

⁷⁵ It may be questionable whether this model respects the principles of Injunctions Directive, especially last sentence of Rec. 3.

⁷⁶ See Sec. 159a (2) of the Czech Civil Procedural Code.

⁷⁷ PETROV KRIVÁČKOVÁ, J., HAMLÁKOVÁ, K. Reprezentativní žaloba v českém civilním procesu. *Acta Iuridica Olomucensia*. 2016, Vol. 11, No. 1, p. 55, or BALARIN, J. Consumer collective redress in the Czech Republic: Current situation and perspectives. In: Rita Simon – Hana Müllerová (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, pp. 58–59.

⁷⁸ For example Supreme Court Decision File No. 29 Odo 1019/2006 dated 10. 4. 2008.

⁷⁹ JANOUŠKOVÁ, A. Introduction of the new collective redress mechanism from the national legislator's perspective – class actions in the Czech Republic. In: Rita Simon – Hana Müllerová (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, p. 77.

law matters (later, the Proposal was reduced only to consumer-to-business matters).⁸⁰ The collective action could seek injunctions as well as compensatory redress. However, given the already existing procedure on injunctions under Consumer Protection Act which was described in the previous chapter, one could expect that the new mechanism would be used primarily for redress measures.

The Proposal was approved by the Government in February 2020 and submitted to the Czech national Parliament as Parliamentary document No. 775.⁸¹ Nevertheless, the Members of the Parliament (Chamber of Deputies) were not very supportive of the document and they did not approve it. As a consequence, the Proposal was never accepted by the national legislator and never became part of the national law.⁸²

The proposal developed throughout the legislative process but the main conception did not change. First of all, the Proposal on Collective Actions Act was based on a combination of opt-in and opt-out. Therefore, upon further circumstances, the collective action could be dealt with on the basis of opt-in model or opt-out model. It would be left for the court to decide, which of them is more suitable for the case at hand. Nevertheless, in order to give parties at least some level of legal certainty, the national proposal contained two criteria, that should be assessed before the final decision on opt-in or opt-out was about to be taken. In line with the proposal, opt-out was reserved to cases, where individual claim was just too small for the claimant to even bother with opting in (problem of rational apathy of the consumers). Obviously, this is a very broad and unclear definition. As a consequence, the proposal contained also a rebuttable presumption which stipulated the maximum limit for small claims that would be running on the basis of opt-out. This limit changed from 10 000 CZK (ca. 425 EUR)⁸³ or to 3 000 CZK (ca. 130 EUR).⁸⁴ In turn, if claims of individual consumers were above that limit, opt in should be used in the collective proceedings.

4.3 Current proposal for the Collective Proceedings Act

The proposal from 2019 was ultimately not approved by the Czech Parliament. However, the Czech national law faces the fact that the Representative Actions Directive was adopted in the meantime. Thus, the Czech Republic must introduce collective proceedings to claim injunction as well as redress measures.

In light of these circumstances, a new proposal for the Collective Proceedings Act⁸⁵ and related amendment to selected existing acts⁸⁶ were introduced into the legislative process

⁸⁰ See Explanatory memorandum to the Proposal. In: *odok.cz* [online]. 2019 [2023-06-10]. Available at: <<https://odok.cz/portal/veklep/material/KORNBA9EXSST/>>.

⁸¹ Document No. 775. In: *Poslanecká sněmovna Parlamentu ČR* [online]. 2021 [2023-06-10]. Available at: <<https://www.psp.cz/sqw/historie.sqw?o=8&T=775>>.

⁸² For details of the legislative process in the Parliament, see information to the Document No. 775.

⁸³ Proposal for the Collective Actions Act from 2019. In: *odok.cz* [online]. 2019 [2023-06-10]. Available at: <<https://odok.cz/portal/veklep/material/KORNBA9EXSST/KORNBA9FGY2W>>.

⁸⁴ Parliamentary document No. 775.

⁸⁵ Proposal for the Collective Proceedings Act. In: *odok.cz* [online]. 2023 [2023-06-10]. Available at: <<https://odok.cz/portal/veklep/material/KORNCA1VTYH>>.

⁸⁶ Proposal to amend selected existing acts in reaction to Collective Proceedings Act. In: *odok.cz* [online]. 2023 [2023-06-10]. Available at: <<https://odok.cz/portal/veklep/material/KORNCA1M6BED>>.

in December 2022 and are currently debated in the Chamber of Deputies as Parliamentary documents No. 523⁸⁷ and 524.⁸⁸ If we are to focus on the development of the question of how affected consumers (class members) will be involved in the proceedings, it is necessary to distinguish between two different institutes that are contained in the submitted proposal. One of them being a collective action under the Collective Proceedings Act and the other being a representative action for injunctive measures under the Civil Procedural Code.

