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Collective Redress & Class Actions 2022

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Slovenia: Law & Practice
and
Slovenia: Trends & Developments

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SLOVENIA

Law and Practice

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1. Policy Development of Collective Redress/Class Action Mechanisms

1.1 History and Policy Drivers of the Legislative Regime

The history of the development of collective actions in Slovenia may be divided into two distinct periods, separated by one milestone – the enactment of the Slovenian Collective Actions Act (*Zakon o kolektivnih tožbah*, or "the Collective Actions Act") in September 2017.

Prior to the Collective Actions Act, collective redress mechanisms in Slovenia were limited to non-compensatory actions that were filed by a plaintiff in the interest of a class of unidentified persons – namely, via:

- a collective injunction relief for safeguarding the interests of consumers under the Consumer Protection Act 1998 (*Zakon o varstvu potrošnikov*, or the "the Consumer Protection Act"); and
- a non-compensatory action for the protection of the (right to a) healthy living environment.

By implementing Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, and later Directive 2009/22/EC of the European Parliament and of the Council of the 23 April 2009 on injunctions for the protection of consumers' interests ("the Injunctions Directive"), the Consumer Protection Act provided for:

- an injunction relief mechanism to cease illegal practices in business-to-consumer relationships; and
- the declaration of nullity of consumer contracts and/or their provisions.

Additionally, the regimes under the Slovenian Code of Obligations (*Obligacijski zakonik*) and the Environmental Protection Act (*Zakon o varstvu okolja*, or "the Environmental Protection Act") enable actions for the collective protection of a healthy living environment. Under the Environmental Protection Act, specifically, the right to a healthy living environment can be exercised by requiring an entity to cease any intervention into the environment that causes (or threatens to cause) excessive negative effects to the environment or imminent danger to human life or health. Cessation of such intervention can be demanded before the court by a non-governmental organisation or a civil initiative, in addition to natural persons.

The adoption of the Collective Actions Act fully introduced collective actions into the Slovenian legal system and, at the same, repealed the chapter of the Consumer Protection Act that provided for the consumers' injunctive relief mechanism. The Collective Actions Act text was based on the EU collective actions framework that was in place at the time, namely the Injunctions Directive and the EC's 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 ("the 2013 Recommendation").

More generally, the adoption of the Collective Actions Act resulted from rising public discourse around the need for such mechanisms to be available in modern society (as a consequence of ever-increasing mass production, mass sales and mass communications) and a prevailing policy trend at the European level.

Aside from the specific collective actions regime, there are other ancillary mechanisms under the

Civil Procedure Act (*Zakon o pravdnem postopku*, or "the Civil Procedure Act") that have been used historically by a larger number of individuals to pursue the same or similar interests or in response to the same harmful event – for example, joinders and model case procedures. Additionally, under the special framework of the Labour and Social Courts Act, there is a mechanism in place to pursue redress actions against an employer by a group of workers. However, these procedures differ substantially from the recently introduced collective actions regime in one key aspect: under the Collective Actions Act, the injured persons are not themselves parties to the proceedings. The claims are instead brought by an entity, which – although not subject to the mass harm – takes on the affected individuals' claims and represents them as members of a class that has been harmed by a mass harm event.

1.2 Basis for the Legislative Regime, Including Analogous International Laws

The Collective Actions Act was modelled on the EU Collective Redress Regime in force at the time of its adoption. The act also incorporated certain good practices and model examples from other European countries - namely, the collective settlement regime's system was organised along similar lines as the Netherlands', whereas the regime for the allocation of damages was based on equivalent regimes in Belgium and the UK.

1.3 Implementation of the EU Collective Redress Regime

Implementation

The injunctive mechanism under the Collective Actions Act aligns with the Injunctions Directive, whereas the compensatory mechanism is modelled on the 2013 Recommendation and therefore also essentially aligns with Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers ("Directive 2020/1828"). As the compensatory actions regime had already been enacted in 2017 on the basis of the 2013 Recommendation, Slovenia was one of the first European countries to fully set forth a compensatory collective actions mechanism – even before Directive 2020/1828 was adopted. There are, however, still some aspects that need to be upgraded and harmonised with new developments under Directive 2020/1828 (see **5.2 Legislative Reform**).

