

# PETERKA PARTNERS

THE CEE LAW FIRM

*Class actions, as of yet not included in the procedural system, may well be introduced in the Czech Republic to enable claimants' groups the use of collective proceedings in order to assert their claims efficiently against a respondent.*

## WILL CLASS ACTIONS BE INTRODUCED IN THE CZECH REPUBLIC?

### Introduction

At the moment, Czech law does not allow for merging identical or similar claims of a larger circle of persons into one collective claim but requires that each claim be individually determined and substantiated, and, in general, Czech law does not allow the concept of collective reparation. Therefore, and although there are certain elements of Czech procedural law that show some aspects of class actions<sup>1</sup>, the concept of true class action does not exist in the Czech Republic. This may be, however, changed in the near future as there is political will to introduce class action into the Czech legal system and the proposal for this introduction has already been published ("[Class Actions Proposal](#)").

At the end of the last four-year term of the Chamber of Deputies of the Czech Republic, in September 2017, the Minister of Justice (Mr. Robert Pelikán from the political party ANO 2011) presented a proposal to introduce class actions into Czech law. The introduction of class actions was also part of the political manifesto of ANO 2011, which won election into the Chamber of Deputies held in October 2017 with 29.64% of the popular vote. It is thus probable that work on the introduction of class actions into the Czech legal system will continue, and if the proposal is approved by Government, the Ministry of Justice will proceed to draw up a draft bill before the end of 2018.

The context for class actions may result from the European Union Recommendation which recommends the introduction of class actions as a means to protect consumers' rights<sup>2</sup>, or from the decision of the Czech Constitutional Court stating that the Czech procedural system lacks the concept of class action which has negative implications on the ability to deal correctly with the reimbursement of court fees<sup>3</sup>. Still, however, the Class Actions Proposal gives the impression of going beyond such inspiration. As it was criticized in certain media reports, the Class Actions Proposal reads in its introductory section rather as a manifesto on class conflict than as a serious legislative proposal. The need for the introduction of class actions is presented as the result of the Industrial Revolution and its consequences, in particular the fact that the production of goods for consumers became the role of big corporations, this resulting in the concentration of profit in the hands of the few. In such situation, the corporations are not forced to produce their goods with a sufficient quality and rely on the unwillingness of the consumer to file lawsuits for minor claims (known as "rational apathy"). This can, however, change if there are a number of consumers with small

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<sup>1</sup> The elements of class actions are reserved for claims seeking abstention from certain actions (*actio negatoria*), under s83 of Czech Civil Procedure Code, or under s25 and s26 of the Consumer Protection Act transposing Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests.

<sup>2</sup> 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).

<sup>3</sup> Czech Constitutional Court Decision ref. No. IV. ÚS 529/16 dated 17. 5. 2016.

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claims against one big corporation with simplified proceedings. As examples are presented Dieselgate, charges of phone operators, bank fees, different quality of food in different Member States of the EU, etc.<sup>4</sup>

In order to improve the situation of consumers<sup>5</sup> as well as any weaker party (including companies), the Ministry of Justice decided to prepare a proposal on the introduction of class actions. For formulating the principles of the class actions regulation, the Ministry of Justice took inspiration in the regulation of United States class actions. Therefore, not only would class actions as such be a completely new and untested concept in Czech procedural law, but it would be also based on a common law concept, which is by definition different from the continental system on which Czech law is based. The text below describes the most essential parts of the proposed legislation on class actions.

## **Principles of the Class Actions Proposal**

Under the Class Actions Proposal, collective redress proceedings would be available to the widest range of private law claims and would entitle both consumers and companies to seek interlocutory injunction or claim damages.

### (i) Opening the proceedings

Admissibility of class actions will be subject to a test performed by a court during certification proceedings. Only claims with a specific characteristic, such as a sufficient number of claims, similarity of claims and their certain substantiation may be approved in certification proceedings and result in the phase of class action proceedings.

