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Collective litigation tools in the Hungarian legal system

1. Introduction

Collective litigation tools are not result of historical development in Hungary, they were introduced to the legal system due to external influence: first by reason of the European Union's activity on consumer protection,[1] then – besides the continuing European interest[2] – due to theoretical work of civil proceduralists.[3]

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[1] Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests (This directive was effective as of the access of Hungary to the European Union on May 1, 2004); Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (currently in force); Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR)

[2] 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 (hereinafter: Recommendation)

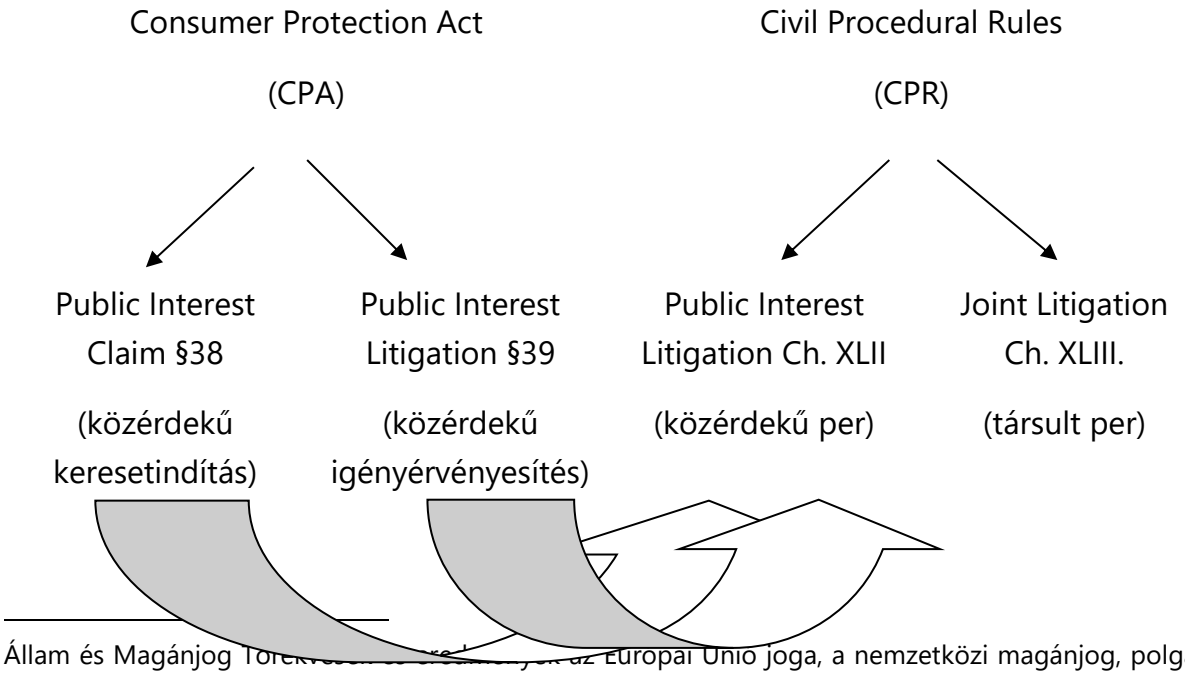
[3] Several examples of scholarly articles and books on the subject: Harsági Viktória: A kollektív igényérvényesítéssel kapcsolatos perek, In: Varga, István (szerk.) A polgári perrendtartás és a kapcsolódó jogszabályok kommentárja: II/III : 263.-633.§ Budapest, Magyarország : HVG-ORAC Lap- és Könyvkiadó Kft., (2018) pp. 2003-2044.; Harsági Viktória: Európai válaszok a kollektív igényérvényesítés szükségességének kérdésére: Főbb európai modellek és a hazai szabályozás kialakítása, Budapest, Magyarország : Pázmány Press (2018) , 158 p.; Harsági Viktória: Kollektív igényérvényesítés Belgiumban, KÖZJEGYZŐK KÖZLÖNYE 2017 : 5 pp. 5-12.; Harsági Viktória: Kollektív igényérvényesítés a német jogban, In: Koltay, András; Darák, Péter (szerk.) Ad Astra Per Aspera : Ünnepi kötet Solt Pál 80. születésnapja alkalmából, Budapest, Magyarország : Pázmány Press, PPKE JÁK, (2017) pp. 311-325.; Harsági Viktória: Deficiencies of collective redress in Hungary and recommendations for codification, in: Roland, Fankhauser; Corinne, Widmer Lüchinger; Rafael, Klinger; Benedikt, Seiler (szerk.) Das Zivilrecht und seine Durchsetzung, Zürich, Svájc : Schulthess Juristische Medien AG, (2016) pp. 201-215. , 15 p.; Harsági Viktória: Gondolatok a kollektív igényérvényesítés kérdéséhez, In: Gellén, Klára; Görög, Márta (szerk.) Lege et Fide : Ünnepi tanulmányok Szabó Imre 65. születésnapjára, Szeged, Magyarország : Pólay Elemér Alapítvány, Iurisperitus Bt., (2016) pp. 185-194. , 10 p.; Harsági Viktória: Quo vadis kollektív igényérvényesítés? In: Barabás, A Tünde; Belovics, Ervin (szerk.) Sapiens in sapientia : Ünnepi kötet Vókó György 70 születésnapja alkalmából, Budapest, Magyarország : Pázmány Press, (2016) pp. 445-458.; Harsági Viktória: A holland kollektív igényérvényesítés rendszere, MAGYAR JOG 2016 : 7-8. pp. 478-484. , 7 p. (2016); Harsági Viktória: A modellválasztás dilemmái a kollektív igényérvényesítés hazai szabályozásánál, ELJÁRÁSJOGI SZEMLE 1 pp. 24-29. , 6 p. (2016); Udvary Sándor: Class action – az ördögtől való? in: Kodifikációs tanulmányok a polgári jog és a polgári eljárásjog témakörében, Novotni Alapítvány, Miskolc, 2011, 262-276.; Udvary Sándor: Az amerikai class action elméleti háttere és jogszabályi konstrukciója, in: Codificatio processualis civilis, Studia in Honorem Németh János II. (Varga István szerk.), ELTE Eötvös Kiadó, Budapest, 2013. 449-488.; Udvary Sándor: On the Theoretical Background of the Class Action, in: Hagyomány és Érték Állam- és jogtudományi tanulmányok a Károli Gáspár Református Egyetem fennállásának 20. évfordulójára, KRE ÁJK, Budapest, 2013, 315-326.; Udvary Sándor: Az állam felelőssége a tömegesen jelentkező igények érvényesítése megkönnyítésében, in:

As of the first part: EU consumer protection legislation was implemented into the Hungarian Act on Consumer Protection (1997:CLV, hereinafter: CPA). Consumers, having encountered harms have different possible remedies in case their harm occurred in great mass. CPA §38 contains a "Public Interest Claim" and §39 a "Public Interest Litigation" clause. Both vehicles are civil cases, to which the general rules of the "Public Interest Litigation" in the Civil Procedure apply.

When the EU showed interest in the general collective litigation tools and produced the Recommendation, it agitated first the above mentioned theoretical interest, but the legislator also observed the need for this tool and considered to introduce it to the then prepared new code on Civil Procedure.[4] Thus, the new Civil Procedural Rules (Act 2016:CXXX, hereinafter: CPR) contain two kinds of mass litigation tools: Chapter XLII contains the Public Interest Litigation, while Chapter XLIII contains Joint Litigation.

2. Overview of the tools

Hungary has a four-pillar system for the collective redress.



Állam és Magánjog Törekvések és eredmények az Európai Unió joga, a nemzetközi magánjog, polgári jog és polgári eljárásjog keresztmetszetében, Pázmány Press Budapest, 2014, 353-360.; Udvary Sándor: A perbeli fő- és mellékszemélyek státusának egyes kérdései – de lege ferenda, in: Németh János – Varga István (szerk.): Egy új polgári perrendtartás alapjai, HVG-ORAC Lap- és Könyvkiadó Kft., Budapest, 2014, 122-171.; Udvary Sándor: Pro Actione Collectiva (habilitation monograph), Patrocínium, Budapest, 2015, 287.; Udvary Sándor: Közérdekű Igényérvényesítés (XLII. fejezet), Társult per (XLIII. fejezet) , in: Wopera Zsuzsa (szerk.): Kommentár a polgári perrendtartásról szóló 2016. évi CXXX. törvényhez, Közlönykiadó, Budapest, 2017. 877-889., 889-908.