Local Deviations/Specificities

The Collective Actions Act, although heavily based on the 2013 Recommendation, contains some isolated deviations. Notably, with respect to lawyer fees, the Collective Actions Act allows for compensation of up to 30% of the damages awarded. Furthermore, if lawyer fees cannot be paid from the share of awarded procedural costs as recovered from the defendant, the individual amount of compensation that each member of the class is entitled to may be proportionally reduced to allow the full payment of lawyer (for more on contingency fees, see **4.9 Funding and Costs**).

Another deviation from the 2013 Recommendation relates to the question of standing. The Collective Actions Act does not require the representative entity to be officially designated by the State as an entity with standing in collective compensatory actions – rather, it is a status awarded by the court during the certification stage of the proceedings (see also **4.2 Overview of Procedure**).

2. Current Legal Framework and Mechanisms Applicable

2.1 Collective Redress and Class Action Legislation

The Collective Actions Act was enacted in September 2017 and entered into force in April 2018. In addition, provisions of the Civil Procedure Act apply for all procedural matters that are not explicitly regulated by the Collective Actions Act.

3. Scope and Definitional Aspects of the Legal Framework

3.1 Scope of Areas of Law to Which the Legislation Applies

The Collective Actions Act provides for collective settlements and collective actions in areas of the law where mass damages are most common, namely:

- consumer protection claims arising from contractual relationships with businesses or violations of other rights (as set out in the Consumer Protection Act);
- competition claims relating to restrictive agreements and abuse of a dominant position;
- claims regarding violations of rules on trading in organised markets and prohibited actions of market abuse (as determined under the Market in Financial Instruments Act);
- claims by employees whose rights would otherwise have to be enforced through individual lawsuits in the so-called individual labour disputes; and
- claims regarding liability in relation to environmental incidents.

3.2 Definition of Collective Redress/ Class Actions

The Collective Actions Act defines the compensatory and injunction collective actions separately.

The compensatory collective action is an action by which the qualified entity – for the benefit of all persons who have been harmed in a mass harm event (members of the class) – claims compensation for such harm, regardless of the legal qualification of the claim and without the members of the class being parties to the proceedings.

The injunctive collective action is an action by which the eligible entity claims for cessation of illegal conduct.

4. Procedure for Bringing Collective Redress/Class Actions

4.1 Mechanisms for Bringing Collective Redress/Class Actions

Collective actions (both compensatory and injunctive) may be brought before the district courts at the seat of higher courts (ie, Ljubljana, Maribor, Celje and Koper). The tribunal is composed of a single sitting judge. A special regime is in place in case of employment-related collective actions, which may be brought before one of the four specialised labour courts that have exclusive jurisdiction over the employment-related disputes. There, the tribunal of first instance is composed of one professional judge and two lay judges.

4.2 Overview of Procedure

Compensatory and injunctive collective action proceedings are both divided into several different stages. Although both include the admis-

sibility and the merits stage, only the injunctive regime prescribes a pre-trial stage. However, the regime on compensatory actions does envision a specific certification stage that is not found under the regime of the injunctive collective actions. The following stages for each type of collective action proceeding are discussed in chronological order.

Pre-trial Stage (Injunctive Only)
Prior to filing the injunctive collective action, the qualified entity (as defined in **4.3 Standing**) must notify the prospective defendant in writing about the intention to file the collective action if the defendant does not cease the alleged violations. This notification is a mandatory precondition for the filing of the injunctive action, as it cannot be filed earlier than 15 days after the prospective defendant receives the notification.

Admissibility Stage (Injunctive and Compensatory)
After the collective action is filed, it undergoes a preliminary court review. The court establishes whether the action:

- contains all the necessary elements;
- has been filed by an entity with legal standing under the applicable law; and
- has been filed in relation to a dispute that falls under the scope of the Collective Actions Act (see **3.1 Scope of Areas of Law to Which the Legislation Applies**).

If the conditions are met, the court then:

- accepts the collective action as admissible;
- registers the collective action in the publicly available collective actions register; and
- serves it to the defendant.

