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Combining Opt-in and Opt-out Systems? – Expert Proposal for the Hungarian Regulation of Collective Redress**

Abstract: At present, collective redress in Hungary is limited to a certain narrow area, with sporadic and typically sectoral regulation being applied. In the existing forms of public interest, litigation is merely an *actio popularis.* During the recent codification of Hungarian procedural law, a working committee of experts, set up pursuant to a government decision, drew up its detailed recommendations concerning collective redress. The present article presents the essence of that expert proposal. Comparing the opt-in and opt-out systems and their combination, it is difficult to decide which model is more suitable for a certain legal system. The expert proposal, on the introduction new collective redress mechanisms into the future regulation of the Hungarian Code of Civil Procedure, suggested a compromise that provides an adequate response to the problems of both types of case (mass torts and scattered loss) by combining the opt-in and opt-out systems and applying a more refined approach. The expert proposal is essentially based on the opt-in model, but in actions where the expected value of the claim is so small (in respect of the individual actions) that it would be disproportionate due to the higher administrative costs of the opt-in system, it should be supplemented with a model based on opt-out.

A main virtue of collective redress methods is that they ensure it is possible to avoid the multiplication of cases, as well as contrasting decisions on the same issue. It is no accident that these mechanisms have acquired increasing importance in recent times.[1] This 'compact form of macro-justice' can be attractive for various reasons: it allows parallel or significantly overlapping cases to be decided efficiently, speedily, consistently and with finality, while also ensuring the equitable allocation of costs.[2] Apart from the enumerated advantages, all such

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** This paper was written within the framework of OTKA (Hungarian Scientific Research Fund) research project (registration number K-105559).

1 Adrian Zuckerman, *Zuckerman on Civil Procedure. Principles of Practice* (Thomson Reuters 2013, London) 655.

2 Neil H. Andrews, *English Civil Procedure. Fundamentals of the New Civil Justice System* (Oxford University Press 2003, Oxford – New York) 974.

procedural mechanisms also give rise to numerous difficulties. The most striking problem is that a conflict may arise between access to justice, fair process, thoroughness and procedural economy.[3]

At present multi-party litigation in Hungary is sporadic – as compared to, for example, Poland, where group litigation in a general sense was introduced in 2010[4] – and typically sectoral regulation is applied, which means that regulation covers only specific areas of law, such as consumer protection, equal opportunity, equal treatment, competition law, environmental protection, animal welfare and protection against unfair standard contract terms and conditions. Moreover, it does not take the form of class actions or group litigation in the sense applied in the common law countries or in other European Union countries, but is merely an *actio popularis.* In the existing forms of public interest litigation, it is principally the following persons, organisations and authorities that may bring a case before the courts: public prosecutors, NGOs, private interest groups, ministers, town clerks[5] and other authorities (e.g. the Hungarian Competition Authority).[6] The newest change was brought in 2013 by an Act that guarantees for the Hungarian National Bank the right to bring an action to enforce the civil law claims of consumers.[7] Public interest litigation *(actio popularis)* in Hungary has several subtypes, but they all share the common characteristic that filing this kind of action is possible only on the basis of statutory authorization; therefore, only organisations and persons specified by law are entitled to bring such an action. The person authorised to file a public interest action does not sue for her or his own benefit. The law lays down the violation of which rights and the enforcement of which claims may give rise to the institution of a public interest action.[8]

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[3] Susan Gibbons, 'Group Litigation, Class Actions and Collective Redress: An Anniversary Reappraisal of Lord Woolf's Three Objectives' in Déidre Dwyer (ed), *The Civil Procedure Rules Ten Years On* (Oxford University Press 2009, Oxford – New York) 129.

[4] Krzysztofik Małgorazata, 'Gruppenklagen bald in Polen' (2010) 2 Deutsch-Polnische Juristen-Zeitschrift 24–25; Robert Kulski, 'Polish Perspectives and Provisions on Group Proceedings' in Viktória Harsági, Cornelius Hendric van Rhee (eds), *Multi-party Redress Mechanisms in Europe: Squeaking Mice?* (Intersentia 2014, Cambridge–Antwerp–Portland) 225–241.

[5] Highest career civil servants of local government.

[6] Miklós Kengyel, Viktória Harsági, 'Hungary – Civil Law' in Eliantionio et al. (eds), *Standing up for Your Right(s) in Europe. A Comparative Study on Legal Standing (Locus Standi) before the EU and Member State Courts* (Intersentia 2013, Cambridge–Antwerp–Portland) 332.; Viktória Harsági, 'The Need for Further Development of Collective Redress in Hungary' in Viktória Harsági, Cornelius Hendric van Rhee (eds), *Multi-party Redress Mechanisms in Europe: Squeaking Mice?* (Intersentia 2014, Cambridge–Antwerp–Portland) 172–173.

[7] Viktória Harsági, 'Kollektiver Rechtsschutz – Ungarn und der Einfluss der Europäischen Entwicklung' in Schulze, Götz (ed), *Europäisches Privatrecht in Vielfalt geeint – Der modernisierte Zivilprozess in Europa / Droit privé européen: l'unité dans la diversité – Le procès civil modernisé en Europe* (Sellier 2014, München) 221–223.

[8] László Kecskés, Lajos Wallacher, 'A csoportos jogérvényesítés formái a választottbíráskodás keretében a magyar jogban' in László Kecskés, Józsefné Lukács (eds), *A választottbírók könyve* (HVG-ORAC 2012, Budapest) 283.

So we can say that in its existing form, collective redress in Hungary is limited today to a certain narrow area. With regard to mass damages (which are not governed by the regulations in force), the joinder of parties or joinder of actions may provide a solution for the enforcement of claims, or there is the possibility of resorting to the substantive legal instrument of assignment. However, these solutions may also give rise to numerous difficulties that may hinder collective claim enforcement. For example, the permissive joinder of parties makes it possible, to some extent, to enforce diffuse interests on a collective basis. At the same time, the legal framework for this is limited: it is a disadvantage of the joinder of parties that although the parties may authorise one common legal representative, this does not (necessarily) happen in practice. They will therefore not 'speak with one voice'. The claims remain independent, and the acts of one party do not necessarily have an effect on the other parties.

It is worth mentioning that there was an attempt in 2009 to pass a law on group litigation in a general sense (Bill No. T/11332 of December 2009 on the amendment of Act III of 1952 on the Code of Civil Procedure). Following a motion put forward by two MPs – without proper consultation with experts – Parliament passed the bill that would have expanded the possibility of collective redress, granting the right to initiate an action to any private individual or legal person as well. The then President of the Republic, László Sólyom, himself a professor of law, sent the bill back to Parliament for reconsideration before the general elections, following which the newly elected Parliament removed the question from the agenda.

During the codification of Hungarian procedural law, which started in 2013,[9] Working Committee No. 3 on the codification of civil procedural law named 'Parties and Other Persons Involved in the Action, Collective and Public Interest Claims' and headed by the author – established pursuant to Government Decision No. 1267/2013. (V. 17.) on the codification of civil procedural law – drew up its detailed recommendations concerning collective redress (as part of the Expert Proposal[10] submitted to the Minister of Justice on 30 October 2015). The present article aims to present the essence of that expert proposal.

I The Basis of the Recommended Regulation

The establishment of the collective redress mechanisms is stimulated by the fact that, by uniting the strength of the group, they increase the equality of arms, and may help to remedy the inequality of resources and imbalances of power. In multi-party lawsuits, there is typically

[9] István Varga, 'Identification of Civil Procedure Regulatory Needs with a Comparative View' (2014) 1 ELTE Law Journal 135–163; István Varga, Ákos Mernyei, 'The Initial Steps Towards the New Code of Civil Procedure in Hungary' (2014) 2 International Journal of Procedural Law 1–4.

