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THE ADVANTAGES AND DISADVANTAGES OF CLASS ACTION[1]

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The necessity of class action – or of similar procedural tool – is widely debated in Europe. Actually, there is a widespread resentment towards the introduction of this instrument to the European field of civil procedure. As it regards the objections to the adaptation and for a meaningful debate, first we should get an insight into the ideas prevailing in the US literature and practice, about the advantages and disadvantages of class action (hereinafter referred as CA).

CA has a century-long history in the US, codified into the Federal Rules of Civil Procedure, Rule 23 in 1937, and thoroughly amended in 1966. Only for the easier understanding of my arguments, I refer to Rule 23 and the three subcategories of CA. There are – in accordance with the Rule – (b)(1), (b)(2) and (b)(3) subcategories, which I write about elsewhere in detail. It is sufficient to mention that type (b)(3) of CA is widely used in mass tort cases, the most infamous category of cases, and it is an opt-out procedure, while the first two categories are mandatory (non-opt-out). Type (b)(1) is close to our understanding of the mandatory joinder, whereas (b)(2) is used for injunctive relief only. From the array of judicial decisions a specifically vivid picture can be drawn of this instrument; presently we are not interested in the construction of the legal regulations, yet we might be so in the overall characteristics of this procedural tool.

Features of the CA can be divided into at least three or four categories: advantages and disadvantages i.e. impacts on the administration of justice, in other words of the judicial economy (i); impacts on the plaintiff side (ii) and impacts on the defendant side (iii). These categories assume that there is a working system of the CA. Therefore, when considering the necessity of introducing such a system, we also must take

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the social effects into consideration, since only social need would legitimate such legislative action. Hence, for our purposes, we may introduce a fourth category, which deals with the impacts on the public, on the society and the state itself (iv). By far, this might be the most critical category for any planned adaptation of the CA, and may comprise, beyond the before-mentioned categories, society-wide impacts, other possible paralegal advantages and disadvantages. Notwithstanding of its reach beyond our primary interest – namely the legal aspects of the CA – this category must also be assessed, since a meaningful stance regarding the adoption of CA should contain reasoning and rebut fears regarding the problems beyond legal reasoning.

1. Impacts on the administration of justice

These impacts can be subdivided into the subcategories of advantages (ia) and disadvantages (ib) of the CA on the regular administration of justice. Before tackling those, it is worth mentioning that in 1966 there was a draft of the proposed amendments of Rule 23, where the explicit license would have been given to the court to certify an action as CA, sua sponte (ex officio).[2] Though this possibility was not codified later in express terms, some suggest that not only the courts are given this opening, but using this device would be quite necessary to avoid "unnecessary costs of redundantly litigating the common questions".[3] So, commentators expressed approval towards even the ex officio use of this device, which might indicate that positive features are present.

Furthermore, in cases of (b)(3) class actions, by mandate of the Rule, the courts have to measure CA with simple means of litigation, since CA shall be available only if it is superior to other means of the administration of justice. With this regulation, the legislator took a prudent step, in my understanding: on assuming the beneficial nature of CA whilst establishing it, the real benefits must be assessed on a case-by-case basis while in the actual cases it must be measured by traditional means of litigation. By such a regulation, fears that CA would hold reign in improper cases as well could be countered. On the contrary, should CA prove inferior to other methods, applying this rule, it shall be ignored.

Now let us concentrate on the advantages of CA in terms of judicial administration.

1.1. Administrative efficiency begins with the avoidance of multiply actions, which was expressed in the 1966 Amendments of the Rule

Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about

2 Newberg: Orders in the Conduct of Class Actions: A Consideration of Subdivision (d). *B.C. Indus. & Com. L. Rev.,* 10 (1969), 577., 600.

3 David Rosenberg: Class Actions for Mass Torts: Doing Individual Justice by Collective means. *Ind. L. J.,* 62 (1987), 561., 568–572.

other undesirable results.[4]

One must clearly see that avoiding multiplicity is achieved best in cases where otherwise the figures of the remedy would warrant individual litigation. For the same end, there are other procedural tools, given by complex litigation practices, such as joining cases, consolidation, transfer and other coordination techniques.[5] Hence, for individually maintainable cases, where the circumstances enable parties to litigate in traditional fashion, only those benefits of CA will turn the tide in favor of our investigated CA. On the other hand, we see those cases that would be non-maintainable on their own. If such cases wouldn't be initiated on their own, it is a safe assumption that CA will not serve the avoidance of the multiplicity of the same actions, since there are no actions, anyway. In such cases, CA serves other administrative goals,[6] detailed infra.