Certification Stage (Compensatory)
In the certification stage, the court tests whether the claim is suitable for a collective proceeding and whether the filing entity is suitable to duly represent the members of the class. The collective action can be certified if the following criteria are met:

- the claims under the collective suit are:
  (a) of the same type;
  (b) brought on behalf of an identifiable group of individuals;
  (c) concern the same, similar, or related factual or legal issues;
  (d) relate to the same case of mass harm; and
  (e) are suitable for consideration in a collective procedure;
- common legal and factual issues for the entire group prevail over issues that relate only to individual members of the group;
- the group is so numerous that asserting claims through separate lawsuits or a different form of association of its members (eg, joinder or consolidation of litigation) would be less effective than filing a collective action lawsuit;
- the filing entity fulfils the conditions regarding representativeness;
- the claim is not manifestly ill-founded;
- the conditions regarding agreements on the costs and financing of the procedure are met; and
- the agreement on contingency fees (if applicable) is reasonable.

The defendant, as well as other qualified entities (as defined in **4.3 Standing**), have a chance to submit a written submission regarding the certification criteria and a court hearing is held.

If the court decides to certify the collective action, it simultaneously determines the:

- criteria according to which the individuals may identify themselves as class members (opt in) or exclude themselves from the action (opt out);
- deadline within which individuals are allowed to opt in or out; and
- deadline for the defendant to file an answer to the collective action suit on the merits.

As under the 2013 Recommendation, the Collective Actions Act puts broad emphasis on the certification stage of the compensatory proceedings, with a view to avoiding abuse of the collective actions system and guaranteeing the sound administration of justice.

Opt-In/Opt-Out Stage (Compensatory)
The opt-in/opt-out stage may last between 30 to 90 days, within which period the individuals may identify themselves as or exclude themselves from being members of the class (as applicable). Once such statement on opt-in or opt-out is given, it cannot be withdrawn.

Individuals may be invited to opt in or out by different means of communication. Should potential members of the class be known to the court, they may be informed directly via (electronic) mail; however, in cases of larger groups, the court may have potential members of the class informed by means of public media or websites, which must be set up by the representative entity.

At the end of this stage, the court forms a list of all the members of the class that is served to both parties in the proceedings.

Merits Stage (Injunctive and Compensatory)
After the compensatory collective action has been certified – or, in the case of injunctive collective action, been declared admissible – the proceedings enter the merits stage. The merits stage proceeds in a manner similar to that of a regular civil procedure. Within this stage the members of the class have the right to submit written statements and be heard in court, subject to the court receiving prior notification. The merits stage is concluded with the court rendering a judgment.

Allocation of Compensation (Compensatory)
If the court rendered a judgment in which it awarded compensation, the proceedings enter the post-judgment stage – that is, the allocation and distribution of compensation. Depending on the specificities of the case (eg, the size of the class), two systems of allocation and distribution of compensation are possible – namely, individualised or non-individualised compensation. Under the former, the compensation is individually divided among the members of the class within the judgment itself. Under the latter, the judgment provides for an aggregate sum or per capita amount of compensation to be paid and names a compensation administrator, who carries out the logistics of compensation allocation (for further details see **4.11 Remedies**).

4.3 Standing

Collective action may only be brought by a qualified entity, which can be either:

- a representative non-profit private legal entity with a direct link between its primary objectives and the rights allegedly infringed; or
- a higher state attorney (*višji državni odvetnik*).

When determining whether a private legal entity is representative, the court must assess whether

it will be an adequate representative of the class and whether it will act fairly and appropriately in the best interests of its members. In particular, it must take into account whether the entity has sufficient financial, human and legal resources to represent the class.

Additionally, the courts must consider:

- the activities already undertaken by the entity to prepare for the collective settlement or collective action and to organise and communicate with the affected persons;
- the number of affected persons who have supported the entity's activities in relation to a specific case of mass harm;
- the entity's media presence and dissemination of information about the alleged violations and its intention of bringing a collective action for damages;
- any conflicts between the sub-groups of affected persons; and
- the existence and activities of other entities that may have standing to bring the case and any experience they may have with pursuing collective claims.

