COMMENTS

REPRESENTATIVE ACTIONS IN RUSSIA

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Class action is an important safeguard to protect the rights and legitimate interests of large groups of people and it has already proven successful in advanced foreign legal systems. One of the most popular forms of class action in countries with a continental legal system (France, Sweden, Argentina) is a representative action, which is initiated by non-profit associations, i.e., "ideological claimants" (associations, foundations, non-profit organizations) in defense of violated collective rights of a large group of people or unspecified persons in the most vulnerable areas of economic life. The institution of collective redress by representative bodies is less popular in countries with common law legal systems (the USA, Australia, Canada), which traditionally use class actions. Nevertheless, countries with common law legal systems such as the United Kingdom (England and Wales) actively use the legal tools for the social protection of the violated rights and interests of citizens. This article analyzes the legislative consolidation and application of representative actions in the Russian Federation. The absence of a mechanism (for filing a lawsuit before the decision) of judicial protection of professional representatives' collective rights and public interests according to the generally accepted international practices involving interested persons whose rights have been violated (opt-in or opt-out), creates barriers to the development of representative actions in Russia. At the same time, the scope of these claims and the judicial protection of collective rights and public interests by public associations has its own characteristics, which can be used by legislators to effectively protect human rights.

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Article 46 of the Constitution of the Russian Federation guarantees everyone judicial protection of rights and freedoms. Historically, the Russian Federation has developed several ways of protecting violated rights and interests of groups of persons, i.e., representation, required joinder and protection of rights of other persons or the general public by the prosecutor, bodies of executive power, and public organizations.

The practice of considering a multitude of separate lawsuits with similar claims against the same defendant proved the complexity and inadequacy of available legal tools to protect the interests of these plaintiffs at all stages of the case trial (from its filing with the court to enforcement of the judgment).

One of the internationally recognized forms of collective defense of the rights and interests of citizens abroad is the "class action."[1] Having originated in the UK, it thrived in the United States and was used extensively to protect the rights of the public from financial and industrial corporations and from damage caused by human actions to large groups of individuals ("group litigation").

However, due to the global trend of civil procedure development, there has been an approximation and mutual enrichment of the two main types of civil proceeding: Romano-Germanic and Anglo-Saxon.[2]

A direct manifestation of this approximation in the countries of Romano-Germanic law tradition was an attempt to integrate class actions with the current system of civil justice by lawmakers and legal scholars.

Despite the significant number of proposals to replicate the Anglo-Saxon system of private class actions, the legislators of European countries (France, Germany and Italy) did not accept the idea. A *sui generis* alternative to the Anglo-Saxon Institute became representative actions initiated by nonprofit organizations, and accredited by the state in some countries, in defense of violated collective rights of a large group of persons or the general public in the most vulnerable areas of economic life.

In the US, by contrast, some non-state associations dealing with human rights practices are prohibited from filing class actions in defense of violated rights and interests of certain social groups, giving rise to concerns among the academic community.[3]

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[1] Stephen C. Yeazell, *Collective Litigation as Collective Action*, University of Illinois Law Review 43 (1989); Stephen C. Yeazell, *From Medieval Group Litigation to the Modern Class Action* (New Haven and London: Yale University Press, 1987); Francisco Valdes, *Procedure, Policy and Power: Class Actions and Social Justice in Historical and Comparative Perspective*, 24 Georgia State University Law Review 627 (2008); John K. Rabiej, *The Making of Class Action Rule 23 – What Were We Thinking?*, 24 Mississippi College Law Review 323 (2005); Geoffrey Hazard et al., *An Historical Analysis of the Binding Nature of Class Suits*, 146 University of Pennsylvania Law Review 1849 (1998); Robert H. Klonoff et al., *Class Actions and Other Multi-Party Litigation: Cases And Materials* 108 (St. Paul: West Group, 2000).

[2] *Малешин Д.Я.* Российская модель группового иска // Вестник Высшего Арбитражного Суда Российской Федерации. 2010. № 1. С. 70–87 [Dmitry Ya. Maleshin, *Russian Model of Class Action*, 4 Bulletin of the Supreme Arbitration Court of the Russian Federation 70 (2010)].