[10] István Varga, Tamás Éless (ed), *A polgári perjogi kodifikációról szóló 1267/2013. (V. 17.) Korm. határozat által elkészíteni rendelt munkabizottsági szakértői javaslat normaszöveg- és indokolás tervezete* [Draft of the norm and explanatory statement elaborated by the working committee in its expert proposal commissioned by Government Decision No. 1267/2013. (V. 17.) Korm. on the codification of civil procedural law] (30.10.2015).

a group of claimants, and according to the Expert Proposal, the new provisions in the Hungarian Code of Civil Procedure would also be limited to this situation. Based on experiences from abroad, defendants are often collective entities, enjoying advantages resulting primarily from their more substantial resources, economies of scale, knowledge, access to information and influence. On the other side, the claimants, being private individuals, join their claims and unite their strength and experience in a procedure developed for this purpose, sharing the risk of litigation while gaining greater publicity and a better bargaining position. This is also advantageous for the court, since the multiplication of proceedings, the confusion and the great number of parties hinder efficiency. If the cases were tried separately, the court would have to deal with the same questions several times. It is considered a further great advantage of collective redress mechanisms that defendants can be saved unnecessary expenses and inconvenience through them.[11] In the event of a large number of claimants there is an obvious need for proper management and control. These actions cannot be pursued otherwise than where, clearly and definitively, there is (only) 'one voice' speaking on behalf of all the claimants and this 'voice' must have experience in the management of such affairs.[12]

Comparing the opt-in and opt-out systems and their combination, it is difficult to decide which model is more suitable for a certain legal system. With regard to developing future procedural mechanisms, *it is probably expedient to differentiate.* When establishing the system, one must take account of the legal, cultural and economic situation of the given country.[13] The basis of differentiation may be that where the individual claim for compensation is substantial, the legislator (or the judge if there is more flexible regulation) may prefer the opt-in system and require the claimants to reveal their identity.[14] The solution seems to be a simple opt-in form which is easy to join and where pre-registration costs are kept low.[15] With respect to individually 'non-viable' claims, a rather high level of inactivity may be observed on the part of potential claimants. In view of this, in such cases it is the opt-out solution that seems not to violate the constitutional rights of claimants, who tend to remain passive in any case.[16] Opt-in procedures may give rise to complicated strategic dynamics, which may prevent the effective protection of consumer rights.[17] Consequently, a wise

11 Zuckerman (n 1) 664, 676.; Neil H. Andrews, 'Multi-party proceedings in England. Representative and Group Actions' [2001] Duke Journal of Comparative International Law 263.

12 Christopher Hodges, *Multi-party Actions* (Oxford University Press 2001, Oxford – New York) 73.

13 Samuel P. Baumgartner, 'Debates over Group Litigation in Comparative Perspective' [2000] International Law Forum du droit international 256.

14 Michael D. Hausfeld, Brian A. Ratner, 'Prosecuting class Actions and Group Litigation' in Paul G. Karlsgodt (ed), *World Class Action* (Oxford University Press 2012, Oxford) 550.

15 Zuckerman (n 1) 678.

16 Astrid Stadler, 'Mass Tort Litigation' in Rolf Stürner, Masanori Kawano (eds), *Comparative Studies on Business Tort Litigation* (Mohr 2011, Tübingen) 174–175.

17 Samuel Issacharoff, Geoffrey P. Miller, 'Will Aggregate Litigation Come to Europe?' (2009) 62 (179) Vand. L. Rev. 203.

compromise may lead to a solution that provides an adequate response to the problems of both types of case.

It follows that the *'one size fits all' method of thinking is not suitable* for developing the future Hungarian rules relating to collective redress. Essentially, two basic situations must be distinguished: *a)* mass torts, namely, more substantial claims for damages where a great number of aggrieved parties try to enforce claims that are also 'viable' individually and *b)* 'scattered loss', where the damage suffered by the individual is trivial but the aggregate claim amount is substantial. They are too distinct to allow a uniform approach or handling. As a matter of fact, they constitute the two ends of the scale. While in the latter situation, the main problem lies in the fact that there are too few claims, the disadvantage of the former is that there are too many claims.[18] A compromise was therefore needed that would provide an adequate response to the problems of both case types. Hence, it is expedient to differentiate with regard to devising the new procedural law mechanisms brought into being.

Pursuant to the Expert Proposal, the new Hungarian Code of Civil Procedure is to combine the two procedural systems by applying a more refined approach in order to provide an answer to both of the above-mentioned problems. To this end, it chooses the solution of amalgamating the (opt-in and opt-out) models, which may be considered rare in Europe. The regulations use the following basis of differentiation. Where the individual claim for damages is expected to be substantial, the legislator prefers the opt-in system, also requiring that the members of the group should be identifiable. As far as individually 'non-viable' cases are concerned, potential claimants are typically characterized by a high level of passivity. On account of this, in such cases a solution based on the opt-out model will presumably not violate the constitutional rights of consumers who would not usually enforce their claim individually having regard to the value of the claim.

The committee took a stand on maintaining the *actio popularis* designed for public interest enforcement and, on the other hand, it considered it necessary to create new procedural instruments to supplement it. In this way, the old and the new could be present in the legal system, coexisting side by side in a clearly distinguished way. *Actio popularis* has priority over the new solutions of collective redress that are being incorporated as new procedures into the Code of Civil Procedure.

The systemisation is based on the enforcement of public interest and the enforcement of aggregated private interests; the old and the new regulations diverge along the lines of these two notions. No essential changes are to be carried out in the existing system of rules of public enforcement, but it has been considered reasonable to include them among the rules of the Code of Civil Procedure, while it seems necessary to introduce new instruments concerning the enforcement of aggregated private interests.

With regard to the basis of the new regulation, it may be stated that there is a need for procedural law instruments that are capable of dealing with cases that are unmanageable at

[18] Compare Gerhard Wagner, 'Collective Redress – Categories of Loss and Legislative Options' [2011] Law Quarterly Review 78.

present due to their dimensions (mostly due to the large number of parties) or appear in the justice system today (in the absence of procedural solutions) in an unnecessarily scattered form, one by one, although 'joining them' could be justified. We consider it necessary to channel claims of so-called negative expected value that cannot be effectively enforced by the existing means (and which therefore often remain unenforced) into the justice system. The new form of regulation is characterised partly by a horizontal approach (see coordinated action), and partly by a sectoral approach (restricting the scope of class actions to consumer cases).

The elaboration of the system of collective redress took place in the light of European Commission Recommendation (2013/396/EU) on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under European law.

In respect of the limits and main principles of the new regulation, it may be pointed out that rules at present is restricted to the formation of groups of claimants; the basis of group formation is to be defined based on questions of fact and law, as well as the time factor; and lawyers are to take on an increased administrative burden (e.g. they are to keep a register of members entering the opt-in system, procure documents, and initiate the qualification of a person as a member of the group; this latter is to be verified later by the court).

It would be reasonable to lay down the rules relating to this procedure in a separate chapter of the new Code of Civil Procedure under the main title of 'Collective Redress'. According to the Expert Proposal, this chapter would include, on the one hand, a part consolidating the common procedural rules relating to the present *actio popularis,* thereby providing it with a framework and simplifying the task of the appliers of law by reducing the scattered and confused nature of the present regulation to a degree. On the other hand, another subchapter would contain the general procedural rules pertaining to aggregate private interest enforcement mechanisms to be newly introduced. The Expert Proposal is essentially based on the opt-in model, but for actions where the expected value of the claim is so small (in respect of the individual actions) that – already mentioned above – the opt-in system would be disproportionate due to the higher administrative costs, the system should be supplemented with a model based on opt-out. Into this latter system, one could channel cases that have not appeared in the justice system before (as these claims have not been enforced). It follows from this that this solution would not affect the effectively functioning order for payment system either; it would not divert cases from there, also having regard to the fact that no faster means can be provided for the person wishing to enforce her or his claim. In particular, those claims which the potential parties typically give on their enforcement in the absence of effective procedural means can be internalised in the opt-out system. The former (opt-in system) would be used to enforce claims that appear in the Hungarian system at present as well, but which cannot be enforced effectively enough within the existing procedural frames. Here, the primary aim would be to reduce the administrative burden on the court by joining the actions suited to this purpose.