4.4 Class Members, Size and Mechanism (Opt In/Out)

A collective compensatory action can either be an opt-in or an opt-out action. Although the claimant is obliged to propose and substantiate to the court which mechanism it seeks, the court is not bound by the proposal and has the discretion to determine the mechanism as part of its decision to approve a collective action.

That said, the opt-in mechanism is mandatory in cases where:

- at least one of the claims in the collective action relates to the payment of compensation for non-pecuniary damage; or
- at least 10% of the members of the group are seeking payment in excess of EUR2,000, according to an estimate in the collective action.

In any case, the opt-in mechanism applies to all persons without permanent residence or a registered office in Slovenia at the time of the decision to approve a collective action.

When the decision on certification of a collective action is final, the court notifies the members of the class about the collective action and whether an opt-in or opt-out mechanism will apply, in addition to setting a deadline in which they can either opt in or opt out. After the deadline has expired, a person may only join the proceedings (opt in) or be excluded from them (opt out) with the defendant's consent or the court's approval – both of which should be granted after taking into account reasons for the delay and whether the defendant's position would be materially prejudiced by such joining or exclusion.

There are no limits regarding the size of the group.

4.5 Joinder

In principle, a collective action may be filed by more than one qualified entity, if such entities act together as joined parties. Each entity may be assigned to specifically represent a sub-group of the members of the class; however, such qualified entity should still be able to demonstrate its representativeness of the class as a whole.

That said, only one compensatory collective action can be certified per mass harm event. Should different qualified entities file compen-

satory collective action claims in relation to the same mass harm event, the court will examine both actions at the certification stage. Unless it dismisses both, the court will only certify one action – the one filed by the entity it considers to be more representative.

4.6 Case Management Powers of Courts

As a rule, the court determines the procedure and the timeline of the proceedings, acting within the limits as set out by the applicable procedural laws. That said, the Collective Actions Act in some respect provides slightly broader limits and more flexibility for the court, including the discretion to decide:

- between the different mechanisms of forming the class (opt-in/opt-out);
- different means of informing the members of the class;
- whether to order a payment of security costs from the plaintiff;
- the deadline for filing the answer to the lawsuit on the merits (within a time window of 60 days); and
- the system of compensation allocation and distribution.

4.7 Length and Timetable for Proceedings

Owing to their dissimilar structure, the length of time it takes to complete both types of collective action proceedings is likely to vary. The injunctive collective proceedings are set up in a similar way to regular civil proceedings, whereas the collective compensatory action proceedings – with their three different stages in which the law envisions a separate set of hearings – will generally take longer.

Within the three stages of the collective compensatory action proceedings, there are specific deadlines determined for different procedural actions. The deadline for the answer to the lawsuit on the merits is twice as long as per regular civil proceedings (60 instead of 30 days). The opt-in/opt-out stage is set to last between 30 to 90 days, depending the court's discretion. The final allocation of compensation stage also adds to the duration of the compensatory proceedings, as the law prescribes a 30-day deadline in which to compile the list of individuals entitled to compensation and an additional 30 days for the parties to contend the list.

As of September 2022, the current case law on collective actions in Slovenia remains scarce, so it is not yet possible to estimate an average length of proceedings. Only one compensatory collective action has reached a court decision so far; however, several cases are now being reviewed at the certification stage.

4.8 Mechanisms for Changes to Length/Timetable/Disposal of Proceedings

The Collective Actions Act does not provide for any specific procedural mechanisms that would enable the court to deviate from the principles and timelines outlined in **4.7 Length and Timetable for Proceedings** – for example, the acceleration, summary disposal or delaying of claims.

4.9 Funding and Costs

Costs

The general rule on costs is the "loser pays" principle. Obligation of the losing party is, however, limited by statutory provisions for maximum recoverable amounts that are calculated on the basis of official tariffs. Said tariffs determine the recoverable costs based on the amount in dispute, according to the "scaled costs" principle. In order to reduce the cost risk for claimants in collective redress proceedings, specific rules for determining the amount in dispute apply –

namely, the amount is set at 2% of the claim for aggregate damages or 20% of the estimated value of all claims of persons affected by the disputed measures, as applicable.