Even US commentators admit that there are many class actions that would not have been brought otherwise before the courts; therefore CA itself caused inconvenience, where it should have brought efficiency and convenience, with the increased number and increased complexity of such cases.[7] Still, these can be controlled by proposed amendments to the certification of CA, which would hinder the certification of those AC, that "just ain't worth it",[8] by adding an efficiency barrier to the certification requirement. We saw also legislative actions to the same end, whereas the Magnuson-Moss Consumer Product Warranty Act gave minimum requirements of initiating CA. Hence, the negative features can be controlled by legislative efforts and the entitlement of the courts with power to deliberate the efficiency of the CA. Still, even in such cases, that would not have otherwise been brought to justice, the other benefits from maintaining CA are present, as seen infra. And we must not forget the very fact that besides the possible inconvenience of the complex CAs, only those will be affirmed, which have merit; hence lawyers should and surely shall think twice whether to come forth with such CA, that has minimal chance of success, and which would only incur great costs to them.[9]

CA has a positive impact when helps avoiding the incompatible results in adjudication, when deciding whole issues at once.[10] It is not only the interest of the judicial branch, but also can be a positive feature for industrial defendants, whereas

[4] Notes of Advisory Committee on Rules–1966 Amendment, Rule 23.

[5] James L. Stengel – Andrew M. Calamari: *Complex Litigation,* Practising Law Institute, New York, 1994. Chapter 3.

[6] Alba Conte – Herbert Newberg: *Newberg on Class Actions (4th ed.).* Thomson West, 2011. [hereinafter: Newberg (2011)] § 5:46., 464.

[7] Ibid. 465.

[8] This informal wording was used by Mr. Scévole de Cazotte: *Vice President of International Initiatives.* U.S. Chamber Institute for Legal Reform, in a personal interview on 15 May, 2012, Washington DC.

[9] Considering the European style of awarding the fees, if such class counsels should pay the representative costs of the prevailing other parties, the deterrent factor would be even higher.

[10] Notes of Advisory Committee on Rules—1966 Amendment, Rule 23.

they enjoy the economies of unitary adjudication, and can plan their activities according to this: all that results in increased legal certainties,[11] for the benefit of the rule of law.

Returning to the issue of extent, there are claims not affordable to be pursued on an individual basis, hence, they exist. In case of such minor claims, the CA may be the only device available for the prosecution of such claims.[12] United States (US) Supreme Court (SC) admitted its beneficial nature in cases like Phillips Petroleum Co. v Shutts, where stated:

Class actions also may permit the plaintiffs to pool claims which would be uneconomical to litigate individually. For example, this lawsuit involves claims averaging about $100 per plaintiff; most of the plaintiffs would have no realistic day in court if a class action were not available.[13]

Commentators also embraced this positive feature of the class action. Tom Ford, citing Professor Kaplan, wrote about this as "historic mission of the class action is taking care of the smaller guy".[14, 15] On allowing this function, minor damages still remain; even when bringing such claims to court as aggregate litigation these would be inefficient in terms of judicial costs against the possible relief sought. In other word, should CA be available for cumulated cases affecting several injured persons, their aggregated claims will not reach less exceed the potential judicial costs of this complex litigation. There is a strong argument that even for such cases the doors of justice should not be closed, since fluid recovery might be available for the cases.[16] It is an appealing theory, since it furthers the other administrative goal of CA, namely the deterrence; and also the integrity of the legal system will be served by letting know of the wrongdoers that they may not enjoy the benefits of their wrongdoing.

That brings us to another important benefit of the CA, namely deterrence. In such cases, where individual damage, hence relief would not justify independent litigation, the threat of being responsible to damaged people might provide a powerful incentive to avoid violation of law.[17]

According to Rosenberg, under deterrent theory:

"By making relatively low value claims marketable to competent plaintiff attorneys, class actions bolster the deterrent effect of threatened tort liability. Absent class action treatment, the bulk of these claims would be excluded from the system, reducing both

[11] Newberg (2011) op. cit. § 5:47., 465–466.

[12] Newberg (2011) op. cit. § 5:48., 466.

[13] Phillips Petroleum Co. v Shutts, 472 U.S. 797, 809 (1985)

[14] Tom Ford: Federal Rule 23: A Device for Aiding the Small Claimant. *B.C. Indus. & Com. L. Rev.,* 10 (1969), 501., 504.

[15] For more on the same topic see: Rosenberg op. cit. 561., 568–572.; Adolf Homburger: Private Suits in the Public Interest in the United States of America. *Buff. L. Rev.,* 23 (1973–1974), 343.

[16] On fluid (cy pres) recovery, see Newberg, § 11.

