

Opt-Out Systems in Collective Redress

EU Perspectives and Present Situation in the Czech Republic

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Abstract. It is common nowadays for a person to suffer an injury as a result of a widespread illegal practice by a particular entity. Individual redress mechanisms prove to be insufficient. It is therefore crucial to provide a suitable way for an injured party to achieve remedy. Collective litigation serves this exact purpose.

This article defines opt-in and opt-out systems of collective redress, assesses their strengths and weaknesses and offers possible solutions. The author does not omit two related topics: time limits for opt-in and opt-out, and notice of initiation of the proceeding. The article also contains a comparative study of Danish, Norwegian, Dutch, Portuguese, British and Belgian systems as representatives of opt-out systems. Lastly, the article also describes the current state in the Czech Republic, where a debate is currently taking place over the possible form of collective redress.

The aim of this article is to provide a complex view of pros and cons of the opt-out system of group proceedings and to show that the opt-out system can be functional and suitable for collective redress.

Keywords: collective redress, opt-out, time limit for option, notice of initiation.

1. GENERAL INTRODUCTION

At present, there is an increasing number of cases in which a large group of persons has suffered an injury as a result of the same illegal practice by a particular entity, see recital 2 of the Preamble to Commission Recommendation No 2013/396/EU on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law. This may cause problems especially with respect to civil procedural law. Conventional individual redress mechanisms are inadequate for these cases and as a result, attention is focused on the issue of collective procedural redress.

This most often takes the form of representative action or group action. In the case of a representative action, the person representing the interests of the persons concerned (representative) has active standing. The persons concerned are not parties to the proceedings themselves and are not bound by the decision. In the case of group actions, the persons concerned or the representative have active standing. The persons concerned can then be members of the group. However, they are not parties to the proceedings in the strict sense of the word, their rights and obligations being greatly reduced in group actions. The responsibility for conducting the litigation lies with the ‘group representative’, which may be represented by a legal representative. They are bound by the decision.

Group actions can be based on an opt-in or opt-out system. The chosen system then has a significant impact on the form and character of group proceedings and the legal institutes applied therein. In general, the opt-in model is acknowledged rather widely and

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without major objections. Contrary to that, an opt-out model gives rise to several uncertainties. Nevertheless, even this later model is (to a greater or lesser extent) applied within the legislation of some European countries.

The aim of this paper is to analyse both models and the institutes related to them, including foreign regulations, and, on that basis, to identify possible advantages and disadvantages of the opt-out model and propose the possible solutions to examined problems. This is particularly important nowadays when the European Union evaluates the current state of collective redress in European countries and is considering further steps in this area. The Czech Republic belongs to those few European countries that have not yet introduced the collective protection of rights into their procedural rules and there is an ongoing policy and legislative debate about establishment of proper system.

2. OPT-IN AND OPT-OUT SYSTEM

The difference between these two systems is how the persons concerned become members of the group. In the *opt-in* model, it is essential for the persons concerned to actively ‘opt in’ to the proceedings, i.e. to make a disposition to enter the proceedings. In this case, the members of the group are individually designated. The decision is binding on them. In the *opt-out* model, the persons concerned become members of the group automatically, without having to express their will to become involved.¹ If they do not wish to be involved in the action, they must opt out. The group is defined based on defining elements.² The decision is binding on those parties that have not opted out of the proceedings. The others, those who have opted out, have the right to bring individual actions.

The US legislation governing class actions also provides for *mandatory class actions*, where the persons concerned become members of the group automatically, without the possibility of opting out.³

A *combination of both systems* is also possible as not all actions are suitable for the selected system.⁴ The opt-in system is particularly suitable for cases involving high claims of the persons concerned and the group of persons who are claimants or known to the court is small. According to E. Werlauff, examples of types of cases where an opt-in will clearly be preferable are aircraft accidents, railway accidents, group journeys, health care and industrial accidents.⁵ Ideally, the persons concerned should know each other. On the other

¹ A different approach to opt-in and opt-out system is presented by A. Szalai. He considers the opt-in and an opt-out systems as mutually complementary. If it is possible to leave an ongoing opt-in procedure, this constitutes the ‘opt-out’. Szalai therefore does not consider the opt-in and opt-out systems as two different options. The alternative to the opt-in system is a system where group membership is established automatically. Szalai (2014) 84. In fact, these two concepts of group membership are in no way inconsistent.

² Balarin (2011) 54.

³ Mandatory class actions are governed by Rule 23(b)(1), (b)(2) of the Federal Rules of Civil Procedure (FRCP) – Incompatible standards, limited fund and equitable class actions. In all these cases, these are non-monetary compensatory actions. Conversely, actions under Rule 23(b)(3) – Damage class actions – are ‘voluntary class actions’ with the right to opt out. Although there are many critics of the opt-out system in Europe, it is not a major problem among the US professionals. In connection with the right to a fair trial, moderate criticism only appears in relation to mandatory group actions, which is virtually unthinkable in Europe: Cottreau (1998) 480–528.

⁴ Dodson (2016) 188.

⁵ Werlauf (2013) 176.

hand, it is inappropriate in the case of small, highly dispersed claims of persons who are difficult to find.

However, legislation may keep both systems existing in parallel, with neither being designated by law as the primary or, alternatively, one of them may be selected as the basic system, with exceptions represented by the other system.⁶ An exception to the system can be laid down directly in a law on the basis of clearly defined conditions, e.g., specific cases, the amount claimed, etc. A law can also lay down only support criteria, the main decision being left to the judge. The European Law Institute proposes that the judge considers the type of claimant, the nature and amount of the claim and the overall circumstances of the case.⁷ However, the criteria should be set out in such a way that the court's decision regarding the change (or selection) of the system is not unpredictable for the claimant and does not lead to unnecessary delays in the proceedings caused by appeals. One may also consider the change of the system being conditional on the consent of the claimant, or being left entirely up to the claimant or an agreement between the parties.

The legislations of some countries also allow for a double opt-out system,⁸ the opt-in system⁹ or their mutual combination. This option is given to group members when the group representative and the defendant conclude an agreement. If group members disagree with the wording of the agreement, they may opt out at this stage and bring an individual legal action. In this case, the legislation must also deal with the statute of limitations and the running of the limitation period. Experience from abroad shows, however, that the number of parties opting out at this stage is minimal, even when the settlement amount in the agreement is rather disadvantageous for the persons concerned. This is often the case, especially where the claims of individual claimants are low.¹⁰

3. NOTICE OF INITIATION OF THE PROCEEDINGS AND TIME LIMITS FOR OPT-IN OR OPT-OUT

The initial requirement related to the commencement of collective proceedings is the problem of formation of the group of litigants and determination of extent of involvement of concerned persons. In relation to that, the key question that must be resolved is the notion of notification (how to notify the persons concerned on the initiation of proceedings) and notion of termination of their involvement (how to adjust their entry into and withdrawal from the proceedings). Here one need to bare in a mind the desirable balance between necessity of preservation of their right to a fair trial on one side and the need to avoid the abuses of group proceedings on the other side.