For collective injunction proceedings, the estimated value of the dispute may not exceed EUR10,000, irrespective of the economic importance of the dispute. The court should also take into account the complexity of the case, as well as its importance to the defendant, collective rights and public interest. In addition to "ordinary" litigation costs (eg, court fees and attorney fees), the collective action regime also allows the claimant to demand recovery of necessary costs incurred by organising and informing the (potential) members of the class in order to bring the collective action.

Third-Party funding

Third-party litigation funding is explicitly permitted and regulated. In order to avoid a conflict of interests, the claimant is obliged to disclose the existence of third-party funding and the origin of the funds used. Based on the disclosed information, the court will refuse to certify a collective action if it finds that:

- a conflict of interest exists between the third party and the claimant or members of its class;
- the funder does not have sufficient resources to meet its financial obligations to the claimant; or
- the claimant fails to demonstrate that it has sufficient resources or adequate security to reimburse the costs of the counterparty if it does not succeed with the collective action.

Third-party funders that are also private entities are prohibited from:

- attempting to exercise decisive influence over the claimant's procedural decisions (including settlement);
- financing a collective action against their competitor; and
- charging any interest that exceeds the statutory interest rates.

Lawyer Success Fees and Lawyer-Funded Litigation

Another distinct feature of collective actions funding in Slovenia is lawyer-funded litigation. As a rule, lawyers may agree a contingency fee up to 15% of the amount to be awarded. This may be increased up to 30% if the lawyer agrees to bear all costs of the proceedings if the claims are unsuccessful. Any agreement on lawyer-funded litigation must be approved by the court during the certification stage and consider whether the agreed success fee is reasonable. The law offers no further guidance on when a success fee is (un)reasonable and, as of September 2022, the courts are yet to decide on this matter.

4.10 Disclosure and Privilege

Common law concepts of disclosure and discovery are foreign to the Slovenian proceedings. Generally, each party is obliged to provide the evidence in support of its claim. However, under the general rules of civil procedure that may also be applied also in collective action proceedings, a party has an option – albeit a limited one – to obtain evidence that belongs to the opposing party. Namely, if a party refers to a document in support of its case and claims that this document is in the possession of the other party, the court may – following the party's motion – force

the other party to disclose that document. Such motion must:

- identify the document specifically;
- state which facts are to be proven by the document;
- describe the contents of the document (as precisely as possible); and
- provide evidence from which it may be inferred that the other party is in possession of the document.

If the opposing party refuses to comply with an order requiring it to produce the document (or denies possessing the document but fails to convince the court), the court may assume that the document exists and that its contents are as alleged by the other party. In any case, a party cannot refuse to submit a document if:

- the party has itself relied on it in the proceedings; or
- if the party is obliged to disclose it by law or on the basis of agreement of the parties.

Regarding the right of a party to refuse to produce a document, the rules on exceptions for witness testimony apply mutatis mutandis. A witness may refuse to testify about a professional secret a party has entrusted to them as its agent or if there are other compelling reasons (eg, to protect themselves or family members from criminal prosecution).

4.11 Remedies

Compensatory Collective Proceedings

Under the compensatory collective actions regime, the prescribed remedy is compensation. Awarding said remedy is founded on two concepts of general tort law: the principle of full compensation (for pecuniary damages) or the principle of fair compensation (for non-pecuniary damages). The Collective Actions Act, despite pursuing the aim of prevention, does not envision punitive damages.

Compensation may be awarded through one of the two main systems:

- individualised allocation of compensation; or
- non-individualised allocation of compensation.

The latter is allocated either by means of an aggregate compensation or by determination of a per capita amount (or otherwise determinable value) that will be received by each member of the class who applies for it and proves that it meets the conditions set out in the judgment. The court will also assess the expected total amount that must be paid by the defendant.

The Collective Actions Act gives priority to the individualised allocation of compensation, and only gives way to non-individual allocation when the former would not be possible – for example, where it would disproportionately burden the collective proceedings. In such case, the compensation is apportioned individually by a designated compensation administrator (ie, a notary) who:

- takes over the logistical matters of verifying each individual's entitlement to a part of the compensation once the judgment becomes final; and
- distributes the awarded compensation among the members of the class.

Should the awarded aggregate compensation be insufficient, the amounts of compensation to each individual may be proportionately lowered.