[3] *Вербик Ф.* Почему дорога закрыта? Необоснованное ограничение, налагаемое на корпорацию правовых услуг касательно коллективных исков // Вестник гражданского процесса. 2012. № 5. С. 177–196 [Francisco Verbic, *Why is the Road Closed? Unreasonable Restriction Imposed on the Legal Services Corporation Regarding Class Actions*, 5 Herald of Civil Procedure 177 (2012)].

The Russian civil procedural legislation was developed by introducing and improving the institution of representative actions as was the case in most continental European countries.

Despite their relevance for Russian society, public class actions suffer from a scarcity of theoretical research in the study of the mechanisms by which courts can adjudicate such claims and, as a consequence, practical application. Furthermore, foreign legislation and court practice have developed a concept and mechanisms to adjudicate representative actions initiated by qualified associations authorized to apply to a court on behalf of a group of persons or authorized to represent a group in a particular case.[4]

Class actions are categorized as opt-in or opt-out,[5] according to the rules of group members involvement in class actions. In opt-in actions, group members only acquire the right to bring a class action if it is a directly expressed will of theirs (European law model). In opt-out class actions, all potential members of the group are assumed to be within it, if they do not declare their unwillingness to be members of the group (Anglo Saxon-law model). That is, opt-out is a right that can be exercised either before or after certification of the group.[6]

According to the European Commission,[7] the opt-in procedure is extremely burdensome and costly for consumer associations that have to conduct all preliminary work on identification of group members (consumers), establishing the facts of each case, the progress of each case and the engagement of each plaintiff.

Difficulties can also occur when a group comprises a significant number of plaintiffs with insignificant losses, which means the applicants themselves have less incentive to act. However, the advantage of this procedure is that there is no risk of maintaining exorbitant and undeserved complaints.

However, the opt-out procedure was assessed by the Commission to be procedurally thrifty compared to the opt-in procedure, but it was also found to be not without disadvantages. The most significant disadvantage of the opt-out system is the risk of encouraging excessive litigation.

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4 Christopher Hodges, *The Reform of Class and Representative Actions in European Legal Systems: A New Framework for Collective Redress in Europe* (Oxford: Hart, 2008); Hans-Bernd Schaefer, *The Bundling of Similar Interests in Litigation. The Incentives for Class Action and Legal Actions Taken by Associations*, 9(3) European Journal of Law and Economics 183 (2000).

5 *Дэвис С.* Групповые иски: «спасательный жилет» для инвесторов и акционеров или верный путь к катастрофе для общества и «золотая жила» для юристов // Вестник Федерального арбитражного суда Уральского округа. 2010. № 1. С. 144–150 [S. Davis, *Class Actions: A "Life Jacket" for Investors and Shareholders or a Path to Catastrophe for Society and a Mother Load for Lawyers?*, 1 Bulletin of the Federal Arbitration Court of the Ural District 144 (2010)].

6 Owen M. Fiss & John Bronsteen, *The Class Action Rule*, 78(5) Notre Dame Law Review 1419, 1441 (2003).

7 Green Paper on Consumer Collective Redress – Questions and Answers, MEMO/08/741, Brussels, 27 November 2008 (Jan. 13, 2018), available at http://ec.europa.eu/consumers/redress_cons/greenpaper_en.pdf.

In the process of discussions on the reform of class actions in the Antitrust and Competition Law of the UK, it was decided to introduce a limited opt-out system only in the Antitrust law, provided that class certification is judicially controlled, so that only the actions that meet the requirements of class actions are: exclusion of any multiple damages; exclusion of any lawyer's success fee; maintenance of the "loser pays" rule; representatives of the class actions can be plaintiffs themselves, trade associations or consumer associations, but not law firms.[8]

In turn, relevant public organizations are actively used abroad to protect infringed rights and interests of citizens and the general public from the actions of financial and industrial corporations. For example, initiators of public class actions may be non-profit associations (public organizations, associations, trade unions), whose rights and legitimate interests were violated.

In case public unions start an action to protect a group (property claims) or the general public, the court of general jurisdiction shall consider persons involved in the group (no matter how many they may be) as separate material plaintiffs even provided that there are grounds for a class action in the absence of procedural rules governing the mechanism of class action.

