

DO MACEDONIAN CITIZENS HAVE ACCESS TO JUSTICE IN THE MASS DISPUTES?

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Abstract:

In the last ten years Macedonian civil justice system was faced with new types of disputes. These cases are characterized by affection of large part of the country's population and they have challenged the country's civil justice system. These cases differ significantly from the regular court cases due to their collective nature. These cases involve collective rights, while the "regular court cases" involve individual rights (*"droit subjectif"*). Basic features of these collective rights (also known as trans-individual rights in the Latino-American countries) are their size, their different nature compared to public and private rights, their heterogeneous object, their indivisible object and their indefinite entitlement. These collective rights challenge the traditional civil justice system because this system does not provide efficient adjudication and socially just results in the mass cases. Namely, it cannot be expected that the court will respect the principle of party autonomy in cases that involve millions of consumers. Those millions of consumers must be represented before the court on a representative basis, as the only possibly way for a mass case to reach the justice. On the contrary, no court may adjudicate one million separate litigations at once. For adjudication of these mass cases, United States have class action mechanism, England and Wales have representative action and group litigation order mechanism, Sweden has group action.

Keywords: *Access to justice, mass cases, collective rights, traditional civil procedure systems, class action, representative action, group litigation order and group action.*

Introduction

The below mentioned cases from Republic of Macedonia triggered me to research how they are treated from civil procedural aspect, because in these cases a large part of the country's population was harmed and left uncompensated. These cases had appeared in the context of competition law infringements, abuse of a dominant position, consumers' rights, air pollution (environmental law). The most significant feature is their size, respectively the fact that the behaviour of a single entity (as a centre of power) affects thousands, sometimes even millions of other persons who are related in a certain way. Namely, in the first mention case below (the EVN case) almost 70% of all landline telephone users were affected; while in the second mention case below (the Telecom case) all families as households in the country. In the third mention case below (the Green Coalition case) all residents who live in the town of Veles and its region were and are still affected.

Many legitimate questions arise at this point, such as: can the Macedonian traditional civil procedure handle these types of collective cases; does the traditional (individual) civil procedure work efficiently in these cases; whether Macedonian traditional (individual) civil procedure will provide socially just results, etc. In order to find the answers of the questions above, in the following text I present details of three characteristic cases from the Republic of Macedonia.

a) Commission for Protection of Competition vs. Makedonski Telekom (case no.1 – “the Telecom case”)

The Commission for Protection of Competition of the Republic of Macedonia¹ adopted Decision No.07-296/3² as of 21 April 2011, imposing a fine on Makedonski Telekom AD Skopje³ in amount of 61,377,000. 00 MKD⁴ for an offence committed pursuant to Article 47/1-2 of the Competition Act. The misdemeanour sanction was imposed because Makedonski Telekom AD Skopje abused its dominant position on the Macedonian market in the period from 1 July 2006 to 28 February 2007 by directly imposing unfair trading

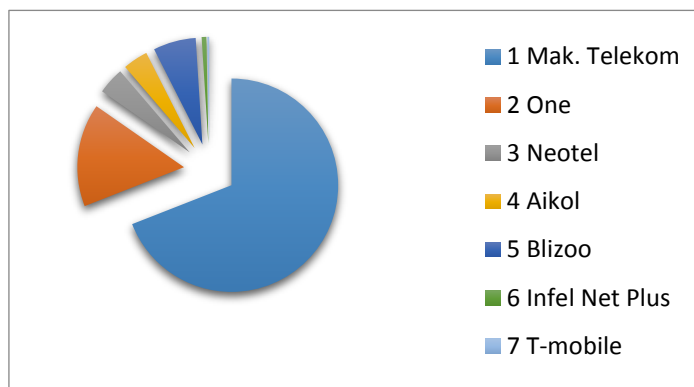
¹Official website of the Commission for Protection of Competition: <http://www.kzk.gov.mk/eng/index.asp>

²The Decision is available on: <http://www.kzk.gov.mk/images/Vestiimages/946/TIPE3EMII.pdf>.