Injunctive Collective Proceedings
Under the injunctive collective actions regime, the prescribed remedy is an order of cessation and prohibition of the violation in the future. Additionally, if the court deems this will contribute to mitigating or removing the harmful consequences of found violations, it has the discretion to decide:

- to have the judgment published at the expense of the defendant; or
- that a correction of inadmissible advertising shall be published.

4.12 Settlement and ADR Mechanisms

The Collective Actions Act prescribes a specific regime for the settlement of collective claims. The act defines collective settlement as a written agreement for the compensation of collective damages caused in the event of mass harm, which is reached in favour of the members of the class between:

- a qualified entity (or several qualified entities together); and
- one (or more) persons who undertake to pay the compensation.

The agreement is then presented to the court for confirmation and, if approved by the court, comes into effect.

The settlement procedure begins at the request of both parties presenting the settlement proposal to the court. If the submitted proposal contains all the necessary elements as set out by law, the court holds a hearing for review of the settlement proposal.

The law sets out several grounds on which the court can deny the settlement proposal, including:

- lack of representativeness of the qualified entity;
- unreasonableness of the settled compensation; and
- failure to safeguard the interests of the individual members of the class sufficiently.

Should it find the proposal acceptable, the court issues a decision on the approval of the settlement. Individuals affected by the settlement then have between 30 and 90 days to either opt in or opt out of its effects (as applicable). Such members of the class may then claim the compensation agreed within the approved settlement from a designated compensation administrator.

4.13 Judgments and Enforcement of Judgments

In line with the two types of collective mechanisms, the injunctive and compensatory actions, there are also two types of judgments that can be delivered.

Compensatory Collective Proceedings
The judgment in compensatory collective action proceedings is binding upon any individual class member who opted in or did not opt out of the class (as applicable). In relation to the members of the class, it has the effect of res iudicata. If the judgement already sets out a list of names of the individuals entitled to compensation (see **4.2 Overview of Procedure**), the judgment itself provides for an enforcement title for each of those listed individuals. In other cases, the enforcement title for a particular individual will have to be determined within the post-judgment stage (see **4.2 Overview of Procedure**).

Injunctive Collective Proceedings
The court issues a declaratory judgment in injunctive collective proceedings. Specifically, where the judgment declares a violation of consumers' rights, the law prescribes the final judgment to be binding upon any court dealing with the individual actions of consumers against the same defendant with regard to the conduct that was declared unlawful under the collective judgment.

5. Legislative Reform

5.1 Policy Development
The foremost pending policy development in the field of collective actions is the expected transposition of Directive 2020/1828 onto the Slovenian legislative framework. No other meaningful policy developments or initiatives are being publicly discussed at present.

5.2 Legislative Reform
On 25 November 2020, the European Parliament and the Council adopted Directive 2020/1828. The deadline for national implementation is 25 December 2022; consequently, legislative reform could be expected in the coming months. However, as of September 2022, there is no publicly available information on the legislative timeline and no publicly available draft of the implementing act.

Taking into account that the currently applicable Collective Actions Act entered into force in April 2018 and is generally considered a robust collective actions platform, it is expected that only partial amendments and additions will be made in order to fully implement Directive 2020/1828. Some of the issues that still need to be addressed by the implementing act of Directive 2020/1828 are:

- rules on the penalties for defendants who do not comply with the court decision;
- the requirement for qualified entities to be designated as such by the State;
- different means of support for the qualified entities; and
- a specific framework for bringing cross-border collective actions.

5.3 Impact of Brexit
Brexit has had no discernible impact on any of the above-mentioned matters.

5.4 Impact of COVID-19
COVID-19 has had no discernible impact on the above-mentioned matters.

Schoenherr Slovenia is a branch of the international Vienna-based law firm Schoenherr – Attorneys at Law, which was one of the first foreign firms to enter the Slovenian market in 2001. Since then, Schoenherr has developed into one of the leading law firms in the Slovenian market. The Slovenian branch offers foreign and domestic investors the complete range of transaction support, including advice on large-scale M&A deals, private equity investments, real estate acquisitions, financial debt restructurings and project finance, in addition to non-transactional work such as competition advice, employment, and litigation. Schoenherr Slovenia's team comprises internationally trained and specialised lawyers with a strong working knowledge of English, German, Serbian and Croatian.