[4] The re-codification of the half-century old civil procedure has started in July 2013, in 2015 the concept of the new code on page 18 contained a clear reference to the necessity of creating collective redress tools (<<http://www.kormany.hu/download/f/ca/30000/20150128%20Az%20%C3%BAj%20polg%C3%A1ri%20perrendtart%C3%A1s%20koncepci%C3%B3ja.pdf>>), mentioning the Recommendation and other European models for reference.

a) CPA's Public Interest Claim (§38) is available for the vindication of consumers' claims (including monetary claims) by the Consumers Protection Authority (hereinafter: Authority) or the consumer protection associations (hereinafter: CPAssn.). In this case, the plaintiff (even being different from the actual "owner" of the claim) may ask for the payment of the discoverable claim, or if there is no discoverable damage, the plaintiff may ask for the verification of the fact of harming activity on the side of the business, upon which verdict, the consumer may commence a follow-on procedure to determine her particular damage. Public Interest Claim is litigated according to the CPR's Public Interest Litigation (CPR, Chapter XLII.).[5]

b) CPA's Public Interest Litigation (§39) is available if the enterprise's unlawful activity is harming a wide, personally undeterminable range of consumers, whereas the circumstances of the violation are available. Thus, the public prosecutor and the CPAssn. are entitled to commence a litigation for the protection of the unnamed consumers. The Public Interest Claim's rules are applied to this litigation (hence, CPR-'s Public Interest Rules also apply), but there is a speciality: plaintiff may apply for an injunction to cease the violation and prohibition of continued violation; may as the abolishing of the illegal situation and *in integrum restitutio*. However, this Public Interest Litigation shall not abridge the consumer's right to pursue his private claim.

c) CPR's Public Interest Litigation is a mandatory collective litigation tool, commenced by entitled claimant without real interest (public prosecutor, entitled associations etc.), however, the real holders of the claim may opt out after having reached final verdict by the entitled claimant, so retaining his right to pursue his claim personally (but enjoying the previous procedure's effects). The regulation does not contain specific claims to be pursued, rather regulates the procedural framework of the litigation. However, according to CPR §577 the court must oblige the defendant to pay damages (or take action or refrain from a certain behavior) directly to the known actual holders' of the claims (not the proxy plaintiff, entitled to commence and pursue the claim). Regarding the costs of the Public Interest Litigation, §577 say, that the plaintiff is directly responsible if he loses, and also directly entitled to costs if wins (and in this latter case, award goes to the actual claimants).

[5] A good overview of the practice of CPA tools can be found in: Gelencsér András: Közérdekű igényérvényesítés Magyarországon I. II. – a gyakorlat tükrében, Eljárásjogi Szemle 2016/3. 31-45.; Gelencsér András: Közérdekű igényérvényesítés Magyarországon II. – a gyakorlat tükrében, Eljárásjogi Szemle 2016/4. 25-37.

d) CPR's Joint Litigation is an opt-in procedure, that is available for monetary claims. As rather unusual tool, the parties may join by signing a Joint Litigation Contract (regulated in CPR, even though this is a substantive legal regulation). According to CPR's §586(1)l) the Joint Litigation Contract must contain the compensation in the judgement belongs to the actual plaintiffs in proportion to their respective claim. §590(2) says that the court must entitle those plaintiffs to the appropriate compensation that have properly joined their claim in to the Joint Litigation.

As to my opinion, this four-pillar system seems sufficient to entertain monetary damages, as well as injunction relief for the great numbers of identifiable consumers – on paper. There is also a possibility for injunction in the case of unnamed claimants, in which case they are later entitled to identify themselves, connect their cases to the former procedure, thus linking their claim in the follow-on procedure. However, statistics indicate problems related to the efficiency of mass litigation. As András Gelencsér analyzed some 90 cases related to the CPA collective litigation tools, numbers are quite miniscule. When we turn to the CPR's tools, we have to admit that after more than one year of being effective, not a single one Joint Litigation has been commenced. Reasons shall be discussed below.