II Coordinated Actions

1 General Character

As elaborated by the Expert Proposal, in coordinated actions the members of the group may be identified individually more easily. It is characteristic of them that these actions could also be brought as individual actions (generally having a positive expected value) and they are usually initiated as such. Individual claim enforcement, however, does not utilise the resources of the court system with due effectiveness and so it is reasonable to deal with these claims as part of one procedure (at least until the decision on the legal basis). As a result, a decrease is expected, for example, in the costs of evidence. The aim of coordinated actions is therefore to provide a swift, efficient and proportionate method for resolving cases where the individual damage is substantial enough to justify launching an individual lawsuit but, due to the number of claimants and the nature of the arising questions of law and fact, these cases cannot be adequately managed within the context of individual proceedings.

Coordinated actions are manifold and flexible procedures. They are essentially distinguished from the joinder of parties by the fact that the joining group members waive their right to designate an individual legal representative or participate in the trial or carry out procedural acts individually. The group formed this way has one common representative, so the group 'speaks with one voice'.

The essence of coordinated actions lies in 'gathering into a bunch' and coordinating cases until the common questions have been decided. The group is formed based on the opt-in system; in other words, a claimant may only become a member of the group based on her or his express declaration to this effect. According to the Expert Proposal, it is up to each party concerned to decide whether to join the group; there is no possibility for classifying a person as a group member *ex officio* or for assigning the case to the group. Joining the group is in practice carried out by registration in the register,[19] prior to which the person is to submit an application. If a party concerned fails to observe the prescribed deadline, she or he may only initiate proceedings in the form of an individual action.

This process of active initiation would distinguish coordinated actions from class actions (see point III). In the case of the latter, the represented party does not have to make a positive decision in order to be represented (although there is a possibility of opt-out).

Although initiating qualification as a coordinated action is a privilege exercised by the representative of the group, it is up to the court to decide on the question of admissibility, so the final decision on qualification is made by the court. Despite the fact that group members may be regarded as parties, their procedural rights are limited. Regardless of the number of individuals making up the group, each procedural act in the action is to be performed only once, which not only serves the interests of the group members but also those of the

[19] Pursuant to the Expert Proposal, the court would keep an electronic register of public interest, coordinated and class actions that would be available to the public free of charge.

defendant. For this very reason, it is essential to strike a balance between the rights that would be held by the claimants and defendants during the individual actions and the group's interest in the effective judicial resolution of the case in the form of one action. Having regard to the above and compared to general individual actions, this procedure is characterised by stronger judicial control, which is required for reasons of guarantee the rights of the claimants due to the limited procedural rights of the parties (e.g. with regard to making a settlement).

The scope of the judgment delivered on the common questions of fact and law extends to the whole group, but in many cases this will presumably concern only the question of the legal basis: individualisation may be required with regard to the claimed amount and so the procedure might be followed by individual (follow-on) actions. If the group loses the action, the costs are to be borne proportionally by the group members.

It seemed reasonable to remove those cases where the amount of the individual claim of an obligee having become a group member does not exceed the threshold value specified in the Act on the Order for Payment Procedure[20] (at present one million forints - ca. 3,100 EUR) from the scope of application of the rules pertaining to the mandatory order for payment procedure.

The Expert Proposal envisages concentrating coordinated actions in the Metropolitan Court of Justice of Budapest. It can be predicted that, most cases would be concentrated in this region also based on the general rules of jurisdiction. Although one cannot expect a high number of cases to be tried as coordinated actions – especially in the first years –, such actions will be of high complexity and outstanding significance. Having regard to this, it may be important that coordinated actions are tried by experienced judges specially prepared for this task within the context of specialised training. It would be worth considering exempting the judge from her or his other tasks if she or he has been assigned a case of such volume. Due to the expected small number of cases, it would not be reasonable to split them up between the different courts of justice, but instead we should endeavour to ensure that judges who have been prepared to try coordinated actions could already gain extensive experience in dealing with such types of case in the first years.

Compulsory legal representation may be justified, not only by the volume or complexity of the cases, but also by the legislator's intention that it is worth assigning certain administrative tasks relating to the case (organising the group, tasks relating to opt-in or opt-out) to the legal representative of the group of claimants with a view to relieving the court of such a workload. Besides, it is also worth drawing attention to the fact that the provisions relating to the compulsory content elements of the statement of claim impose an additional burden on the lawyer (e.g. adequately precise definition of the group). The legal representative is entitled to disclose the commencement of the action to the public in order to encourage persons concerned to join the action.

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[20] For more detail, see: Viktória Harsági, 'The notarial order for payment procedure as a Hungarian peculiarity' (2012) 37 (204) Revista de Processo 177–192; Viktória Harsági, 'The notarial order for payment procedure as a Hungarian pecularity' in Reinhold Geimer, Rolf A. Schütze (eds), *Recht ohne Grenzen. Festschrift für Athanassios Kaissis zum 65. Geburtstag* (Sellier 2012, München) 343–353.

The collective nature of claim enforcement and the requirement of efficiency exclude the possibility of joining a coordinated action with another action or the possibility of a counterclaim or offset claim. The death or termination of a group member does not result in the stay of the proceedings. As opposed to this, if the representative of the group leaves the group, no longer has the capacity to sue or appear as a party in the lawsuit, or moves to an unknown place then the proceedings are stayed. A group member may leave the group even during the stay.

2 Scope

The Expert Proposal regards the coordinated action as the basic type of collective redress, the scope of which – as opposed to class actions – is not limited.

This is a procedure basically modelled for when the specified claims (for damages) of specific persons – who are identifiable and specifiable right at the beginning of the procedure – are being enforced as part one procedure. The instrument of coordinated actions may be suitable for enforcing product liability claims (e.g. actions against pharmaceutical companies), claims for damages arising from railway and air accidents, environmental pollution and industrial disasters. With regard to product liability cases that may be better schematised, the possibility of class action (compare point III) is not excluded either. The working committee that drew up the Expert Proposal is also aware that the group of aggrieved persons cannot always be as unambiguously defined as it was, for example, in the Kolontár case (cf. with the case of cyanide contamination on the Tisza, for example)[21]. It is an essential criterion for a coordinated action that it should be possible to join the cases together at least with regard to the legal basis, however, they may continue as individual actions in respect of awarding the amount.

According to the Expert Proposal, a group may be organised exclusively of claimants, whereas in the case of multiple defendants only a joinder of parties is possible.

It may be stated that there is a looser connection between the cases in coordinated actions than in class actions (compare point III.). A coordinated action basically means the coordination of the cases of the members joining the group. The link between the claims of the group members is constituted by the person of the defendant(s) and the common question(s) of law and fact.

Pursuant to the Expert Proposal, a coordinated action may be filed where one or more common questions of law or fact arising from the rights of a substantial number of, but at least ten, natural or legal persons (hereinafter: group) originating in the same or essentially similar factual basis and be asserted against the same defendant or joined defendants and decided in the frames of one legal action. In a coordinated action the person asserting her or his claim may seek:

[21] See: Harsági (n 6) 171–173; Harsági (n 7) 221–223.

a) the declaration of the infringement of his or her rights,
b) the cessation of the infringement and an injunction against the infringer to prohibit it from further infringement,
c) elimination of the injurious situation and restoring the state existing prior to the infringement,
d) the payment of a lump sum monetary compensation in an amount covering the damage caused by the infringement and compensation for the injury to rights, a refund of unjust enrichment, a monetary claim resulting from the invalidity of the contract, or
e) compensation for the damage caused by the infringement, unjust enrichment and payment of the monetary claim resulting from the invalidity of the contract in an amount that can be certified by a document.