One of the most compelling examples may be numerous court trials in Russia, when lending institutions obtained money (commission) from their clients for account maintenance, while the responsibility for opening and maintaining such accounts was entrusted to the those institutions by law. Therefore, every borrower had to prove the illegality of the commissions in court, which could have been avoided in case of appeal to the court of public associations for the protection of groups of persons who entered into a loan agreement with a certain bank during a particular period.

In another class action[9] at the level of municipalities, a concert organizer's non-compliance with terms of the contract forced the actors to cancel the performance and the organizer did not return the money to the audience. In the end, several citizens had their rights restored on application of the public association of consumers in defense of citizens according to the rules of procedural joinder. However, the audience was over 100 persons and they could have won their money back if they had agreed to join the action. These cases are interesting because, if a case is tried according to the class action procedure, all persons affected can restore their violated rights.

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[8] From the Expert report of the Department for Business, Innovation and Skills of the UK in connection with the reform of class actions in competition law (April 2012).

[9] *Крыльцова О.* Не увидев спектакль, зрители обратились в суд // Комсомольская правда. 18 мая 2011 г. [Olga Kryltsova, *Not Having Seen the Performance, the Audience Applied to the Court*, Komsomolskaya pravda, 18 May 2011] (Jan. 13, 2018), available at https://www.alt.kp.ru/daily/25687/891488/; http://www.gcourts.ru/case/5074397.

Three basic reasons[10] are put forward in favor of interest representation by "ideological plaintiffs": a representative's interests coincide with the interests of the whole group, not its individual members; individuals are protected from risks and burdens of representation; and process financing is more manageable.

In other words, currently, a class action is the only way to deal with a dispute involving many individuals whose rights have been violated.

A successful form of collective protection of financial services consumers and investors in Russia is a financial ombudsman and the Central Bank of the Russian Federation is working on the draft law "On a Financial Ombudsman for Consumers of Financial Organization's Products," to ensure the procedural status of an authorized person.

According to the report prepared by the State Council "On the National System of Protection of Consumer Rights," there is a need to introduce the institution of group actions, since the violations in e-commerce and other fields are often widespread and it would be easier and more efficient for public authorities, and public associations, to protect consumers under a single process which could be joined by affected individuals without the need for settling complex documents or incurring any costs. It will also significantly reduce the burden on the judicial system, because, for the last two years, the number of lawsuits to protect the rights of consumers has nearly reached one million.

Despite the annual increase in the number of non-profit associations in the Russian Federation,[11] whose charter purpose is, in addition to judicial protection of the rights of the consumer market, to ensure the quality of protection of collective rights and legitimate interests of citizens, such public associations still require significant development.[12]

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[10] Rachael Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Oxford: Hart, 2004); David L. Shapiro, *Class Actions: The Class as Party and Client*, 73(4) Notre Dame Law Review 913 (1998); The Recognition of a Class Action in South African Law, South African Law Commission (Working Paper No. 57, August 1998); Vince Morabito, *Ideological Plaintiffs and Class Actions – an Australian Perspective*, 34(2) University of British Columbia Law Review 459 (2001); Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 New York University Law Review 13 (1996); Report on Class Actions, Ontario Law Reform Commission (Ministry of the Attorney General, 1982), at 128, 132; Lafond Pierre-Claude, *Consumer Class Actions in Quebec to the Year 2000: New Trends, New Incentives*, 8 Consumer Law Journal 329, 332 (2000).

[11] As at December 2016, there were 1,755 non-profit organizations dedicated to the protection of consumer rights.

[12] Доклад Государственного Совета РФ "О национальной системе защиты прав потребителей" // Международная конфедерация обществ потребителей. 21 апреля 2017 г. [Report of the State Council of the Russian Federation "On the National System of Consumer Protection," International Confederation of Consumer Societies, 21 April 2017] (Jan. 13, 2018), available at http://konfop.ru/доклад-государственного-совета-рф-о/.

1. The Scope of Representative Proceedings in Russia

Article 46 of the Civil Procedure Code of the Russian Federation (hereinafter RF CPC), is of a reference nature, since the parties' right to appeal to court in the interests of other persons shall be provided by either other rules of the RF CPC, or other federal laws.

For example, the law of Belgium, which introduced class actions in 2014 (Art. XVII.37 of the Commercial Code of Belgium), sets out a list of normative-legal acts, the potential violation of which may result in the bringing of a suit within the framework of collective redress. These rules relate to cases of consumer rights protection; misleading and unfair advertising; unfair terms of contracts and distance contracts; undisputed collection of consumer debt; environmental harm; discrimination and racism; as well as copyright.