3. Features of the litigation tools

3.1. First scrutiny deals with the method of collecting members into the litigants' pool, namely the opt-in or opt-out system. However, we have to mention mandatory system as well (where interested parties are members of the pool by virtue of commencing a procedure in their name and no opt-out exists), which is virtually unknown in the continental systems du to constitutional legal issues, but is recognized in the US class action system.[6]

CPR's Public Interest Litigation is an opt-out system, but with special features. First of all, substantial interest holders, substantial claimants are not parties in the public interest litigation for the purposes of that procedure [CPR §578(2)]. Still, the procedure might have *res iudicata* effect on those substantial claimants, if the plaintiff – according to §574(1) determined the method of verifying the conditions of membership in the claimants' group AND the court in her verdict determined the substantial claimants and the method of verification. To enjoy *res iudicata* effect, further conditions are to be met: the defendant must inform the members of the group about the final verdict [578(1)a)]; inform the substantial claimant that *res iudicata* applies to her case, unless

[6] see: Udvary Sándor: Pro Actione Collectiva, Patrocínium Budapest, 2015, 69. One reason behind creating a mandatory class action is the relatively low costs of organizing a group, so making the class action tool available, see: ibid., 233.

she notifies the defendant in written form that she reserves her right to initiate solo procedure plaintiff [§578(1)b)] AND the substantial claimant fails to give such notification. Since the res iudicata applies by default and may be averted by action on the part of the substantial claimant, the system is opt-out but with a trace of mandatory system, since opt-out is available only after having reached verdict.

CPR's Joint Litigation is a true opt-in system, where the substantial claimants must join their claims in the Joint Litigation Contract to be part of the procedure. So joining the claims will result in res iudicata for the representative facts and legal issues, whereas the claimants must interconnect their actual facts and circumstances within a specified time-limit.

CPA's Public Interest Claim and Public Interest Litigation must follow the CPR's Public Interest Litigation regulations, hence, both vehicles are opt-out, with a mandatory feature, because in both procedures, the procedural plaintiff might commence the procedure without the prior consent of the actual aggrieved party, who has the right to opt-out after having reached verdict.

3.2. For the purposes of the procedure, the identity of the procedural plaintiff is of the utmost importance, hence the EU deals with this issue in the Directive and the Proposal as well. In both cases, entitled organizations are favored to be selected as procedural plaintiff for the application of non-present parties.

In the CPA Public Interest Claim the Consumer Protection Authority and Cons. Prot. Assns are entitled to intitiate such claim; 2009/22/EC Directive specifies the consumer protection assns, that may apply for being enlisted on a European Union Commission List of those organisations, that are entitled to enforce consumer claims (under I Annex of the above-mentioned Directive).

In CPA Public Interest Litigation, (procedural) plaintiff may be public prosecutor and Cons. Prot. Assn. (under the Cons. Prot. Act).

CPR Public interest Litigation may be commenced by entitled organizations to initiate such special procedures. According to Civil Code §6:88(4) the public prosecutor is entitled to initiate a procedure to annul a contract and apply the legal consequences of annulment for the termination of violation of public interest. This is a Public Interest Litigation. Furthermore, unfair terms of contract might be challenged in Public Interest Litigation by the public prosecutor, minister and leader of certain administrative organs, director of the Regional Government Office, Industrial and Commercial Chambers, Consumer Protection Assns. (within their scope of protected consumers' rights) [Civil Code §6:105(1)]. Even certain substantial clauses of a commercial contract

might be challenged in Public Interest Litigation, if the unfair close was part of the terms. This might be challenged by an organization promoting and protecting entrepreneurs' interests [Civil Code §106(1)]. Caveat! Claimants with real interest shall not be parties in the Public Interest Litigation, since CPR §573(2) specifically excludes the substantial interest holders to be a procedural party; still *res iudicata* may apply.

In CPR Joint Litigation, the representative plaintiff must hold actual claim, alongside with her fellow joined claimants. Thus, NGOs, authorities are excluded if it is not their substantial interest that is the subject of the procedure (which is rather unlikely, given the subject-matter limitations on the Joint Litigation, see Scope of the Claim part, infra].

3.3. CPR Public Interest Litigation has no minimal number of group members. Actually, the procedural party, that is who is entitled to initiate the procedure is the only party in procedural meaning, since CPR §573(2) clarifies that "In the Public Interest Litigation those persons that have substantial interest in pursuing the claim, are not party in the litigation." [see: res iudicata, infra]

In the Joint Litigation there is a minimum number of 10 actual substantially interested parties, they have to join their claim with a special procedural vehicle, the joint litigation contract. The procedure shall terminate, if the joint litigation is not admissible due to the less than 10 parties.

3.4. Limitations on scope of the available claims might impair the functioning of any tool. In general, we may assert that the scope of available claims are rather limited on the substantive legal side, but open from the point of view of the available remedy.