The enumeration of points *a)-e)* does not mean the partitioning of claims; the elements in the list do not necessarily constitute alternatives and there may also be a conjunctive connection between them. Underlying this is the consideration that, according to the position of the working committee in charge of drawing up the Expert Proposal, the majority of cases to be tried as coordinated actions may be joined or coordinated only until the decision on the legal basis (this constituting the common question), while the cases require individual consideration with respect to the amounts. However, one is to take account of the fact that even this latter question may be dealt with as part of the coordinated action, provided that the claims can be schematised in accordance with those specified in point *d),* e.g. the members of the group are ready to accept lump sum compensation. In the absence of this then, following the decision on the legal basis, their cases requiring an individual approach can be pursued only in the form of individual follow-on actions. In the event of individualisation with regard to the amount, not only the differences between the cases but also the volume of evidence may burst the framework of the coordinated action and hinder these cases from being tried in the form of a coordinated action. At the same time, if each group member can certify by a document the amount of the damage resulting from the infringement, the amount of the claim arising from unjust enrichment and the invalidity of the contract, this does not mean an additional burden of such an extent for the court trying the coordinated action that it would hinder the adjudication of their cases within the context of a coordinated action. Although some individualisation is undeniably required, this may be realised without great difficulty, having regard to the fact that legal documents have the character of liquid evidence. Taking this into account, it does not seem justified that, following the decision on the legal basis, the members of the group should enforce their monetary claims in individual follow-on actions. It is with regard to this that point *e)* has been incorporated into the proposal.

In summary, where there are multiple claimants whose petitions are based on common questions of law and fact, these petitions may be brought under the 'umbrella' of a coordinated action. The coordinated action may serve as an effective and cost-saving solution to decide questions of liability, for example, concerning such a common question as to whether a vaccine may cause a specific disease. In the event of a road traffic accident where the defendant has been identified and the violation of rights affects a substantial number of

claimants, common questions may include, for example, causation and liability. The judgment delivered is binding concerning the common questions to all parties registered as members of the group. In such cases, however, after liability has been established (in the coordinated action), it is up to the individual litigants to prove (within in individually initiated follow-on actions) the fact that they have suffered harm and the extent of their loss.

This type of action is distinguished from the joinder of parties by the great number of parties. Typically, the parties also enforce their claims individually but in the present system these actions are neither effective nor easily manageable.

It seemed reasonable to limit the minimum number of cases to ten. Under this number, the coordinated action would not ensure a greater degree of effectiveness or better manageability of cases than the joinder of parties would. At the same time, incorporating a minimum threshold does not mean of course that over this number it would be impossible to choose the joinder of parties instead of collective redress mechanisms if this would seem a better solution having regard to the nature of the case. Even in countries where no such minimum threshold has been specified, one may find – at least at the level of case-law or legal academic literature – such definitions where, although no minimum number of parties is defined, the number of parties must be enough to justify resorting to the given procedural means.[22] After all, the Hungarian expert proposal gives effect to this principle as well by imposing an obligation on the court to relate, in its order on admissibility, to the circumstances based on which the case is more suitable to be tried within the framework of a coordinated action in consideration of its scope and subject-matter and the volume of evidence.

It may occur that, at the time of filing the action, the number of group members is over the threshold but it is later reduced to less than ten. Having regard to those mentioned above, in this event the court will transfer to the general rules and the members of the group will become joined parties in the action.

The proposal grants priority to public interest claims over coordinated actions in such a way that, on the basis of the judgment delivered in an action arising from a public interest claim, it is possible to file a follow-on coordinated action in respect of points *d)* or *e),* but the court trying the coordinated action is bound by the judgment delivered in the public interest action in respect of points *a)-c).*

3 Filing a Claim

The court may try a case in the framework of a coordinated action exclusively on the basis of a petition to this effect. Although one may encounter examples where qualification as a coordinated action may also take place *ex officio* abroad (e.g. in English law), the Expert Proposal, in view of the parties' right of disposition over the lawsuit, has ruled out this possibility.

[22] See: *Austin v Miller Argent (South Wales) Ltd.* [2011] Ehv LR 32.

It is a precondition for qualification as a coordinated action that the group should be defined, which takes place in the statement of claim. It is essentially through this that it becomes clear which individual claims may belong here and which may not. This is mostly a generalising characterization, but it is of crucial significance that it should be well and properly formulated. In cases where individual questions predominate, a higher degree of care is required of the court concerning the analysis of the cases and questions.

The legislative intention can be directed unambiguously at defining one or several questions which are common to the group in relation to all claims. The rules make references to such questions of law or fact arising in the action that are common; and the aim of the coordinated action is to decide these questions in such a way that the registered parties would be bound by the decision. As such, in such a situation – where a lot of applicants have similar claims, but although these claims are against the same defendant, they are separate from the aspect of their legal basis and there is no common question which, if decided, would result in a binding decision for all cases – it is not likely that a coordinated action would serve as the appropriate instrument.

A minimum ten members are required for the formation of a group. It is also sufficient to specify such a number of members in the statement of claim. The potential further group members may join at a later stage of the procedure too within the defined time frames and based on defined conditions. It is not excluded either that, (resulting from the nature of the coordinated action), a far higher number of group members could typically be specified in the statement of claim. In this latter situation, it would impose a serious burden on the court if it were compulsorily required to check the data of all the members. The Proposal therefore only requires the court to check the data of a minimum of ten group members. The rules aimed at keeping the administrative burden within reasonable limits could pose a danger through potentially extending the scope of the judgment to a party asserting her or his claim who could not be a member of the group. The filtering out of such members is also in the interests of the defendant, so it is at the defendant's initiative that such members may be excluded from the group by an order of the court.

According to the Expert Proposal, – apart from the content elements prescribed by the general rules, – the statement of claim must also contain the following:

a) an express petition to the effect that the court should adjudicate the legal dispute in accordance with the provisions of the coordinated action;

b) the specification of a minimum of ten members who had joined the group by the time of filing the statement of claim;

c) appointment of a group representative from among the group members;

d) a sufficiently precise definition of the group;

e) specification of the number and nature of the claims and of the likely number of parties;

f) description of the common questions of law and fact;

g) the circumstances that may be important from the aspect that the claim should be adjudicated in the framework of a coordinated action, including in particular the circum-

stances based on which – having regard to the volume and scope of the case and the volume of evidence – the case is more suitable to be tried as a coordinated action.

Powers of attorney made out by the group members for the legal representative are to be submitted if specially requested by the court.

The defendant must be aware of what claims she or he is exposed to in order to be able to prepare properly for her or his defence and make a well-founded decision on a potential settlement. Having regard to the fact that new parties may later join the group, at least the number and nature of the claims and the likely number of parties should be evident from the statement of claim.

The provisions relating to the internal relations of the would-be group members, including the appointment of the representative of the group, are to be laid down – if they are required at all – but not in the Code of Civil Procedure, and so the Expert Proposal deliberately refrains from laying down such rules. It merely points out that the representative of the group must come from among the members of the group. Based on the position of the committee, the representative of the group may also be a self-appointed person; it is not absolutely necessary to develop a rule concerning her or his election. The prevalence of the will of the majority of members could not otherwise be consistently carried through the regulations either, since the parties joining subsequently could not have any influence on the selection of the person of the group representative anyway. One must therefore accept that group members' right to free disposition only extends to deciding whether to join or leave the group represented by the group representative.

Group members cannot exercise their right to withdraw the claim separately. They can leave the group by opting out, and the court must consider the order acknowledging the opt-out as an order to discontinue the action in respect of the group member.

4 Legal Status of Group Members, the Group Representative and the Legal Representative

In a coordinated action, the problem of group formation is of crucial importance. It is a fundamental characteristic of this type of action that the identifiable and specifiable parties pursue their claims in a coordinated manner. Registration is a mechanism that serves to verify membership of the group effectively. Pursuant to the Expert Proposal, out of the group members only the minimum number of ten members must be specified in the statement of claim. As a matter of course, this regulation does not preclude the possibility of the legal representative specifying more members when drafting the statement of claim. With respect to a group consisting of a substantial number of members, it may be reasonable to attach the list of further members as an annex to the statement of claim. The members of the group identified in the statement of claim are recorded by the court in the register. Changes are also to be entered in the register, for example, registration of members joining the group later or deletion of members following their eventual exclusion.

A person can become a group member if she or he would otherwise be entitled to take action individually. The process of qualification as group member is begun by the lawyer. In order to establish whether a person is eligible to qualify as a group member, there may be need for documents in support of the group member's claim. For this reason and with a view to simplifying the subsequent evidentiary procedure, the proposal requires the person applying to become a member of the group to make the documentary evidence supporting her or his individual claim available to the legal representative.

