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Consumer Collective Redress in Turkey: The Need for Reform in Light of the EU Regime

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Abstract

Over the past 25 years, since the beginning of the process of Turkey's accession to the European Union (EU), the Turkish Republic has expanded its consumer protection strategy and adopted legislation in compliance with EU law. Still, full harmonisation has not been attained yet, particularly in the field of consumer disputes. One example is EU Collective Redress Directive 2020/1828 with which Turkish domestic law is still incompatible. The underlying objective of the introduction of the Collective Redress Directive is to establish effective and efficient collective action for consumers in order to provide injunctive relief and compensation to those harmed by the same or a similar infringement. The regime of collective actions in Turkey is, however, fragmented and in need of reform in order to protect the collective interests of consumers. The relevant legislation not only lacks the necessary elements required for the well-functioning of a collective action mechanism, but also does not allow the filing of a collective action for certain infringements of consumer law and for claiming damages for any infringement. This article therefore evaluates the EU collective redress regime to seek lessons to be learnt by Turkey, and, in light of this evaluation, aims to design a new legal framework for consumer collective redress in Turkey.

Keywords Consumer protection · Consumer redress · Collective actions · EU Collective Redress Directive · Turkish consumer collective redress

1 Introduction

Typically, all claimants and defendants represent themselves and their own interests before the court in a traditional lawsuit.¹ However, when a wrongdoing causes small harm to a large number of victims, a traditional lawsuit does not provide a resolution to the dispute² as it is neither realistic nor economic for the victims to sue individually considering the risks and costs

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¹ Kliebard et al. (2020).

² Bronsteen and Fiss (2003), p 1419; Yeazell (1987), p 10.

of the litigation.³ The need for a procedural tool to prevent and compensate harm in mass tort situations has resulted in the creation of a collective action which constitutes ‘an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only’.⁴ In a collective action, a lead plaintiff/representative party sues on behalf of a group of victims who are similarly situated but absent from the proceedings to claim group-wide relief for a wrong committed by the defendant(s).⁵ Aggregating individual claims in one lawsuit makes the litigation less risky and costly⁶ by spreading the costs and risks between all members of the group.⁷ In the end, the decision of the court binds the representative as well as the sued party/parties and the group of unnamed victims who are neither participants in nor parties to the litigation.⁸ The design of a collective action therefore consists of five elements: i. standing to bring collective actions; ii. formation of the group (opt-in, opt-out or mandatory); iii. responsibility for costs and funding of such action; iv. admissibility criteria; and v. calculation and distribution of the award if the case is brought to seek damages.⁹

Collective actions, called ‘class actions’ in the United States (US), have long roots in the US, as federal rules of civil procedure have included a class action mechanism in Rule 23 since 1938. Having a vast literature and case law on class actions, the US system sets an example for other common law jurisdictions. As a result, Canada (the earliest in Quebec in 1978)¹⁰ and Australia, in 1992,¹¹ also incorporated a class action procedure into their procedural laws.¹² Collective actions that can be traced back to 1870¹³ in the United Kingdom (UK)¹⁴ have undergone substantive reform, and the new regime came into force with the 2015 Consumer Rights Act.¹⁵ Civil law jurisdictions, on the other hand, stayed away from collective actions due to their nature, which undermined litigant autonomy.¹⁶ However, the lack of an efficient and effective procedural way to defend consumers’ collective interests in practice makes it inevitable for the EU to take an active step to solve this problem.

Indeed, consumer losses have specific features that make the pursuit of them in individual lawsuits unrealistic, unpractical and economically unfeasible. Consumers suffer small value losses that do not give them adequate incentives to sue as the litigation is lengthy, risky and costly.¹⁷ They also lack sufficient funding and knowledge to sue individually. Another obstacle to harmed consumers is consumer ignorance, i.e., unawareness of the infringement, harm and

³ Mulheron (2004), pp 52-53.

⁴ *Califano v Yamasaki* 442 U.S. 682 (1979), pp 700-701.

⁵ Kliebard et al. (2020); Rasnača (2021), p 418.

⁶ Leslie (2007), p 75; Keske (2010), p 74; Federico (2023), p 5; Russell (2010), p 145.

⁷ See Bronsteen and Fiss (2003), p 1419.

⁸ Uzelac and Voet (2021), p 4; Gidi (2013), p 334; Federico (2023), p 5.

⁹ See Geradin (2015), pp 1092-1095.

¹⁰ British Columbia in 1995, Saskatchewan in 2002, Newfoundland in 2001, Manitoba in 2002, Alberta in 2004, New Brunswick in 2006 and Nova Scotia in 2008 enacted a class action mechanism, see Zakaib and Saint-Onge (2018), p 1.

¹¹ Part IVA of the Federal Court of Australia Act 1976 (Cth) and Division 9.3 of the Federal Court Rules 2011 (Cth) set rules for filing a class action in the Federal Court, which have been in force since March 1992, see Federal Court of Australia (2021).

¹² Mullenix (2021), p 2.

¹³ *London Commissioners of Sewers v Gellatly* (1876) 3 Ch. D. 610, para. 615 per Jessel MR. in Sanger et al. (2022), p 1, fn 3.

¹⁴ The UK refers to the jurisdiction of England and Wales.

¹⁵ Before that, the UK had two tools, i.e., group litigation orders under Section III of Part 19 of the Civil Procedure Rules (CPR), still in force, and representative actions under Section 47B of the Competition Act 1998, amended by Schedule 8, para. 5 of the Consumer Rights Act 2015, see The National Archives (2015).

¹⁶ Mullenix (2021), p 2; Federico (2023), p 4; Nagy (2019), p 24; Russell (2010), p 142.

¹⁷ Peyer (2022), pp 1-2; Rasnača (2021), p 427; Nagy (2015), p 533; Russell (2010), p 144.

the procedural ways to defend their rights.¹⁸ All these features of consumer losses make the need for a collective action procedure for consumers apparent.

Turkey, which has been a member of the Organisation for Economic Co-operation and Development (OECD) since 1961 and has had a Customs Union agreement with the EU since 1995, has synchronised its domestic consumer law with both OECD and EU regulations. Present Consumer Protection Law No. 6502 (CPL), which is in accordance with EU law, was passed by the Turkish Parliament in 2013. There are also national regulations that implement EU directives into Turkish law, such as Directive 2015/2302 on package travel and linked travel arrangements, Directive 2011/83 on consumer rights, and Directive 2002/65 regarding the distance marketing of consumer financial services. However, the aim of full harmonisation in consumer law has not been realised yet. The adoption of EU Collective Redress Directive 2020/1828 adds another law which the Turkish legislator should consider complying with.

In Turkish law, the collective action, which may be filed under different legal acts, was conceptually introduced for the first time in Article 113 of the Turkish Civil Procedure Code (CPC) that came into force in 2011. Despite the introduction of the new regime in the CPC, the rules regarding the filing of a collective action which already existed in other laws have not been abolished.¹⁹ The Turkish law is therefore fragmented, resulting in diverse conditions for filing a collective action lawsuit in each area of law. The CPL, on the other hand, is inadequate to protect consumers and their collective interests through collective actions as it does not contain rules for the admissibility of such actions, cost allocation and funding, and excludes certain infringements of consumer law from the scope of collective actions. Nor does it allow to claim damages in a consumer collective action, and therefore it does not contain any elements necessary for the design of a collective action for damages.