The whole package is to some extent related to the previous proposal from 2019. Yet, it is influenced by the political requirement to transpose the Representative Actions Directive in a minimalistic manner.⁸⁹ The new Proposal thus aims for a more conservative approach and follows the trends seen, for example, in Germany.

I will look first at consumer involvement in the collective proceedings under the proposed national law. At the outset, it is important to note that the proposal for the Collective Proceedings Act does not limit the action solely to seeking redress. The injunctive relief may also be sought under that Act. However, given there is another specific injunctive relief mechanism, which will be described in details below, I do not expect that the collective actions for injunctive relief will be pursued on a larger scale. It can therefore be said that the collective actions will primarily be aimed at obtaining redress measures (compensatory relief etc.).

In terms of consumer involvement, there is a significant shift from the previous model. The proposal provides for a new solution which is based exclusively on the opt-in principle, i.e. consumers are only involved in the proceedings and bound by the decision if they actively apply for it. Opt-in takes place at the beginning of the proceedings, right after the court certified the collective action and set a time limit for consumers to opt in.

On the other hand, it is necessary to distinguish injunction actions for the protection of the collective interests of consumers under the Civil Procedural Code. The procedure for injunctions follows the existing mechanism of the mandatory 'no choice' action, but with one important difference. In accordance with the text of the Directive, it will not be possible for the consumer to join the proceedings as a new party (claimant). To that extend, the case-law of the Czech highest courts will become irrelevant. At the same time, the final decision is binding on all consumers. The right of the consumers to exclude the effects of the decision against themselves within 6 months after the court has delivered its final decision ('late opt-out') is no longer possible. This possibility was included in the Proposal in previous version which was submitted to the Government in April 2023.⁹⁰ However, the Government approved changes suggested by the its Advisory Legislative Committee.

⁸⁷ Parliamentary document No. 523. In: *Poslanecká sněmovna Parlamentu ČR* [online]. 2023 [2023-09-10]. Available at: <<https://www.psp.cz/sqw/historie.sqw?o=9&T=523>>.

⁸⁸ Parliamentary document No. 524. In: *Poslanecká sněmovna Parlamentu ČR* [online]. 2023 [2023-09-10]. Available at: <<https://www.psp.cz/sqw/historie.sqw?o=9&T=524>>.

⁸⁹ Explanatory memorandum to the proposal for the Collective Proceedings Act. In: *odok.cz* [online]. 2023 [2023-06-10]. Available at: <<https://odok.cz/portal/veklep/material/KORNCMALVTYMI/>>.

⁹⁰ See previous version of the Proposal. In: *odok.cz* [online]. 2023 [2023-09-10]. Available at: <<https://odok.cz/portal/veklep/material/KORNCMALVTYMI/ALBSCRGFG9IS>>.

Lastly, I shall emphasize that the legislative process of the described proposal is not yet completed. As a consequence, there is a reasonably high probability it may undergo some further changes.

5. SEARCHING FOR THE OPTIMUM MODEL OF CLASS MEMBERS' PARTICIPATION

5.1 Different approach to injunctions and redress measures

In order to find an optimal regime for class members' participation in the collective procedure, I am convinced it is necessary to make a distinction between injunction and compensation. These two measures are not similar, and I believe that it is necessary to treat them differently.

In my point of view, the starting point for the differentiated approach are the presence of public interest on one hand, and the different level of individuality of the claims of each class member on the other. In case of injunctive measures, there is a strong impact of the public interest (if someone is breaking the law, it is in public interest that such a wrong-doing is ceased as soon as possible) and, at the same time, there is no need that a single class member has already suffered harm. Put in other words, the interests of all class members should generally be the same and the same ruling of the court should be fully applicable to all of the class members.⁹¹ The court dealing with such a collective action may decide the case without actually looking at the individual situation of each of the class members.⁹²

On the other hand, the necessity to assess individual cases is naturally higher in collective actions seeking compensatory redress. Here, the main interests to be protected and pursued are the interests of the group of affected class members, the class members must have suffered harm and the court must always, to some extent, consider the damage of individuals.⁹³

The need for a differentiated approach of injunction and redress measures may be supported by the latest development in this field of law. As was already stated above, the new Representative Actions Directive deliberately distinguishes between redress and injunction measures. The same applies also to the Model Rules.