In Germany, the class action (structurally similar to the class-action lawsuit in the United States) was introduced in order to protect the rights of investors under the Model Law of Germany. Mechanisms of collective redress in Germany are in force (and were previously introduced) in areas of consumer protection and competition protection, telecommunications regulation, etc.[13]

That is, legislators of European countries made special laws in those areas where violation of collective rights of citizens or amendments to existing legal acts are possible. However, most countries' procedural laws do not change.

It should be noted that the organizations for consumer protection are authorized to file lawsuits to protect consumers in Belgium, Luxembourg, the Netherlands, Spain and Portugal.[14]

In Russia, the scope of representative proceedings is traditionally as follows: legislation on environmental protection, consumer rights, protection of securities investors, and copyright. However, there were cases in court practice when even legal actors granted the right to protect the interests of other persons directly by the law, faced obstacles to initiating proceedings. As some Russian scholars note,[15] the courts do not take into account the fact that, in reality, the general public and

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[13] Brigitte Haar, *Investor Protection Through Model Case Procedures – Implementing Collective Goals and Individual Rights Under the 2012 Amendment of the German Capital Markets Model Case Act (KapMuG)* (CFS Working Paper Series, 2013), at 11 (Jan. 13, 2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2352248; Mariusz Maciejewski, *Overview of Existing Collective Redress Schemes in EU Member States*, European Parliament' Doc IP/A/IMCO/NT/2011-16 (July 2011), at 22 (Jan. 13, 2018), available at http://www.europarl.europa.eu/document/activities/cont/201107/20110715ATT24242/20110715ATT24242EN.pdf.

[14] Christopher Hodges, *Europeanisation of Civil Justice: Trends and Issues*, 26 Civil Justice Quarterly 96, 115 (2007).

[15] *Туманов Д.А.* Проблемы защиты общественного интереса в российском гражданском процессе // Законы России: опыт, анализ, практика. 2012. № 9. С. 3–11 [Dmitry A. Tumanov, *Issues of Public Interest Protection in Russian Civil Procedure*, 9 Laws of Russia: Experience, Analysis, Practice 3 (2012)].

the public good is determined not by the literal wording of the law, but by its logic, and the nature of the legal relations.

Despite the annual increase in state control in the field of participation in shared construction, large-scale violations resulting in failure to restore shared construction participants' rights occur in every subject of the Russian Federation. One of the latest mechanisms for the protection of the rights of shared construction participants is the creation of the nonprofit organization "Fund for Protection of the Rights of Citizens Who Are Participants of Shared Construction." The main objective of the fund is to protect the rights, legitimate interests and property of participants of shared construction, whose rights were violated by developers who are subject to the procedures initiated by a commercial court applied in bankruptcy cases.

One of the most successful national examples of collective rights protection implemented by public organizations is the protection of copyright holders and other related rights. This protection is carried out by non-profit organizations (the Russian Authors Society, the Russian National Intellectual Property Organization, and the Russian Union of Right Holders), which are accredited by the state as represented by the federal executive body exercising control and supervision functions in the field of copyright and related rights. Under the provisions of Art. 1242 of the Civil Code of the Russian Federation (hereinafter RF CC), such organizations possess the right to advocate for both copyright holders and on behalf of an indefinite number of right holders in accordance with the opt-out model.

The draft law "On Amendments to Certain Procedural Acts of the Russian Federation" (hereinafter Draft Law), proposed by Ministry of Justice in 2017, would establish the procedure for a group of persons with a collective statement of claim to apply to court; representation in cases on protection of rights and legitimate interests of a group of persons; the replacement of a person who has appealed for the protection of the rights and legitimate interests of a group of persons; requirements for the application, statement of claim and administrative statement of claim filed in defense of the rights and legitimate interests of a group of persons; and the actions of a judge in preparing a case for protecting the rights and legitimate interests of a group of persons for trial.

The Draft Law provides a list of cases that can be heard under the procedure provided by Chapter 22.2 of the same. These include the following:

1) disputes regarding consumer protection;

2) other cases provided for by federal law, subject to the availability of objective conditions for the initiation of collective proceedings.