This article begins with an analysis of the current legal framework for collective actions in the EU and presents the rules set forth specifically for the filing of such actions in consumer cases. Then the article moves on to examine the current legal framework for collective actions in Turkey and explains the conditions for filing a collective action lawsuit in areas of law where such an action is allowed. The last part of the article is devoted to the need for substantive reform of the collective action procedure in Turkey, presenting recommendations for Turkish law in light of the lessons drawn from the EU rules.

2 Collective Actions in the EU

2.1 Background of the Directive on Collective Redress

In fact, the protection of collective interests of consumers has been on the agenda of the EU institutions since the 1980s.²⁰ Discussions on the framework for a directive to defend consumers' collective interests before courts originally started in 1985 with the European Commission (Commission)'s memorandum on consumer redress,²¹ and continued with action plans²² and the enactment of the Injunctions Directive²³ and the Codified Directive²⁴ on injunctions for the protection of consumers' interests.²⁵ However, none of these legal

¹⁸ de Ávila Ruiz-Peinado (2016), p 21.

¹⁹ Budak and Karaaslan (2020), p 154.

²⁰ European Economic and Social Committee (2008), para. 3.7.

²¹ European Commission (1985).

²² European Commission (1990).

²³ European Commission (1998).

²⁴ European Commission (2009).

²⁵ Fairgrieve and Salim (2022), p 466.

instruments provide compensatory relief to consumers. In 2005, the Green Paper on damages actions for breach of the EC antitrust rules²⁶ (Green Paper) was the first paper that put the focus on collective actions in order to improve consumers' access to justice and facilitate consumer damages actions in competition cases. Following this, in 2007, the Commission published its six-year consumer strategy, stating the need for collective actions for consumers for violations of consumer law as well.²⁷

In 2013, the Commission published a set of common, yet non-binding principles for injunctive and compensatory collective redress actions encompassing all areas of law (Recommendation).²⁸ The Recommendation asked the Member States to implement these principles in their national collective redress systems by July 2015.²⁹ The Commission's report of 2018 collected data on the implementation rates and details of the principles set out in the Recommendation and found that, while all Member States had some kind of collective redress in the form of injunctive relief, the same could not be said for compensatory collective redress. The report stated that compensatory collective actions existed in only 19 Member States and their design differed greatly.³⁰ As a result, the Recommendation was not successful in ensuring Member States' compliance with the common principles and was therefore not successful in providing the necessary tool for large groups of consumers to seek redress.

In 2018, a proposal for a Directive on representative actions for the protection of the collective interests of consumers (Directive proposal) submitted that, due to globalisation and digitalisation, a large number of consumers were at an increased risk of being affected by similar unlawful conduct, and that the EU needed to establish an effective enforcement means for consumers to also seek compensation collectively when their rights were infringed.³¹ In 2020, the Directive proposal was transposed into law and the Directive on representative actions for the protection of the collective interests of consumers was adopted (the Directive).³² The Directive requires that Member States have at least one effective and efficient representative action for injunctions and for redress available to consumers.³³

A detailed reading of all provisions of the Directive shows that the Directive aims to improve consumers' access to justice as well as protect their collective interests throughout the EU and at the same time prevent abusive litigation by putting appropriate and common safeguards in place. The Commission³⁴ has associated abusive litigation with US-style class actions³⁵ since the publication of the first consultation paper.³⁶ The Commission and stakeholders fear abusive collective litigation, thus the Directive's design of such actions aims to close doors to unfounded cases. The following sections will critically examine the conditions set by the Directive for filing a collective action.

2.2 Parties to the Collective Action

²⁶ European Commission (2005).

²⁷ European Commission (2007), p 11.

²⁸ European Commission (2013).

²⁹ *Ibid.*, para. 38; Fairgrieve and Salim (2022), p 467.

³⁰ European Commission (2018a), para. 2.1.1.

³¹ European Commission (2018b); Fairgrieve and Salim (2022), p 467.

³² European Commission (2020).

³³ *Ibid.*, para. 7. Article 3 of the Directive defines the terms 'consumer', 'trader', 'collective interests of consumers', 'qualified entity', 'representative action', 'domestic representative action', 'cross-border representative action', 'practice', 'final decision' and 'redress measure', and in so doing, clarifies the meaning of each.

³⁴ See European Parliament (2012), para. 6.2.

³⁵ See the possible risks associated with the US class actions regime, Geradin (2015), p 1088.

³⁶ See European Commission (2005).

Qualified entities are allowed to bring collective actions under the Directive. Article 4 of the Directive requires that the representative party should be a qualified entity, including consumer organisations and public bodies.³⁷ It sets forth the criteria for the entity to be designated to bring a cross-border collective action. According to these criteria, it should be a non-profit, independent and non-insolvent entity which can demonstrate 12 months of actual public activity in protecting consumer interests and a legitimate interest in consumer protection in the fields covered by EU law, and provide information about its compliance with the criteria, the sources of its funding, its organisational structure, its purpose and its activities on its website.³⁸

The Directive also allows but does not support the qualification of entities on an ad-hoc basis in domestic collective actions (Directive Article 4/6).³⁹ However, ad-hoc qualified entities are prevented from bringing cross-border collective actions.⁴⁰ Article 5 of the Directive imposes an obligation on the Member States to submit a list of qualified entities to the Commission, to inform the Commission of any changes in this list, and to check every five years whether the qualified entities still meet the required criteria. In order to protect collective interests of consumers throughout the EU, Article 6 of the Directive states that an entity qualified in one Member State can bring a collective action in another Member State and that in case an infringement causes loss to consumers located in different Member States, several qualified entities from different Member States can also bring a collective action in different Member States. Qualified entities can also bring a collective action before national courts in stand-alone and follow-on cases. An action can be brought on a stand-alone basis where there has been no prior finding of an infringement by the authority responsible for consumer protection or on a follow-on basis where there has been an authority decision finding that an infringement has been committed (Directive Article 9/8).

2.3 Admissibility Criteria

The Directive makes it possible to bring a collective action before administrative national authorities and courts (Directive Article 7/1). The qualified entity should provide the authority or the court with sufficient information on the group of consumers on whose behalf the collective action is brought (Directive Article 7/2) and can seek either or both monetary damages and/or injunctions in a single proceeding or in separate proceedings (Directive Article 7/5). The information to be presented differs according to the remedy sought and whether the collective action is on the basis of the opt-in or opt-out principle.⁴¹

The Directive also provides for another attempt to eliminate abusive litigation.⁴² It is stated that when a collective action is brought, the court or administrative authority first assesses the admissibility of the action so that an unfounded case can be dismissed at an early stage (Directive Article 7/3, 7). In assessing the admissibility of collective actions for damages, the court or administrative authority will look at the nature of the infringement and characteristics of the harm incurred by consumers.⁴³

2.4 Available Measures in Collective Actions

³⁷ Ibid., para. 24.