CPA Public Interest Claim may be initiated upon the violation of particularly listed rules of the CPA, that is §45/A, which contains a fairly wide list of commercial activities, however, excludes e.g. the problems arising from the existence, validity, legal effects and termination of the contract. §45/A contains those parts of the commercial activities, that can be supervised by the Cons. Prot. Auth., such supervision and validation of the violation is prerequisite to commence CPA Public Interest Claim. Hence, limitation arises in terms of substantive law: only consumers' rights, and only those might be vindicated, which were adjudicated in a prior consumer protection procedure. However, having fulfilled this condition, the Cons. Prot. Auth. and Cons. Prot. Assns. may raise pecuniary claims in the name of unknown consumers as well, hence, this is a fairly wide possibility for the entitled organization.

CPA Public Interest Litigation is available if the enterprise's unlawful activity is harming a wide, personally undeterminable range of consumers, whereas the circumstances of the violation are obtainable. On the one hand, this is a wider possibility than that of

CPA Public Interest Claim, since it is not limited by ACP §45/A subject matter limitation. However, according to our opinion, this tool is restricted to apply consumer protection claims (still, wider range than the prior tool). As for the possible claim, since §38(2)-(6) is applicable to this instrument, this means that a pecuniary claim is available, whereas the procedural plaintiff raises the claim for the actual holders of the right. They will be entitled to vindicate their particular portion after the enforceable verdict is reached.

CPR Public Interest Litigation might be commenced (under these rules) only if (the substantial) law so orders. Hence, challenging e.g. unlawful terms of contract in Public Interest Litigation is based on the direct rule of Civil Code §6:105-106. Consumer Protection cases are allowed by CPA § 38-39, environmental cases are allowed by the Act on Environmental Protection (1995:LIII), where NGOS (§99) are entitled to commence litigation. Also the minister is entitled to act for the enforcement of other's claims, if they fail to litigate and so notify the minister within the statute of limitations period [§103(2)]. Thus, this instrument is rather limited in scope, but as seen before, CPR Public Interest Litigation does not exclude pecuniary compensation to be claimed.

CPR Joint Litigation has limited scope by subject-matter. According to CPR §583(2), consumers' claims, labour law claims and certain environmental claims (personal and monetary damages caused by human activity or inactivity resulting in unforeseeable environmental load). Injunction is not included into the environmental litigation, see the legislative history of §583(2)c). Pecuniary claim is available, indeed, supported by the legislator.

As of several particular types of damages: cartel damages might be enforced by the Hungarian Competition Authority if the competition law violation affects a wide but determinable range of consumers. This is a follow-on procedure which does not affects the rights of the consumers to their separate litigation, but may simplify the procedure, for they only have to verify the damage and the casual link between the unlawful behaviour (determined due to the Competition Authorities procedure). However, this is a special procedure, to which the Public Interest Litigation seemingly does not apply, for there is no direct regulation so telling.

Company law damages are not included in Public Interest Litigation or Joint Litigation. Civil Code contains regulations on the challenging of the decisions of any legal person [§3:35-37], but this is a separate type of litigation.

Note that the Act on Antidiscrimination (2003:CXXV) entitles the Antidiscrimination Authority to commence Public Interest Litigation for the enforcement of claims (even personal claims) arising from the violation of the Act. Besides the Authority, the public prosecutor and the NGOs are entitled to litigate.

3.5. The competence of the authorities and the court is relatively constant. Both CPA tools behave like CPR Public Interest Litigation, that is to be commenced before the Regional Court.

Joint Litigation may be commenced before district or Regional Court, depending on the value of the claim (above 30.000.000.- HUF, appr. 96.000 Euro, the regional court has subject-matter jurisdiction).

3.6. Legal representation is crucial to ensure proper procedure, especially when real (substiantially interested) parties are absent from court.[7] Public Interest Litigation must be commenced before the regional court [CPR § 20(3)ac)], where legal representation by attorney or other entitled person is mandatory [CPR §72].

Although Joint Litigation might be commenced before district court (where legal representation would not be mandatory), by direct regulation of the law, legal representation in Joint Litigation shall be mandatory [CPR §582(2)]. Legal representative must be named in the Joint Litigation Contract.