The possibility of dealing with a high number of claims in one procedure presupposes that the group members speak 'with one voice', which constitutes the very essence of collective redress mechanisms. As a result, although the individual group members are parties to the coordinated action, they have restricted procedural rights. Hence, for example, they cannot choose or instruct their legal representative freely. They may be excluded from having any influence on the procedural acts.

The Expert Proposal basically endows the representative of the group with the exercise of the group members' rights, (in awareness of the fact that, having regard to compulsory legal representation, this exercise of rights takes place via the legal representative in practice). However, the representative of the group cannot do this without control. On the one hand, where a group member is dissatisfied with the conduct of the lawsuit, she or he may leave the group – after settling accounts in respect of the legal costs. On the other hand, at the stage of the proceedings where it is not possible to opt out from the group, certain procedural rights of the parties are curtailed by law only partially, (e.g. an appeal may be filed by the group representative on behalf of the group only on approval by at least the simple majority of group members). It was justified to increase judicial control over settlements due to the restricted procedural rights of the parties (see point II 8).

During the conduct of the lawsuit, the group representative is to act in such a way as to protect the interests of group members. The group representative is obliged to provide the group member with information at her or his request if such information is of relevance to the party concerning the exercise of her or his rights. Concerning questions of relevance from the aspect of the conduct of the lawsuit and the merits of the case, the group representative is obliged to provide an opportunity for the group members to expound their views if this is feasible without substantial difficulty. This rule is aimed at compensating for the reduction of the procedural rights of group members. The group representative's information obligation also serves the purpose of enabling group members to decide on potential opting out from the group.

The death of group members cannot result in proceedings being discontinued, since for a larger group this would prevent the practical functioning of the institution of coordinated action. Having regard to the fact that the procedural rights of group members – with a few exceptions – are exercised by the group representative, her or his opting out from the group, or the cessation of her or his capacity to sue or be a party to a lawsuit, or her or his moving to an unknown place is to result in the proceedings being discontinued.

The Expert Proposal narrows down the range of legal representatives to lawyers. In a coordinated action, the group of claimants has one legal representative. The right to organise and represent the group as its legal representative is granted – in accordance with what is laid down in a separate law – to lawyers. The lawyer is entitled to 'publicise' the lawsuit and thereby encourage potential group members to join the group, as well as to organise and represent the group. In a coordinated action, a greater administrative burden is imposed on the legal representative, for example in the field of the administration of joining and withdrawing group members and the advancement of legal costs. They are in charge of obtaining the documents initiating qualification as a group member, the latter being ultimately reviewed by the court. The legal representative obtains powers of attorney from the group members specified in the statement of claim. Members wishing to join the group later may submit their request to join to the legal representative; their application to this effect is to be regarded as a power of attorney granted to the legal representative.

5 Examination of Admissibility

The hearing of claims as a coordinated action is initiated in the statement of claim by the group representative, but it is the court that will ultimately decide on the admissibility of the coordinated action. The court examines whether the conditions for a coordinated action are met and whether the statement of claim contains all the prescribed content elements. The court decides on admissibility by order, which may be appealed only if the application has been rejected. The order, amongst others, defines the group, lays down the subject-matter of the action and it also specifies by what deadline and on what conditions it is possible to join or leave the group.

In the event of admissibility as a coordinated action, the court may immediately continue the hearing as a pre-trial hearing or set a date for the pre-trial hearing.

A public interest action would have priority over a coordinated action. If, in the subject-matter of the coordinated action, a public interest action is filed by an entity authorised by special regulation to do so, the court is to stay the proceedings concerning the coordinated action until the final resolution of the public interest action.

The Expert Proposal defines the relationship between coordinated actions and class actions (see point III) as follows: The judgment delivered in a class action does not apply to class members who became a group member in a coordinated action before filing the class action on the same subject-matter. Another situation that may arise in connection with the rivalry between the two types of action could be where the class action is already in progress, but some class members would potentially like to enforce their claims in a coordinated action. In this case, it is a condition that they should opt out from the class action prior to this. In the lack of such withdrawal, the court hearing the coordinated action will dismiss their claims immediately before the commencement of a legal case.

The precondition for individual claim enforcement is that the group member should leave the group.

The Expert Proposal does not consider it justified or feasible to preclude the parallel commencement of two coordinated actions, but it does not exclude the possibility of merging the actions for reasons of procedural economy.

6 Form and Deadline of Joining the Group, Opt-out from the Group

A person may announce her or his intention to join the coordinated action without the need for special permission from the court within 40 days of the publication of the notice issued following the decision on admissibility. After this deadline has passed but before the closing of the hearing preceding the delivery of the first instance judgment at the latest, the court will grant permission to join on the defendant's approval. The defendant may also be interested in granting people the possibility to join the coordinated action later (e.g. in order to reduce additional costs resulting from separate actions); at this stage, the defendant's approval is required as a precondition for the court permission.

If the obligee wants to join the action, she or he is to apply to the legal representative. The application is also deemed a power of attorney granted to the legal representative. The legal representative is to announce to the court the fact of joining without delay. The legal effects of the commencement of action set in upon this announcement to the court. The court either rejects or acknowledges the joining based on the result of the examination of admissibility. Based on the court's order granting the request to join the group, the joined group member is recorded in the register. Rejection does not hinder the enforcement of rights in the context of an individual action.

The proposal regulates the possibility of opt-out from the group in line with the two-stage structure of actions laid down by the new Hungarian Code of Civil Procedure. Following the end of the first stage, opting out from the group can take place only with the approval of the defendant but until the closing of the hearing preceding the delivery of the first-instance judgment at the latest, or prior to a court settlement reached between the parties. The member who has opted out from the group would not be able to rejoin the group.

Administration of the potential opting-out, similarly to joining, is assigned to the legal representative. This is necessary, among other reasons, because in a coordinated action group members have to advance their proportional share of legal costs, so in the event of opting-out, the withdrawing party has to settle accounts with the legal representative in respect of the costs. The settling of accounts is treated in the Expert Proposal as a precondition for opting-out.

Due to the opting-out of more members, a situation may arise where the number of group members is reduced under the statutory minimum of ten persons. In such a case, the court continues the action based on the general rules. Beginning from this time, the rules relating to the joinder of parties are duly applicable to the relationship between the group members. The representative of the group can no longer act in this capacity.

At the request of the defendant, the court will, by order, exclude from the group a member who does not meet the conditions of eligibility to be qualified as a member. This rule, if

properly applied, could also act as a filter that helps to sift out claims that do not organically fit into the scope of the given coordinated action. The application of the planned rule has to be initiated by the defendant.

7 Costs

It is in conformity with opting in the regime if the burden of advancing and bearing the costs is imposed on the group member. Potential members decide on joining the action in awareness of the fact that their decision may lead to expenses. In order to enable the party to make an informed decision, she or he needs to be informed by way of a notice on the costs that may arise for group members during a coordinated action.

Group members advance legal costs through their legal representative. If they lose the action, they bear the costs incurred proportionately. Group members registered later bear costs – arising at a time prior to the registration – in the same way as those having joined earlier. If the group loses the action, the general rule is that common costs are divided between the group members to be borne *pro rata*. Joint liability for costs would be inequitable, having regard to the volume of the action and it would deter potential group members from joining. Group members are therefore to be protected from having to share in the part of the other group members. It would be disproportionate if each claimant in the group were liable to pay all the costs arising on both the claimants' and defendant's side.

In the event of opting out, the legal representative is to settle accounts with the withdrawing member. The amount of the individual share of costs may also depend on the potential date when the group member concerned will be deleted from the register. The date of joining is not taken into account, since members joining later could otherwise draw a profit from this.

Procedural costs would include the costs of administration of the group by the group's legal representative.

As a result of the volume of the proceedings, the defendant also has a substantial cost risk, so it is with regard to this that the Expert Proposal has incorporated the requirement of security for legal costs, which does not presuppose the defendant's request to this effect and which may be applicable regardless of the domicile of group members.