⁶ In Europe, such legislation can be found e.g. in Norway and Denmark. The group action legislation in Belgium and the UK allows a choice between the systems. See below for further details.

⁷ European Law Institute (2014) 40 link 1.

⁸ See, for example, Rule 23 e (4) FRCP: If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

⁹ The de facto polish legal regulation (Article 19 of Act on the Enforcement of Claims in Group Actions, *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym*).

¹⁰ Kahan and Silberman (1996) 244.

3.1. Notice of initiation of the proceedings

In opt-in and opt-out litigations, it is always necessary to ensure that the members of the group or potential future members of the group are properly informed about the initiation of the litigation and the possibility to opt in and opt out. Such information is given by means of a notice of initiation.

Only in this way can collective redress regulation meet the requirements of the right to a fair trial.¹¹ This need is even more evident in opt-out litigation where the persons concerned will be bound by the decision and not allowed to bring individual actions if they do not opt out. If the persons concerned do not learn of the initiation of the opt-in litigation, they do not lose the right of access to court and have the possibility to initiate separate litigation.

The notice of the possibility to join or withdraw from a settlement has the same effects. This notice needs to be distinguished from informing the group members during the proceedings as well as from the information provided prior to the initiation of the proceedings concerning the intention to file a group action.

The Recommendation foresees the establishment of a registry of collective redress actions (Articles 35–37). The national registry should be available free of charge to any interested person through electronic means and otherwise. The registry website should provide access to comprehensive and objective information on the available methods of obtaining compensation, including out of court methods. The Member States, assisted by the Commission should endeavour to ensure coherence of the information gathered in the registries and their interoperability. However, it would be appropriate to create this registry at European level so that it is readily accessible from all EU countries.¹²

Information on collective redress action is laid down in Articles 10–12 of the Recommendation. The Member States should ensure that it is possible for the representative entity or for the group of claimants to disseminate information about a claimed violation of rights granted under Union law and their intention to seek an injunction to stop it, as well as about a mass harm situation and their intention to pursue an action for damages in the form of collective redress. The same possibilities for the representative entity, *ad hoc* certified entity, public authority or for the group of claimants should be ensured as regards the information on the ongoing compensatory actions.¹³ The dissemination methods should take into account the particular circumstances of the mass harm situation concerned, the freedom of expression, the right to information and the right to protection of the reputation or the company value of a defendant before its responsibility for the alleged violation or harm is established by the final judgement of the court.

3.2. Moment of notice

The notice of initiation is given only after the group action has been certified. This means that the action has to define the group of the persons concerned to meet the certification

¹¹ Cf. Balarin (2011) 193.

¹² See also European Economic and Social Committee (EESC), Opinion of the European Economic and Social Committee on the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Towards a European Horizontal Framework for Collective Redress, 10 December 2013, COM(2013) 401 final.

¹³ Here, the Recommendation only mentions informing in compensatory litigations.

conditions.¹⁴ Group actions are divided into two phases, the pre-certification phase, in which the conditions for the group litigation are identified, and post-certification when the court is already dealing with the merits. Certification is decided by a court in a resolution which can be appealed. The failure to meet the certification conditions can no longer be invoked in the appeal against the final decision on the merits. Certification is naturally easier in the opt-in system where the court has all the facts that are decisive for issuing a resolution on certification. On the other hand, however, it can be difficult when assessing the fulfilment of the condition of numerosity and superiority.¹⁵ For the opt-out system, certification is of particular importance, as it may prevent the abuse of collective actions.

The notice should be published as soon as possible after the certification of a group action.¹⁶ If a settlement is to be concluded in the litigation, another notice should be given after the court has approved the settlement [see e.g. Rule 23(e)(4) Federal Rules of Civil Procedure]. The notice may also be repeated, if necessary.

3.3. Form of notice

The manner in which the notice of initiation is to be made must be adapted to the very specific nature of the judicial collective redress procedure¹⁷ and, of course, the size of the group of persons concerned and the specific information about them.

If any group members are known, the notice should be given individually. In relation to the others, another appropriate form should be used e.g. daily press, specialized magazines aimed at the persons concerned, radio or television but also through a registry specifically created for this purpose.¹⁸ Recently, notices made through the Internet (websites dedicated to a particular group) are also becoming more important. It can also provide additional information. This method of notice is cheaper in comparison to other methods and the information published here can be updated at any time.¹⁹

Under certain circumstances, no notice is required at all. However, this is the case only in opt-in group actions where the court concludes that all the parties concerned have already

¹⁴ The following four criteria are considered during certification: numerosity, preliminary merits, commonality of issues, and superiority.

¹⁵ Dodson (2016) 174.

¹⁶ The notice may be postponed if a settlement is expected. In this case, it will not be necessary to send the notice twice. Anderson and Trask (2014) 217.

¹⁷ For example, the U.S. Federal Rules of Civil Procedure provide for two forms of notice. The appropriate notice in the case of mandatory class actions, and best notice practicable in the case of a compensatory action with the opt-out option. For more details, see Anderson and Trask (2014) 218–19.

¹⁸ For example, in Germany, in the case of the model proceedings pursuant to the Act on Model Proceedings in Capital Market Disputes (*Gesetz über Musterverfahren und Kapitalmarktrechtlichen Streitigkeiten*), the process court publishes an application for model proceedings in the federal Official Journal (section Register of Actions under the Act on Model Proceedings in Capital Market Disputes) and suspends the proceedings. If at least nine other applications for the model proceedings are published in the Register of Actions, the court issues a resolution to submit the case to the superior court. Otherwise, it rejects the application and continues with the original proceedings. This register serves both for the publication of proceedings information and for the service of the prescribed documents. In addition, there is a non-public information system in which the submissions of individual parties to the proceedings and interim decisions of the High Court are published.

¹⁹ See Anderson and Trask (2014) 221–22.

opted in. However, the court should always consider this carefully, with regard to the right to a fair trial. In some jurisdictions, it is possible to restrict or completely prohibit the notice to be made through public media.²⁰

3.4. Content of notice

The notice must include information about the commencement of judicial collective redress procedure and its certification by the court. It must be clear from the notice who has filed the application to initiate the proceedings, who is the defendant, who has been appointed a group representative, who is the legal counsel of the group, what type of action is being taken, what is claimed, the notice must define the group, set the time limit for opt-in or opt-out and the method which the concerned entities may use to do so. The possibility of opting in and out of the proceedings should be as simple as possible for the entities concerned, e.g., by means of a prescribed form. There is no need to justify an opt-out.