³⁸ See also *ibid.*, para. 25.

³⁹ Ibid., para. 28.

⁴⁰ Ibid.

⁴¹ Ibid., para. 34.

⁴² Ibid., para. 39.

⁴³ Ibid., para. 49.

Collective actions can be brought to seek injunctive and redress measures under the Directive. A collective action for an injunction to cease or prohibit a practice is available in two forms, i.e., a provisional measure for practices that carry a risk of causing serious or irreversible harm to consumers, and a definitive measure for infringements (Directive Article 8/1).⁴⁴ Member States are free to require that, before seeking an injunction, the qualified entity should offer the alleged infringers a chance to stop their unlawful practice by giving them two weeks. When the two weeks have passed and the unlawful practice has not come to an end, the qualified entity can immediately bring a collective action for an injunction (Directive Article 8/4). The same route can be followed in collective actions for damages as well.⁴⁵ For qualified entities, seeking an injunction is easier than seeking damages because in collective actions for injunctions entities do not have to prove actual loss or damage caused to consumers by the infringement, or intent or negligence on the part of the infringer (Directive Article 8/3). Another facilitation tool provided is that consumers do not need to express their wish to be represented in collective actions for injunctions (Directive Article 8/3).

Qualified entities can also bring a collective action for redress measures that include compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid (Directive Article 9/1). In such a collective action the award of punitive damages is like a red rag to a bull for the Commission. Some statutes in the US allow the award of treble damages in class actions for damages.⁴⁶ The Commission, however, firmly argues that national laws should not make punitive damages available in collective actions.⁴⁷ This is understandable as the concept of punitive damages is foreign to the national laws of the Member States and incompatible with the primary goal of private enforcement in the EU, i.e., compensation.⁴⁸

2.5 The Formation of the Group

Since the start of the debates on collective actions, there has been strong opposition to opt-out collective actions in the EU due to the fear of abusive or frivolous litigation associated with the US class action procedure.⁴⁹ However, the Directive overcomes this prejudice by allowing opt-out actions alongside opt-in actions in Article 9. This means that, considering their legal tradition, Member States are free to introduce an opt-in⁵⁰ or opt-out⁵¹ mechanism or a combination of the two.⁵² Irrespective of the chosen design, national laws are required to provide consumers with an adequate opportunity to explicitly or tacitly express their wish to be bound by the outcome of the case (Directive Article 9/2). The only exception that entails an opt-in to the collective action is for consumers whose habitual residence is outside of the Member State of the court or administrative authority before which a collective action has been brought (Directive Article 9/3).

According to the Directive, the Member States that have an opt-in mechanism should provide that consumers can express their wish to be included in the group before or after the collective action has been filed.⁵³ By granting consumers a right to be represented in the

⁴⁴ *Ibid.*, para. 40.

⁴⁵ *Ibid.*, para. 41.

⁴⁶ See, for instance, the Clayton Antitrust Act, § 15.

⁴⁷ European Commission (2020), para. 42.

⁴⁸ Koziol (2008), pp 741, 748, 753.

⁴⁹ Nagy (2019), p 35 et seq.

⁵⁰ 'In an opt-in mechanism, consumers should be required to explicitly express their wish to be represented by the qualified entity in the representative action for redress measures', European Commission (2020), para. 43.

⁵¹ 'In an opt-out mechanism, consumers should be required to explicitly express their wish not to be represented by the qualified entity in the representative action for redress measures', *ibid.*

⁵² *Ibid.*

⁵³ *Ibid.*, para. 44.

collective action even after the action has been brought, the Directive aims to cover as many affected consumers as possible. For procedural efficiency purposes, once consumers opt in to a collective action or do not opt out from an action, the Directive makes it impossible for them to be represented in another collective action with the same cause of action against the same trader or to bring an individual lawsuit with the same cause of action against the same trader.⁵⁴ Again for purposes of expediency and efficiency, the Directive allows the Member States to grant consumers a right to benefit from the relief awarded without requiring prior participation in the collective action.⁵⁵

In collective actions for redress measures, the qualified entity is required to present the court or administrative authority with sufficient information about the case, a description of the group of consumers harmed by the infringement and the questions of fact and law to be examined in the case. The qualified entity, however, does not need to individually identify each consumer included in the group.⁵⁶ This is for good reason, because an infringement might inflict harm on numerous consumers, which makes it almost impossible to individually identify every affected consumer in practice.⁵⁷ Therefore, when individual identification of affected consumers is not an option, the group description should include the consumers who are entitled to the remedies awarded in collective actions for redress measures.⁵⁸

In bringing the action, the qualified entity needs to specify the method of quantification of harm and the way in which consumers benefit from and traders employ these remedies.⁵⁹ It is stated that represented consumers should receive their share of the award in the timeframe established by the decision without opening a separate proceeding (Directive Articles 9/5, 6, 7). In this respect, national laws might expect consumers to take certain steps to collect their share of the award, including making themselves known to the entity.⁶⁰ Member States should furthermore decide what will happen to the uncollected damages in collective actions.⁶¹

The problem of undistributed damages has actually been observed in opt-out collective consumer actions where the group on whose behalf the collective action is brought is not only large but also consists of identifiable but not individually identified consumers with small value losses.⁶² In such cases, it is difficult to locate the large number of consumers in order to notify them of their rights, or it is not worth bearing the notification and distribution costs when the recoverable amount is indeed very small.⁶³ In case of a collective action on an opt-out basis, one can also never be sure in the first place that group members even know that they are represented in such an action.⁶⁴ Although regarded as one of the most controversial elements of class actions,⁶⁵ the US practice adopts the *cy pres*⁶⁶ doctrine⁶⁷ to distribute unclaimed funds without increasing management costs and necessitating more judicial involvement.⁶⁸ It is therefore necessary for the Member States to set out rules to deal with undistributed funds in

⁵⁴ *Ibid.*, para. 46.

⁵⁵ *Ibid.*, para. 47.

⁵⁶ *Ibid.*, para. 49.

⁵⁷ Cramton (1995), p 816.

⁵⁸ European Commission (2020), para. 50.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ *Ibid.*, para. 51.

⁶² Barnett (1987), p 1595; Shepherd (1972), p 448.

⁶³ DeJarlais (1987), p 730.

⁶⁴ Redish et al. (2010), p 619.

⁶⁵ Bone (2020), p 571.

⁶⁶ 'The *cy pres* doctrine allows a court to distribute all or a portion of the proceeds of a class settlement to a third-party charity when the funds cannot be distributed to members of the class', Bone (2020), p 572.

⁶⁷ This doctrine has been used since Roman law times, see Fisch (1953), p 375.