8 Settlement, the Binding Force of the Judgment and Legal Remedies

In individual actions, the court does not have any special influence on court settlements; before approving them, the court only examines their conformity with the legal rules. However, the court has influence on court settlements affecting an entire coordinated action. Prior to approval, the judge is to examine conformity not only with the legal rules but also with the interests of the group. It is important that the court can use the services of experts if necessary, which was justified to increase judicial control due to the parties' restricted procedural rights.

The above-mentioned do not apply to court settlements concluded separately between a group member or individual group members and the defendant. The Expert Proposal does not anticipate any danger to the interests of group members in this case, since they can influence the conditions of the settlement unlike in the event of a settlement extending to the whole group, where the conditions are developed by and between the representative of the group, the legal representative and the defendant. From the aspect of the group, a settlement made separately is basically equivalent to opting-out from the group.

There is no obstacle either to parties making a settlement out of court and the group member opting out from the group. However, the group member has to authorise the legal representative separately to this effect, but she or he will do so in awareness of the fact that she or he is not entitled to the protection resulting from judicial control.

It is a consequence of the coordinated action that the judgment delivered in the case is binding on the parties with regard to the common issues. Registration is of crucial importance, since only those claims can enjoy the fruits and share in the burdens of the coordinated action that have been entered in the register and that are still recorded in the register at the time of closing the hearing preceding the delivery of the first instance judgment.

The assignment of the parties' procedural rights to the legal representative of the group requires the incorporation of guarantees for the group members. They may exercise control over the proceedings in two ways, on the one hand, by exercising their right of opting out and, on the other hand – at the stage of the proceedings where there is no further possibility of opting out – by their approval, which has been incorporated into the system at the required points by the Expert Proposal. Having regard to the fact that, following the closing of the hearing preceding the delivery of the first instance judgment, the group members can no longer opt out from the group, group members are to be granted a say in deciding whether to submit an appeal against the judgment. Filing an appeal requires the approval of a simple majority of group members. The same applies to a cross-appeal, review petition and cross-petition for review. Due to the complexity of coordinated actions, a longer time limit of 45 days is justified for submitting an appeal against the judgment.

III Class Action

1 Character of the Proceedings

According to the Expert Proposal, claims could be enforced in the framework of a class action if they are separately 'non-viable' and therefore have not typically appeared so far in the justice system. Based on experiences from abroad, the difficulty concerning opt-in procedures lies in the lack of attractiveness; for a claim of a smaller value, the problem of incentives may arise in connection with joining the group. It is for this reason that the Hungarian regulation of collective redress should supplemented with an opt-out type procedure.

The class action would function like a representative action, where on the one side one may find the representative claimant or her or his legal representative. In this way, one may ensure the unity of the class, 'speaking with one voice', by which the major drawback of the joinder of parties may be essentially eliminated. The class is to be treated as one unit right until enforcement; there is no individualisation.

The Expert Proposal envisages concentrating class actions in the Metropolitan Court of Justice of Budapest, similarly to coordinated actions and based on identical reasons.

Compulsory legal representation may be justified by the volume or complexity of the cases. The regulations relating to the compulsory content elements of the statement of claim impose an additional burden on the lawyer (e.g. definition of the class with adequate precision). However, since there is no group organisation, the administration of class actions – resulting from experiences from abroad – is thus not expected to be of such a scale as that of opt-in type coordinated actions. As such, there is no need to assign them to the competence of lawyers instead of the court.

2 Scope

The basic purpose of class actions is to ensure access to justice in cases where a great number of individuals are affected by another person's infringing conduct, but the individual losses are so small that this would render individual actions 'non-viable'.

With regard to small claims, it is to be taken into account that there are effective systems (e.g. the order for payment procedure) in the present regulation and therefore the new elements of the Expert Proposal are limited only to cases that do not appear in the present system. As a result, a narrower field of application had to be defined; therefore the instrument does not have general application. The narrowing down of the personal scope ensures that cases are not extracted from the scope of the order for payment procedure, which has proved effective. However, rivalry between the two procedures does not seem likely either, because based on experience the majority of cases to be enforced by way of an order for payment procedure (arrears of public utility charges, matters related to parking or condominiums etc.) are not of such a character that they could be included in this range.

The narrowing of the personal scope could also alleviate fears relating to the abusive use of opt-out type collective redress mechanisms, which fears are typical in Europe. Strict consideration is required before the legislator opens up the possibility of recourse to the new procedural instrument for the enforcement of certain types of claim. A class action may be suitable, for example, for the aggrieved parties in cartel cases to enforce their claims, or actions relating to monetary claims arising from unfair contract terms could also be tried within the framework of such actions.

Limiting the personal scope to consumers does not mean that consumer claims would be enforceable exclusively by an opt-out type class action or that they would be excluded from the scope of coordinated actions. If the coordinated action seems a more suitable procedural means with regard to the nature of the claim (e.g. in certain product liability cases), then it is

reasonable to choose that means. The possibility of choice and the initiative aimed at it will come from the representative of the group or class of claimants (group representative and representative claimant), while the decision on this is expected to unfold in practice based on the professional advice given by the legal representative.

A class action may be filed where the infringing activity of the enterprise affects a wide range of personally non-identified consumers who may be defined based on the circumstances of the infringement and where such activity may cause considerable harm to them, and their claims against the same defendant or defendants arising from the same or essentially similar factual basis or identical legal basis can be decided in the context of one action, provided that the interests of the consumers to be represented by the representative claimant are the same. It is a condition for filing a class action that the amount of the total claim of the represented class and of the individual claims of the class members can be determined and that there should be unambiguous criteria for the division of this amount. Using a class action, the person wishing to enforce her or his claim may enforce a claim for compensation for the harm resulting from the infringement, a claim for reimbursement of unjust enrichment or a monetary claim resulting from the invalidity of the contract.

Claims arising from an infringement established in a binding decision by an authority specified in a separate law or by a court based on a public interest claim are enforceable by way of a class action (follow-on class action).

There is a closer connection between the cases of class members than between those of group members in a coordinated action. The introduction of class action enables the applicant to file an action on behalf of a precisely defined group of consumers (hereinafter class) in order to enforce their homogenous claims. The requirement of this homogeneity is embodied in the formulation contained in the proposal '[…] if the interests of the consumers to be represented by the representative claimant are the same'. This formulation presupposes that the relief sought is, as a matter of course, advantageous for everyone who the representative claimant suggests representing. The rules provide a procedural mechanism for resolving cases where several people have the same interests in a given case. It is to be noted, however, that the requirement of identical interests is to be interpreted in such a strict manner that it would exclude the application of the rule even in such cases where, although the claims to be enforced in respect of a wide circle of consumers are founded on an identical or essentially similar legal basis, the interests of the consumers cannot however be regarded as the same.

The members of the class cannot be identified at the beginning of the procedure. The Expert Proposal does not deem it necessary to define a minimum threshold for the number of class members. At the same time, the infringement by the defendant has to be capable of causing substantial harm to several persons, even if the harm actually occurs in respect of a few consumers.

On the other hand, it is a precondition for applicability that the total amount of money to be paid to the class being represented (the amount of the claims the defendant's is 'exposed to') should be known. It is a further requirement that the share of the individual consumer could be established easily. This does not necessarily require that each consumer should be

entitled to an equal share, but the division must be based on unambiguous, clear and transparent criteria. In a given case the defendant should know the amount of the total claim; she or he must be able to calculate, for example, the number of infringements and the amounts that may be claimed by the individual consumers in respect of those infringements.

If the (differing) amounts of money due to the class members have to be determined individually, class action seems a less suitable method; in such cases the solution could be constituted by a coordinated action and subsequent individual follow-on actions.

Pursuant to the Expert Proposal, a class of claimants is exclusively possible; a plurality of defendants may exist only in the framework of a joinder of parties.

An earlier court judgment delivered with general effect *(erga omnes)* is binding on the court trying the class action. This rule ensures the priority of public interest claims over class actions. Following a judgment delivered in an action arising from a public interest claim, it is possible to file a follow-on class action, but the judgment delivered concerning the public interest claim is binding on the court hearing the class action.