The notice should also indicate the implications for the entities concerned if they use their right to opt in or out e.g., the question of the binding nature of the decision. The notice should also indicate the person who bears the costs of the proceedings. It is also appropriate to include a link where the entities concerned may find more detailed information, or a contact person, e.g. the legal counsel or representative of the group.²¹ However, all the basic information must be included in the notice.

The notification should be made in a way that is understandable to the entities concerned. If foreigners can be expected to be among the entities concerned, the notice should be made in several languages. The notice should neither encourage nor discourage participation in the group.²² Even if giving the notice is left to the claimant, the court must approve its content and form in advance e.g., US legislation Klonoff 2012, 198.

3.5. Person giving the notice and costs of notice

The notice of a group action may be given either by the claimant or the court. If this obligation is left to the claimant, the text of the notice and the manner in which the claimant intends to give it must be submitted to the court for approval. At the same time, the court must ensure that the notice is really given in this way. For example, in the U.S. specialized companies focus on giving notices of the initiation of class actions.²³ These companies usually also manage settlements.

If the notice is not delivered properly, i.e. it does not reach the persons concerned, it does not have any serious consequences for the entities concerned under the opt-in system. However, in the case of opt-out, they participate in the litigation without their knowledge.

²⁰ For example the French representative action (*action en représentation conjointe*). Pursuant to Article L622-1 Code de la consommation, an association may file a compensatory action where at least two consumers have suffered harm. However, associations may not contact the entities concerned via television, radio, posters or personal letters (Article L622-2 Code de la consommation). Pursuant to Article 452-2 of the Code Monétaire et financier, the presiding judge may, in the case of an action brought by the Association for the Protection of Investments, authorize the entities to be contacted via these channels.

²¹ Anderson and Trask (2014) 226.

²² Klonoff (2012) 198, see also Anderson and Trask (2014) 227.

²³ See e.g. www.notice.com, Hensler (2009) 18.

This does not prevent them from taking an individual legal action, in which the claimant would have to prove that he did not opt out of the collective action for objective reasons.

In exceptional circumstances, it is possible for the court to impose an obligation on the defendant to notify potential persons concerned of the commencement of the group action in the course of its normal activities (referred to in foreign literature as a piggyback notice), unless it is burdensome. Typically, this is a situation where the defendant is a telephone operator who is required by court to deliver the notice by means of the monthly billing statements to its clients. However, the claimant proposing this method should always demonstrate that no other appropriate means of delivering notice is possible.²⁴

The cost of publishing the notice is borne by the person who gives it. The court may ask the claimant for an advance payment.²⁵ The reimbursement of these costs then depends on the outcome of the case.

3.6. Time limits for opt-in and opt-out

As provided in the Recommendation, natural or legal persons claiming to have been harmed in the same mass harm situation should be able to join the claimant party at any time before the judgement is passed or the case is otherwise validly settled, if this does not undermine the sound administration of justice. (Article 23 of the Recommendation). Any member of the claimant party should be free to leave the claimant party at any time before the final judgement is given or the case is otherwise validly settled, subject to the same conditions that apply to withdrawal in individual actions, without being deprived of the possibility to pursue its claims in another form, if this does not undermine the sound administration of justice (Article 22 of the Recommendation). The defendant should be informed about the composition of the claimant party and about any changes therein (Article 24 of the Recommendation).

However, such regulation is not suitable. The persons concerned may wait for the proceedings to be advantageous and opt in, or, conversely, opt out immediately before the decision is made. This, of course, entails the risk that the group action will no longer satisfy the requirements necessary for certification and, in the extreme case, the group would have to be de-certified and thus the entire collective action would be frustrated. On the other hand, if the possibility of leaving the proceedings is limited for a certain period of time, it will *de facto* deprive the members of the group of the right to withdraw the action, which is an immanent part of the right to a fair trial.

Therefore, opting out or opting in should be restricted by a time limit.²⁶ The time limit can be set by a law or a court.²⁷ Another option is also to set a certain statutory limit, with

²⁴ The defendants may naturally oppose this method of delivery. See also Anderson and Trask (2014) 220.

²⁵ In Sweden, the notice is given by court. If appropriate, however, it may impose this obligation on a party to the dispute. In such a case, it is entitled to reimbursement of public expenditure (section 50 of the Group Proceedings Act).

²⁶ Norway has a different regulation. Withdrawal is possible until the judgment is passed [section 35-8 Act Relating to Mediation and Procedure in Civil Disputes (Dispute Act)]. For more details, see below.

²⁷ For example, in Poland this time limit is set by law to be at least 1 month and no more than 3 months (Article 15 of the Act on the Enforcement of Claims in Group Actions, *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym*). In the US, the court usually sets the time limit at 30–60 days. In most cases, it is possible to waive this time limit for serious reasons.

the specific length of the time limit to be set by a court depending on the circumstances of the case. It should be possible to waive the failure to observe the time limit only for serious reasons under statutory conditions.

4. OPT-OUT SYSTEM IN FOREIGN LEGISLATIONS

In the European Union, there has always been a clear tendency towards the opt-in system,²⁸ justified in particular by the potential abuse of collective actions under the opt-out system²⁹ (with the US class action always being presented as a negative model), and also the loser pays principle.³⁰ The Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU) (hereinafter the 'Recommendation') provides for the opt-in system for compensatory collective redress mechanisms (there is no special regulation of injunctive collective redress mechanisms). The claimant party should be formed on the basis of express consent of the natural or legal persons claiming to have incurred damage. However, as in many other cases, the Recommendation provides for the possibility of an exception.³¹ Any exception, whether under a law or a court order, should be duly justified by reasons of sound administration of justice (Article 21 of the Recommendation). This vague concept gives Member States a fairly wide choice between opt-in and opt-out e.g., to ensure effectiveness of group actions.³²

The opt-in system of group proceedings prevails in most European countries. However, the opt-out system is not completely excluded and there are some examples of its application. The opt-out system applies to a greater or lesser extent in Portugal, the Netherlands, Denmark, Norway, Belgium and most recently in the UK. There is also support for the introduction of the opt-out system in Sweden. The main author of the law, P. H. Lindblom, has been pushing for the opt-out system from the outset but finally the opt-in system was enacted in the Swedish Group Proceedings Act (*Lag om grupprättegång*).³³

²⁸ See, for example, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions. Towards a European Horizontal Framework for Collective Redress. COM (2013) 401/2, p. 11–12. Available at: http://ec.europa.eu/justice/civil/files/com_2013_401_en.pdf. However, see also the developments before the Recommendation – Resolution (EP) 02.02.2013 2011/2089 (INI), which suggests that originally there were attempts to introduce the opt-out system, but it was opposed esp. by the business lobby, which led to extensive debates (Stadler 2014, 81).

²⁹ Nevertheless, no relevant studies have been submitted to demonstrate whether these concerns are justified, nor does the experience of European countries indicate that it should lead to this alleged abuse.