⁶⁸ DeJarlais (1987), p 730.

consumer collective actions, and when doing so they can benefit from the US experience, with a history of nearly two hundred years.⁶⁹

2.6 Costs and Funding Options in Collective Actions

Collective actions are costly and burdensome procedures in comparison with individual procedures,⁷⁰ which makes the issue of funding important. Article 10 of the Directive entails full transparency about the funding of collective actions, especially if there is a third-party funder. Indirect funding includes equal contributions by the organisation's members, crowdfunding, donations, and donations in the context of corporate social responsibility.⁷¹ It is however pointed out that there should be no conflict of interest between the third-party funder and the qualified entity, nor should there be an economic interest for the third-party funder in the collective action for damages, and it should not be possible for the third-party funder to unduly influence the qualified entity's decision making in procedural matters of the case.⁷² In order to enable the court to assess the conformity of sources of funding with the criteria set in Article 10, the qualified entity is required to submit the list of sources of funding to the court. The court has the authority to reject the legal standing of the qualified entity in case the funding sources do not comply with the criteria. Therefore, a variety of funding options is available to qualified entities as long as these options are compatible with the requirements of transparency, impartiality and the absence of conflicts of interest.⁷³

Regarding the litigation costs, in line with the Directive's aim to prevent abusive litigation, the loser-pays rule is adopted in Article 12. Accordingly, the unsuccessful party bears the costs of the collective action.⁷⁴ The Directive requires that the affected consumers only benefit from the outcome of the collective action⁷⁵ but do not bear the cost of the proceeding unless their intentional or negligent conduct results in the extra cost incurred (Directive Article 12).⁷⁶

3 Current Legal Framework of Collective Actions in Turkey

3.1 Article 113 of the Civil Procedure Code

Article 113 of the CPC establishes a conceptual framework for collective actions in Turkish law.⁷⁷ The entry into force of Article 113 has given legal persons the right to file a collective action under the general provisions of the law.⁷⁸ The Preamble of Article 113 states that the aim of the introduction of a collective action mechanism is to protect the public interest by expanding the concept of legal interest in a narrow and technical sense.⁷⁹ The legislator draws

⁶⁹ The first time a class action procedure was codified in the US was in 1849 in the Field codes of New York and California, see Calabresi and Schwartz (2011), p 171.

⁷⁰ Wegner (2021), p 347; Legg (2022), p 247; Hensler (2014), p 505.

⁷¹ European Commission (2020), para. 53.

⁷² *Ibid.*, para. 52.

⁷³ *Ibid.*

⁷⁴ *Ibid.*, para. 38.

⁷⁵ *Ibid.*, para. 37.

⁷⁶ *Ibid.*, para. 38.

⁷⁷ Preamble of Article 113 of the CPC.

⁷⁸ Pekcanitez et al. (2017), p 1103; Kök (2021), p 3158; Korkusuz and Uğur (2019), p 19.

⁷⁹ Preamble of Article 113 of the CPC.

attention to the fact that although such actions have originated in the US and the UK, they have also started to be incorporated into continental European legal systems.⁸⁰

According to Article 113 of the CPC, in order to protect the interests of their members or the persons they represent, associations or other legal entities, within the framework of their certificate of incorporation, may file an action before courts in their own capacity for the determination of the rights of the persons concerned, or for the cessation of the unlawful situation, or for the prevention of the violation of future rights of the persons concerned.⁸¹ No cost rule has been put in place specifically for collective actions, thus the main principle of ‘loser pays’ applies to collective actions as well (Article 326 of the CPC). The following sections will critically examine the conditions for filing a collective action under Article 113 of the CPC.

3.1.1 Parties to the Action (Persons Granted the Right to File a Collective Action)

Article 113 of the CPC allows an association or a legal entity to file a collective action. Associations having a legal personality are defined in the Turkish Civil Code as groups of individuals of at least seven real or legal persons who continuously combine their knowledge and work in order to achieve a specific and common goal other than earnings sharing.⁸² Hence, an association must not have a profit-sharing objective in order to be qualified as an association. However, the association can engage in an economic activity to fulfil its objectives, such as operating a business, and this does not impair the association’s status as an association. It is thus acknowledged that the association which pursues an ‘ideal’ goal can bring a collective action on behalf of the community it represents, notwithstanding its involvement in the business.⁸³ Swiss law, which serves as a model for the provisions in Turkish law, also predominantly states that an association may bring a collective action even if it is conducting a business.⁸⁴

In addition to associations, ‘other legal entities’ are also entitled to file a collective action under Article 113 of the CPC. Apart from real persons, legal persons are defined as groups of goods or persons who come together to realise a certain purpose and have the capacity to have rights and debts.⁸⁵ In order to be a legal entity, the group of goods or persons shall have a personality independent of its constituent persons and goods, have an income-earning or spiritual purpose, and have a sufficient organisational structure to realise this purpose.⁸⁶

The CPC only allows legal entities to initiate a collective action. This means that groups, communities and interest groups that do not have a legal personality are denied the right to file a collective action.⁸⁷ This brings another question to mind, i.e., whether foundations can have this right. The Turkish Civil Code defines foundations as collections of assets in the form of legal entities formed by real and legal persons who assign sufficient goods and rights to a specific and permanent purpose. This definition leaves no room for argument as to their standing. Therefore, foundations, like associations, can file a collective action as well.⁸⁸ Apart

⁸⁰ Preamble of Article 113 of the CPC.

⁸¹ Article 113 of the CPC.

⁸² In addition to Article 56 of the Turkish Civil Code, in Article 2(a) of Associations Law no. 5253, ‘association’ is also defined as follows: ‘[A] group of persons with legal personality who is formed by at least seven natural or legal persons and who continuously combines their knowledge and work in order to realise a specific and common purpose that is not prohibited by law, other than sharing profits.’

⁸³ Taşpolat Tuğsavul (2016), p 197.

⁸⁴ Hausheer and Walter (2012), p 981.

⁸⁵ Abdelfatah (2017), p 6.

⁸⁶ Ibid.; Kök (2021), p 3167.

⁸⁷ Yılmaz (2017), p 1709; Kök (2021), p 3167.

⁸⁸ Taşpolat Tuğsavul (2016), p 205; Pekcanitez et al. (2017), p 1099; Şahin and Çelik Şahin (2014), p 398.

from these entities, collective, commandite, joint stock and limited companies and cooperatives specified in the Turkish Commercial Code (TCC) are commercial companies having legal personality. However, it is accepted in both Turkish and Swiss doctrine that these companies cannot bring a collective action lawsuit.⁸⁹

Regarding public legal entities, the CPC only grants the right to file a collective action to professional organisations having the nature of public institutions. In contrast, other public administrations and public institutions having the nature of professional organisations cannot file a collective action since they do not have members to protect their collective legal interests.⁹⁰ Still, there are some professional organisations having the nature of public institutions that are not deemed to be administrative organisations, although they actually provide a public service. Organisations that are considered to fall within this scope are the Union of Turkish Bar Associations, the Turkish Medical Association, the Notaries Union of Turkey, the Union of Chambers of Craftsmen and the Union of Chambers and Commodity Exchanges of Turkey. Since ministries are an integral part of the state legal entity, they have the right to initiate a collective action in some cases.⁹¹