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Trends and Developments

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The Use of Collective Actions in Slovenia: Status Quo

Although collective redress was not entirely alien to the Slovenian legal system prior to adoption of the Collective Actions Act in 2017, the available instruments were limited both in scope and effect. Traditionally, the majority of disputes have been brought before Slovenian courts by individuals suing on behalf of themselves only. Unsurprisingly, the Collective Actions Act – which introduced the option for a qualified entity to bring a collective compensatory action on behalf of the entire group – did not gain much traction in the first years of its application. Until 2021, only three collective actions had been brought before Slovenian courts.

This trend changed in 2021 and 2022, when a total of 15 new collective actions were filed. One was launched against Apple, Inc concerning allegations that the company deliberately slowed down and reduced the functionality of certain iPhone models sold on the Slovenian market. Other collective actions were filed against various Slovenian banks in relation to non-application of negative EURIBOR interest rates in consumer loans with variable interest rates. As of September 2022, these proceedings remain at a very early phase (certification stage) and no decisions have been issued in any of these "second wave" collective action cases so far.

The Collective Actions Act also provides for a collective settlement. There have not been any collective settlements reached as of September 2022.

New instrument, novel legal issues

At the time of writing, the Collective Actions Act remains largely untested before Slovenian courts and its scarce application leaves the door open to challenges posed by different interpretations. Most of these relate to a preliminary stage that is unique to collective action proceedings, during which the court must determine whether a collective action satisfies the many statutory criteria.

Slovenian courts will need to determine, for instance, if the claims bundled in a collective action are suitable for adjudication in a single (consolidated) proceeding. The court may only certify a collective action if:

- common questions of law or fact prevail over those specific to individual group members; and
- the group is so numerous that pursuing claims in individual actions or through joinder would be less efficient that bringing a compensatory collective action.

This will require the court to closely analyse the pros and cons of conducting one single proceeding versus multiple (bilateral) proceedings, while keeping a close eye on the procedural requirements that apply specifically to collective actions, as well as more generally to all litigation proceedings.

Further, the court will also need to determine – based on broadly formulated statutory criteria – whether the organisation filing the action is qualified to bring a collective action in the first place. The organisation must be non-profit and the court must determine whether the organisation will be acting in the best interest of the group members.

As part of this representativeness test, the court will (among other things) examine:

- whether the organisation has sufficient financial, human and legal resources to pursue the action on behalf of all group members;
- the activities already conducted by the organisation in relation to the collective action or organising or communicating with individual group members; and
- the number of group members that have already backed the organisation's activities in relation to the case in question.

The representativeness test does not apply in instances where a collective action is brought by a higher state attorney.

If contingency fees have been agreed between the organisation and its lawyer, the court will also need to examine whether this agreement is reasonable as part of the action certification proceedings. Neither the law nor the existing case law offer any guidance on when a contingency fee can (or cannot) be seen as reasonable. If the collective action is to be funded by a third party, the court would also assess whether provisions on conflict of interest and other limitations have been complied with.

Ultimately, although in force for some years already, a collective action remains a relatively new instrument in Slovenia. The Collective Actions Act provides a robust platform for collective redress, and its applicability and more prolific use in the future are not in question. It will be interesting to see how case law will address the above-mentioned issues and any others that arise in practice.

Third-Party and Lawyer-Funded Collective Actions

Among the notable drivers of collective actions are the rules on litigation funding. One of the distinctive features of the Collective Actions Act is a lawyer-funded litigation. As a rule, lawyers can agree on a 15% contingency fee with the plaintiff (qualified entity). This is calculated against the aggregate total damages awarded to all group members combined. The contingency fee can be increased to 30% in cases where the lawyer agrees to assume the risk of procedural/litigation costs.

It is noteworthy that procedural/litigation costs are limited in collective action proceedings. By virtue of express statutory provision, costs are calculated only against 20% of the actual quantum. This serves to ensure that the cost of the proceedings will not disincentivise qualified entities from bringing collective actions.