³Official website of Makedonski Telekom AD Skopje is: <http://www.telekom.mk/mk/>

⁴MKD 61.377.000,00 is approximately equal to EUR 1.000.000, [author's note].

conditions on the market. The abuse consisted of charging its minimal services users a monthly handling fee of 6 MKD (around € 0,10) for preparation of the bill for the, 25 MKD (around € 0,50) for residential service users and 50 MKD (around € 1) for business service users. According to the *Annual Report on the Development of the Electronic Communications Market for 2011*⁵ published by the Agency for Electronic Communications⁶, there were 422,053 landlines in the Republic of Macedonia in 2011. The diagram below indicates the participation of the landline operators on the Macedonian market (status: 31 December 2011).



Makedonski Telekom AD Skopje as a landline operator participated with 69,05% in the Macedonian market in 2011, which makes it the dominant landline provider. According to the Competition Act⁷, the dominant position of a company in the Macedonian market is not subject to sanctions per se, but the abuse of the dominant position is. Article 14 of the Competition Act expressly prohibits the abuse of the dominant position by any company whatsoever on the relevant market of the Republic of Macedonia. Article 47/1 (2) qualifies the abuse of the dominant position as an infringement of the provisions of the Competition Act and the legal person that abuses its dominant

⁵The report is available at the following website:

http://www.aek.mk/index.php?option=com_docman&task=doc_download&gid=628&Itemid=&lang=mk

⁶Official website of the Agency for electronic communication of R. Macedonia:
<http://www.aec.mk/>

⁷Official Gazette of RM, No. 4/05 and 70/06. The English translation of the Law can be found on the following link:
<http://www.kzk.gov.mk/images/LawOnProtectionOfCompetition.pdf>

position shall be punished by imposing a fine in amount of 10% of the total annual income realized in the year preceding the year in which the misdemeanour was committed. In this case, Makedonski Telekom abused its dominant position on the market because, by charging the customers a handling fee for the preparation of the telephone bills, it directly imposed unfair trading conditions in the territory of the Republic of Macedonia (Article 14/2 of the Competition Act).

The economic effects caused by the abuse of the dominant position by Makedonski Telekom can be generally considered at macro and micro level. At the macro level, by abusing its dominant position, Makedonski Telekom caused distortion and disorder of the relevant market of public landline telephone networks and services in the Republic of Macedonia by imposing unfair trading conditions. Macedonian Telecom disrupted the healthy market competition and illegally acquired app. EUR 1.200.000,00⁸. At micro level, 291.427,00 customers in total were illegally charged a handling fee in average monthly amount of EUR 0,5 or EUR 4,00 in total for the period from 1 July 2006 to 28 February 2007.

The legal effects of the decision reached by the Commission for Protection of Competition as of 21 April 2011, based on which the abuse of Makedonski Telekom was sanctioned, can also be analysed at macro and micro level. At macro level, the State (R. Macedonia) will collect MKD 61.377.00,00 or around EUR 1.000.000,00 for its budget, while at micro level 291.427,00 customers in total will remain uncompensated. From the restitution prospective, I have no records that any individual initiated a court procedure against Makedonski Telekom for reimbursement of the illegally collected handling fees.

b) Commission for Protection of Competition vs. EVN Macedonia (case no.2 – “the EVNcase”)

On 16 March 2011 the Commission for Protection of Competition reached a Decision PP No. 09-15/8⁹ based on which a fine was imposed on

⁸422.053 (total number of landline connections) x 69,05 (market share of Makedonski Telekom) = 291.427 consumers. The average value of the handling fee for all types of landline packages is MKD 30 (EUR 0.5). 291.427 x 0,5 = 145.713 x 8 (months) = EUR 1.165.704,00.

⁹The Decision can be found on the following link: <http://www.kzk.gov.mk/images/Vestiimages/940/TIPE3EMII.pdf>.

EVN Macedonia AD Skopje¹⁰ in amount of MKD 30.627.000,00¹¹ for committed misdemeanour pursuant to Article 47/1 (2) of the Law on Protection of Competition. The misdemeanour sanction was imposed because EVN Macedonia AD Skopje abused its dominant position on the market in the period from 27 May 2006 to 28 March 2008 and directly imposed unfair trading conditions in the territory of the Republic of Macedonia by calculating and charging the retail tariff customers a handling fee in a fix amount of MKD 6,00 (around € 0,10).