3.1.2 *Filing a Case Within the Framework of the Status of Legal Entity*

The CPC stipulates that associations and other legal entities can file a collective action ‘within the framework of their certificate of incorporation’ to protect the interests of their members or the group they represent. The main certificate of incorporation, which establishes the legal entity’s fundamental order, determines the legal entity’s principal *raison d’être*, its area of operation, decision-making, executive and supervisory bodies, and the framework of its contacts with its members.⁹² The main certificate of incorporation is called ‘bylaw’ in the case of associations, unions and political parties, and ‘foundation certificate’ in the case of foundations.⁹³

The definition of the phrase ‘within the framework of their certificate of incorporation’ in the CPC is subject to debate. One author argues that legal persons are bound by the ‘*ultra vires*’ principle, i.e., they are only permitted to do business in accordance with the purposes for which they were established.⁹⁴ Therefore, the legal person needs specific permission in its main certificate of incorporation to act as a legal person in order to bring a collective action.⁹⁵ The ‘*ultra vires*’ principle, which impedes legal entities’ rights and obligations and serves as the foundation of the viewpoint stated above, is questionable in terms of its validity and quality.⁹⁶ While one author claims that the ‘*ultra vires*’ principle restricts the legal capacity of the legal person,⁹⁷ another contends that it restricts the capacity to act rather than the legal capacity.⁹⁸ On the other hand, a different view argues, referring to Article 48 of the Turkish Civil Code stating that ‘legal persons are entitled to all rights and obligations other than those that depend on human characteristics such as sex, age and kinship.’, that the limitation of legal capacity can only be achieved through a provision of law.⁹⁹ According to this view, since there is currently no such provision, the legal capacity of legal entities to bring a collective action is not limited

⁸⁹ Taşpolat Tuğsavul (2016), p 205; Pekcanitez et al. (2017), p 1099; Kök (2021), p 3167.

⁹⁰ Taşpolat Tuğsavul (2016), p 205; Pekcanitez et al. (2017), p 1099.

⁹¹ Tanrıver (2021), pp 631-632; Kök (2021), p 3167.

⁹² İkişler (2012), pp 64-66; Yılmaz (2017), p 1709.

⁹³ İkişler (2012), pp 64-66.

⁹⁴ Taşpolat Tuğsavul (2016), p 194.

⁹⁵ Yılmaz (2021), p 2555; Kaya (2008), pp 1302-1309.

⁹⁶ Özsunay (1982), p 62.

⁹⁷ Serozan (2022), p 508.

⁹⁸ Akipek et al. (2021), p 546; Hatemi (1979), p 154; Alper (2013), p 76.

⁹⁹ Akınal (1995), p 26.

to their purpose.¹⁰⁰ Thus, one should not evaluate whether a collective action filed by a legal entity falls within the framework of its certificate of incorporation which is based on a principle whose existence is debatable.

In our view, the expression ‘within the framework of their certificate of incorporation’, which is one of the requirements to bring a collective action lawsuit, should be understood as the purpose to be attained by filing a collective action lawsuit that is compatible with the purpose of the association. Therefore, in order for the legal entity to file such a lawsuit no explicit authorisation contained in the main statutes is needed.¹⁰¹ This requirement should be considered as being fulfilled if the relevant legal entity files a collective action lawsuit the purpose of which is in line with the purpose for which it was established. In cases where the purpose, scope of work and field of activity of the association or the relevant legal entity coincide with the aim intended to be achieved by filing the collective action lawsuit, it should be possible to file that lawsuit.¹⁰²

3.1.3 *Filing a Case Within the Scope of a Collective Legal Interest*

Article 113 of the CPC requires that collective actions shall concern the interests of the associations’ and other legal entities’ members, or the group they represent. This means that there must be a collective legal interest in filing the collective action. The legal protection that associations and legal entities may seek from the court in a collective action should be related to the protection of the interests of the persons represented by them. In order to file a collective action, violation of personal interests is not sufficient; the infringement must affect more than one person and the group on whose behalf the action is brought must be formed by the persons harmed.¹⁰³

Since the collective legal interest is a set of common and indivisible interests and rights that supersede individual interests, if the court determines that there is no collective interest, it must dismiss the case due to the absence of a legal condition required to bring the lawsuit at hand. However, the most difficult condition for a judge to determine and evaluate during an investigation on whether a collective action satisfies the legal requirements is whether there is a collective legal interest.¹⁰⁴ The most important criterion to be assessed by the judge when examining the existence of a collective legal interest in a lawsuit is whether the lawsuit filed is independent of the personal interests of the members, or of the members of the association or of the relevant legal entity, or of the group they represent.¹⁰⁵ If the infringement violates individual rights or personal interests of one community member, it will not be possible to bring a collective action lawsuit. The infringement must target more than one person, i.e., it must harm the community of these persons.¹⁰⁶ The underlying goal is to stop group litigation from evolving into a sort of procedure that pursues personal interests and moves away from its original purpose.

There is also the question of whether it should be determined for the filing of a collective action lawsuit how many people have had their interests infringed. There is actually no specific number stipulated in Turkish legislation in this regard. In the US, however, FRCP Article 23(a)(1) states that for an opt-out class action to be brought the group must consist of a large number of individuals, which makes it impractical for them to come forward to join the

¹⁰⁰ Ibid.

¹⁰¹ Dişel (2014), p 1850.

¹⁰² Ibid.; Özbay (2015), p 127; Karaaslan and Eroğlu (2009), p 215; Hasırcı and Tekin (2021), p 958; Tanrıver (2021), p 633; Kök (2021), p 3168; Korkusuz and Uğur (2019), p 20.

¹⁰³ Pekcanitez et al. (2017), p 1102; Özbay (2009), p 5; Tanrıver (2021), p 633; Kök (2021), p 3170.

¹⁰⁴ Taşpolat Tuğsavul (2016), p 199.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid., p 201.

action.¹⁰⁷ Turkish law does not require that the infringement violates the interests of all or the majority of the members in order for the collective action to be filed because the collective legal interest does not refer to the sum of individual interests of the members. Thus, the answer to the question is that no numerical value should be set in Turkish law. The reason for the community's existence and the legitimate interest it defends, not the number of members, is what justifies the conferral of the right to bring a collective action lawsuit on legal entities.