5.2 Injunction relief

First, I would like to present an ideal concept for collective injunctions. To find a perfect model, it is crucial to take account of the following. In order to ensure the effective functioning of injunction relief, it is necessary that such a measure is delivered quickly. Also, injunction measures do not need to be based on individual claims.

In light of these facts, I do not consider standard opt-in and opt-out models as the most suitable ones. These models make the proceedings more complicated and administratively difficult, making it hard for the court to deliver the ruling quickly. Besides, we do

⁹¹ MARCUS, S., KOELTL, J. C. et al. *Manual for Complex Litigation*, Fourth. p. 261.

⁹² BALARIN, J. *Kolektivní ochrana práv v civilním soudním řízení*. p. 87.

⁹³ MARCUS, S., KOELTL, J. C. et al. *Manual for Complex Litigation*, Fourth. p. 269.

not need individuals to opt in, since for the action to be admissible, individuals do not need to suffer any individual harm at all.

This fact is also respected by the Representative Actions Directive. For the purposes of injunctive redress, the Directive sets forth that '*individual consumers shall not be required to express their wish to be represented by that qualified entity.*'⁹⁴ When interpreted in line with art. 9 para 2 *a contrario*, this rule could even be understood as prohibiting opt-in and opt-out altogether.

The Representative Actions Directive also stipulates that consumers must benefit from the injunctive measure granted by the court.⁹⁵ Hence, I think that a 'no choice' model of representative action based on the principle of individual action is not a good choice either. In this type of action, individual class members cannot directly benefit from the court ruling. Consequently, it is not suitable to reach the targeted goal.

Therefore, I believe that the collective injunction should be based on one of the remaining methods. Here, I prefer a late opt-in or late opt-out where the party autonomy and party disposition principles are better safeguarded than in mandatory collective actions (no choice model where the final ruling is binding to all class members). In this context, I would like to draw attention to the German *Unterlassungsklagengesetz* where the German law applies similar approach.⁹⁶ Although the commencement of the injunction action by qualified entity does not limit the possibility to file for an individual actions of consumers,⁹⁷ the consumers may, under prescribed circumstances, benefit from the decision of the court on such action. The German law provides for a possibility to invoke the effects of the decision rendering injunction by affected consumers in any subsequent individual proceedings (*Feststellungsdriftwirkung kraft Einrede*).⁹⁸ As already mentioned above, a variation of late opt-in model is promoted also by the Model Rules.⁹⁹

A mandatory collective action is possible and suitable for injunctive measures, too. Yet, it raises some concerns with regard to the right of access to justice. As a consequence, albeit there is a tradition of similar collective injunctions in the Czech consumer law,¹⁰⁰ I do not consider this model to be the optimal one. To that end, I have to be critical to the current version of the Czech proposal which does not guarantee a right to late 'opt-out' anymore¹⁰¹ and maintains the approach of mandatory representative action in the Czech Civil

⁹⁴ Art. 8 para 3.

⁹⁵ Art. 7 para 6.

⁹⁶ See Sec. 11 of *Unterlassungsklagengesetz: Handelt der verurteilte Verwender einem auf § 1 beruhenden Unterlassungsgebot zuwider, so ist die Bestimmung in den Allgemeinen Geschäftsbedingungen als unwirksam anzusehen, soweit sich der betroffene Vertragsteil auf die Wirkung des Unterlassungsurteils beruft.* (...)

⁹⁷ ZHANG, C. *Kollektiver Rechtsschutz nach dem deutschen Unterlassungsklagengesetz (UKlaG)*. Göttingen: Cuvillier, 2009, p. 64.

⁹⁸ Ibid., p. 90 or KRÜGER, W., RAUSCHER, T. a kol. *Münchener Kommentar zur Zivilprozessordnung: ZPO, Band 3: §§ 946–1120, EGZPO, GVG, EGGVG, UKlaG, Internationales und Europäisches Zivilprozessrecht*. 2. Auflage. München 2022, § 11, ref. n. 1.

⁹⁹ According to Art. 206, a collective interest injunction binds the defendant in all future proceedings. As it is further explained, this means that any class member may later rely on the decision in its individual proceedings. In ELI – UNIDROIT Model European Rules of Civil Procedure, pp. 368–369. In: *European Law Institute – UNIDROIT* [online]. 2021 [2023-06-10]. Available at: <<https://www.unidroit.org/english/principles/civilprocedure/eli-unidroit-rules/200925-eli-unidroit-rules-e.pdf>>.