3 Filing of the Claim, Content of the Statement of Claim

The court may decide the case in the framework of a class action exclusively based on an express application to this effect. Since the consumers are not identified at the beginning of the procedure, special significance is attributed to providing an adequately precise definition of the class. This may take place, for example, by defining the class of claimants as the consumers who purchased a specific product or some product from a product group in a precisely defined period.

Having regard to the above, it is also true that the defendant must know the amount of the claim she or he is 'exposed to' so as to be able to prepare properly for the defence and make a well-founded decision on a potential settlement. Here – as opposed to coordinated actions - the problem lies not in the possibility that further members may join, since in the opt-out type class action, the consumers coming within the definition of the class are regarded as class members automatically unless they opt out. With regard to these actions, it is the anonymity of the class members that causes a problem. It may, however, also be stated that it is from the account ledgers of the defendant himself that the data relating to the exact number of consumers concerned may be obtained. Hence, all that may be expected of the representative claimant or the legal representative is to specify in the statement of claim the probable number of consumers concerned, since this is what the court may proceed from when examining compliance with the requirements of admissibility. It is to be noted, however, that it is not necessarily in the interests of the defendant to supply the data relating to the exact number of consumers concerned and so it may be necessary to employ an accounting expert.

In comparison with coordinated actions, it emphatically applies to class actions that the typically personally unidentified class members of the class action cannot take part in the election of the representative claimant. The representative claimant is therefore self-appointed, but she or he should in any case be some (identified) member of the class.

Apart from the general content requirements, the statement of claim shall contain the following:

a) an express petition to the effect that the court shall resolve the legal dispute based on the provisions of the class action;

b) an adequately precise definition of the class;

c) specification of the probable number of consumers concerned and the number and nature of claims;

d) the designation of the representative claimant;

e) the circumstances that may be of relevance from the aspect that the claim is to be tried in the framework of a class action, including in particular those circumstances based on which – having regard to the identical interests of consumers, the volume and subject-matter of the case and the volume of evidence – the case is more suitable for being tried as a class action.

Any class member is entitled to file a class action on behalf of the class members (representative claimant).

Filing the statement of claim suspends the limitation period in respect of the class members, provided that the court makes a binding decision on the merits concluding the proceedings.

4 Legal Status of Class Members, the Representative Claimant and the Legal Representative

Pursuant to the Expert Proposal, the members of the class do not have to be identifiable by name at the beginning of the procedure, provided that the criteria for class membership can be defined at this stage. On the other hand, at every stage of the proceedings (and not only at the time of the delivery of the judgment), one must be able to establish with regard to each person whether they can be classified as a member of the represented class or not (based on whether they share the same interests).

With regard to the limits and main principles of the new regulations, it may be pointed out that present regulation is restricted to forming a class of claimants; defining the basis for class formation must take place along questions of fact and law and the time factor.

A speculative class does not meet the preconditions for the commencement of proceedings. However, this does not imply that group membership must remain permanent and closed all the while.

The representative claimant would bring the action on her or his own and the others' behalf in these procedures. A member of the represented class could (at most) exercise her or his right to opt out. The members of the class are not parties to the action; only the representative claimant is a party in the fullest meaning, she or he is the sole claimant. In contrast to the representative claimant, the represented persons cannot be ordered to pay costs either. However, they are not merely 'bystanders' who are not interested in the outcome of the case, since the delivered judgment is also binding on them.

The Expert Proposal considers it necessary to limit the personal scope to those consumers who are domiciled or residing in Hungary at the time of filing the statement of claim. It is to be feared that the consumer domiciled or residing abroad has no information on the action and therefore she or he has no possibility to opt out from the class. As a matter of course, these regulations do not prevent an individual action to be filed or the claim to be enforced in a coordinated action. This point of the Expert Proposal was developed with reference to the Belgian regulations[23].

Based on this, a consumer is to be deemed a member of the class:

a) if the consumer could also file an individual action regarding the subject-matter of the class action against the defendant or defendants, or she or he could individually assert her or his claim in an order for payment procedure;

b) if the consumer is domiciled or resident in Hungary at the time of filing the statement of claim and

c) if the consumer has not expressed her or his intention to opt out from the class.

The claimant of the class action is the representative party; the members of the class represented by him or her are not involved in the proceedings as parties; they do not have the burden of advancing or bearing the costs.

It is a fundamental requirement of fair process that before the delivery of the judgment, one should know who would be covered by the scope of that judgment. This enables those concerned to take steps in order to be able to protect their interests properly (e.g. by opting out).

The requirement of an 'identical interest' (see point III 5) has been designed to ensure a perfect overlap between the interests of the representative claimant and the represented class members. The fulfilment of this requirement is of crucial importance from the aspect of enabling the representative claimant to represent the interests of the class members properly. When examining compliance with this requirement, a distinction may be made between cases where class members have diverging interests and cases where they have conflicting interests. Where interests are merely diverging, there is a risk that the representative party may not represent firmly or stress those arguments that do not serve her or his interests. Where there are conflicting interests, the representative party's conduct of the lawsuit may undermine other members' interests. In neither case would it be reasonable for

[23] Wet tot invoeging van titel 2 "Rechtsvordering tot collectief herstel" in boek XVII "Bijzondere rechts procedures" van het Wetboek van economisch recht en houdende invoeging van de definities eigen aan boek XVII in boek I van het Wetboek van economisch recht / Loi portant insertion d'un titre 2 "De l'action en réparation collective" au livre XVII "Procédures juridictionnelles particulières" du Code de droit économique et portant insertion des définitions propres au livre XVII dans le livre 1er du Code de droit économique, Art 38; Stefaan Voet, 'European Collective Redress: A Status Quaestionis' [2014] International Journal of Procedural Law 127.; Janek Tomasz Nowak, 'The New Belgian Law on Consumer Collective Redress and Compliance with EU Law Requirements' in Eva Lein, Duncan Fairgrieve, Marta Otero Crespo, Vincent Smith (eds), *Collective Redress in Europe – Why and How?* (British Institute of International and Comparative Law 2015, London) 182.

the court to declare the class action admissible. At the same time, modern reality is rather different, since procedures initiated in the interests of collective redress are not usually managed and controlled by an individual party. Based on comparative experiences, multi-party cases are usually initiated and financed by lawyers and the representative party is merely a nominal leader.[24]

The persons represented do not need to be informed of the representative claimant's intention to file an action. They are not individually notified that the proceedings are in progress, but may learn of it only from the public data of the register or the published notice of the legal representative. It is not a requirement either that the representative claimant be appointed or elected by the members of the class concerned. The party may therefore be self-appointed and become a representative claimant, regardless of whether the represented persons have authorised him or her to represent them or not.

The representative claimant or her or his legal representative may choose freely how they are going to conduct the lawsuit on behalf of the class, but during the conduct of the lawsuit, the representative claimant shall act in a way that protects the interests of the members of the class. At the request of a class member, the representative claimant is obliged to provide the member with information, if such information is of relevance concerning the member's exercise of her or his rights. The representative party is the 'master of the case', from which it follows that she or he is also entitled to make a settlement. Such a settlement is binding on the represented persons if they have not opted out from the class prior to this. As a consequence of the nature of the proceedings, the class members cannot have any influence on the settlement process; it was therefore necessary to incorporate rules for the protection of their interests. Control over the court settlement is exercised by the court seized of the case. The court may approve the settlement only if it complies with the legal regulations and the interests of the class members. The court is to refuse approval in particular if that settlement is unfair. The court examines the interests of the group members *ex officio* and, if necessary, it shall appoint an expert.

At the same time, if a class member is discontented with the way the representative party is conducting the lawsuit, she or he may opt out from the class and enforce her or his claim individually based on her or his decision. As a matter of course, the representative claimant cannot opt out from the class.

The legal representative is authorised by the representative party to represent the case. With regard to a class action, the class of claimants has one legal representative. An authorisation to represent the class as their legal representative may be granted – as defined by a separate legal regulation – to a lawyer. Following the entry into force of the order granting the request for filing of the class action, the legal representative is entitled to disclose to the public that a class action has been filed.