In the Macedonian electricity distribution market, EVN Macedonia AD Skopje has a market share of 100% since it is the sole distributor of electricity in the Republic of Macedonia.¹² Retail tariff customers are actually households electricity consumers in the Republic of Macedonia. In the absence of official data from EVN about the number of retail tariff customers, the number of households in the Republic of Macedonia can be taken as the relevant data. According to the last census conducted in 2002¹³, there are 564.296,00 households in the Republic of Macedonia. Even though from 2002 onwards the number of households has increased, for the purpose of this thesis I will consider that there are 560.000,00 households in the Republic of Macedonia.¹⁴ EVN charged the 560.000,00 retail tariff customers a handling fee in fix monthly amount of MKD 6, 00 for a period of 19 months as a result of which it acquired assets in amount of EUR 1.046.557.¹⁵

¹⁰Official website of EVN Macedonia AD Skopje is: <http://www.evn.com.mk/>

¹¹ MKD 30.627.000, 00 is approximately equal to EUR 500.000,00 [author's note].

¹²See more on the web site of the Regulatory Commission of the Republic of Macedonia at: <http://www.erc.org.mk/Uploads/2006.09.14%20Odluka%20za%20odobruvanje%20tarifen%20stav%20-%20AD%20ESM%20so%20obrazlozenie.pdf>

¹³The number of the households can be found on the official web site of the State statistic authority: <http://www.stat.gov.mk/OblastOpsto.aspx?id=31>, [Accessed on 12.08.2016].

¹⁴A household is considered to be every family of other community of people who declare that they live together and jointly spend their income to settle their basic needs (housing, food etc.), regardless whether all members are constantly in the place where the household is settled or some of them reside for a certain period in another place, or a foreign country because of work, education or for any other reasons. The previous definition is given by the State Statistical Office of RM and can be found on the following link: <http://www.stat.gov.mk/OblastOpsto.aspx?id=31>, [Accessed on 12.08.2016].

¹⁵MKD 6 x 19 months x 560.000 consumers = MKD 63.840.000,00.

The economic effects caused by the abuse of the dominant position by EVN can be also considered at macro and micro level. At macro level, by abusing its dominant position, EVN caused distortion (disorder) of the relevant market for electricity distribution and illegally it acquired app. EUR 1.046.557, 00. At micro level, around 560.000 households (customers) were illegally charged a handling fee in a fix amount of EUR 0, 10 on monthly basis or EUR 2,00 in total for the period from 27 May 2006 to 28 February 2008.

At macro level, the legal effects achieved by the Commission for Protection of Competition with its Decision PP No. 09-15/8 against EVN resulted in collection of EUR 500.000,00, while at micro level about half a million of households received no compensation.

Unlike the Telecom case, some attorneys were looking for subscribers¹⁶ to persuade them to initiate a procedure for reimbursement of the unlawfully collected handling fees. The average attorney's fees¹⁷ in a case with value of €0,10 are around €60 (with one hearing), around €88 (with two hearings), but if the case ends up before the Appellate Court, the costs shall be doubled. At the beginning, the subscribers were not interested in initiating procedures for recovery of only € 0.1,¹⁸ but the attorneys offered them half of the attorneys' fees in case of winning the lawsuit. Furthermore, the attorneys took the obligation to pay all necessary cost for initiating and running the procedure, and to cover all expenses in case of losing the lawsuit. Under such circumstances, a large number of subscribers tried their cases before the courts. There were a large number of claims, particularly before the courts in the city of Ohrid, the city of Bitola and the city of Stip. The courts in these cities were inundated with such claims against EVN, because the attorneys in these cities were more active than those in other cities. All submitted claims in Ohrid, Bitola and Stip had the same legal ground - unjust enrichment in amount of the collected handling fees by EVN, plus interest and costs. Actually, the attorneys did not have any other options, except to use the institute against unjust enrichment, because the damage claims at that time were already time barred. According to the Macedonian limitation rules, the here is five years' limitation period of unjust enrichment claims, while the damage claims have only a three-year limitation. Last controlled day by the Commission was 28 February 2008, hence any potential damage claim should have been submitted no later than 28 February 2011, but the Commission delivered its Decision PP No. 09-15/8 on

¹⁶The term "subscriber" in this context refers to those individuals who were formally registered as users (consumers) of electricity. Mostly one member of the family.