[17] Abram Chayes: Foreword: Public Law Litigation And The Burger Court. *Harv. L. Rev.,* 96 (1982), 4–60.

the firm's incentives to take precautions and its internalization of residual accident costs."[18]

Despite its great potential in deterrence, CA may be misused. Private attorney functions may be dwarfed by the hunt for great attorney's fee by the class counsel.[19] Certainly, in the short run, allowing CA will not necessarily reduce litigation; however, in the long run, through the damages awarded, it will force defendants to voluntarily comply with the law.[20] Several cases mention a certain positive feature of class action in civil right cases, where discrimination cases might be furthered with the use of this device.[21]

A further benefit regarding CA derives from the private attorney function. It is definitely distant a feature of the US law from the European way of thinking to entrust private citizens with the enforcement of public goals. Moreover, several experiments in the US show daring results on one hand and possible misuse of this device on the other. It is the Congress, the legislator who encourages such litigation by giving cause of federal action in certain areas of law, most importantly antitrust law, environmental law, civil rights etc. These legislative incentives, enjoined with the "handsome rewards", treble-damage awards, sharing of costs all lead to the system of private incentive of litigating public goals besides their monetary interest at stake.[22]

Issacharoff and Miller admit a possible connection between the abuse of CA and the private attorney function, still they insist that it must be compared to the other possible solution. They cite economic literature and hold that the other possible outcome would be increased corruption on the public side.[23] Let us propose another possible end: the impotency of public officials to prosecute mass-claims. Actually, the trend of small claims procedure shows that the state tries to get rid of them by simplifying the procedure, allowing for different methods of conflict resolution etc.[24] being a burden on the shoulders of the state; it is quite hard to imagine that officials would venture to walk that unpopular path. Our fear is this: when minor claims were given public prosecution, many would go unpunished, or without prosecution.

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18 Rosenberg op. cit. 561., 573, et seq.

19 Spegon v Catholic Bishop of Chicago, 989 F. Supp. 984, 987 (N.D. Ill. 1998).

20 Newberg (2011) op. cit. § 5:49, 469.

21 Jenkins v United Gas Corp., 400 F.2d. 28 (5th Cir. 1968)

22 Newberg (2011) op. cit. § 5:51, 471.

23 Samuel Issacharoff – Geoffrey P. Miller: Will Aggregate Litigation Come to Europe? Law & Economics. *Research Paper Series Working Paper* No. 08–46, *Vanderbilt Law Review,* Vol 62. (2008), 179–210., 188–189.

24 See: Nikoletta Pallos: A kis értékű perek. PhD thesis, 2011. 234–235. available at: http://www.juris.u-szeged.hu/karunkrol/szte-ajtk-doktori-iskola/doktori-vedeseink/dr-pallos-nikoletta

1.2. Disadvantages of CA on the administration of justice

However bright I tried to make the picture, there are certain disadvantages that must be revealed fairly. First, there is an inherent *difficulty of class management*, as compared to the management of a singular case. CA shall by its nature be more difficult to administer than a single case; yet one must not forget that CA must be compared to not one, but high number of cases. Management difficulties might result in decertification of these cases; however this reason must be an exception, rather than a rule for rejecting CA treatment.[25]

CA also caused great *backlogs* in the courts. Despite such fears being founded, the CA cases should be divided into two types: those for declaratory, injunctive relief and those for monetary damages. The first mentioned type is quite alien from the European way of thinking, since it contests public policies, tries to shield from the potential consequences of an unconstitutional law.[26] CA for injunctive relief did have a great increase in number, though it is not clear from any evidence whether these cases were brought only because CA was available. These cases might have been brought anyway, singularly, actually.[27] For the other category, making CA available did not flood the gates when seeking monetary relief, as the judicial system seems to be still functioning. True, such cases were brought to justice, like small value claims, which otherwise would not have been brought, but these cases contribute to the overall prosecution of laws.[28] More importantly, as noted,[29] class actions might be separated, bifurcated after deciding the common issue of liability, thus the decision of damages shall fall under separate trial. Deciding over the responsibility issues first, and then going for the quantitative issues.[30] is a well-known concept in the European procedures as well.

One major disadvantage of CA might be the *harsh results* due to the statutory minimum penalty requirement. A US example for this is the so-called Truth in Lending Act, where a minimum damage of $100 or the actual damage of more, if proven, shall be awarded upon violating the Act.[31] Where such rule exists, it might cause

[25] Manual for Complex Litigation, Pt. I § 1.43. Note 72.

[26] We must not lose sight of the very curious similarity between this injunctive device and the procedures of the constitutional courts, e.g. Hungarian Constitutional Court, when, upon petition, they grant relief not only to the parties of the case, but by annulling laws, to the general public as well. By the same token, the European Court of Human Rights must be mentioned; though its decisions might not directly affect the national decisions, their binding effect will exclude the same violation of the law for the future.

[27] Arthur R. Miller: *An Overview of Federal Class Actions: Past, Present and Future.* Federal Judicial Center, December, 1977. 46. et. seq.

[28] Newberg (2011) op. cit. § 5:55, 475.

[29] Miller op. cit. 56. et. seq.

[30] For Hungarian example, see: közbenső ítélet, §213 of the Hungarian Civil Procedural Code (Act III. of 1952), see more in: Kapa – Szabó – Udvary: *Commentaries to the Act III of 1952 on the Hungarian Civil Procedural Code,* Magyar Hivatalos Közlönykiadó, Budapest, 2006, 803-818.