³⁰ This is known as the 'English model' of decision-making on reimbursement of legal costs, which is typical for European countries. The 'American model' is the opposite, where the costs are borne by the two parties. Higgins and Zuckerman (2013) 42.

³¹ It is hard to imagine that States that already have an opt-out system in place, or States that have switched to this system because the opt-in system had not proved useful, would transition to the opposite system proposed by the Commission Recommendation. See below for further details.

³² European Law Institute (2014) 38 link 1.

³³ The opt-in system was a last-minute choice due to the legislators' concerns about the undesirable consequences of the U.S. class action system. Caffagi and Micklitz (2007) 30.

4.1. Denmark³⁴

The combination of the opt-in and opt-out system forms the basis of regulation of collective actions in Denmark. Legal regulation of group actions (*Gruppesøgsmål*) is contained in Chapter 23 and (§ 254a–254k) of the Administration of Justice Act (*Retsplejeloven*).

The main system is opt-in. The court determine the time limit within which the persons wishing to opt in must apply. The court may allow opt in even after that time limit if it considers it appropriate, for example in the case of pardonable minor delays.³⁵

However, the court may decide that in a particular case, the members of the group may also include those who do not opt out, i.e. that an opt-out system will be used if it is evident that the opt-in is not suitable for the proceedings. Pursuant to Section 254e(9) of the Administration of Justice Act, two conditions must be met. The claims of the individual persons concerned in the matter are so low that individual litigation is evidently unsuitable for them (less than DKK 2 000),³⁶ due to the administrative burden and possible financial costs being disproportionate to the amount that may be adjudicated. The second condition is that the opt-in system must be unsuitable, especially if the number of persons concerned is high and the administration of the notice and the treatment of the group would require disproportionate expenditure. The number of cases where the opt-out system can be used is therefore small.³⁷ In such a case, the court will determine a time limit for the opt-out. In exceptional cases, the court may allow a party to opt out of the proceedings, even after the time limit. In the case of opt-out litigation, only the Consumer Ombudsman (254c of the Administration of Justice Act) may be appointed as the representative of the group.

The notice of initiation of proceedings [Section 254e(6), (8), (9) of the Administration of Justice Act] is left to the court. The court also chooses the appropriate form. It can be done either individually, in public, or by a combination of both, i.e. an individual notice to the known group members can be complemented by a public notice. The Danish court administration also publishes a list of ongoing group proceedings, with mandatory notice information, including an indication of opt-in or opt-out system and the determination of the time limit for opting in or out of the proceedings.

4.2. Norway³⁸

Collective actions in Norway are regulated under the Act Relating to Mediation and Procedure in Civil Disputes (the Dispute Act) (LOV-2005-06-17-90), effective from 1st of January 2008 [Part VIII. – Special types of procedure, Chapter 35 – Class actions]. Collective actions, like in Denmark, are based on the opt-in system, with the opt-out option.

³⁴ For more detail on the legal regulation of collective judicial redress in Denmark, see, for example Møgelvang-Hansen (2008) link 2 or Werlauf (2009) 202–08 link 3. See also Werlauf (2008) link 4 or Kiurunen, Lindström and Bylov Rath (2012) 186–97.

³⁵ Kiurunen, Lindström, and Bylov Rath (2012) 193.

³⁶ Kiurunen, Lindström and Bylov Rath (2012) 193.

³⁷ Werlauf (2009) 79.

³⁸ For more details on the legal regulation of group actions in Norway, see e.g. Moher (2012) link 5, Bernt-Hamre (n.d.) link 6, Backer (n.d.) link 7 or Kiurunen, Lindström, and Bylov Rath (2012) 229–40.

An opt-in system requires that those, who fall into the group, as defined by a court, and want to opt in, to get registered in the registry kept by the court. The Norwegian legislation is peculiar in that in the event of an opt-in, it may be withdrawn by the group member until judgment is given (Section 35-8 of the Dispute Act). The consent of the defendant is not required. This is an exception to the rule governing other civil actions, with the exception of small claims proceedings. According to this rule, a party may not withdraw its action without giving up its claim, unless the defendant agrees. The aim is to prevent persons from being sued as a mere threat.

The court chooses the opt-out system when the majority of the individual claims are so low that it can be assumed that individual actions will not be brought, and the proceeding does not concern matters that need to be dealt with individually (Section 35-7 of the Dispute Act). In these cases, the opt-out system is therefore more appropriate than the opt-in system. The opt-out system can be chosen even if some claims involve higher amounts and important interests of the persons concerned. It is decisive whether a large majority of claims complies with the opt-out system requirements. The opt-out system is therefore suitable in cases where all claims have the same factual and legal basis, but where the amount of damage may vary. The opt-out system may also be proposed by the claimant, but the decision on the system is up to the court.

It is also possible to change the system. In such a case, the court will determine a new opt-in or opt-out time limit. The court will decide on the form of notice and its content. It is up to the court to ensure that the information on the initiation of proceedings is duly notified to the persons concerned. However, the actual giving of the notice may be left to the group representative. It may also decide that the group representative must pay the costs of the notice. These costs may be reimbursed to the group representative by the other party or group members (Section 35–13 of the Dispute Act).

The notice must include clear information on the purpose of the group action and group proceedings, including the consequences of registration or deregistration as a group member, potential liability for the costs that may arise, the status of the group representative, and the registration deadline.

If a settlement is concluded in opt-out court proceedings, the court must approve the settlement [Section 35–11(3)]. The court may, if necessary, appoint an expert to assist the court in assessing the settlement. The court must ensure that the group members are informed of the settlement and that those who do not wish to be bound by the settlement have the opportunity to leave the group before the settlement becomes final.

In the case of opt-in actions, the court has the same powers as in settling disputes in any other type of litigation. The court seeks to ensure that the settlement does not violate the mandatory provisions of the law and examines whether any of the parties has been coerced to accept it. Even in the case of an opt-in group action, it is important that all group members are informed of this settlement, so that they can decide whether to leave the group if they do not wish to be bound by this settlement. Therefore, the court should ensure that the group members also receive adequate information on the settlement proposal in opt-in group proceedings.

4.3. The Netherlands³⁹

The legislation of collective settlement is specific in that the collective litigation begins when settlement agreement has been concluded between the parties. Collective settlement procedure was enacted in 2005 by the *Wet collectieve afwikkeling van massaschades* (WCAM) the Collective Settlement Act of 23 June 2005, Stb. 340. It was inspired mainly by US legislation.⁴⁰ An important element of this regulation is that it is primarily based on material law and law of obligations not on procedural law.⁴¹ Legal regulation can be found both in the Code of Civil Procedure (Articles 1013–1018 BRv – *Wetboek van Burgerlijke Rechtsvordering*) and in the Civil Code (Articles 7:907–910 BW – *Burgerlijk Wetboek*). Minor amendments were made by the WCAM II Act (Act of 23 June 2013),⁴² which came into force on 1st of July 2013.⁴³

In the case of collective settlement, an opt-out system is applied. If the settlement agreement is considered and declared binding by a court, authorised entities may withdraw from it within a certain time limit after notice [Article 7: 908(2) of the Civil Code]. The agreement is automatically binding on those entities concerned that do not opt out. The main advantage for the obligated party is therefore that the settlement is binding on all the entities concerned, including those that did not participate in the settlement negotiations. If a group member decides to opt-out, the agreement will have no consequences for such a member. They can then litigate individually.

