Csongor István Nagy, Collective Actions in Europe. A Comparative, Economic and Transsystemic Analysis (Book Review)

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Csongor István Nagy not only practices as a lawyer, teaches as a senior lecturer and acts as the member of the Permanent Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, but also engages actively in research. He is a guest lecturer of several universities and earlier he was a guest researcher in numerous renowned European universities. He was also a guest researcher in the US and Australia. Although his main field of research is private international law, he is also devoted to competition law. He has authored numerous individual works in this field, such as the well-known Handbook on Cartel Law.

Prior to *Collective Actions in Europe*, the writer did not publish an entire book on collective actions, but he had a large number of publications and delivered a lot of lectures in the past 10 years, which dealt with the topic of collective actions. Already from the earliest of his works, it was clear that he was interested in the European possibilities of collective actions and how the US model, which is most preferred by the writer, could be applied to the European system. In one of his lectures held in Florida in 2016, he referred to collective redress as the 'American cowboy'. This book fits smoothly into the writer's professional oeuvre, since the book is an important step in the writer's work on collective actions.

A great many publications present the main features of single countries' collective action systems. Such works, however, which undertake to compare the different systems, are rare even amongst English language publications. A comparative volume was published in 2019 in relation to the V4 states analyzing the field of collective actions,[1] focusing on the Central European region and describing the practice of the V4 countries based on the experiences gleaned from the current system of consumer protection and environmental damages. It should be noted that that book failed to adequately capture the Hungarian practice, because it neglected to mention the Hungarian Competition Authority's (GVH) practice of compensation, while it mentioned such practice of the Polish

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1 Rita Simon & Hana Müllerová (eds.), *Efficient Collective Redress Mechanisms in Visegrad 4 Countries: An Achievable Target?* Institute of State and Law of the Czech Academy of Sciences, Prague, 2019.

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Competition Authority. Compared to that book, *Collective Actions in Europe* intends to take a broader, analytical perspective on how Europe – or more precisely, different Member States of the EU – implemented collective actions. The book also describes the greatest dogmatic concerns that emerged in relation to collective actions in European, which led to the elaboration of different system on this side of the Atlantic.

Pro actione collectiva[2] should also be mentioned amongst the Hungarian publications. As far as its topic is concerned, it may also have inspired Csongor Nagy to supplement the existing, shorter studies and lectures in the field of collective actions with a broader, foreign language study, making the knowledge and experiences gathered available not only to the domestic, but also the international audience.

According to the author, the basic problem is that the classic litigation system was grounded on the premise that parties to the litigation are equal both in terms of financial potential and abilities, they have unlimited time and resources to present their case. The reality, however, is different in the 21st century. Modern age is characterized by standardized contracts and standard cases. Collective actions introduce exactly this feature into procedural law.[3]

The 1966 introduction of the collective redress mechanism brought about a paradigm shift in US law of civil procedures (as the author puts it: a "Copernican turn"):[4] Before the introduction of the collective redress systems, the procedure had been organized around the claim. Since the introduction of class actions, claims have been organized around the procedure. The author believes that there is a need for collective action systems because they are cost-efficient (*e.g.* one witness will be heard once, collecting evidence will have to be done once only). Without this, many people would not even consider enforcing their rights, *e.g.* because of the small value of the claim.[5] Yet, 11 out of 27 Member States have yet to introduce a collective redress system.[6]

It has become evident that collective redress is a divisive topic amongst legal practitioners not only on the level of Member States, but also on the level of European legislation. In the EU, the proposal for introducing an opt-out system was withdrawn in 2009 after a public consultation. In 2013, a non-binding recommendation[7] suggested the introduction of an opt-in system. In 2018, a proposal for a directive[8] was published in the field of consumer protection, which

2 Sándor Udvary, *Pro actione collectiva – a komplex perlekedés amerikai eszközei, különösen a class action összehasonlító vizsgálata az intézmény magyarországi recepciója céljából*, Patrocinium, Budapest, 2015.

3 Csongor István Nagy, *Collective Actions in Europe. A Comparative, Economic and Transsystemic Analysis,* Springer, 2019, p. 33.

4 Id. p. 2.

5 Id. pp. 114-116.

6 Id. p. 75.

7 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.

8 Proposal for a Directive on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC.

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would substitute the 2009/22/EK directive.[9] This proposal did not argue for either the opt-in or the opt-out system, but – as the author also mentions in his book – its main advantage is beyond doubt that upon the proposal's acceptance, the Member States would be obliged to introduce one of the systems for consumer protection cases.[10]

Even if the preconditions of bringing a collective action is similar in Europe and in the US (*e.g.* a determined large number of injured parties and a jointly suffered damage is required to bring an action), there are differences between the legal practitioners' thinking about the collective actions. The book demonstrates that the many criticisms voiced against the opt-out system by European practitioners, be it constitutional concerns (acting without authorization, violation of the right of self-determination) or a criticism stemming from legal traditions (the rigid distinction between public and private law enforcement), are not real threats, because the 'only benefits'[11] principle ensures that the aggrieved party shall not suffer any disadvantage in the bearing of costs and through the *res judicata* effect of the judgment. The author takes a clear stance asserting that the opt-out system provides a better solution for mass complaints than the opt-in system, *e.g.* through decreasing organizational costs (as there is no need to collect all of the aggrieved parties).

The author elaborates that the crucial question in the regulation of collective mechanisms is no longer whether an opt-in or an opt-out system should prevail, but rather that the financing of litigation should be duly solved. In spite of the fact that one of the most important stimulating factors in the US system is the contingency fee, European legal systems still refuse it.[12] In the US, there are several other factors besides contingency fees which induce collective actions, such as the rule on punitive damages, treble damages, extensive pre-trial discovery and the rule of one-way cost-shifting instead of the European 'loser pays' principle.