[31] 15 U.S.C.A. § 1640

deterrence overkill if all members of an extensive class would be awarded by the minimum amount[32] (assuming that one does not bother proving more). Toward the end of avoiding such dire consequences, the Congress created a ceiling for class action recoveries,[33] which effectively prevented the defendants in such cases from going bankrupt, though served public goals. And this is what any properly balanced procedural device should do: allowing for personal relief while serving public goals.

There are other factors that may justify the introduction of this device, that I mention in (iv) infra.

2. Impacts on the plaintiff's side

When facing an action that may be a blockbuster in terms of the potential number of claimants, one must ask whether CA is more suitable than the other forms of adjudication. These considerations are reserved mostly for plaintiffs and just as supra, the impacts on plaintiff side shall be divided into advantages (iia) and disadvantages (iib).

2.1. Advantages of CA on plaintiff side

There are some advantages that are considered major advantage. The *sheer numbers* comprised in a class might give leverage to the plaintiff side, so the defendant will take this action most seriously. It has a potential of forcing or pushing the defendant towards settlement,[34] a feature that can be taken positively from the plaintiff (counsel's) point of view, but as a negative one from the general perspective, since it turned class action legalized blackmail.

Any device which is workable only because it utilizes the threat of unmanageable and expensive litigation to compel settlement is not a rule of procedure-it is a form of legalized blackmail.[35]

Other benefit of class treatment comes from "*mootness avoidance*". Should representative plaintiff be satisfied, or her claim otherwise become moot,[36] the class

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[32] D. Gould: Staff Report ont he Consumer Class Action Submitted to the National Institute for Consumer Justice, 57–59, Federal Judicial Center, 1972.

[33] 15 U.S.C.A. § 1640.

[34] Note, *The Rule 23(b)(3) Class Action: An Empirical Study,* 62 Geo. L.J. 1123 (1974); Note, *Abuse in Plaintiff Class Action Settlements: The Need for a Guardian During Pre-trial Settlement Negotiations,* 84 Mich. L. Rev. 308, 308-09 n.6 (1985); *In re* School Asbestos Litig., 789 F.2d 996, 1009 (3d Cir. 1986), where the court held: "[T]he realities of litigation should not be overlooked in theoretical musings. Most tort cases settle, and the preliminary maneuvering in litigation today are designed as much, if not more, for settlement purposes than for trial. Settlements of class actions often result in savings for all concerned."

[35] Milton Handler: The Shift from Substantive to Procedural Innovations in Antitrust Suits–The Twenty-Third Annual Antitrust Review. *Colum. L. Rev.* 71 (1971), 1., 9.

[36] This is not alien from civil law procedure, either, where in several cases of mootness would cause the fall of the litigation, too.

will remain intact. The highest of its importance is shown in criminal class actions (!), where for example the inmates sue for lawful, constitutional treatment in prison. Constant changes of the prison population, a parole might cause loss of personal interest, hence mootness; therefore the case will still go on.[37]

Another major advantage is the class-wise application of *statute of limitation*. The filing of a class complaint will toll the statute of limitations for the benefit if the whole class,[38] even though class certification be finally denied.[39] It also extends to the exhaustion of administrative remedies, hence the absent members need not exhaust these.[40]

Regarding the attorney's fees, for public interest litigation, there is an increased chance of recovering attorney's fees – regardless of the American rule of everyone paying her own attorney. Public interest prosecution might be an example to this, where the Civil Rights Act of 1964 made it possible to recover these fees. In Newman v Piggie Park Enterprises, the SC – speaking of civil rights injunction – held:

When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone, but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees – not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II. It follows that one who succeeds in obtaining an injunction under that Title should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.[41]

Besides changing US rule to a (half-)European style cost rule,[42] CA may be the only means of acquiring relief especially if *small amounts* are at stake, or plaintiffs are dispersed in terms of geographical location. Commentators used to call this type

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[37] Monmouth County Correctional Institutional Inmates v. Lanzaro, 834 F.2d 326 (3rd Cir. 1987) regarding inmate abortion procedures, where class representative lost her personal stake – morbidly enough, her baby – at case, the problem was still capable of repetition, therefore class treatment was maintained.

[38] American Pipe & Const. Co. v. Utah, 414 U.S. (1974).

[39] Chardon v Fumero Soto, 462 U.S. (1983) when limitations tolled during the pendency of the class action, yet began anew when certification was finally denied.

[40] Sharpe v American Exp. Co., 689 F. Supp. 294 (S.D. N. Y 1988).

[41] Newman v Piggie Park Enterprises, 390 U.S. (1968).