Agency-problem[8] might arise between absent parties and their representative plaintiff (i) and/or the legal representative (ii). As of the first (i) issue, plaintiff in Public Interest Litigation shall be an authority, public prosecutor or entitled assn., thus the legislator presupposes that the procedural plaintiff shall adequately represent the interests of the substantive claimants. For those cases, where they deem insufficient their plaintiff, they may retain their right to separate litigation with the opt-out. Still the first issue regarding the Joint Litigation: the representative plaintiff shall be named by the joining parties in the contract, where the main limitations on his behaviour shall be also set. (E.g.: entitlement to settlement, approval of settlement). There is a direct regulation requiring the Joint Litigation Contract to contain specific rules on the professional responsibility of the representative plaintiff for performing his vicarious duties [CPR §586(1)g)]. The court though has no power or duty to check the adequate representation by the plaintiff [CPR §586(4)].

As to the second (ii) issue (legal representative agency problem), the procedural plaintiff in Public Interest Litigation or the representative plaintiff in Joint Litigation is entitled and obliged to control the actions of the attorney. Note that due to the rules

[7] In the US federal class action, even the selection of class counsel is a very thorough procedure, in order to ensure adequate representation, as part of constitutional reqirement for the protection of absent parties. see: Udvary Sándor: Pro Actione Collective, Budapest, Parocínium, 2015, 128-137.
[8] ibid.; see also 170.

of attorney-fees, the attorneys have no such direct interest in pursuing the litigation, as they might have in the American-style class action.

3.7. Certification is a supplementary part of the pleading phase in a collective action. Whereas in the ordinary actions proceed after pleading phase into preparatory, then meritorious trial, collective actions generally require a further step mainly at the end of the pleading phase, but certainly before the trial on the merit, this step being the permission to proceed under these special rules. The main reason behind this is the res iudicata effect, which will be binding on absent parties as well, hence, the radiant effects of this single procedure require special attention

CPR Public Interest Litigation – hence, CPA Public Interest Claim and Litigation, which are conducted according to these rules – has no formal certification procedure, but the pleading phase has special requirements. CPR §574(1) requires that the claim form contains – beyond the general elements – reference to the substantive claimants and the method of their verification of their claim, in order to enable the court to oblige the defendant in their claim. Should there be no commonality in the claimants' substantive claim-pool, the procedure must be terminated [CPR §575]. The procedure shall terminate *ex officio* if the method of verification is not uniform or cannot be determined uniformly. Thus, even though there is no formal certification, these two regulations work as a permission phase where the inadmissible non-common claims shall result in the termination of the Public Interest Litigation.

CPR Joint Litigation has a formal certification phase. The representative plaintiff must apply for the certification within his claim [CPR §584]. The application for certification must contain the following elements:

- the joint plaintiffs and the fact of their joining;
- the naming of the representative plaintiff and her substitute;
- the naming and authorization of the legal representative (power of attorney to be enclosed);
- the representative right;
- the representative facts;
- the method that is appropriate to verify the link between the facts and the plaintiffs and the representative right (interconnection);
- reference to the joint litigation contract, whereas the contract must be enclosed.

The claims must be marked by each joined plaintiff respectively. The court is to decide the application after 60 days of the lodging of the claim-form but no later than the closure of the preparatory phase of the procedure [Hungarian civil procedure has three stages: pleading, preparatory phase, trial on the merit.] The order on the certification

must contain the representative right, the representative facts and the method of the verification of interconnection and the deadline for the actual verification. Should the certification be rejected, the procedure shall be terminated, but the claimants may lodge their claim within 30 days of the rejection. The order may be appealed and shall be decided within 30 days, after which the procedure may be continued.

As to the new rules of the Public Interest Litigation or Joint Litigation, no practice exists yet.

3.8. Control over the procedure belongs to the parties, not the court. As to the Public Interest Litigation, the court has no control over the actions of the procedural plaintiff and the technicality-functionality of her action. The only discretion the court has regarding the group's composition is the possibility to terminate the action if the verification method is improper to verify the interconnection – according to the view standpoint of the court.

In CPR Joint Litigation, it is the representative plaintiff, who adequately represents the group. For assuring his duties, the Joint Litigation contract must contain regulations about his responsibility, especially his liability for the incompetent, inefficient litigation. CPR §586(4) directly says that it is not within the court duty to control the compliance with the Joint Litigation Contract.

3.9. Res iudicata estops the parties from new procedure and shall be authoritative between the parties. If the verdict contains obligation, it shall be enforceable.