¹⁰⁰ See chapter 4.1.

¹⁰¹ This possibility was suggested only in the previous version of the Proposal from April 2023.

Procedural Code. However, this time deliberately diverting from the relevant case-law of the Czech Constitutional court since consumers may neither join the proceedings as another party, nor may they be a secondary party next to the plaintiff. In my opinion, such a model where the individual consumers have no possibility to influence the proceedings, yet the final judgement is in any case binding on them, may be considered unconstitutional. I thus strongly suggest that the mechanism is supplemented by the right to an *ex post* opt-out of the consumers or that the broad binding effect of the court ruling is at least limited only to decisions where the action was upheld by the court (dismissal would not be binding on the consumers concerned).

5.3 Compensatory relief

In the key chapter of this paper, I would like to present most suitable model of class members' participation in relation to redress collective actions.

As opposed to injunctions, the public interest is not the prevailing element of redress class actions. On the contrary, in collective redress measures, the focus should be always placed primarily on the group of individual interests (individual damages).¹⁰² Therefore, I think that both subtypes of 'no choice' models should be left aside. Because the court essentially considers the claims of individuals, I believe the model based on *actio popularis* is fully disqualified. In case of mandatory collective action, it would be necessary to grant the class members significant procedural rights, ideally rights of a party to the proceedings. Otherwise, the rights of a fair trial and that of access to justice of the class members could be called into question. Nevertheless, such an approach would severely undermine effectiveness of the process. As a consequence, the mandatory collective action is definitely not suitable for this type of redress.¹⁰³

Late opt-in or late opt-out are practicable, but I do not think they are the best solution. This is mainly due to the fact that these methods never make it possible to end the dispute with the final ruling of the court. Since the class members express their will to be or not to be bound by the court decision only afterwards, the court ruling is not definitive and the dispute may take month or even years beyond that moment. This applies especially to late opt-in, where the individual damages will be determined long after the court delivered its decision. In my opinion, these two phases make the collective proceedings unnecessary long and complicated.

I thus believe that the national law should always choose opt-in or opt-out. At this moment, I would like to revert to chapters 2.3 and 2.4 where I focused on pros and cons of both of these methods. I tried to prove both models have some strong points but also some weak ones. I would like to reiterate the most important findings. Whereas opt-in is better placed to respect party disposition and party autonomy. Also, it makes it easier for the court to determine the class members and their individual damages. Opt-out on the other hand fully utilizes the benefits of collective actions and better copes with potential *rational*

¹⁰² See also art. 3 para (3) of Representative Actions Directive which stipulates that '*collective interests of consumers' means the general interest of consumers and, in particular for the purposes of redress measures, the interests of a group of consumers*'.

¹⁰³ MARCUS, S., KOELTL, J. C. et al. *Manual for Complex Litigation*, Fourth. p. 269.

apathy of class members. It also has some significant procedural benefits, such as motivation for the parties to settle the dispute as early as possible.

All of these facts lead me to a conclusion, that it is not possible to ultimately define the best option *ex ante*. In some cases, opt-in may be the ideal choice, whereas in others opt-out may provide for a better solution. Consequently, I believe that combination of both, opt-in and opt-out, is the best way how to make use of the benefits and eliminate the negatives.¹⁰⁴

If the national law opts for a combination of opt-in and opt-out, the question of who decides which model to use in a particular proceeding still needs to be resolved.

In the first place, it is possible to consider an option where the choice of opt-in or opt-out is decided by the claimant at the time of filing the action. It is also possible to leave the decision up to the legislator by setting forth a strict normative division in the relevant legislative framework. However, I do not find these two models to be entirely appropriate. In the former, there is no guarantee that the claimant will choose the optimal mechanism for the proceedings at hand. In the latter, it might be very difficult for the legislator to stipulate the borderlines *ex ante*, such a division by law is also rigid and may require frequent amendments.

In my opinion, national law should choose a third option. I suggest that it should be left to the court to make the decision taking into account the circumstances of the case at hand. Nevertheless, I believe that the court discretion should not be unlimited. National rules must always strive to comply with the principle of legal certainty. Besides, information on the method (opt-in or opt-out) is a very important factor for the plaintiffs when they contemplate whether to initiate the collective procedure or not. Unlimited discretion would thus contradict possible legitimate expectations of the plaintiffs before they decide to file for collective action. Therefore, I recommend that national law provides for guidelines or, even better, sets forth criteria that need to be assessed by the court in order to choose the optimum method in a specific case. The criteria should ideally respect the advantages and disadvantages of each model as defined in the previous chapters of the paper at hand and take account of the right to a fair trial and right of access to justice of individual class members.