[42] Note that this change is halfway, because only in case of on side success does plaintiff have the right to reimburse attorney's fees, however, in case plaintiff loses, defendant is not entitled to redeem his costs. See Civil Rights Act of 1964 ENFORCEMENT PROVISIONS SEC. 2000e-5. *[Section 706]* (g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders (B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title *[section 703(m)]* and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court- (i)

of litigation "negative value" CA, since the costs of bringing these claims individually would probably exceed their potential recovery in terms of monetary relief. As Justice Ginsberg noted, citing a lower level court:

The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.[43]

This reasoning works the other way around, too. If the value of possible recovery is substantive and it is worth of suing individually, that might cause the denial of CA certification.[44] Note that this reasoning also protects corporate defendants from being liable to a huge class, which might easily cause bankruptcy. This practice is a balance between the values underlying the CA concept – the fair administration of justice. Also a possible reason to necessitate CA treatment may be ignorant or defective conduct on behalf of possible plaintiffs, e.g. in cases where possible claimants refrain from suing defendant due to their continuous relationship.[45] Hence, CA may provide convenient *cover to plaintiffs* who are afraid of retaliation from their defendant with whom they may be in continuous relationship.

There are additional benefits of class action to the plaintiff side, such as *eased requirements of jurisdiction, venue and service*. Should a class be certified, the absent members shall be disregarded from these points of view.[46] In other words, the absent plaintiffs need not provide notice to the defendant personally, since they are assumed to do so when the class was certified. In my understanding, this concept is firmly rooted in the representative nature of the CA, and has a counterpart in the practice regarding the statute of limitations, and its tolling for the whole class.[47],[48]

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may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and *attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title [section 703(m)]*; and (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A). (Emphasis added, US)

43 Amchem Products, Inc., v Windsor, 521, U.S. 591, 617 (1997).

44 Rutstein v Avis Rent-A-Car Systems, Inc., 211 F3d 1228, 1241 (11th Cir. 2000).

45 Simmons v City of Kansas City, Kan., 129 F.R.D. 178 (D. Kan. 1989) class treatment was given to 48 former and present Afro-American police officers in case related to alleged racial discrimination, because this treatment minimized the possible retaliation to individual members.

46 Newberg (2011) op. cit. § 5:8, 433.

47 See infra (iia).

48 One must note that SC in Zahn v International Paper Co., 410 U.S. 925 (1973) held that every member of the diversity jurisdiction class should fulfill the amount-at-stake condition, which was $10.000 then, $75.000 now. However, Congress granted to so called supplemental jurisdiction in 28 USCA § 1367(a), which grants jurisdiction in such cases, where the individual amount-at-stake requirements may not be met. See: Richard L. Marcus – Martin H. Redish – Edward F. Sherman: *Civil Procedure, A Modern Approach* (4ed), Thomson West, 2005, 890–911.

Other procedural benefits may accompany the class treatment.[49] These are shortly, easier obtaining of injunctive relief, providing basis for a later damage claim, broader discovery, based on express regulations – like Civil Rights Act of 1964 – there may be additional reliefs available, broader representational rights for organizational plaintiffs (than their membership), avoidance of the requirement of exhaustion of administrative remedies, elevated client-attorney liabilities. To this latter advantage, let an example stand here: the case of an attorney, whose fee application was reduced because, according to the court, he "failed miserably in his obligation to the class to prosecute their claims efficiently".[50] The client-attorney relationship is special in CA, since the opposing counsel is not entitled to communicate directly – outside of the reach of the class counsel – with class members;[51] this ethical provision is intended to prevent abusive tactics by opposing counsel, like slicing class etc.

2.2. Disadvantages on the plaintiff's side

Though CA is considered to be advantageous for the plaintiffs, several difficulties may present themselves even for this side. First of all, when representing a class, class representative, via their class counsel assumes a *fiduciary position* towards the absent members that comes with higher standards of responsibility.

Judicial involvement in managing complex litigation does not lessen the duties and responsibilities of the attorneys. To the contrary, complex litigation places greater demands on counsel in their dual roles as advocates and officers of the court.[52]

Also, class treatment may have a *diverse effect on the timely administration* of the individual claims.[53] If brought individually, the court and counsels can focus on the case, when it comes to trial; in CA there is increased court approval for settlement and other issues, and the complexity of the issue naturally delays the conclusion of the trial. However, one must bear in mind that only in comparison with one single case could this be a disadvantage, when we loaded all the individual cases to courts, the caseload would hinder timely administration, either. And on the other hand, if CA is the only efficient relief, this argument goes void as there is no other singular procedure to compare with.[54] This impairment of CA will also lead to *settlement and dropping*

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[49] Newberg (2011) op. cit. § 5:9–5:21. 434–446.

[50] In re Fine Paper Antitrust Litigation, 98 F.R.D. 48, 215 (E.D. Pa. 1983).

[51] Newberg (2011) op. cit. § 5:17, 441.

[52] Manual for Complex Litigation, Fourth, § 10.21

[53] Newberg (2011) op. cit. § 5:24, 448.