In this way, the list of cases is limited until the adoption of federal legislation.

Vladimir Yarkov criticizes the establishment of a broad category of cases that can be tried as class actions. In his opinion, the establishment of such an extensive list of disputes that can be tried as class actions immediately after the introduction

of class actions to legislation of the Russian Federation is not merited, since it may lead to an abuse of rights to judicial protection.[16]

In our view, an exhaustive list can lead to the violation of citizens' or organizations' rights to access justice through class action lawsuits, due to the evolution of financial institutions, a lack of state control and legal regulation in some areas and, as a consequence, the possibility of violations of collective rights in specific areas of society not included in the list of cases enumerated in the Draft Law.

Moreover, since 15 September 2015, the Code of Administrative Court Procedure (hereinafter RF CACP) has been in force in the Russian Federation. Article 40 of the RF CACP establishes class actions for cases arising from public legal relations, when taking legal action to protect other persons or the general public.

It should be noted that the provisions of the RF CACP and Art. 46 of the RF CPC also refer to special legislation. Examples of cases when non-profit organizations can take legal action are social control (public organizations) for law enforcement in the Russian Federation and other regulatory legal acts on the state contracts system in relation to public procurement (Art. 102); the compensation fund is entitled to represent and protect, in court, the property interests of applicants to the fund and, in enforcement proceedings, to sue for the protection of the rights and legitimate interests of investors at large, i.e., individuals (Art. 63).

In view of recent reforms and the existence, since August 2014, of a Unified Supreme Court of the Russian Federation, a course has been set to unify proceedings in civil cases in courts of general jurisdiction and commercial courts and to create a Unified Civil Procedure Code of the Russian Federation. In para. 50.10 of the Concept of the Unified Civil Procedure Code of the Russian Federation (hereinafter Concept), approved on 8 December 2014, it is proposed to enshrine an exhaustive list of categories of cases that can be considered under the procedures for the protection of the rights of groups of individuals. The possible abuse of the right to judicial protection is the reason for the introduction of such list.

Since the existing legal regulation of collective judicial protection is reflected only in sectoral legislation, it is necessary to expand the scope of class actions, by implementing the opportunity for public associations to initiate class actions for the protection of a group of persons or the general public in the relevant federal legislation. Such areas can include protection from unfair competition, cases of cultural heritage, and the rights of participants of shared construction.

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[16] *Ярков В.В., Тимофеев Ю.А., Ходыкин Р.М.* О проекте главы 38.1 ГПК "Рассмотрение дел о защите прав и законных интересов группы лиц" // Арбитражный и гражданский процесс. 2012. № 8. С. 16–20 [Vladimir V. Yarkov et al., *On the Draft of Chapter 38.1 of the Civil Procedure Code of the Russian Federation "Consideration of Cases on the Protection of the Rights and Legitimate Interests of a Group of Persons,"* 8 Arbitration and Civil Procedure 16 (2012)].

2. Representative Actions in Russia: Opt-In or Opt-Out?

The Russian procedural system provides for the participation of public associations (organizations) in the protection of violated collective rights of large groups of persons or the general public in the most vulnerable areas of economic life (Art. 46 of the RF CPC and Art. 42 of the RF CACP).

According to the definition of a subject of judicial protection set out in Art. 4(1) of the RF CPC, a class action can be formulated as a statement made to protect both the violated rights of a large group of persons and the legally protected rights of the subject applying to court in defense of this group.

A person, applying to a court of general jurisdiction becomes a key participant in the class action proceedings, acquiring procedural rights and bearing all the procedural obligations of the plaintiff in the case, compelled to conscientiously protect clients' rights and legitimate interests except for the right to conclude the settlement agreement and the obligation to pay court costs (Art. 46 of the RF CPC).

The filing of a claim by a person concerned has the goal of restoring a violated right, and the person seeking protection of the right or interest must prove that their right or interest was really violated by the defendant's unlawful conduct and that the selected remedy will lead to its recovery.

At the same time, none of the methods of collective protection available in the Russian Federation, which could be initiated by non-profit associations (organizations), is inconsistent with generally recognized international practices of class action consideration in opt-in or opt-out models.

Therefore, the provisions of Art. 42 of the RF CACP concerning administrative class actions do not specify whether public organizations can be referred to "other persons" (subjects) that may apply to court in defense of the violated rights of a group of persons.