As to the Public Interest Litigation (which is normative to CPA collective tools, as well), the CPR has rather difficult rules. Res iudicata shall be binding between the defendant and those affected claimants (the procedural plaintiff is not included, only to the amount of the litigation costs), that comply with the following conditions:

- the defendant has sent a written notification of the particular substantial claimant within 30 days of the final verdict;
- this notification contains a 60 days period, within which the plaintiff might maintain his right to pursue separate litigation with direct written notice to the defendant;
- and the claimant failed to make such notice.

If the substantive claimants were not notified by the defendant, they are supposed to maintain their right to pursue separate litigation. This approach is interest-based: according to the expectations of the legislator, the defendant even in a lost case is more interested in finally closing the case than not sending the notice. For the

unwelcome case of no-notice, the right to pursue separate litigation is upheld, thus the defendant might face an avalanche of litigation.

Joint Litigation has special rules as well. CPR §590(2): the court shall oblige the plaintiff to those joint plaintiffs, that have completed the interconnection within the specified deadline properly. The parties having failed to interconnect their case, were real, though absent parties of the case, therefore the rejection by the court shall result in the binding refusal of their claim – according to my opinion.

A judicial verdict in Public Interest Litigation might have *erga omnes* effect, but only if substantial law so regulates. [E.g.: verdict dissolving a marriage has erga omnes effect, Civil Code §4:23(4)]. As to the scope of the Public Interest Litigation, we have no information on such regulation, giving *erga omnes* effect to the Public Interest Litigation verdict. Joint litigation certainly has no *erga omnes* effect, since it is an opt-in procedure, it is binding only to those parties that have properly opted-in by signing the Joint Litigation Contract.

3.10. Regarding the publication of collective procedures: neither the Public Interest Litigation, nor the Joint Litigation rules require mandatory publication of the commencement of the procedure. However, Joint Interest Litigation plaintiff collects the plaintiffs to be joined, thus it is in her interest to widely inform the public about the possibility to join. Thus, The Joint Litigation Contract must contain a method of informing plaintiffs [who already joined, CPR §586(1)k)]. There are publications on forming groups of plaintiffs, but again, there is no mandatory publication in an authentic register.

CPA has special publication rules for the verdict in CPA Public Interest Claim and Litigation. According to CPA §38(6), the court may order in its verdict upon sentencing the responsible enterprise, to publish an announcement on his cost regarding the content of the verdict.

What happens if the harmed person, who opted in, has no interest on the compensation, where this amount goes?

3.11. Since opt-out procedures often involve unidentified consumers, real parties, circumstances may arise, when the enterprise is obligated to pay remedies but no real party applies for the remedy. What happens if the harmed person (either opted in, or was absent party, has no interest on the compensation, where this amount goes?

CPR Public Interest Litigation (again, this applies to CPA tools) is commenced by procedural plaintiff, where absent members might receive compensation. However, they must be identified to be compensated: according to CPR §577(1) the verdict must

contain the "affected claimants and the method of the verification of their connection". So regulates CPR §574(1), when requires a clear interpretation of the conditions to be affected and the method of its verification. Thus, no uninterested party shall be rewarded in the verdict.

In Joint Litigation the absent claimant may only be rewarded if the interconnection of his claim is duly completed [CPR §590(2)]. Thus, it is impossible to oblige mandatory compensation of the plaintiff in connection with an uninterested "party".

4. Costs in collective litigation

4.1. The fee of any court procedure in Hungary (including collective claims) in general is 6% of the value of the claim on first instance, 8% of the appealed value on appeal and 10% of the reviewed value of the case on the Kuria's review. Should more cases and claims be joined, the value must be added, thus the fee rises, up to the maximum fee of 1.500.000.- HUF on first instance, 2.500.000.- HUF on appeal, 3.500.000.- HUF on review. Hence, there is a ceiling on the claim, from which amount the fee shall be flat maximum. For those cases, where there is no determinable value of the case – e.g. injunctions or determining violation of law – the Act on Fees (1991:XCIII) gives a fictive base of fees: 350.000.- HUF at district court, 600.000.- HUF at regional court (where the 6% rule applies, and there is rule for the appeal and review cases, too).

For Public Interest Litigation the fictive base for fee is applicable, if there is no monetary claim. I there is monetary claim, they must be added, up to the point of the fee-ceiling. In Joint Litigation the claims shall be added for determining the fee according to the above-mentioned rules.