¹⁷Attorney's tariff is announced in the Official Gazette of R. Macedonia No.164/10.

¹⁸In the R. Macedonia 0.1 euros is a trivial harm.

16 March 2011. In fact, the Commission by its belated ruling prevented the subscribers of claiming damages against EVN. For the reason stated above, the attorneys had no other options, except to try with the institute of unjust enrichment.

In my opinion, in the above case, there is no factual background for raising a claim grounded on unjust enrichment, because an abuse of a dominant position in its essence is *a delict*, which automatically generates a right to compensation in response to a damage claim. Actually, Article 58 of the Competition Act regulates that all victims of a competition infringement may claim damages against the infringer. However, the courts in Ohrid, Bitola and Stip affirmed all claims, requiring only that the claim to be submitted within the period of five years. For example, in the case P4-725/2013 the claim was submitted in 2013, which is within the limitation period of five years, and consequently the court affirmed it.

One group of attorneys from the city of Veles tried to follow the steps of their colleagues from Ohrid, Bitola and Stip, but their attempt proved unsuccessful. Surprisingly, the court in city of Veles denied the claims finding that they are time barred. For this court any claim which subsequently comes from the Commission decision should have been submitted in the period of three years. For example, in the case *Malv.P. no. 487/2012*¹⁹ the court denied the claim, because it was submitted on 30 November 2012, which date exceeded the three years' limitation period.

c) The traditional civil procedure vs. mass cases

The traditional individual civil procedure is defined as a means for providing protection of *the individual rights* by the general courts. The traditional civil procedure relies on two corresponding principles: party autonomy and party disposition.²⁰ The aim of the traditional civil procedure is to safeguard *individual rights (droit subjective)* through private lawsuits and in that way to regulate the private relationships between the parties (*jus dicere*).²¹ Hence, the question is whether collective rights might be subject to

¹⁹The decision on Macedonia language may be found on the official webpage of the Basic Court Veles on the following link: <http://www.osveles.mk/Odluki.aspx?odluka=6406>, [Accessed on 14.08.2016].

²⁰Hess, B., 2012. A Coherent approach to European collective redress. In: D. Fairgrieve and E. Lein, ed.2012. *Extraterritoriality and Collective Redress*. Oxford: Oxford University Press. Ch.6.13.

²¹Georgievski, S., 1988. *Parnicna Postapka*. Univerzitetska pecatnica. Skopje p. 25.

adjudication through the traditional (individual) civil procedure. There are no explicit restrictions in that context, so it may be possible to adjudicate collective rights through the “plurality techniques” within the context of the traditional civil procedure.

1. Plurality of claims – (*lat. cumulatio actionum*)

Plurality of claims refers to the situation where the plaintiff may join demands and claims against the same defendant in one lawsuit, subject to the rules of jurisdiction and venue.²² This procedural technique is not applicable to the collective cases, because the “plurality” here refers only to the “claims” and not to the “parties”. In the collective cases there are numerous parties with similar claims, which makes the institute ‘plurality of claims’ inapplicable to the collective disputes.

2. Plurality of parties - (*lat. litisconsortium*)

In a broader sense, the term “plurality of parties” refers to the situation where several parties join as plaintiffs or defendants²³ in the same proceedings in order to avoid conflicting decisions and multiplication of the lawsuits. All procedural systems agree that plurality of parties is applicable only in certain cases where some form of connection exists between the various parties on either side.²⁴ In the former SFR Yugoslavia, the civil procedure law was influenced by the German legal doctrine. According to Cohn (1987, p.172) the essence of the German doctrine is that “the court has no power to compel or otherwise induce a party to join or to be joined in the proceedings.” This doctrine recognized several types of plurality of parties depending on the various elements such as the origin of the connection, the effect of the final judgement, the time of establishing the plurality.²⁵

Depending on the origin of the connection between the parties in terms of whether they had already been connected in a legal or casual relation before

²²Cohn, J. E., 1987. Parties. In: M. Cappelletti, ed. 1987. *Civil Procedure*. p.172.