In a class action, it flows from the character of the proceedings that there is a smaller administrative burden than in a coordinated action, so it does not necessarily have to be

[24] Compare: Zuckerman (n 1) 671.

assigned to the legal representative for the sake of relieving the workload of the court. Therefore, for example, the withdrawing members – unlike in with regard to coordinated actions – announce their intention to opt out directly to the court.

5 Examination of Admissibility

The representative claimant may file an action not only to assert her or his own personal interests, but also to assert the rights of those who are similarly affected by the infringement of the defendant. The proposal lays it down (see point III 4) as a condition for filing a class action that the members of the class should share the same interests. It is not reasonable for the court to decide that a class action is admissible if there may be several types of defence against the members of the class. In such a case, the representative claimant may not properly represent the interests of some class members, if such interests differ somewhat from her or his own interests and the interests of class members having the same interests as her or him. Hence, if as a result of the examination of admissibility it becomes obvious that the members of the class have competing interests, the cases are not suitable for being tried on the basis of a class action and the admissibility of the class action must be rejected. Although there is no strict restriction, the class action is however not admissible where the rights or obligations of the class members are too diverse to be brought into line with the basic objectives of the procedure. Filing a class action may be admissible only if it is certain that the procedure serves the interests of all members of the class represented.

The court seized of the case is to decide by order on the admissibility of the proceedings filed in the form of a class action within 45 days of the statement of claim being filed, following written preparation and, if necessary, hearing the parties. The order of inadmissibility is subject to appeal. In its order establishing the admissibility of the class action, the court defines – *inter alia* – the class of claimants based on characteristics suitable for identifying the class of claimants, the subject-matter of the action and the amount of the total claim of the class and the share of the amount claimed in respect of the individual members of the class or the clear criteria for division.

As opposed to coordinated actions, rivalry or parallelism of class actions is unimaginable – due to the difference in their nature –, since the effect of the judgment delivered in the class action basically extends to all members of the class. In the event of two class actions having the same subject-matter, the court shall dismiss the statement of claim filed later before the case commences *(in limine litis).* In the application of the rules of *in limine litis* dismissal, the parties mean the class and the defendant, defendants or joint defendants. If a judgment has already been delivered in the class action, it results in a *res iudicata* in respect of the class members.

The provision is intended to ensure the primacy of *actio popularis* over the class action. The proposal suggests regulating the relationship between coordinated actions and class actions by stating that the class members who, prior to filing the class action, have become group members in a coordinated action, the subject-matter of which coincides with the

subject-matter of the class action, have thereby excluded themselves from the scope of the judgment delivered in the class action. Another situation that may arise in respect of the rivalry between the two types of action is where the class action is already in progress, but some class members would potentially like to enforce their claims in a coordinated action. A precondition for this is that they should opt out from the class. In the absence of this, the court seized of the coordinated action will dismiss the class member's claim without the issue of process.

A precondition for enforcement of an individual claim is that the class member should leave the class.

6 Opting-out from the Class

Since the authenticity of opt-out systems leans on the presumed consensus of the class members, publication and thereby informing the class members of the action is important with a view to enabling them to avail of the possibility of opt-out. The consumer may become a class member in spite of her or his will, so she or he should be left with the possibility to choose freely whether to leave the class. This obviously cannot be conditioned on the defendant's approval.

The practice relating to the American opt-out system shows that class members are usually passive and do nothing. Very seldom do they take advantage of the possibility of opt-out. In consumer cases, on average less than 2% of those concerned exercise their right to opt out from the group.[25] In Australia the situation is somewhat different, empirical research has shown that people are not averse to opt-out and the rate of opt-out is a lot higher than expected (average: 13.78%, median: 5.28%).[26]

Pursuant to the Expert Proposal, a member of the class could notify the court of her or his opt-out until the closing of the hearing preceding the delivery of the first instance judgment or until the conclusion of a court settlement. The defendant's consent is not required for opting out from the class. A member who left the class would not be allowed to rejoin but opting out from the class is not an obstacle to claim enforcement in an individual action.

7 Costs

A relevant obstacle to application may be posed by the question as to who should bear the costs. The problem of bearing the costs arises in that the procedure may be commenced even without the consent of the class members and therefore they do not appear as parties to the lawsuit, nor do they bear the costs of the action. It follows from this that all the costs must be

[25] Samuel Issacharoff, Geoffrey P. Miller, 'Will Aggregate Litigation Come to Europe?' (2009) 62 (179) Vand. L. Rev. 203.

[26] Zuckerman (n 1) 693.

borne by the representative party if the class loses the action. Even if the representative claimant wins the lawsuit, there is a risk that she or he will not be able to recover all the costs from the losing party. The representative claimant's personal risk for costs may be a serious deterrent to filing such actions. Hence, in the case of opting out from the class, there is no need to settle accounts with the leaving class member.

As a result of the volume of the action, the defendant also bears a great risk for costs, with a view to which the Expert Proposal has incorporated the requirement of security for costs, which does not presuppose a request by the defendant to this effect and which can be applied regardless of the representative claimant's domicile.

8 Questions Relating to Settlement, Judgment, Res Judicata and Legal Remedies

In an action commenced on the basis of a class claim, there is no possibility to make separate settlements with individual class members as far as court settlements are concerned. However, if the identity of the class member has been revealed, there is no obstacle to him or her concluding an out-of-court settlement with the defendant, leaving the class at the same time. Nevertheless, due to the typically negligible value of the individual claim, this is expected to be a rather rare scenario.

Before granting approval, the judge is to examine compliance not only with the laws, but also with the interests of the class. It is important that the court may employ an expert for this task, if necessary. In a class action, weighing of interests would be more emphatic than in for coordinated actions, with a view to protecting the interests of claimants not attending the trial.

Being acquainted with criticism formulated concerning models from abroad, special care must be taken while developing the rules relating to settlement. The most common objection to the opt-out system is that it may lead to significant abuses in practice. It is raised as a counterargument that, in order to prevent abuses, it is possible to introduce control mechanisms: especially strong judicial control over the cases.[27]

It is a peculiar feature of a class action that, at the beginning of the action and during the action, the members of the class cannot be specified. The scope of the judgment delivered in the case extends to all consumers corresponding to the description of the class who have not opted out from it, but the identity of the individual consumers will become known when they have proved their eligibility as laid down in Point III.9. The scope of the judgment delivered in the class action does not extend to class members who, prior to the commencement of the class action, joined a coordinated action filed with regard to the same subject-matter as a group member (cf. point II 5).

[27] Christopher Hodge, *The Reform of Class and Representative Actions in European Legal Systems* (Hart 2008, Oxford) 119.

Due to the complexity of class actions in respect of the appeal of judgments, a deadline of more days is justified. An approval similar to that of coordinated actions would not be feasible due to the lack of information on the number and identity of class members.

9 Performance

The class is to be treated as a unit right until the enforcement, in this action there is no possibility for individualisation. The therefore defendant pays a lump sum to the class by way of depositing the money with the court.

It may be a life-like situation that some of the consumers concerned do not come forward (e.g. they have not kept the receipt or they may show no interest). From a legal political aspect, it would not be justified if the amount was to remain in the defendant's possession and therefore the Expert Proposal suggests its use for public interest purposes. It would be reasonable to lay down detailed rules relating to this in a separate statute. Apart from this, it will be necessary to amend the Act on Judicial Enforcement and, potentially, acts relating to insolvency procedures as well.

The court will pay the amounts due to the class members in accordance with those laid down in a separate law if they have certified their eligibility by a legal document after having come forward in response to the notice addressed to them. The members of the class may announce their claim relating to this within five years of the expiry of the deadline for performance. When the deadline has passed, the potential remaining amount is to be spent on public interest purposes in the form specified by a separate law.

IV Conclusion

The proposal would broaden the narrow frames of the present day collective redress system, retaining its good and effective elements, thereby preserving some of the tradition as well. As such, it could provide the possibility for creating the essential procedural mechanisms for cases which, due to the lack of adequate procedural means under the Hungarian regulation in force, may currently be tried only with difficulty or are not even commenced for this reason.