The prospective claimants (or members of the claimants group) will be determined based on the satisfaction of certain criteria, such as place of residence.

### (ii) Parties to the proceedings – Opt-out mechanism

The determined members of the claimants group will be registered in a specific registry with open access without any need of their explicit consent; they will have the opportunity to become aware of their involvement by checking the register. Those members unwilling to take part in the collective proceedings may decide to opt-out. After opting out, the members concerned may file individual claims against the respondent and the decision in class action proceedings is not binding for a member that opted out of the claimants group. The system for opt-out, in connection with the fact that only the legal representative of the claimants group enjoys full procedural rights, raises

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<sup>4</sup> As motivation for the introduction of class actions, the Class Actions Proposal quotes objections of consumers' associations against the current mechanism for consumers' procedural protection, focused on the asserted inefficiency of refrain petitions (*actio negatoria*) resulting from the fact that the respondents often change their conduct in order to compromise the success of the refrain petition's relief sought.

<sup>5</sup> It should be noted that at the moment, the rights of consumers in the Czech Republic as well as other Member States of the EU are well protected and procedural law makes no difference. Consumers are protected in a way that their forum is guaranteed (under the Brussels Ibis Regulation); since 2017, consumers cannot enter into arbitral agreements, consumers cannot enter into agreement on the choice of court (prorogation clauses). A consumer may file an individual action and sue any corporation in its jurisdiction (provided that the corporation is focused on the respective territory, which shall usually be the case). Concerning the quality of products, it must be emphasized that there is a two-year warranty period provided by law. EU law itself imposes enormous regulation on consumer safety.

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THE CEE LAW FIRM

concerns due to the risk of infringement of the constitutionally-protected right of access to courts. The Ministry of Justice negated this concern by stating that the opt-out mechanism only reverses the principle of “silence does not mean consent” to the principle of “silence means consent”, which by itself is already introduced in Czech procedural law (such as decision by consent<sup>6</sup>).

## (iii) Specialized courts

The class action disputes should be dealt with by specialized courts or specialized departments of courts. The details will be specified in the draft bill on class actions.

## (iv) Financing of the dispute

As a rule, the dispute shall be financed by the attorney leading the case, that is, the legal representative of the claimants group. The legal representative thus pays all court fees and if the case is lost, this legal representative must reimburse the costs of the respondent. In a winning scenario, the attorney will be paid from the collected claims of the claimants group by a certain percentage. The distribution of the collected claims will be supervised by the court. Also, the settlement, as resolution of the dispute, will be subject to the court’s approval, which will be allowed to approve settlement only if it is legal and observes the common interest of all claimants.

The financing obligation puts risks on the attorney representing the group. The Class Actions Proposal states that this risk is mitigated if the attorney leads several class actions files, because it is probable that the gains from successful collective litigations will prevail over the losses from unsuccessful ones and the attorney should win sometimes or at least reach a settlement. At any rate, the amounts at stake will be high and the opportunities for insurance remain unclear at the moment.

## Conclusion

In conclusion, the possible introduction of class actions into the Czech legal system is at its outset. The Class Actions Proposal is being viewed by Czech law practitioners and institutions with caution<sup>7</sup> and anticipation. The introduction of class actions is certainly capable of reducing the costs of certain disputes and improving the effectiveness of a group of similar claims. However, as Czech procedural law knows practically only individual actions with a claimant’s obligation to prove and substantiate every claim, it is hardly imaginable how exactly the courts (although specialized) will deal with a group of although similar still not identical claims of different persons. Such procedural detail, burden of proof, the level of proving the claim, etc., are not yet clear and will have to be more specified in the draft bill.

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<sup>6</sup> It should be emphasized that decision by consent is strictly regulated and represents an exception.

<sup>7</sup> For example, in its opinion dated 18 October 2017 to the Class Actions Proposal, the Confederation of Industry of the Czech Republic, presented a rather negative opinion on the Proposal, emphasizing especially the risk that class actions will be used as a method to pressure corporations.