The notice must include the form and time limit of opt-out [Article 1017(3) of the Code of Civil Procedure]. This time limit must be at least three months [Article 7: 908(2) of the Civil Code].⁴⁴ The law also provides for an additional period if the person concerned could not have become aware of its claim at the time of the first notice [Article 7:908(3)].

As mentioned above, the law does not apply to the negotiation phase. Unlike in the American compensatory claims, it is therefore necessary to reach a settlement before filing a court proposal. The court cannot hear a case on the basis of collective settlement provisions unless an agreement is reached. The agreement must be attached to the application for the initiation of proceedings. The application itself must contain a brief description of the agreement.

The application for a declaration of the binding outcome of settlement is then filed by the organization defending the interests of the persons concerned and the entity responsible for the damage caused. Everyone must be represented by a lawyer. The agreement is then reviewed by the Amsterdam Court of Justice. It may be stipulated in the agreement that if a large number of persons leave the group, the parties may withdraw from the agreement under the terms of Article 7:904(4) of the Civil Code.

³⁹ For more details on the legal regulation of collective settlement, see Tzankova and Tjong Tjin Tai (n.d.) link 8. Also Fleming and Kuster (2012) 286–300 or van Rhee and Tzankova (2014) 209–24. Also Tzankova (n.d.) link 9, Werlauf (2013) 182–84, Micklitz and Stadler (2006) 1490–92, Jelsma and Cordewener (2011) 13–20. Also Loos (n.d.) link 10.

⁴⁰ Tzankova and van Rhee (2014) 215.

⁴¹ Werlauf (2013) 183.

⁴² *Staatsblad* (2013) 255.

⁴³ *Staatsblad* (2013) 256.

⁴⁴ In the *Dexia* case, the court extended this time limit to six months.

The entities concerned, i.e., those in whose favour the agreement was made, must be notified. In conventional court proceedings, the parties are notified by registered mail delivered by a postal service provider (Article 272 of the Code of Civil Procedure). Mass redress cases involve a large number of stakeholders and proper notification in this way could be time consuming and costly.⁴⁵ For this reason, the law provides that the parties may be informed by an ordinary letter, unless otherwise decided by the court (Article 1013(5) of the Civil Procedure Code). Additionally, the notice must be published in a newspaper selected by the court, and also elsewhere if so decided by the court e.g., on a website. It is also possible to use e-mail, but only in the case of entities resident in the Netherlands.⁴⁶ The notice must be made as thoroughly as possible.⁴⁷

The notice must clearly indicate that the foundation or association representing consumers may object to the agreement (Article 1014 of the Code of Civil Procedure), because it regards the settlement as unsatisfactory to the interests of consumers.

If the obligated party participates in other compensatory proceedings, which are compensated in the settlement agreement, these proceedings will be suspended on its motion (Article 1015 of the Code of Civil Procedure). The suspension is terminated in the cases under Article 1015(2) of the Code of Civil Procedure. Such cases include situations when proceedings involve compensation for damage which is not included in the collective settlement (Article 1015(2)(a) of the Code of Civil Procedure) and cases where the consumer has decided to withdraw from a collective settlement in accordance with Article 7: 908(2) of the Civil Code (Article 1015(2)(b) of the Code of Civil Procedure).

One of the consequences of submitting an application for a declaration of binding outcome of collective settlement is that the limitation period is suspended (Article 7: 907(5) of the Civil Code). If the agreement is declared binding, the new limitation period commences after the decision on the final amount of damages has been taken.

The legal regulation of collective settlement is used in practice and it is highly effective thanks to the opt-out method.⁴⁸

4.4. Portugal⁴⁹

The Portuguese regulation is contained in the Constitution (Articles 52 and 60) (VII constitutional revision, 2005) and Act No 83/95 Participation and Popular Action Law (*Direito de participação procedimental e de acção popular*). The Portuguese system of collective redress (*acção popular*) is based on the opt-out system (Articles 14 and 15 of the Participation and Popular Action Law). After the initiation of the proceedings, the persons concerned are invited to notify the court within a given period of time whether they wish to

⁴⁵ For example, there were almost 395,000 people concerned in the Dexia case.

⁴⁶ Tzankova and van Rhee (2014) 217.

⁴⁷ See, for example, the Shell case, where 110,000 letters were sent to shareholders in 22 languages across 105 countries and the announcement was also made through 44 newspapers around the world. Hermans and Leuveling Tjeenk (2013) link 11.

⁴⁸ Werlauf (2013) 184. Van Rhee and Tzankova hope that the EU initiative will not obstruct the Dutch legislation by going, for example, for the opt-in system, which is inefficient and often unsuccessful in most of the more conservative EU states. Tzankova and van Rhee (2014) 221–22.

⁴⁹ For more details on the legal regulation in Portugal, see Tortell (2008) link 12, Reis (n.d.) link 13 and Antunes (n.d.) link 14. Also see Cruz Villaca, de Nápoles, and Choussy n.d. and Borges and Baptista (2012), 312–22 link 15.

opt in, whether they agree to be represented by the claimant or whether they opt out. They may do so until the end of the evidence collection phase. If the persons concerned do not do any of the above, they are presumed to agree with the representation. If they do not wish to take part in the proceedings, they must opt out of it.

4.5. United Kingdom⁵⁰

Recently, the opt-out system in group proceedings has been introduced in the UK. It applies to compensatory group proceedings in relation to damage caused by violating the cartel law. This change was brought about by the Consumer Rights Act 2015, which amended the Competition Act 1998 (sections 47B, 47C, 47D). The proceedings fall within the jurisdiction of the Competition Appeal Tribunal (CAT). However, the opt-in system has not been completely abandoned, it depends on the decision of the court which system it will choose [Section 47B(7)(c) of the Competition Act 1998].