[54] Eisen v Carlisle and Jacquelin, 417 U.S. (1974) where the SC held that „Economic reality dictates that petitioner's suit proceed as a class action or not at all. Opposing counsel have therefore engaged in prolonged combat over the various requirements of Rule 23. The result has been an exceedingly complicated series of decisions by both the District Court and the Court of Appeals for the Second Circuit." That case should also be a memento for delaying tactics as employed by the defendants to hinder relief.

of the case since CA may be settled or voluntarily dismissed only with the approval of the court as for the enhanced protection of the rights of the absent members.[55]

The disadvantages reach to the *pleading theory*. CA is more rigid than ordinary procedures, hence, amendments to pleading will hardly be allowed.[56] To avoid the dire consequences and the costs incurred, pleading must be drawn with utmost care, since leave to amend might not be available after the notice has been sent to absent members.[57] CA may be countered with special defense tactics[58] which focus on the certification issue that may effectively delay the administration of justice by the defendant. The plaintiff's position is more burdensome in ways of *broader discovery* against the class representative and the counsel. Furthermore, CA will settle the issue for good; within the same jurisdiction, *res iudicata* will bar subsequent litigation by any members of the class.[59] This is most important, though, from the point of legal certainty and the interests of the defendant: having successfully repulsed any hard attack, she may rest easy hereinafter. Res iudicata, as most important issue, shall be discussed in detail, infra.

CA is often *unwelcome in forums* of choice. Judges often dislike these actions because of their complexity. However, this notion is decreasing in the US due to the increase in number of the decided CA and their contribution to the fair administration of justice.[60] One might safely assume that, given the storm on the European legislative efforts, CA would be unwelcome guest to the European and Hungarian courts alike; who would like hard job, anyway? To this problem the Constitution shall have a proper answer, the right to judicial relief to every citizen, may it be simple or complex. True, I am aware of the fact that it is only within legal limits that this right might be granted; still, I consider the complexity of such procedures only one issue in the negative balance regarding CA, which is to be measured against the benefits, as detailed hereinafter.

3. Impacts on the defendant's side

CA is often considered overtly advantageous to the plaintiff side. However, commentators and cases presented a strong argument that CA may be beneficial to the defendant side considering several factors. Yet, tehere are disadvantages for this side, naturally. First let us turn to the advantages (iiia), then we shall see to the grim side of the picture (iiib).

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[55] F. R. Civ. P. Rule 23(e).

[56] In Materazzo v Friendly Ice Cream Corp., 70 F.R.D. 556 (E.D. N.Y. 1976) the leave for amendment was denied after the notice to the absent members on the originally pleaded theory was disseminated to the class members.

[57] Newberg (2011) op. cit. § 5:28, 450.

[58] See. e.g. Materazzo v Friendly Ice Cream Corp, f.n. 56. supra.

[59] Rankin v State of Fla., 418 F.2d 482 (5th Cir. 1969).

[60] Newberg (2011) op. cit. § 5:35, 454.

3.1. Advantages on the defendan's side

It is undeniable that for existing cases, defendant may find comfort in the *singular adjudication of all claims* against her. Under "existing" I mean that this argument is valid only in those claims that would have been obviously brought to courts. This argument goes void when the claim is due to the mere existence of CA; in these cases the real comfort for defendant would be no litigation at all. We focus to the prior category, though, because that argument was evaluated supra, under (i).

In asbestos litigation cases, the sheer number of potential cases may cause the demise of the defendant; and he may well be aware of his legal responsibility. In such cases, even the economy of singular adjudication might be decisive. In re Temple the courts were locked in the battle between the asbestos litigants and their counterpart, Raymark Industries, the manufacturer of asbestos-related products. Raymark realized that it cannot withstand the literally thousands of substantial individual lawsuits, filed against it.

Faced with an avalanche of litigation, Raymark moved (…) to certify a mandatory class action to consolidate all present and future asbestos-related personal injury actions brought against it. Raymark argued that certification was justified primarily because the corporation had limited assets from which claimants could be satisfied. The district court accepted Raymark's assertion that its resources were insufficient to satisfy judgments from pending and potential lawsuits and to conduct defense adequately.[61]

Though the motion was vacated due to denial of plaintiffs' due process rights, the reasoning is evident; defendants may have incentive to opt for CA instead of the avalanche of individual claims directed against them. It also enables the defendants to be subject to *ceiling-provisions of monetary responsibility.*[62] The defendants also enjoy *class-wide res iudicata* effect, which is greatly beneficial to them for the case they won, but also in the case of settlement. Commentators clearly see positive features of this impact in terms of defendant interests[63] since defendants are able to exclude multiplication of liability as they can settle the issue once and forever, consequently they can reach absent members without having to wait for a burdensome judgment. Class counsel's seems a convenient position in such cases, they "blackmail" the defendant, who in turn will rather settle than go to trial for various reasons. However, we must note that it is a complicated yet economical issue whether the plaintiff adequately represented the absent members with the proposed settlement, therefore plaintiff (together with defendant) ought to convince the court about and existing adequacy.[64]

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[61] In re Temple et al., 851 F.2d 1269 (11th Cir. 1988)

[62] In re Northern Dist. of California, Dalkan Shiled IUD Products Liability Litigation, 693 F2d. 847 (9th Cir. 1982) The certification was vacated due to procedural issues.