From this perspective, I suggest that opt-in should be used in cases where individual class members pursue a relatively high claim, or, in other words, if we may expect that the class members are willing to enforce the claims individually.¹⁰⁵ At the same time, in the context of continental law, the opt-in is more appropriate for resolving disputes where the group of class members is not homogeneous, it is likely that not all class members can be identified, and the amount of their individual claims determined (for instance in cases of damages *ex delicto*).

In contrast, opt-out should be used for lower claims where we face the phenomenon of rational apathy. The specific amount may be determined directly in the law as a rebut-

¹⁰⁴ Similarly *Stadler* in STADLER, A. et al. *Collective and mass litigation in Europe: model rules for effective dispute resolution*. pp. 116–117.

¹⁰⁵ *Ibid.*

table presumption,¹⁰⁶ but I consider a more general definition without fix amount to be preferable option. For instance, Model Rules provide for a very good inspiration.¹⁰⁷ In addition to this category, I suggest applying the opt-out to larger claims provided the class is homogeneous and it is certain that all members can be identified and their damages calculated relatively easily (typically claims arising from long-term contractual obligations).

Regarding possible unconstitutionality of opt-out in the Czech legal context, I have to clarify that I do not consider opt-out as such to be contrary to the Czech constitution. I would like to support this conclusion with the following reasoning. First, we shall come back to the Czech regulation of the mandatory collective injunctions pursuant to Sec. 83 and 159a of the Czech Civil Procedural Code. As I already mentioned above, the Czech Constitutional court concluded that these mandatory collective actions, where all class members are bound by the decision without any possibility to opt out, are not unconstitutional. *A maiori ad minus*, if a ruling may be binding upon the class members concerned without granting them a right to opt out at any stage of the proceedings, it is clear, that a ruling may be also binding upon the class members in situations where they have a possibility to leave the proceedings before the final ruling is delivered.

In any case, in order to be sustainable in terms of constitutional law, the national procedure must pay due attention to notify all the class members concerned. The class members must gain a real chance to find out that they have become part of a collective action. What is more, the process of leaving the action must be as simple as possible so that even class members that are not used to modern technologies or those with disabilities are able to lawfully opt out. Last but not least, it is the judge who should also take into account the right of access to justice when considering which method to use and whether such right may be preserved even if the method of opt-out is applied.

6. CONCLUSION

The aim of the paper at hand was to analyse and evaluate possible options for the participation of class members in collective proceedings under European national legal systems. In this context, the article primarily focused on the question of how and when the class members can express their will – either explicitly or implicitly – as to whether they should be bound by the court's decision rendered in collective proceedings. To that end, I have identified six possible options of participation which differ in terms of whether consent is required, whether the consent is explicit or implicit (opt-in or opt-out) and at what stage, if any, the consent is required (at the beginning of the proceedings or after final court decision).

The paper noted that the Representative Actions Directive does not give one clear option to Member States on how to deal with this issue. Nevertheless, it favours certain possibilities and does not allow others. The discretion of Member States is thus to a certain extent limited. The article also pointed out that other jurisdictions do not approach the issue

¹⁰⁶ See to that end the former Czech Proposal for Collective Actions Act, which set a fix amount of 3 000 CZK.

¹⁰⁷ See chapter 3.2.

uniformly. For example, if one looks at the most discussed opt-in and opt-out methods, there are national systems based solely on opt-in, national laws allowing for a combination of opt-in and opt-out, and finally national legal systems employing purely opt-out.

In the last part, the paper contains assessment and recommendations for each type of action. It is advocated that in seeking an appropriate solution for class members' involvement, it is necessary to treat separately claims for injunctive relief and claims for damages. For the former, I recommend choosing one of the late opt-in or late opt-out options. A mandatory class action is also conceivable, but it is not recommended given the possible contradiction with constitutional rights of class members.

For actions on damages, I prefer a model that ensures the formation of the class before the final court decision. To that end, an opt-in or opt-out method is suggested as the best solution. In this article, I recommend a combination of the two, with opt-in being reserved for larger claims and non-homogeneous groups, whereas opt-out for smaller claims and homogeneous groups where identification of their members before delivering final judgement is relatively easy. I argue that both models have strong and weak points. Therefore, in my opinion, only combination of opt-in and opt-out may guarantee a balanced mechanism, where effectiveness of collective proceedings is secured without, at the same time, sacrificing class members' right to a fair trial and that of access to justice.