The first decision under the new legislation has been adopted recently (on 31 March 2017) in the case of *Dorothy Gibson v Pride Mobility Products Ltd* [2017] CAT 9, 1257/7/7/16. However, there was no certification in this case. J. Balarin noted that the court used interesting arguments to deal with the objections to the collision between the opt-out system and the defendant's fundamental rights (not the claimant, who was not mentioned in the reasoning of the decision). In the context of the alleged violation of the defendant's legitimate expectations principle (the group proceedings concerned claims which had arisen before the effective date of the group proceedings legislation), the court concluded that the legitimate expectations of the defendant could not have been affected by the introduction of a procedural mechanism that served the more effective enforcement of the existing substantive rights of the claimant(s). Legal protection cannot be granted to the expectations or the idea of the defendant that the injured persons (or part of them) will not enforce their claims arising from the defendant's unlawful conduct. The new system will lead to increased financial costs for the defendant, but this is the result of more effective enforcement of existing rights.⁵¹

4.6. Belgium⁵²

On 1 September 2014, the law of 28 March 2014 enforcing collective consumer rights protection entered into effect in Belgium. This protection is set out in the Code of Economic Law (Code de droit économique) – book XVII Procédures juridictionnelles particulières, Book 2 – De l'action en réparation collective (Articles XVII 35–69).⁵³ Belgian courts, as in

⁵⁰ For more details on the new legal regulation, see Geradin (2015) 21–22. See also Živělová (2016) 49 and Rodger (2015) 258–86.

⁵¹ Balarin (2018) in print.

⁵² For more details on the applicable legal regulation, see Vanhulst (n.d.) link 16 or Boularbah, Van der Bossche (2017) 21–31.

⁵³ Different from these collective redress actions are actions sometimes called collective actions, which are actions by which different persons raise the same claims against one defendant. The court will then join such actions into one proceeding (Article 30 of the Belgian Judicial Code – 10 October 1967 – Code Judiciaire: Des demandes en justice peuvent être traitées comme connexes lorsqu'elles sont liées entre elles par un rapport si étroit qu'il y a intérêt à les instruire et juger en même temps afin d'éviter des solutions qui seraient susceptibles d'être inconciliables si les causes étaient jugées séparément). This avoids mutually incompatible decisions. See also Article 701 of the Code Judiciaire.

England, may (if no agreement is reached)⁵⁴ choose between the opt-in and opt-out systems. The opt-in model is mandatory only in cases of personal injury, non-material damage or when the consumers are not resident in Belgium (Article XVII.38, Section 1(2) and Article XVII.43, Section 2(3) Code of Economic Law).

Five group actions have been brought in Belgium since the effective date of the regulation above. All of them were filed by Test-Achats, a consumer interest organization.⁵⁵ In the case of the Thomas Cook airlines, the court concluded that when choosing a system, it is necessary to consider which of the systems will better protect the interests of consumers. Where the claims of individual persons are obvious, the opt-in system is more appropriate. By contrast, the opt-out system is more practical where consumers may not necessarily be aware of the damage caused to them or their claims are not so obvious. The court also stated that the number of persons concerned and the size of the group are not irrelevant, but they are not in themselves decisive when choosing the suitable system.⁵⁶

Notice of initiation is published in the Belgian Official Gazette and on the website of Federal Public Service Economy, Small and Medium Enterprises (SMEs), Self-employed and Energy (<http://economie.fgov.be/en>). The time limit for opting in or out commences on the date of publication within the time limit set in the notice. It must be set to expire before the end of the mandatory negotiation phase, which lasts from three to six months and commences after the court has ruled on the admissibility of the action, Articles XVII.45–51 of the Code of Economic Law.⁵⁷

5. ADVANTAGES AND DISADVANTAGES OF THE OPT-OUT SYSTEM AND POSSIBLE SOLUTIONS

In addition to individual redress, easier and more accessible redress and lower costs, one of the purposes of collective judicial redress is its preventive and educational function. Existing foreign experience in this context shows that this can only be achieved through the introduction of the opt-out system because only then does the relevant number of persons take part in. The choice of a system has a major impact on the size of the group. In the case of an opt-in system, the participation rate of the group members is lower than that in the opt-out system. This is due to ‘rational apathy’ which the persons concerned display in these cases. This is particularly evident in individual litigations and is one of the reasons why collective actions are introduced into legal systems. However, it turned out to be equally true of group actions based on the opt-in system.⁵⁸ Rational apathy is well demonstrated by the UK case *The consumers association v JJB Sport PLC* 1078/7/9/07 concerning cartels. The number of the persons injured was around 2 million, with the

⁵⁴ The proceedings fall within the jurisdictions of Brussels Court of First Instance and the Brussels Commercial Court as the courts of first instance, and the Brussels Court of Appeal (Article XVII.35, Belgian Code of Economic Law as the appellate court; Article 633 ter, Belgian Judicial Code).

⁵⁵ Information as of May 2017. For specific cases see Boularbah, Van der Bossche (2017) 22.

⁵⁶ Boularbah and Van der Bossche (2017) 25.

⁵⁷ Boularbah and Van der Bossche (2017) 25.

⁵⁸ Apathy is also a problem in the opt-out system. Whenever a default position is given, people tend to make no choice, despite being able to do so Stadler (2014) 83. See also Baart (2013) 489. About the number of members who opted out generally see Willging, quoted from Cottreau (1998) 481. See also Eisenberg and Miller (n.d.) 1–46.

damage reaching about 50 million GBP. The action was filed by Which, a consumer organization, on behalf of 130 consumers; subsequently, about 1,000 other consumers opted in. This accounts for approximately 0.0008% of all those injured.⁵⁹ A similar case occurred in France, where UFC Que Choisir, a consumer organization, filed a compensatory action against three telephone operators. Despite all efforts, it managed to engage only 12,350 consumers, although about 20 million consumers were affected.⁶⁰

These considerations are essentially negligible in the case of injunctive relief; naturally, their importance is growing in connection with compensatory actions. Only this system will fully ensure that the defendant will be liable for the full extent of the damage caused by his conduct⁶¹ and that the action will also act as prevention.⁶² The filing of such an action (even e.g. by a consumer organization) has a wider impact; both for incurred costs and the time spent on the preparation of the action. The proceedings themselves will be used better in relation to the outcome and the proceedings will be effective.⁶³ If the legislators decide for the opt-in system, they should also consider other options to seize the remaining unlawful profits.⁶⁴

The greater the number of persons involved in the proceedings, the lower the risk of those who file a separate individual action. For the defendant, this leads to an almost definitive resolution of the case. This also leads to more frequent settlement in the case of group actions. Settlements are often formulated with the defendant's condition to involve a certain minimum number of persons. The defendant reserves the right to withdraw from the settlement if a certain number of claimants do not opt in or, conversely, if they opt out.

The negatives mentioned in the context of the opt-out system include its inconsistency with the right to a fair trial and the related restriction on the right of disposal of the persons concerned. The principle of due diligence used in private relations and disputes, according to which the remedy must be sought by the subject concerned individually, is to certain extent affected here.

A fundamental component of the right to a fair trial is the right of access to the court. This is not violated by the opt-out system in any way, the affected entities become members of the group automatically. It is evident that the claimant's participation in the proceedings

⁵⁹ An agreement was finally concluded between the defendants and the injured party under which each injured participant received 20 pounds, and other injured persons received 10 pounds if they raised the claim within 12 months.

⁶⁰ Geradin (2015) 16–17.