[63] Parker L. Stevenson: Reopening the Debate: Postjudgment Certification in Rule 23(b)(3) Class Actions. *Cornell L. Rev.* 66 (1981), 1218.; Newberg (2011) op. cit. § 5:38–5:40, 456–459.

[64] About the economics of settling see eg.: Quincy Wright: The Cost-Internalization Case for Class Actions. *Stan L. Rev.* 21 (1969), 383., 404.

Defendants have certain *tactical advantages*, too. There are jurisdictional issues that might favor easier transfer to federal courts. Defendants regularly challenge CA certification, which delays the procedure, even though CA treatment would be clearly beneficial to them; such instances may raise ethical issues as well.[65]

By simple comparison of the arguments, we might come to the preliminary conclusion that CA has more advantages for plaintiffs than for defendants, still we insist that this conclusion depends on the very circumstances of the case and should be judged by the actual case rather than theoretically. Now let us turn to the disadvantages on the defendant's side.

3.2. Disadvantages of CA to defendant

The conclusion is quite easy to draw, that the advantage on the plaintiff side shall be disadvantage on the defendant side. However, some perspectives must clearly be stressed here. Defendants in CA may be subject to enormous measure of monetary liability, which can easily cause the demise of a corporate defendant. Even more inconvenience flows from those CAs that would not have been brought to court due to their relatively small amount.[66] Again, tolling of statute of limitation class-wide is burdensome factor for the defendant, since in case of decertification, he may face new individual suits. Procedurally speaking, CA enables broader discovery rights to the plaintiff, and subjects defendant to broader injunction by the court – both of which are genuine US features of the procedure, of relatively less importance, from my perspective.

4. Impacts on the society, public and state *affairs*

There are impacts that cannot or should not necessarily be measured by numbers, costs or fees. CA is a device of social engineering in the US, in terms of many actions were brought to alter public policies, to award injunctive relief and other social goals. That was acknowledged when, US Senator Grassley, R-Iowa, made a statement of CA as "an important tool that brings representation to the unrepresented and results in important discrimination and consumer decisions".[67] Curiously enough for an alien eye, it was a conservative senator, who made that comment.

CA has paralegal benefits for the plaintiff side, i.e. closely connected with the public. One of them is related to the costs; expenses shall be shared by the class, and regularly will be advanced by the class counsel. Attorneys, as class counsels, are explicitly entitled to advance costs of the litigation on the anticipation of the success of their claim and the sub-anticipation of a "handsome reward", a contingent fee,

[65] Newberg (2011) op. cit. § 5:41–5:43, 459–461.

[66] Newberg (2011) op. cit. § 5:44, 461–462.

[67] 66 U.S.L.W. 2294 (Nov. 18, 1997)

which might reach 15-30% of the aggregate monetary relief granted. Model Rules of Professional Conduct Rule 1.8.(e)(1) says:

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that: (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter (…)[68]

It is the much criticized contingent fee and entrepreneurial lawyership that gave rise to the dawn of CA; hence one may assert with certainty that any experiment of adaptation of CA without proper financial incentive on the side of the class counsel will be deemed to fail.[69] At the end of the day, it will be a decision of possible benefits against the potential abuse of CA. In my understanding, this is under fire in the US as well, but they are to be countered by legislative and judicial means.

Last but not least, there is an elevated public awareness of the issues litigated in the CA, and a ghoulish nature has been depicted for the European public, in case CA was reckoned to be adopted. Public attention may be deterrent for the defendants while a potential aid in the hands of class counsel regarding public relations. However, one need carefully weigh the competing interests of the public to be informed, and the right of privacy of business good-will. US courts admitted that this elevated publicity may be a threat to the interests of the corporate defendant.[70] All in all, CA are private, but at the same time semi-public remedy.[71]

The semi-public nature is confirmed as an overlap of legislative issues given the fact that the CA has often reached society-wide dimensions. This was recognized in the US jurisprudence decades ago, when in 1991 the American Law Institute conducted a research on liability issues, especially with reference to compliance with safety regulations.[72] As found by the reporters, "some form of regulatory compliance defense should be recognized in tort litigation."[73] Naturally, legislation has a decisive role in determining and distributing the risks; however when these issues come to litigation, the picture may be obscure. If safety requirements exist, the juries in the US experience had difficulties measuring and allocating the risks properly, but when no such regulations exist, litigation may fill these gaps in.[74] He distinguishes the forward-looking and the backward-looking types of litigation from the regulatory

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[68] http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_8_current_clients_specific_rules.html>

[69] See Issacharoff–Miller op. cit. 188–191.

[70] *Weight Watchers of Philadelphia, Inc. v. Weights Watchers Intern.*, 53 F.R.D. 647, 649 (E.D. N.Y. 1971).

[71] Jr. Harry Kalven – Maurice Rosenfield: The Contemporary Function of the Class Suit. *U. Chi. L. Rev.*, 8 (1941), 684., 717.