3.1.4 *Filing a Case in Line with the Demands Specified in Law*

Article 113 of the CPL sets forth the demands that can be raised in a collective action. The demands should be related to determining the rights of the related parties, eliminating the unlawful situation, or preventing future rights of the relevant persons from being violated. According to the CPL, legal associations do not have the authority to assert a material claim on behalf of their members. Individuals who have experienced material harm will claim damages in individual lawsuits. According to some authors, the difficulty in determining the amount of compensation and distributing it between the members of the group is the reason why the collective action for damages is not regulated in the CPL.¹⁰⁸ However, other authors argue that putting the defendant under an obligation to compensate the loss s/he caused will act as a necessary deterrent and prevent the violation from occurring in the first place.¹⁰⁹ In this way, the main objective of a collective action, which is to compensate those harmed and by doing so preclude infringements, will be better realised. Victims wishing to be bound by the decision should also participate in the case through an opt-in system.¹¹⁰

Associations or other legal entities that can file a collective action may request a determination from the court as to whether a right or legal relationship exists. A declaratory collective action is set out in Article 106 of the CPC. Let's suppose there is a collective legal interest in determining a right or legal relationship. In that case, the association or legal entity must be able to file a collective action that includes the request for a declaratory action, and the effects of the violation do not need to be still ongoing.¹¹¹ If the request for a declaratory action is accepted, the judgment will not contain any action for performance but will only determine the existence of a legal relationship.¹¹²

Article 113 of the CPC states that in addition to a declaratory action, associations or other legal entities that can file a collective action may request to eliminate the unlawful situation. In a collective action lawsuit filed by associations or legal entities, the purpose of demanding the removal of the unlawful situation is to prevent and put an end to the ongoing unlawful status.¹¹³ This is called 'action for performance': through the action for performance, the court orders the defendant to provide or perform something or avoid doing something.¹¹⁴ When an action for a performance lawsuit is filed, the court will determine whether the right is the subject of the case. After the right is determined, it will order the defendant to fulfil the action relating to that right or to abstain from something. In a collective action lawsuit filed with the demand to eliminate the unlawful situation, the violation must have started and continued.¹¹⁵ For this

¹⁰⁷ Federal Rules of Civil Procedure, Rule 23(a)(1).

¹⁰⁸ Pekcanitez et al. (2017), p 1102; Kök (2021), p 3171.

¹⁰⁹ Karaaslan and Eroğlu (2009), p 215.

¹¹⁰ Ibid.

¹¹¹ Kök (2021), p 3139.

¹¹² Kuru and Aydın (2021), p 403; Kök (2021), p 3171.

¹¹³ Taşpolat Tuğsavul (2016), p 211.

¹¹⁴ Article 105 of the CPC.

¹¹⁵ Taşpolat Tuğsavul (2016), p 212; Kök (2021), p 3172.

lawsuit to be filed, it is sufficient for the violation to be unlawful, and the defendant does not have to be at fault.¹¹⁶

The final type of demand set forth in Article 113 of the CPC is the request to prevent the violation of future rights of the person concerned. In collective action lawsuits filed with the request to prevent the violation of future rights of the plaintiffs, no right has been violated yet, but there must be strong evidence that it will.¹¹⁷

3.2 The Collective Action Procedure in Other Legal Acts

3.2.1 Collective Actions in the Trade Unions and Collective Bargaining Act

Article 26/2 of Trade Unions and Collective Bargaining Act No. 6356 (Bargaining Act) states that unions should file a collective action in order to protect the interests of their members. According to Article 26/2 of the Bargaining Act, organisations shall have the capacity to act as plaintiffs or defendants in matters arising out of working life, legislation, custom and usage.¹¹⁸ In addition, trade unions shall, at the written request of the person concerned, have the capacity to act as a plaintiff or defendant in legal actions concerning rights under the contract of employment and employment relationship and regarding social security rights, acting as representatives of their members and the latter's heirs.¹¹⁹ Since Article 26/2 of the Bargaining Act mentions the lawsuit to be filed on behalf of employees and employers, employees who are not members of the union but pay solidarity fees will benefit from the collective actions filed.¹²⁰ Article 26/2 provides for two different litigation capacities: while the collective litigation capacity has been granted to unions and confederations, the individual litigation license has been granted to unions only.¹²¹

It is worth noting here that while abolished Act No. 2821¹²² did not grant confederations a right to sue, with the new Bargaining Act in place, confederations and unions of employees and employers have been given the right to file lawsuits on behalf of their members in matters concerning the interests of workers and employers and to follow up the case in court. However, since the possibility of filing a lawsuit 'on matters arising from the collective labour agreement' in the abolished act is not included in the new act, confederations cannot sue in disputes arising from the collective bargaining agreement.¹²³

Apart from these lawsuits to be filed by unions and confederations, Article 53/1 of the Bargaining Act states that the parties to the agreement can bring a lawsuit arising from the interpretation of the collective bargaining agreement.¹²⁴ In Turkish law, collective bargaining agreements are concluded between the union and the employer, and the employees who are members of the union also benefit from the provisions of the collective bargaining agreement. Therefore, one can conclude that the interpretation case is a classic determination case arising from the contract. However, considering the nature of the collective bargaining agreement, since the union actually protects the collective interests of its members, it should be accepted that these lawsuits are similar to collective actions.¹²⁵

¹¹⁶ Kök (2021), p 3172; Dinç (2020), p 122; Micklitz and Stadler (2005), p 428.

¹¹⁷ Article 113 of the CPC.

¹¹⁸ Şener (2016), p 186; Kök (2021), pp 3160-3161.

¹¹⁹ Bargaining Act, Article 26/2; Tuncay and Savaş Kutsal (2023), p 124; Kök (2021), p 3161; Ekin (2019), p 138.

¹²⁰ Şener (2016), p 187; Özkaraca (2017), p 220; Kök (2021), p 3161.

¹²¹ Esener and Bozkurt Gümrükçüoğlu (2017), p 81; Narmanlıoğlu (2013), p 239; Mollamahmutoğlu (2012), p 51; Korkusuz and Uğur (2019), p 11.

¹²² Act on Trade Unions No. 2821.

¹²³ Narmanlıoğlu (2013), p 239; Esener and Bozkurt Gümrükçüoğlu (2017), p 81.

¹²⁴ Bargaining Act, Article 53/1.

¹²⁵ Çelik et al. (2014), p 547; Ekmekçi (2022), p 240; Korkusuz and Uğur (2019), p 6.

3.2.2 *Collective Actions in the Law on Consumer Protection*

One of the fastest-growing markets in the world is that of electronic commerce. It gives consumers a huge selection of products and services without regard to time or place restrictions. In Turkey, thousands of online transactions are completed each day.¹²⁶ The likelihood of disputes rises as electronic commerce transaction volumes continue to increase.¹²⁷ In order to harmonise its national consumer law with EU legislation and the OECD policies, the Turkish Parliament enacted the current law, i.e., the CPL. The CPL has brought radical changes to Turkish consumer law, and the impact of these changes has been seen in the resolution of disputes arising from consumer relations.¹²⁸ However, the effectiveness of the legal protection provided to the consumer can be measured by the functionality of collective actions. No matter how extensive the rights for consumers, preventing infringements against consumer legislation through individual lawsuits is very difficult.¹²⁹

Article 1 of the CPL states the following:

The purpose of this Law is to take measures that protect the health, safety and the economic interests of the consumer, to compensate the loss of the consumers, to ensure the protection of the consumers from environmental hazards, to inform and educate the consumers in accordance with the public interest; to promote self-protecting initiatives by the consumers and to regulate particulars on the promotion of the voluntary organizations for establishing policies regarding this matter.¹³⁰

Article 3/m of the CPL stipulates that the concept of consumer organisations means ‘associations, foundations, or their supreme organisations established for the protection of the consumer’.¹³¹

Together, Articles 1 and 3/m of the CPL demonstrate the legislator’s support for the promotion of voluntary organisations. Consumers are defined in Article 3/k as ‘natural or legal persons acting for non-commercial or non-professional purposes’. The underlying aim of filing collective actions on behalf of consumers is to protect consumers’ collective legal interest, which is stipulated in Article 73/6 of the CPL entitled ‘Consumer Courts’. According to this Article, except regarding provisions for unfair commercial practices and commercial advertising, in cases that concern consumers and in cases where there is a threat that a contradiction to the CPL may arise, consumer organisations, the relevant public institutions and corporations and the Ministry of Trade may file a lawsuit in consumer courts seeking an interim injunction to prevent or suspend such situations, or to detect, prevent or suspend the unlawful condition.¹³² Thus, qualified entities that have a legal standing to sue in collective actions include consumer organisations, relevant public institutions and corporations, and the Ministry of Trade.