⁶¹ This is also pointed out by Stadler (2014) 84. If the legislators choose the opt-in system, they should also remember to enact 'skimming off' procedure pursuant to § 10 of the *German Act against Unfair Commercial Practices* and § 33 and 34a of the *German Antitrust Act*.

⁶² Therefore, if the Commission [EU Green Paper SEC (2005) 732, 19 Dec 2005] seeks to ensure that compensatory actions fulfil both preventive and compensatory functions, this can be achieved better under the opt-out model. See Mulheron (2007) 5.

⁶³ See European Law Institute (2014) 38 link 1.

⁶⁴ For example, Germany may serve as a model. Specifically, the Unfair Competition Act (*Gesetz gegen unlauteren Wettbewerb, UWG*) and the Competition Protection Act (*Gesetz gegen Wettbewerbsbeschränkungen, GWB*). § 10 of the UWG governs the right to have profits returned to the State budget by a person who has deliberately committed an unfair-competition act pursuant to § 3 or § 7 and has gained profits for himself at the expense of a larger number of customers. Similarly, in the case of the protection of competition, Articles 34 and 34a govern the entitlement to have the benefit repaid to the State budget by the person who deliberately breached competition law and thereby gained an economic advantage.

(although it is not participation in the true sense, see above) without the participant actively expressing his will to participate in the proceedings and, in particular, the subsequent binding nature of the decision are not common for our concept of the civil procedure. However, if the group members wish to bring individual actions, they may opt out of the proceedings.⁶⁵ Therefore, this also preserves the right to judicial redress on an individual basis.⁶⁶ Naturally, the persons concerned must be sufficiently informed about the initiation of proceedings and the possibility of leaving the group by a notice (see below for further details).

Given that the members of the group do not significantly intervene in the course of the proceedings and all the rights and obligations are assumed by the selected group representative in order to assure the right to a fair trial, it is necessary to enact an increased role of the court, whether at the certification stage (especially with regard to a suitably elected group representative), as well as during the actual proceedings. This will ensure that the rights of the persons concerned are adequately and appropriately defended. This is all the more true in an opt-out procedure where the person concerned may not even be aware of the fact that they have actually become a member of the group during the entire proceedings.⁶⁷ As regards the question of reimbursement of legal costs, it is not possible to transfer any costs to the members of the group in the event of failure in the case.

The opt-out system is also associated with concerns about the abuse of group actions through the filing of unjustified actions. This can be avoided, in particular, by an appropriate regulation of reimbursement of legal costs based on the 'loser pays' model, a proper court assessment at the certification stage (where the court should consider whether the action is justified),⁶⁸ an appropriate choice of financing for the proceedings, possibly also by restricting active legal standing (only to certain representative bodies or public authorities e.g., in Denmark it is the public authority-consumer ombudsman), or by enacting the possibility of the appropriate system to be chosen by a court.

The disadvantage of this system is that individual members of the group are not identified, i.e., the exact scope of the group members is unknown. This is, of course, very problematic in view of the possible impact on the financial situation of the defendant, especially in the case of entrepreneurs, who have to carefully plan their future costs.⁶⁹

For the same reason, the process of certification of the action as a collective action is more demanding for the court. This is especially true when assessing 'numerosity', i.e. the

⁶⁵ E. Werlauf noted the opt-out system in many cases facilitates and supports the right of access to court. Werlauf (2013) 177.

⁶⁶ In *Lithgow and Others v The United Kingdom* (Application no. 9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; 9405/81), the ECHR stated the following: The right of access to the courts secured by Article 6 para. 1 (art. 6-1) is not absolute but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired.

⁶⁷ It is also possible that the members of the group will be divided into two groups, with the corresponding level of rights and obligations, namely into those who have expressed the will to participate by actively opting in, and the others, i.e. those who did not opt out from the proceedings.

⁶⁸ On the other hand, however, some believe that it is not an anti-abuse safeguard; in the event of certification, it forces the defendant to a settlement. Hodges (2008) 119.

⁶⁹ See Falla (2012).

requirement that the number of members of the group is so high that the participation of all the members of the group is too difficult and ‘superiority’, i.e. an assessment whether collective action is the most appropriate form of adjudicating the claims.

A decision in a group action is binding on all members of the group. The opt-out system makes it difficult to identify the members of the group in the operative part; the decision must also expressly state who has opted out of the action. This may be quite unsuitable in the case of certain sensitive issues.⁷⁰ It is also difficult to quantify the damage if it is not clear who is an injured person and then the actual distribution of the final amount. On the other hand, opt-in makes it possible to specify the particular persons concerned and their claims. The opt-out system is thus particularly suitable for injunctive claims or in two-phase proceedings. The first phase takes place in the form of a collective litigation, and the second phase involves separate compensatory actions.

The abuse of the group litigation is also associated with the issue of settlement.⁷¹ The defendant, for fear of possible negative consequences of the proceedings, often prefers to settle, even in the case of blackmail actions, in order to avoid damaging his reputation. However, the settlement may not be advantageous even for all the injured parties. Most of the persons concerned do not participate in the conclusion of the agreement and do not affect its final form.

To protect all the parties involved, the court should be given the power not to approve the settlement not only if it is contrary to substantive law but also if it does not comply with other statutory requirements.⁷² The settlement has to be fair, reasonable and adequate. In this context, the Recommendation points to the fact that the legality of the binding outcome of a collective settlement should be verified by courts, taking into consideration the appropriate protection of interests and rights of all parties involved (Article 28 of the Recommendation). Even in the case of the examination of the agreement envisaged by the Recommendation, the court will not merely examine the legality as known from the settlement regulation in the Czech Republic. By approving the settlement, both the Recommendation and international legislation refer to the ‘declaration of the binding outcome of settlement’, Czech law uses the term ‘approval of settlement’, the court must verify not only its legality but also whether it meets the above criteria. However, it is naturally impossible to require the court to reject a settlement only because it does not provide full compensation to the injured persons because it is the result of a negotiation.⁷³ To prevent the settlement from being disadvantageous for the particular persons concerned, they should have the possibility to opt out at this stage,⁷⁴ or not to accept the settlement.⁷⁵

⁷⁰ See Werlauf (2013) 176.

⁷¹ See also Werlauf (2013) 184.

⁷² A sophisticated system of mass settlement can be found primarily in the Dutch legislation. See below for further details.

⁷³ Krans (2014) 299. On the other hand, however, some authors point out that, under the settlement, the parties concerned are often given higher amounts than they would have obtained in individual litigations. See Szalai (2014) 84–85.

⁷⁴ This is not possible e.g. in Portugal, where the person concerned may opt out only once the presentation of evidence is concluded (Article 15, Law 83/95, of 31 August – *Law of Popular Action*).