[72] The American Law Institute's Reporters' Study on Enterprise Responsibility for Personal Injury. (Excerpt) *San Diego L. Rev.*, 30 (1993), 405–423.

[73] Ibid.,, 415.

[74] W. Kip Viscusi (ed.): *Regulation through Litigation*. Washington, AEI–Brookings Joint Center for Regulatory Studies, 2002. 2–3.

perspective. The forward looking category is occupied with setting up requirements for the future conduct of the industries; given example is the tobacco litigation and the excessive taxes imposed on the products as the result of the litigation.[75] We add anti-trust litigation to this example, where the implied expectation is the change of illegal activities. The backward looking category is occupied with seeking relief; compensation for those injured, however, by doing so stimulates regulatory changes. The mass-tort cases of asbestos litigation, breast implants, and lead paint cases are examples for this.[76] Especially David Rosenberg argues for a regulatory advantage of class action compared with the individual cases, where he even advocates the use of mandatory class action to further its advantages.[77] Even so, Viscusi admits the possible shortcomings of the litigation as regulation device:

[L]itigation was being used as the financial lever to force companies to accept negotiated regulatory policies as part of the litigation.[78]

Others use more severe critique and state that CA on a macro level is capable of undermining democracy by the indirect manipulation of the substantive law under the guise of a procedural mechanism.[79] Even the separation of powers is endangered by instituting the CA. Since no real dispute is resolved, a legal arrangement with wide ranging consequences is approved.[80] As one commentator put it, the Rules

to the extent that they encouraged plaintiffs to bring, and the courts to allow, the maintenance of class actions that are unmanageable by this device, they brought the rule into disrepute even for the cases to which it is well suited.[81]

These considerations are not to be taken lightly. As a social mechanism, CA reached great goals, as changing tobacco policies, but also contributed to severe mistakes, as breast implant litigation. Therefore a careful consideration should be given to the extent of which one might want to adopt such device, should that be an option.

5. Concluding remarks

Zechariah Chafee, Jr. noted about CA: "The situation is so tangled and bewildering that I sometimes wonder whether the world would be any the worse off if the class-suit device had been left buried in the learned obscurity of Calvert on Parties to Suits in Equity."[82] Arguing pro class action is even more a burden when a high reputation

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75 Ibid. 22–51.

76 Ibid. 106–177.

77 David Rosenberg: The Regulatory Advantage of Class Action. In: Viscusi op. cit. 244–304., 303.

78 Ibid. 3.

79 Martin H.Redish: *Wholesale Justice. Constitutional Democracy and the Problem of the Class Action Lawsuit*. Stanford, Stanford University Press, 2009. 228.

80 Ibid. 229.

81 Charles Allen Wright – Mary Kay Kane: *Law of Federal Courts*. St. Paul, West Group, 2002. 511.

82 Jr. Zechariah Chafee: *Some Problems of Equity.* Ann Arbor, University of Michigan Press, 1950. 200., cited by Richard H. Field – Benjamin Kaplan – Kevin M.Clermont: *Civil Procedure*. St. Paul, Thomson West, 2007. 885.

professor concludes this. However, as the subsequent 60 years of CA history has confirmed, not mentioning serious abuses and constant amending, the CA is still part of the US legal system; therefore, our evaluation shall focus on our own purposes when considering adoption of the tool.

Concluding in general: CA, when properly balanced, is not a one-sided tool of plaintiffs' or defendants' as a procedural tool. Both sides of the mass litigation have their particular procedural interests in the actual litigation, of which must be carefully weighed against each other. If law provides such device, it shall be attributed fairly so that none of the sides have substantive advantage over the other solely as a result of his procedural position. Hence, by thinking about adopting such a procedure, one must focus on the proper allocation of procedural rights that provide equal opportunities to the opposing parties to further their procedural and substantial goals. More importantly, any CA procedure must be designed in a manner that it should not alter or infringe the substantive rights of the parties. The rule itself should be construed as a neutral playing field, on which the plaintiff and defendant shall play out their dispute in fair play.

As it regards the social impact of the CA, it is hard to deny that academic critique is quite persuasive in terms of possible abuse of legislative power, shifting the regulatory power from the legislator to the courtroom. However, these features of CA only developed in the greatest mass-tort cases, which – though quite extensive – are far from a typical CA situation. The (b)(3) type of CA carries such hazards and not all of them. For example, none of the critiques denied the positive potentials of antitrust class litigation, which are of the same category, hence, might have positive market and social impacts beyond doubt. Consequently, these arguments are not conclusive for us, we see CA as an able tool, until the valid scruples can be quashed with cautious legislation.

CA serves private goals as well as public policies. A knife can cut an apple or stab someone one in the back. Yet we should not think that knives shall not be allowed to use. To complete my analogy: as every creation of mankind does, civil procedure has be used and misused, whereas the latter ought to be battered with vigor by courts. As constant US amendments have confirmed, enhancing better potentials in conjunction with CA is a reality. Hence, in our view, the negative features should by no means be a concern and give grounds for avoidance.