²³In the former Yugoslav republics, their civil process laws recognize a so – called *necessary plurality of parties* only on the defendant site, because the right in question can be asserted only by or against several persons.

²⁴Cohn, J. E., 1987. Parties. In: M. Cappelletti, ed. 1987. *Civil Procedure*. p.172.

²⁵There are also other divisions of the plurality of parties as procedural institute, but they have no relevance regarding the topic of these thesis.

the procedure started, the plurality may be “material” or “formal”. Article 186/1-1 from the Macedonian Civil Procedure Act²⁶ defines the “material plurality” as a situation where several people may sue or may be sued through one claim, if in regard to the subject of the dispute they are in a legal community or if their rights and obligations arise from the same facts and legal ground (*lat. idem factum, idem jus*).²⁷ In the theory of procedural law the term ‘same facts’ (*idem factum*) is usually related to rights and obligations that stem from the same life event.²⁸ The term ‘same legal ground’ (*idem jus*) is usually related to rights and obligations whose origin (genesis) can be explained by legal reasons that are alike. Article 186/1-2 from the Macedonian Civil Procedure Act²⁹ defines the “formal plurality” as a situation where several people may sue or may be sued through one claim, if the subject of the dispute are claims i.e. obligations of same type, which arise from similar facts and legal grounds (*lat. simile factum, simile jus*), plus for each of the claims and over each of the defendants the same court has subject matter jurisdiction.³⁰ The term ‘similar facts and legal grounds’ (*lat. simile factum, simile jus*) refers to different life events, but the rights and obligations that arise from them are that much similar to each other that enables all claims to be solved in one single suit.³¹

Depending on the effect of the judgement, whether it will affect all parties equally (with single relief) because the dispute may be solved in an equal manner against all of them, or the judgement will affect all parties, but with different reliefs, the plurality may be in a form of a “single co-litigants” or in a form of a “simple co-litigants”. Depending on the time when the party

²⁶Civil Procedure Act (Закон за парничната постапка), Official Gazette of R. Macedonia No.79/2005.

²⁷They are called “material co-litigants”, because the substantial law bounds them. The court may not deliver different decisions in case of material co-litigants. The court decision must be the same for all of the material co-litigants.

²⁸See more at Ivosevic. Z., 1979. Suparnicarstvo. Beograd: Pravno Ekonomski Centar.pp.44-54.

²⁹Civil Procedure Act (Закон за парничната постапка), Official Gazette of R. Macedonia No.79/2005.

³⁰They are called “formal co-litigants”, because they are joined from procedural reasons such as procedural economy.

³¹For example, several employees who work for the same employer and who were injured at their work places in different moments. Each of the employees is entitled to commence a court proceeding for compensation against the mutual employer. Under such circumstances, the employees are allowed to submit single action against the employer all together.

entered into the proceeding i.e. at the time of issuing the claim, the plurality may be in a form of “initial” or “subsequent.”

Keeping in mind that the plurality of parties as procedural institute deals with the situations where there is more than one party³², the principal question is whether the collective disputes such as the Telecom case or the EVN case might have been resolved through the plurality rule. The answer is no. Below there is a table containing explications for this answer. The example presented in the table below is the EVN case.

The table below shows that material plurality is not possible in the EVN case due to substantive reasons. In terms of formal plurality, the first required element – “*simile facts, simile jus*” was present, but the second required element, *same subject matter and territory jurisdiction of a same forum*, was lacking. Hence, neither the formal plurality rule may be applied in the EVN case.