The criticism geared towards the US class action system is frequently voiced against the European system as well. The author cites these criticisms and refutes them at the same time. For instance, regarding the fear of a litigation boom, the

9 This directive made it possible for certain organizations using the opt-out system to bring a class action in consumer protection cases aiming for non-pecuniary damages (statement of infringement).

10 Nagy 2019, p. 3.

11 In case of a collective action, the group members may only enjoy benefits of the action.

12 The Code of Conduct for European Lawyers of the Council of Bars and Law Societies of Europe finds contingency fee agreements unethical unless it "is in accordance with an officially approved fee scale or under the control of a competent authority having jurisdiction over the lawyer." (Code of Conduct, Section 3.3.) In spite of this, in 2008 the Spanish Supreme Court stated that the Spanish Bar Association's ban on contingency fees is restrictive of competition, therefore it annulled it. Nagy 2019, p. 48.

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author refutes the argument with numerical data,[13] while the argument about the blackmailing potential of group representatives in achieving illegitimate settlements with the defendants is rebuked by describing a logical fallacy.[14] Another criticism against the US system is that it is not the aggrieved parties, but the proceeding law firms that are perceived to be the real winners of class actions. Unfortunately, this perception is also supported by a British study released in 2020.[15]

In my opinion, the real conclusion of the book is that the European legislators found solution for their doubts concerning the collective redress systems by restricting and prohibiting those institutions (*e.g.* lack of contingency fees), which would be the most important incentives for the functioning of the mechanism. Meanwhile, they failed to provide alternative means to substitute these incentives. As a result, collective redress mechanisms are deficient in the European legislation.

This view is supported by results of the opt-out enforcement tool which is available to the GVH: collective action.[16] Its rules have been part of competition law since 1996 and its provisions served as model for the general rules of collective actions of the new Code of Civil Procedure. In practice, however, this institution does not work successfully, because the judicial procedure is lengthy and its outcome is uncertain because of a vast number of questions, some of which stem from the procedural aspects of the very institution. The expectations of the courts are also unclear, because for instance, the court stated that the GVH cannot ask for the statement of invalidity of individual contracts. Due to the uncertainty and possible differences between the amounts of damages awarded,

13 Between 1996 and 2019 there was only one occasion, when pecuniary damages were awarded in Hungary. In Italy from 2007 until 2016, altogether 58 class actions were initiated, but a large part of it was not accepted by court, and a large number of them are still pending. In Germany since 2018, class actions were started in 3 cases, one of which was submitted in connection with the Volkswagen Diesel scandal, on the very day when the class action regulation entered into force. Id. pp. 79-84.

14 The author describes that studies have shown a positive correlation between eating ice cream and shark attacks. When more ice creams are sold, there are also more shark attacks, and *vice versa*. Could there be a correlation? Would the conclusion be that shark attacks can be avoided if no ice creams are eaten? Obviously, both the number of ice creams eaten, and the number of shark attacks increase in the summer, as more people swim in the sea. The author came to the conclusion that correlation does not automatically mean a cause and effect relationship. Therefore, the correlation between abusive practices (forcing illegitimate settlements) and class actions is nothing more than an optical illusion. Id. p. 41.

15 A study was carried out with 1000 British participants in 2020 in connection with collective redress mechanisms. The study clearly showed that *(i)* people instinctively refuse to trust collective actions: a former, Ofcom study showed that 71% of the participants trust television news in general. The British study showed of those people, who were questioned only 34% trusted television news and 17% trusted television advertisements promoting collective action mechanisms. This means that the trust in collective redress mechanisms is well below average. *(ii)* Law firms and sponsors of collective actions were perceived to be the real winners of collective actions by 61% of the participants questioned. Class Action Report 2020 at https://portland-communications.com/publications/class-action-report-2020/.

16 Act No. LVII of 1996 on the prohibition of unfair and restrictive market practices (competition law), Chapter XIII/A.

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the GVH usually asks the court to establish the illegality of the company's action with a general scope covering all consumers concerned. The consumers would have to bring a separate action to enforce their specific damages against the company, even though the consumers certainly would not go to court for this, since those who suffered harm are considered to be vulnerable in most of the cases.

Therefore, the GVH has decided to encourage the parties to the proceedings to give compensation to the damaged parties in return for a fine reduction as another solution instead of class actions. The GVH will be more open to accept a commitment if it contains a compensatory element. The GVH also encourages companies to compensate the aggrieved parties through the reduction of fines (the full compensation given to the consumers concerned can be deducted from the sum of the fine, which leads to a partial fine reduction). In 2019, compensation was offered in a sum of altogether 601 million HUF by parties to the proceedings (Hungarian Telekom offered in different cases 250 and 1 million HUF, 4Life Direct Kft. and Red Sands Limited offered 100 million HUF, Wizz Air Hungary Kft. offered 250 million HUF.) Other clients (Tesco, OTP, Vodafone) had offered the compensation of consumers in a value exceeding several ten millions of HUFs in the years preceding 2019.

On the one hand, I would recommend the book to lawyers and law students who are interested in the civil procedures' collective action part, who would like to learn more about the different systems' (opt-in and opt-out systems[17]) features. I would also recommend the book to those who want to understand why European legal thinking rejects the class action system which works properly in the US, how the doubts can be refuted and what the author's proposals are to make this legal institution efficient. The book can also be of great value to academics, PhD students and undergraduate students writing a thesis.

17 In the opt-out system, the group representative of the aggrieved parties may bring an action without the explicit consent of the people represented and the group members can leave the group (and the procedure) by way of on an explicit declaration. In the opt-in system the group representative may act only on behalf of those members who gave explicit authorization for the procedure.