4.2. Lawyers' fees are one of the main deterrents in regulating and commencing collective actions. Thus, their regulation must be carefully drawn. Though scholarly opinion signaled that the so-called American rule might encourage the plaintiffs to initiate such procedures,[9] Even though The Act on Attorneys (2017:LXXVIII) regulates the general rule: the attorney fee is subject to total discretion of the parties. However, it has new rule on the contingency fee: it might not exceed the 2/3rd of the total fee of the attorney.

However, there is a difference between the commission-fee of the attorney, which is to be borne by the client to the attorney, but might be reimbursed if the litigation is successful (Loser Pays Principle); and the fee of representation to be determined by the court. Although according to the 32/2003. (VIII. 22.) IM decree (decree of the Minister of Justice), the fee of representation – determined by the court to be borne by the loser

[9] See: Udvary Sándor: Pro Actione Collective, Budapest, Patrocínium, 2015, 245-247.

party – shall be determined in accordance with the commission fee of the attorney, the court might – in her reasoned order – reduce the fee in proportion with the actual work of the attorney. The winning party is also entitled to claim a representation of 5-3-1% of the value of the claim, in this case he waives his right to claim the commission fee in the contract with the attorney. Thus, contingency fee is possible, but limited to the 2/3rd of the whole attorney fee, even this might be reduced, if the court deems it inappropriate with the attorney's real work.

4.2. Third party funding is the continental solution to finance the risks of collective litigation. Even though the European Union's Recommendation refers to third party funding,[10] the Hungarian rules of CPR or CPA does not contain such provisions. Thus, it is within the general liberty of civil actions to fund other person's litigation, but no rule assures the position of this lender. Problem might arise in the cases under the competition law (1996:LVII), where the damaged person might pursue her claim arising from the violation of the act (specially cartel damages, assumed to be 10% of the price). Though this is not a collective litigation *per se*, neither Public Interest Litigation, nor Joint Litigation (for the limited scope does not allow these claims to be joined), the third-party funding might result in the funding by the competitor or his proxy. This should be excluded.

In my scholarly opinion, third party funding might produce little to none difference to the US style entrepreneurial litigation, only the person of the entrepreneur changes. Where in the US, the attorney herself decides over the risks of the commencement of the litigation and provides the funds for the action – naturally with the prospect of profit –, the incentive being her attorney's fees. Excessive fees might be reduced, there is even a civil association which regularly challenges such fees.[11] As we saw above, Hungarian regulations cap the contingency fee of the lawyer in an action. However, no such barriers exist for the – profit-oriented – third party funds, which will employ legal staff for evaluating risks, hence not only the lawyers, but the third-party fund's administrative costs shall be incurred in the litigation process.

5. Evaluation of efficiency, recommendations

Regarding the new rules of the CPR Public Interest Litigation and the Joint Litigation, we have no knowledge of new cases. Thus, we cannot report on the efficiency of those procedures.

[10] Recommendation Art. 14-16.

[11] see the sctivities of Center for Class Action Fairness at https://cei.org/issues/class-action-fairness

As to the recommendations, the main obstacle shall be the cost-factor, where the procedural plaintiff and the representative plaintiff (both to be obliged to pay costs, if lost) shall avoid risks and commence only low number of cases with overwhelming chances, if any. Thus, the numbers of the cases shall be low according to my estimation, unless alleviations be made in the cost system towards the American system (even though EU does not encourage this). For if the loosing procedural party should bear only his costs already incurred (sunk costs), but bearing the other party's costs would be waived, more courageous they could be in commencing collective actions. Notice, that costs would be incurred for the loosing party this way too, only the (mainly entrepreneur) defendant should bear surplus cost in comparison with the familiar looser pays principle. However, this would be moderated because the CPA Public Litigation is limited in subject matter, CPR Public Interest Litigation might be commenced only by entitled plaintiffs, and CPR Joint Litigation must go through a certification phase, hence the impact would be curtailed.

As to the Public Interest Litigation, the NGO-s, public prosecutors, other institutions are rather widely entitled to commence specific litigation. Ombudsmen have no direct entitlement to commence a case in the name of others, but might intervene into judicial procedures, if the protection of constitutional rights so requires. The entitled procedural plaintiffs have a right to claim monetary compensation, too, in the name and for the sake of the substantive plaintiffs. Joint Litigation is for the actual substantive claimants; thus, I see no possibility to enable NGO's to litigate in the name of those others. However, giving a license to intervene into the procedure might be sufficient to produce the expected result.