PLURALITY OF PARTIES		
Material	Prerequisites	Explanation based on the facts of the EVN case
(MKD) CPA art.186/1-1 ³³	The parties are in a legal community before the procedure started	None of the subscribers for electricity was in a prior legal community with other subscriber regarding this issue.
	Their rights and obligations arise from the same facts and legal ground (<i>lat. idem factum + idem jus</i>)	All subscribers shared the same fact (same life event), they were harmed by the same company under the same circumstances (abuse of a dominant position), but they did not share same legal ground (different legal origin), because each of them had separate contract with the company for distribution of electricity. In other words, one delict, but around 500.000 separate contracts for electricity distribution, which makes the application of the principles of the material plurality of parties impossible in this case.
Formal		
(MKD) CPA art.186/1-2 ³⁴	Claims i.e. obligations of same type which	The right to compensation for all subscribers arose from the same delict (<i>idem factum</i>), but separate contracts. Even though these contracts are separate, each of them still has a

³²From all distinctions of the institute - plurality of parties, only the distinction between material vs. formal plurality has relevance for this thesis, because it deals with the question whether it is possible to apply the plurality rule over the collective disputes.

³³Macedonian Civil Procedure Act, Official Gazette of the RM, No. 79/05.

³⁴*Idem.*

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	<p>arise from similar facts and legal grounds (<i>lat. simile factum + simile jus</i>).</p>	<p>typical content and the rights and obligations that arise from them are similar (<i>simile jus</i>).</p>
	<p>Additionally, for each of the claims and over each of the defendants the same court has subject matter and local jurisdiction</p>	<p>The EVN cases were dispersed around the country. Macedonian civil procedure allows all claims (referring to the whole country's territory) against the same defendant to be allocated (attracted) before a single forum only in case of material plurality, and not in a case of formal plurality.³⁵</p> <p>But, in this case the principle of <i>forum delicti</i> can be used, and all claims may be submitted before the forum where the harmful activity was performed, that is the place where the company headquarter was situated.</p> <p>This means a possibility for all claims <i>ab initio</i> to be submitted before the <i>forum delicti</i>, and not the claims to be reallocated before the <i>forum delicti</i>.</p>

In any case, what would have been the benefits, if the formal plurality rule had been used in the EVN case? There would not have been any important benefits, because the formal co-litigants are autonomous parties and their behaviour is neither beneficial, nor harmful to the other co-litigants. There is a possibility some of the facts to be commonly determined,³⁶ but that is not enough for one collective dispute to be efficiently resolved. And one of the crucial disadvantages of the formal plurality rule is the inability to bring all claims from the entire country before one single forum. A power to attract all claims from the entire country happens only under the material plurality rule, while the formal plurality rule can attract claims only within one particular court.

3. Joinder of proceedings (cases, lawsuits)

A joinder of proceedings is a case management order, which enables two or more ongoing proceedings to be run jointly. This order may be granted on the request of one of the party's or on judge's own initiative (*ex lege*). Actually this is a crucial difference between the formal plurality rule and joinder of

³⁵Art.42 Macedonian Civil Procedure Act

³⁶See more at Ivosevic. Z., 1979. Suparnicarstvo. Beograd: Pravno Ekonomski Centar.pp.44-54.

proceedings rule. The formal plurality may be established only by an action, because in German law the institute – *litisconsortium* entirely depends on the parties' will. The court has no power to compel or otherwise induce a party to join or be joined in the proceedings. Unlike, the joinder of proceedings as procedural institute may be established by a court decision, even contrary to the parties' will.

The preconditions for joinder of proceedings are met if several current procedures between the same parties are ongoing before the same court or if the same person is the opposing party to different plaintiffs or defendants. Regarding the joined cases, the judge may take a joint verdict or a separate verdict. This is entirely in his disposition. The aim of this joinder is to accelerate the adjudication of the cases and to decrease the costs.