A by-product of this rule is reduced exposure for funders of the collective action in the event the case is lost. Indeed, publicly available information suggests that the majority of recently initiated collective actions have relied on external funding – more specifically, these have been lawyer-funded cases.

In addition, the Collective Actions Act also permits funding from third parties (ie, other than lawyers). However, as far as is publicly known, none of the collective actions brought before Slovenian courts to this date have relied on

third-party funding. This is not surprising given that, until the adoption of the Collective Actions Act, Slovenian legal system was not familiar with third-party funding. It is anticipated this will change as collective redress becomes more widely used in practice.

If a collective action is funded from external sources, this must be disclosed to the court. The court will review the financing arrangement and will dismiss the action in cases of – among other things – conflict of interests, undue influence of the funder on the plaintiff's procedural decisions, absence of proof of sufficient funds, or in cases where the funder is a competitor of the defendant.

Implementation of the EU's Collective Redress Directive 2020/1828

On 25 November 2020, the European Parliament and the Council adopted the Directive 2020/1828 on representative actions for the protection of the collective interests of consumers. The Directive 2020/1828 represents a second pillar of the EU's New Deal for Consumers and is aimed at ensuring effective means for consumers to bring unlawful practices to an end and obtain redress, thereby protecting fair competition and smooth functioning of the internal market. The deadline for national implementation is 25 December 2022.

As of September 2022, the implementation timeline and process in Slovenia are unclear. A draft implementing act has not yet been made publicly available or shared for public consultation.

Given that the applicable Collective Actions Act already incorporates a good portion of legislative solutions promoted by the Directive, the implementation of the Directive 2020/1828 is not expected to entail massive changes to the current regime. Among areas that require national implementation – or are expected to see an upgrade or refinement – are:

- the rules on penalties for defendants in cases of non-compliance with court decisions; and
- a specific framework for bringing cross-border collective actions.

That said, the process of implementation presents a good opportunity for the legislator to also review the existing legal framework and consider other potential tweaks or improvements, based on either initial dilemmas of application in practice, issues raised in legal writing, or good practices from other jurisdictions.

Outlook: A Proliferation of Collective Actions?

Looking ahead, Slovenia can expect to see an increase in the use of collective actions in the (near) future. This activity will be driven in part by the regulatory environment – not least the ever-increasing demands placed by the EU and national legislators on consumer-facing industries – and the availability of third-party funding.

The majority of collective actions filed to date have been consumer-driven. While this is likely to remain the case in the near future, it will be interesting to see if collective redress will also be pursued in other areas – for example, in antitrust, environmental or securities/market abuse-related matters. At the same time, additional organisations are expected to bring collective actions.

Slovenia, as said, has opted for a liberal approach on lawyer funding, permitting contingency fees of up to 30 % in case of lawyer-sponsored collective actions. The majority of recently initiated collective actions have been financed by lawyers and, all things being equal, third-party funding (albeit not limited only to lawyer-funded litiga-

tions) is expected to become the norm when it comes to financing collective actions in Slovenia. This is largely down to the fact that third-party funding is also becoming increasingly prominent in continental European jurisdictions – not just in arbitral proceedings, but in regular litigation as well.

Now that the Collective Actions Act provides the procedural framework to bring bigger-ticket cases before the courts, Slovenia can expect to attract the interest of active funders in the region. Although certain aspects of permitting funding agreements under the Collective Actions Act still require judicial interpretation, the framework seems robust enough to enable rather than inhibit such arrangements and, consequently, increase the number of collective actions brought.

Contributed by: Bojan Brežan, Marko Frantar, Maks David Osojnik and Miriam Gajšek, **Schoenherr Slovenia**

Schoenherr Slovenia is a branch of the international Vienna-based law firm Schoenherr – Attorneys at Law, which was one of the first foreign firms to enter the Slovenian market in 2001. Since then, Schoenherr has developed into one of the leading law firms in the Slovenian market. The Slovenian branch offers foreign and domestic investors the complete range of transaction support, including advice on large-scale M&A deals, private equity investments, real estate acquisitions, financial debt restructurings and project finance, in addition to non-transactional work such as competition advice, employment, and litigation. Schoenherr Slovenia's team comprises internationally trained and specialised lawyers with a strong working knowledge of English, German, Serbian and Croatian.

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