In the CPL, however, unfair advertising and commercial practices have been excluded from the scope of collective action lawsuits since the authority to impose penalties for unfair advertising and commercial practices has been granted to the Board of Advertisement.¹³³

¹²⁶ Kaya (2020), p 162-165.

¹²⁷ Ibid.; Kök (2021), p 3137.

¹²⁸ Yeşilova (2014), p 107; Kaya (2022), p 227.

¹²⁹ Erişir (2014), p 346; Taşpolat Tuğsavul (2016), p 146; Kök (2021), p 3160.

¹³⁰ CPL, Article 1.

¹³¹ CPL, Article 3/m.

¹³² CPL, Article 73/6.

¹³³ Baş Süznel and Erişir (2019), p 659.

According to the view of the doctrine, with which we agree, unfair advertising and commercial practices are actually the areas where collective actions are most needed.¹³⁴ Excluding unfair advertising and commercial practices from the scope of collective actions limits consumers' access to justice in these cases.¹³⁵

Moreover, Article 74/1 of the CPL states that the Ministry of Trade, consumers or consumer organisations can file a lawsuit to detect whether a series of goods offered for sale is defective, to suspend their production and sale, to remedy the defect and to recall them from those who are holding them for selling purposes.¹³⁶

The claims that can be made in collective actions are set forth in Article 73 of the CPL. In collective actions, the relevant organisations and the Ministry of Trade can ask for the prevention or cessation of an unfair situation; they can also file a determination lawsuit or request cessation of an ongoing violation.¹³⁷ However, consumer organisations do not have the right to bring a collective action seeking damages before courts.

3.2.3 *Collective Actions in Unfair Competition Cases*

Another field where collective actions have been introduced in the TCC is unfair competition. Unfair competition provisions are laid down in Articles 54 and 63 of the TCC. Article 54 states that the purpose of these provisions is to ensure fair and undistorted competition in the interest of all concerned. Any behaviour or business practice that is deceptive or infringes the principle of good faith in any other way and which affects the relationship among competitors or between suppliers and customers shall be deemed unfair and unlawful. According to Article 56/3 of the TCC, chambers of commerce and industry, chambers of craftspeople, stock markets, professional and economic unions which are authorised to protect the interest of their members, non-governmental organisations and publicly controlled institutions which are to protect consumers according to their charters can initiate proceedings set forth in Article 56/1a, b and c.¹³⁸ This provision aims to motivate victims to file a lawsuit together with others who wish to file a lawsuit on the same issue. Collective action lawsuits arising from unfair competition may be brought on behalf of persons whose economic interests are damaged or likely to be damaged due to the same/similar conduct.¹³⁹ In order to determine whether the act is unfair, to prevent unfair competition, to eliminate the material situation that is the result of unfair competition, to correct statements if unfair competition has occurred because of these false or misleading statements, and to prevent infringement, the persons and institutions listed in paragraph 56/3 of the TCC will be able to demand, through a lawsuit, the destruction of tools and goods that are effective in processing unfair competition.

The organisations listed in Article 56 of the TCC are authorised to protect the economic interests of their members. In order to protect the collective legal interest, seeing that the conduct infringing the unfair competition provisions will violate the general interests of the persons in a certain occupational group, these organisations have the right to file a collective action against those who commit the act of unfair competition. Competitors, and customers, who are the victims of unfair competition can bring determination lawsuits, prevention lawsuits, correction lawsuits, actions for pecuniary and non-pecuniary damages, while professional organisations can file lawsuits claiming remedies other than pecuniary and non-pecuniary

¹³⁴ Erişir (2014), p 346.

¹³⁵ Taşpolat Tuğsavul (2016), p 154.

¹³⁶ CPL, Article 74/1.

¹³⁷ Baş Süzel and Erişir (2019), p 658; Çabri (2021), p 1193.

¹³⁸ TCC, Article 56(3).

¹³⁹ Kök (2021), p 3162; Çelik (2022), p 67.

damages.¹⁴⁰ Persons affected by unfair competition may claim compensation from the defendant in accordance with paragraphs 56/1 and 2 of the TCC.¹⁴¹

3.2.4 *Collective Actions in Environmental Law*

Environmental Law No. 2872 does not explicitly mention collective actions, but some of its articles may be interpreted as allowing the filing of collective actions. Article 1 of the Environmental Law stipulates that the purpose of this law is ‘to protect the environment which is the common asset of all citizens, in line with the principles of sustainable environment and sustainable development’.¹⁴² According to Article 3/a of the Environmental Law, everyone, especially the administration, professional chambers, unions, and non-governmental organisations, is responsible for protecting the environment and preventing pollution, and is required to adhere to the measures taken in accordance with the principles established in this regard.¹⁴³

Moreover, Article 30 of the Environmental Law states that anyone who is harmed by or aware of an activity that pollutes or degrades the environment can apply to the relevant authorities and request that the necessary measures be taken or the activity be stopped.¹⁴⁴ It should be acknowledged that environmental organisations, environmental associations and related professional organisations may file a collective action demanding the actions necessary to prevent the harm caused by environmental pollution or to put an end to the ongoing environmental pollution in accordance with the provisions set forth in the Environmental Law.¹⁴⁵ The most widespread use of collective actions can be seen in environmental law.¹⁴⁶ Particularly in situations where the environmental impact is severe, there will likely be a power imbalance between the polluting company and the harmed parties in favour of huge corporations. In these situations, the intended prophylactic effect of collective actions will be more apparent.

4 The Need for Substantive Reform of the Collective Action Procedure in Turkey

The reason why the consumer movement revolves around protecting the consumer is that the consumer is typically the ‘weaker’ party in private legal relationships.¹⁴⁷ The underlying motive for the Commission’s very first proposal on collective actions, i.e., the Green Paper, was to defend consumer interests as consumers do not sue the infringers due to the specific nature of their loss.¹⁴⁸ The recent Directive also reflects the need to protect the collective interests of consumers through collective actions, as the technological world we live in results more frequently in the occurrence of mass harm and this generates more consumer detriment.¹⁴⁹ In Turkish law, however, the CPC as a general law does not provide for rules that consider the specific features of consumers and their loss in setting forth the conditions for filing a collective

¹⁴⁰ Kayar (2017), p 218; Kök (2021), p 3163; Dinç (2020), p 153.