The joinder of proceedings has limited territorial scope, because it can be applied only within one particular court. The joinder of proceedings cannot attract all claims from the entire country to one single forum. But under the Art. 61 of the Macedonian Civil Procedure Act, there is a possibility of reallocating a case or cases from one competent court to another. Upon a proposal of a party or of a competent court, the Supreme Court may reallocate a case from one competent court to another for a practical reason or for any other important reason. So far, Art. 61 has been used on an individual basis, which means that only one case was reallocated. However, there is no formal limitation that hinders the Supreme Court to order all EVN claims to be reallocated before one single court. In this way all claims could be reallocated to one single court, perhaps a management court. This the first big issue on how to secure one single court for all claims might be solved.

But the problems do not end here; the next issue is how the management court to deal with approximately 100.000 claims at once. Before joining all proceedings, each consumer (subscriber) has to initiate his or her own separate procedure, and to comply with the formalities required by the Civil Procedure Act, such as drafting a claim, submitting a claim, paying court taxes, hiring an attorney, submitting evidence, etc. Each of those 100.000 claims must be presented to the defendant (a service). If the defendant replies with an answer, that answer must be presented back to all the plaintiffs. So far, around 200.000 claims have been thus processed. One of the advantages here would be the possibility of determining some of the facts in common. But the court would still have the obligation to receive all documentary evidence accompanied with the claim forms and to exchange them between the parties. Regarding the witnesses and experts, presented as evidence in the procedure, it would probably be possible to determine a common list, in order to be avoid necessary multiplication of the same evidence. One of the biggest disadvantages here

would be the fact that the court would have to run 100.000 proceedings at once (jointly), and to prepare a verdict with 100.000 plaintiffs, since the claims would remain separate and distinct from one another.

It seems that the model described above is not feasible in reality, and it can be seen only as theoretical. The present traditional civil procedure would lead to a real flood of cases and the entire court system would collapse. A good example of a court being inundated with thousands of claims is a case in Germany, where the Regional Court of Frankfurt/Main had faced nearly than 14.000 security fraud cases at once.³⁷ In that case the court was obviously not able to use any of the traditional procedural institutes such as “plurality/joiner of claims” and it simply waited for the legislature to enact a suitable mechanism for handling all those 14.000 claims. The German Reichstag enacted a new act, the Capital Markets Investors Test Case Act, as a test case based collective mechanism.

d) What can be concluded from the cases described above?

In the Telecom case, the State Commission for Protection of Competition presented an unacceptably belated ruling, which was the direct reason that none of the affected consumers to be compensated. All potential damage claims were time barred at the time when the Commission delivered its decision for imposing a fine due to abuse of dominant position by the Telecom. This case included only the punishment effect, while the deterrence and the restitution effect were absent.

The EVN case also presented an unacceptably belated ruling by the State Commission for Protection of Competition, but some of the regular courts in Republic of Macedonia affirmed actions in a form of unjust enrichment claims. However, even though we assumed that we had had ruling by the Commission on time, other problems appeared. For one, the affected consumers were not willing to initiate court procedures for compensation because their claims had trivial value and the litigation costs were many times higher than the expected compensation. The indifference of the consumers was used by the lawyers who took the initiative and filled hundreds of claims for compensation of 10 euro cents. The aim of the attorneys was not the compensation of the consumers, but the litigation costs which might be taken from the opposing and supposedly losing party. On average, for compensation of 10 euro cents the amount of attorney’s fee might be up to 150 euros. Upon winning, the outcome of these cases was predictable. The consumers will

³⁷ Wagner, G., 2011. Collective redress - categories of loss and legislative options. *Law Quarterly Review 2011* (127) p. 62.

succeed in their claims which automatically gives them right to reimbursement of their litigation cost from the opposing party. Hence, the reimbursement of the litigation cost from the opposing party was the only reason why the attorneys agreed to pay the court's taxes from their own pocket. The deal between them and the consumers was that if the attorneys won the case, the litigation costs (attorney's fee) would be halved. In this way each claim brought net profit of 70 euros. This phenomenon is known as entrepreneurial lawyering.