⁷⁵ An opt-in system is de facto applied to settlement under Polish law. Withdrawal, waiver or partial waiver of claims or settlement requires the consent of an absolute majority of the members of the group (Article 19 of the Act on the Enforcement of Claims in Group Actions, *Ustawa o dochodzeniu roszczeń w postępowaniu grupowym*).

Opt-out systems are also criticised for high proceedings costs but such an argument is rather unfounded, or would at least deserve an empirical verification.⁷⁶ The opt-out system may also cause difficulties in financing the proceedings. According to Article 14 of the Recommendation, the claimant party should be required to declare to the court the origin of the funds that it is going to use to support the legal action. Assessing sufficient funding may be part of the conditions for certification of the proceedings. The uncertain size of the group may discourage third-party litigation funding, especially if it is the type of funding where the reward of the financial provider depends on the total adjudicated amount.⁷⁷ On the other hand, the adjudicated amount can be expected to be higher than that in opt-in litigation.

6. THE CURRENT STATE OF LEGAL REGULATION IN THE CZECH REPUBLIC

The collective redress mechanism is almost absent in the Czech Republic. Certain features of representative proceedings can be found only in special laws. These laws grant the designated entities (representatives) legal standing to initiate certain proceedings; the entities concerned are not parties to these proceedings.⁷⁸ The proceedings are conducted as conventional adversarial finding proceedings, without any differences.

Legal regulation contained in Act No 99/1963 Sb., the Code of Civil Procedure [Section 83(2), Section 159a(2)], sometimes referred to as a collective action, does not have any of the elements of collective judicial proceedings. In the cases described there, these are classic adversarial finding proceedings, with a specific regulation of *lis pendens* and *res judicata*. Here, the initiation of proceedings precludes other judicial proceedings being conducted against the same defendant following actions brought by other claimants that seek the same claims arising from the same conduct or situation. This means that if a person concerned brings an action, the others may not initiate proceedings themselves or participate in these ongoing proceedings. However, the decision is binding on them. This regulation is likely to prevent large numbers of proceedings, thereby avoiding different decisions in similar cases. However, it *de facto* prevents the parties concerned to have access to court and is thus in breach of the right to a fair trial. These persons concerned may only participate in the proceedings as interveners. Often, however, they will not even become aware of the initiation of such proceedings. Although the decision is binding on them, they may not even file a motion to initiate the enforcement proceedings if the obligor fails to provide performance voluntarily.

The current absence of legal regulation governing collective redress for individuals is no longer sustainable. This is also acknowledged by the Ministry of Justice, which is currently working on a draft of the Collective Redress Act.

⁷⁶ For more details, see Delatre (2011) 49–51. Increased costs are associated with group actions in general, regardless of whether they are based on the opt-out or opt-in. Response to the alleged increased costs of this type of group action in the White Paper Impact Study ‘Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios’ DG COMP/2006/A3/012.

⁷⁷ For more details on litigation funding, see Hamuěáková (2016) 127–44.

⁷⁸ For more details on representative proceedings in the Czech legislation, see Petrov Kriváěková and Hamuěáková (2016) 51–60.

Immediately after choosing the type of collective judicial proceedings (representative, group or other), it is crucial to choose the system on which the legal regulation of collective proceedings should be based, i.e. whether on the opt-in system where the entities concerned become group members by opting in, or the opt-out system, where they become group members automatically and if they do not wish to become involved in the proceedings, they must opt out.

The Czech Ministry of Justice considers the opt-out system as the predominant model, with the option of introduction of courts discretion to choose the application of opt-in model under certain conditions. This option is considered in particular for the cases with the high value of claims and claims of a relatively small group of litigants, where the opt-out regime would not be the most appropriate and rational way to manage the procedure. The basic criterion for choosing the proper model should be the plea of the plaintiff, i.e. whether he would propose opt-in or opt-out system, and the value of individual claims. However, the court would also take into account the other circumstances of the case, in particular whether each of the members of the group would eventually start proceedings individually, whether the group is sufficiently identifiable etc. The examples of those decisive criteria will be included into the text of future law on collective proceedings.⁷⁹

7. CONCLUSIONS

The choice of the system depends, in particular, on what the legislators think the purpose of group actions should be. The primary purpose will naturally always be the protection of the individual rights of the persons concerned. In the case of collective court proceedings, the purpose is also easier administration of such proceedings, lower costs and avoidance of different decisions in similar cases. If the preventive effect of legal regulation is to be added to the mix, the opt-out system is clearly more appropriate with regard to the involvement of a larger number of persons.

After all, this is evidenced by experience from European countries. Examples include the United Kingdom, which has switched from opt-in to opt-out for compensatory group proceedings concerning damage caused by cartel law violation. However, the opt-in system has also been retained, depending on the court's choice of system. Likewise, Belgium has a combined system. However, here the opt-in model is mandatory in certain cases. Although the Danish regulation of collective actions prefers the opt-in system, the court may decide that in a particular case, group members will also include those who do not opt out i.e., that an opt-out system will be used if it is evident that the opt-in is not suitable for the proceedings. The regulation of collective actions in Norway is similar. The opt-out system is the main system of collective proceedings in Portugal, and also in the Netherlands in the case of collective settlement. If the settlement agreement is considered and declared binding by a court, authorised entities may withdraw from it within a certain time limit after notice.

In all these countries, the opt-out system has proven to be highly effective and, in combination with sufficient safeguards, it does not lead to excessive unjustified use of collective actions. The concerns regarding abuse of collective actions were one of the main

⁷⁹ The draft version of the proposal on law on collective actions is available at: https://apps.odok.cz/veklep-detail?p_p_id=material_WAR_odokkpl&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&p_p_col_id=column-1&p_p_col_count=3&_material_WAR_odokkpl_pid=ALBSARKE8ZPJ&tab=detail.

reasons for rejecting the opt-out system. The instruments to prevent the abuse of the opt-out system and to limit its disadvantages include in particular the active role of the court throughout the proceedings (possible choice of opt-out, certification, confirmation of a suitable group representative, assessment of settlement), possible limitation of active legal standing, appropriate litigation funding to prevent the abuse of collective actions, double opt-out, proper informing of the persons concerned (about the initiation of proceedings and during the proceedings as a whole), enacting the principle of successful outcome governing the reimbursement of costs, and others, e.g., prohibition of discovery, prohibition of punitive damages, protection against conflicts of interests, etc. On the other hand, however, the legislation cannot be too restrictive in order not to minimize the number of collective actions filed.

If opt-in is chosen as the only group action model, rational apathy of the persons concerned could cause group proceedings not to be used. Therefore, if the opt-in model is to be chosen as the sole model of a group proceedings, it is necessary to enact mechanisms that support the use of collective proceedings (court fees, proceeding financing). A combination of both systems may also be appropriate, with the choice being left to the will of the participants or the court. This may, however, impinge on the predictability of the court procedure. There are numerous examples from European countries, which may serve as inspiration. However, the above clearly shows that concerns about the opt-out system are mostly unfounded.

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