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Collective Actions in Turkey

As a result of mass production, mass marketing and mass consumption, the number of cases in which mass-produced products or standardized corporate practices harm numerous individuals in similar or identical ways has been growing. Defective products and unfair practices often result in relatively small amounts of damage to individuals and significant amount of damage to the society at large. In the absence of any collective action mechanism, individual claims are too small to justify any enforcement efforts. Collective actions can provide a solution to improve access to justice by gathering many individual claims together into a single lawsuit.

Although class action, one of the most powerful legal tools available in the USA, has instilled a touch of fear in countries with civil law backgrounds,[1] a tendency to use collective redress as a procedural vehicle to facilitate access to justice while empowering individuals against concentrated corporate and governmental power has recently emerged in these countries – at least in Europe. On 11 June 2013, the European Commission issued a non-binding Recommendation 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).[2] This should not be seen as surprising given the fact that several EU Member States and Candidate Countries, such as Turkey for example, had already recognized collective redress even before the adoption of the Recommendation by the European Commission. In 2011, through the introduction of a new mechanism called 'collective action' in Article 113 of the Turkish Code of Civil Procedure (TCCP), the legislature integrated a collective redress mechanism into the Turkish legal order.

The difference between national statutes granting collective rights and the EU Recommendation is that whereas the EU Recommendation provides for explicit rules, which govern standing to bring a representative action, admissibility/certification and funding, in civil law countries like Turkey, most of the national legal provisions seem to leave these vital issues to courts. One of the reasons behind this phenomenon is that the EU Recommendation is the result of a long and very controversial debate on the reform of the European system of enforcement of consumer rights and the rights of tort victims in mass harm situations.[3] In Turkey, before the entry into force of the TCCP, neither the legislature nor scholars had a real debate on the scope of application of the class action, the conditions under which such an action may be brought or the need for a specific legal financing rule to accommodate collective actions.

In Article 113 TCCP, the Turkish legislature merely defined the notion of collective action without further precision: "Associations and other legal entities may, within the limits of their statutes, and in order to protect the interests of their members or that of the class they represent, initiate an action to determine the rights of the interested persons, to eliminate unlawful practice

[1] See Alexander Bruns, Einheitlicher kollektiver Rechtsschutz in Europa [Unified Collective Legal Protection in Europe], Zeitschrift für Zivilprozess 2012, p. 399.

[2] Commission Recommendation 2013/396/EU 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 (OJ L 201, 26.7.2013, pp. 60–65).

[3] See, for instance, the project "Statement on Collective Redress/Competition Damages Claims" carried out by the European Law Institute. Available at: *www.europeanlawinstitute.eu/projects/completed-projects*

[and cure its consequences], or to protect the security of prospective rights".[4] Although this recently legislated non-trans-substantive procedure aims at improving access to justice for many causes of action, including, among others, securities, banking, antitrust, environmental, employment and discrimination claims, the wording of the rule does not help judges and lawyers to provide clear answers to practical questions such as the specific circumstances in which a collective action may proceed. These questions can be studied from three perspectives.

1. **Standing**

   Who has standing to represent the class, since the language of the rule does not limit standing to associations, but also refers to 'other legal entities' without defining the conditions for them to be declared eligible to bring the action?

2. **Due process**

   Does the outcome of the suit bind all of the class members or only the legal entity, which brought the action? Does the wording of Article 113 TCCP ensure the class members' interests in substantive and procedural due process when they are represented by an association? How should courts deal with conflict of interest that may arise among class members?

3. **Protected interests**

   According to 113 TCCP, may collective action be used solely to seek declaratory and injunctive relief or is it also possible to aggregate individual claims for compensatory relief?

These questions matter because they lie at the heart of the practice of a revolutionary mechanism – at least from the point of view of the Turkish legal system. The answers will shape the implementation of the new policy on access to justice as a response to the increased frequency of mass claims. For instance, if it is accepted that the new rule does not apply to claims for damages, in a system imposing a 'loser-pays' rule, which is the case in Turkey, there may be very few plaintiffs willing to assume the risk of having to cover their own expenses as well as that of adverse costs, since associations – even the public ones – are reluctant to devote their limited resources to bring an action.

Since the case management of mass litigation differs from that of ordinary claims, particularly the permitted methods of funding collective actions, the criteria for admissibility of a representative body to bring an action, the necessity or the possibility of joining direct and indirect purchasers in one legal action and collective settlements should be studied in order to achieve the aim.

In Article 113 TCCP, there is no mention of the allowed methods of funding collective redress actions. Therefore, one of the most intriguing questions is whether third parties – for instance the lawyer of the association or the legal entity in question – may be a financer and, if yes, whether associations and other legal entities should declare the origin of the funding. If the association or legal entity is required to declare the origin of its funding, to whom – the defendant or the court – should it be addressed? The use of crowdfunding and other market-based financing methods if they exist – such as assignment of claims – is another question, which is worth to study.

[4] Words in brackets are to clarify the original version of Article 113 TCCP. In its original version, the latter reads: "*Dernekler ve diğer tüzel kişiler, statüleri çerçevesinde, üyelerinin veya mensuplarının yahut temsil ettikleri kesimin menfaatlerini korumak için, kendi adlarına, ilgililerin haklarının tespiti veya hukuka aykırı durumun giderilmesi yahut ilgililerin gelecekteki haklarının ihlal edilmesinin önüne geçilmesi için dava açabilir*".

One of the conditions for establishing an efficient collective redress mechanism is to define the criteria for sanctioning of the association or legal entity to bring an action. Since courts will play a crucial role in the *ad hoc* recognition of these entities, setting up specific training programs for Turkish judges may be needed, particularly in antitrust cases. A study on the necessity or the possibility of joining direct and indirect purchasers in one legal action deserves careful consideration. Indeed, a collective redress mechanism should avoid contradicting results in multiple proceedings by plaintiffs who are at different levels of the distribution chain (e.g. direct purchasers, indirect purchasers) and possibly in different countries. If the interests of direct and indirect purchasers are disparate, should the procedural mechanism permit to subdivide the group, e.g. along the various levels of the distribution chain, and to provide for separate representation of each of the subgroups where their interests clash?[5]

Since there is no legal reference for collective settlement procedure in Turkish civil procedure, the criteria for fairness and adequacy of a settlement should be defined by the court. However, Turkish courts do not have extensive experience when it comes to collective settlement. Therefore, collective settlement is another practical question to be considered when dealing with the Turkish collective action system.

All these issues should be addressed to set the theoretical and empirical foundations needed in order to use collective actions as defined in Article 113 TCCP in a way that would allow the enforcement of even minor claims, while at the same time avoiding the misuse of the mechanism.

[5] See Erdem Büyüksagis, Standing and Passing-on in the New EU Directive on Antitrust Damages Actions, Schweizerische Zeitschrift für Wirtschaftsrecht (SZW) 2015, pp. 2-14 (particularly pp. 10).