The EVN case presented another serious problem, the problem of the lack of an effective mechanism for collective redress (compensation). Instead of such mechanism, the EVN case implemented the rules from the traditional civil procedure. The final outcome was that the traditional civil procedure in the EVN case results meant that many consumers were left uncompensated, litigation costs were high, and there is a great danger of flooding the courts with thousands of cases with trivial value. The EVN case involved thousands of consumers, therefore I tried to simulate how would it like to handle with such big number of consumers at once by using some of the institutes from the traditional civil procedure which deal with situations where there is a plurality of parties. The analysis showed that the procedural institutes such as the material plurality of parties, formal plurality of parties or joinder of proceedings are either theoretically or practicably inapplicable in collective disputes. The principal reason for that lies in the fact that the traditional civil procedure was designed for adjudication of individual rights, and not for adjudication of collective rights. The EVN case involves "collective rights"³⁸, which challenge the application of the traditional civil procedure over the mass cases. The traditional civil procedure might be adapted for solving mass cases by doing two principal reforms. First, beside the individuals, the corporations and the state, groups and collectives as holders of diffuse or collective rights or interests should be recognised as subjects in the law. Second, these groups or collectives should have collective standing to sue, which would give them a right to represent their members before the court. The collective standing to sue enables the existence of representative litigation, which means that a whole group or collective may be represented before the court by one or several representatives. Only the representatives are formal parties in the suit, while the rest of the members of the group are not, but in any case, they will be bound by the court decision the same as the representatives.

The results from the analysis have disclosed the fact that the consumers in Macedonia had no effective right of access to court in both the Telecom and

³⁸More precisely the rights involved in EVN case are defined as aggregated individual rights suitable for collective treatment.

the EVN cases. Principally, there were two factors leading to such conclusion. First, the traditional civil procedure showed that it is an inadequate mechanism for solving mass cases, and second the entire civil justice system does not provide sufficient remedies for solving mass cases. In order for the consumers to have an effective right of access to court in the future, a comprehensive reform of the current civil justice system has to be made. First, the traditional civil procedure has to be adopted for solving mass cases, as it was explained above. Second the current civil justice system has to implement new types of remedies for solving mass cases. For example, the Telecom case pointed out the need for the consumers to be entitled with a right to initiate their own action, a stand-alone action, while the EVN case pointed out the need for the consumers to have on disposal a remedy for collecting damages on a collective basis, or follow-on action. Off course, the reform list does not end here.

e) The other countries

Many other countries have representative civil litigation mechanisms for handling mass cases, cases which involved collective rights. For example, United States have a legal action designated as class action. In essence, it is a representative litigation mechanism, which means that one or several members of one class or group may act on behalf of the entire class and the final court judgement shall bind the entire class. It is also an interest based litigation, because the representative party derives its legitimacy to represent the class from his/her own self-interest, which off course has to coincide with the common interest. The prerequisites required for granting a class certification are examined at a certification hearing. If the prerequisites are met, the court grants a certification in form of a separate written court order. The required four prerequisites are: numerosity of parties, common facts or law, typicality of claims and adequacy of parties' representation.

England and Wales have two representative mechanisms stipulated in the English civil procedure rules for handling mass cases. The first mechanism is the representative action, which is a pure kind of representative litigation. The absent members are represented by a representative and later on all of them shall be bound by the judgement without any exclusion. The second mechanism is the group litigation order (GLO), which is actually an order which enables the courts to manage a defined group of claims which have common or related issues of fact or law, instead of investigating every individual claim in detail. The GLO works as a platform for handling large number of related claims. Under the GLO platform, the management court shall define the entrance criteria and shall set a time limit for bringing claims.

There is no formal certification stage. All claims from the entire England and Wales will be allocated and transferred before the management court. Subsequently, this court shall determine several claims to be proceeded as test claims. The issue/s common to all claims, such as the liability of one manufacturer who allegedly released defective products, shall be resolved through such test claims. After that all claims may proceed further for determination of the individual harm.

Sweden also has a group action litigation possibility on the books, which is also a representative mechanism. The Swedish group action may be instituted as a private group action, an organization action or a public group action. It has no sectoral approach and it is applicable to all civil cases that can be brought before the general, district, courts. The Swedish group action is not enacted as part of the Swedish Code of Judicial Procedure (as it was the case with the United States and England), but it was enacted in a separate act (Group Proceedings Act).

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