¹⁴¹ Taşpolat Tuğsavul (2016), p 176; Kök (2021), p 3163; Hasırcı and Tekin (2021), p 961.

¹⁴² Environmental Law No. 2872, Article 1.

¹⁴³ Ibid., Article 3.

¹⁴⁴ Ibid., Article 30.

¹⁴⁵ Taşpolat Tuğsavul (2016), p 170; Kök (2021), p 3163; Başoğlu (2021), p 179.

¹⁴⁶ Başoğlu (2021), p 178. The class action procedure was vastly used in environmental law in the US, see Cooley and Lemly (1972), p 1385.

¹⁴⁷ Riefa and Saintier (2021), p 2.

¹⁴⁸ European Commission (2005), para. 2.5.

¹⁴⁹ European Commission (2020), para. 1.

action. Nor are other legal acts that provide for a collective action procedure concerned with consumers in stipulating their rules. Such fragmented and diverse rules inevitably give rise to different conditions for filing a collective action lawsuit in each area of law and impedes the use of collective actions in practice.

The CPL focuses on consumers' needs in its provisions, but specifically as regards collective actions this law does not provide all the elements of such actions that are necessary for the protection of consumers and lacks one important function, that is, to provide compensation to those harmed. Compared with the Directive, the CPL does not contain any rules regarding the admissibility criteria of collective actions for consumers, the formation of the group on whose behalf the action is brought, the responsibility for costs and funding opportunities for representative parties. The CPL also excludes from its scope unfair advertising and unfair commercial practices. However, a collective action should be available in the case of all infringements in order to grant consumers greater access to justice.

In order to be compatible with the Directive, the CPL should first set forth rules for the admissibility of the action brought by considering the nature of the infringement and the characteristics of the damage caused to consumers. In doing so, the qualified entity will have the information required by the court to file such an action and the court can easily assess whether the dispute is suitable to be solved in a collective action.

In the current legal framework of the CPL, the group seems to be formed on a mandatory basis as it is not possible to claim compensatory relief in collective actions. This is actually the striking difference between the Turkish legislation and the EU Directive. Collective actions without the remedy of compensatory damages do not benefit consumers harmed by the infringement. The decision granting declaratory relief or an injunction can only have the function of establishing that the conduct is illegal or unlawful. After the decision, if consumers wish to obtain damages, they will need to bring individual lawsuits. Even if there is no need to establish that the conduct is illegal or unlawful in individual cases, consumers still encounter other problems associated with the paucity of their damages claims. It is thus unrealistic, unpractical and economically unfeasible for consumers to sue individually. A collective action should be designed in such a way as to provide consumers with a realistic tool to obtain damages. Otherwise, harmed consumers go uncompensated and infringing traders gain from their illegal conduct. Such a consequence acts as an incentive for trades that violate the law and, as the Directive suggests, eventually hampers competition between infringing and law-abiding traders. Under these conditions, consumers who are not protected from unlawful acts lose their confidence and the market, in turn, does not provide goods and services that have better quality, greater variety, reasonable prices and high safety standards.¹⁵⁰ Collective actions should therefore be made available in Turkish law so as to grant compensation to harmed consumers.

The design of a collective action for damages should include the way in which the group is formed. Since consumers are at the end of the supply chain, they are large in number and when harmed, their losses are scattered and low in value. This makes opt-out collective actions more suitable for addressing consumer losses. The Directive also allows opt-out collective actions for consumer cases. In opt-out actions, the group should be defined in such a way as to include all affected consumers and therefore the qualified entity does not have to individually identify the group members. Actually, individual identification is an impossible task when numerous victims have been harmed by the infringement. There should also be rules in place that require the qualified entity to specify the damage calculation method and the way in which consumers benefit from the award when bringing a collective action for damages. At the end of the litigation, the court should try to distribute damages to those harmed as far as possible. However, it is inevitable to have undistributed sums in opt-out actions. There should thus be

¹⁵⁰ See European Commission (2020), paras. 1-4.

rules governing how to deal with undistributed sums, and the Turkish legislator can consider the *cy pres* doctrine as one of the ways to deal with this.

The loser-pays rule applies to the costs of litigation in Turkey and there is no need to change this for collective actions. However, collective actions are lengthy and costly procedures compared with individual litigation. Since consumers cannot be responsible for the costs, there should be funding schemes available to representative parties. These schemes could range from legal aid to third-party litigation funding and before or after-the-event insurance. Lawyers could also finance collective actions; for instance, in the US class action procedure, contingency (damage-based) fees are used. As in the Directive, representative parties should benefit from a range of funding opportunities so that they can choose between them according to the nature of the case. However, these opportunities should be subject to criteria in order to avoid any undue influence of the funder as well as any conflict of interest between the qualified entity and the funder.

5 Concluding Remarks

Collective actions may be one of the more controversial issues in procedural law due to their particular features that are contrary to the principles of individual litigation. However, mass harm situations occur more than ever in today's globalised and digitalised world, which increasingly puts consumers in the unfortunate position of suffering harm caused by the same/similar conduct. Collective actions are the only realistic way to provide effective access to justice to large numbers of consumers who are affected by the same/similar conduct, whose losses are small as a result, and who also lack sufficient knowledge and funding to pursue their claims in court. In order to address the obstacles to the enforcement of consumer law and to protect the collective interests of consumers, the Commission adopted a Directive that provides for an effective and efficient collective redress mechanism, for both injunctions and damages. The Directive aims to improve consumers' access to justice on the one hand and prevent the abuse of collective actions on the other. With this aim in mind, the Directive carefully sets forth *i.* admissibility criteria for bringing collective actions, *ii.* conditions for being an entity qualified to sue on behalf of affected consumers, *iii.* the way in which the group is formed, *iv.* the scope of information to be provided to the court depending on the remedy sought, *v.* the responsibility for costs and funding options, and *vi.* the distribution of the damages award.

Turkish legislation, however, adopts a fragmented approach to collective actions and designs such actions independently of other areas of law. Collective actions set forth in the CPL specific to consumer protection are also incompatible with their counterpart in the EU and do not protect the collective interests of consumers in practice. In order to provide consumers with a realistic means to obtain redress, as is required by the Directive, the Turkish collective action mechanism should *a fortiori* grant the qualified entity the right to claim damages for those harmed. In collective actions for consumer damages, it would be more practical to form the group on an opt-out basis by describing those harmed by the same/similar conduct of the infringing trader(s). The qualified entity should provide the court with necessary information about the case depending on the remedy sought in order for the court to assess the admissibility of the collective action. The qualified entity should also inform the court of the method of calculating and distributing damages if the action brought seeks compensation. The loser-pays cost rule should apply to collective actions as well, thus making the issue of funding important for qualified entities. A range of funding options should be available in collective actions, with the appropriate safeguards in place. As a result, the Turkish legislator should consider a new design for its consumer collective action mechanism by taking into account the provisions of the EU Directive on consumer collective redress.

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