According to Vladimir Yarkov,[17] "other persons" can implicate, for example, a prosecutor, state bodies, and public associations that are entitled to bring a class action only in cases stipulated in the federal law.

Furthermore, the provisions of Art. 40 of the RF CACP provide that, in certain cases ascertained by law, organizations can still go to court to protect the rights, freedoms and legitimate interests of others. However, according to Art. 40 of the RF CACP, the persons mentioned above and not specified in that Article, have no right to apply to court, since, if acting within the law (Art. 40(3) of the RF CACP), public associations can go to court in defense of common rights, interests and freedoms of all their members, however, they are not entitled to require the protection of public interests or the interests of the general public.

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[17] *Ярков В.В.* Групповой иск в административном судопроизводстве: краткий комментарий // Арбитражный и гражданский процесс. 2015. № 11. С. 52–58 [Vladimir V. Yarkov, *Class Action in Administrative Proceedings: A Brief Review*, 11 Arbitration and Civil Procedure 52 (2015)].

In order to eliminate obstacles to collective protection of violated rights, it is necessary to make amendments to Art. 42 of the RF CACP regarding what entities, other than citizens, can go to court with administrative claims to bring a class action. Such persons should include state agencies, local governments, and public associations. The current wording of Arts. 40 and 42 of the RF CACP (on the stipulation that "other persons" mean non-profit and public associations), *de facto* overlaps. Moreover, sectoral legislation, which Arts. 40 and 42 of the RF CACP make reference to, does not contain areas of legal relations authorizing the filing of administrative claims by non-profit associations in defense of groups of persons. Only in Art. 208(2) of the RF CACP is it stated that they can file a lawsuit challenging normative legal acts in order to protect all *their* members, which repeats the provisions of Art. 40(3) of the RF CACP and does not entitle nonprofit organizations to file a collective claim to protect non-member persons.

According to Vladimir Yarkov, a significant number of the procedural issues of Art. 42's application are unregulated (unsettled), including the issues concerning the specific nature of preparation and hearing of a case under an administrative class action, notification of potential group members, interaction between members of the group and the representative plaintiff in proxy, the order of selection and replacement or termination of the representative plaintiff's powers, the powers of the group members to personally participate in the proceedings, peculiarities of drafting of the operative part of a judgment, etc.

In other words, having proposed the opt-in model to protect collective rights in administrative proceedings, the legislator has not resolved the basic procedural mechanisms for trying such claims, which means that this institute cannot function fully at present.

As regards civil proceedings, it should be noted that the RF CPC does not contain any provisions on collective rights and interests defense according to the opt-in model, or mechanisms for the resolution of collective disputes.

The Russian equivalent of the class action opt-out model is the claim for the protection of the general public, stated in Art. 46(1) of the RF CPC, which may be initiated by a public association. For example, in the domestic procedural doctrine, protection of public interest relates to protection of the general public by public associations.

The Civil Procedure Code of the RSFSR (Art. 42(1)) stipulated that, in cases provided for by law, organizations are entitled to apply to court for protection of violated or disputed rights, freedoms and lawful interests of other persons at their request or for protection of violated or disputed rights, freedoms and lawful interests of the general public.

When adjudicating upon such claim, the court has no right to impose any pecuniary duty on the defendant to a specific plaintiff or group of plaintiffs, since this category of cases results from the need to protect certain common values and the public interest.

Under para. 20 of the Resolution of the Plenum of the Supreme Court of the Russian Federation on proceedings concerning consumer protection (31), actions to protect the rights and legitimate interests of the general public are filed by prosecutors, competent authorities, bodies of local self-government (*parens patriae* actions), public associations and unions of consumers with the status of a legal entity (representative actions) who can only initiate actions aimed at finding a defendant's actions illegal or, barring the defendant's wrongful actions without monetary claims. Therefore, the possibility to use representative actions for damages in Russia is not provided.

Moreover, in European doctrine, actions to protect the general public do not provide for possible financial compensation of losses of individual participants of the general public. The nature of the provided judicial protection in such cases is public law.

Furthermore, in accordance with Art. 31 of the French Civil Procedure Code, a trial is only possible if a plaintiff has a reason for, and an interest in, judicial recourse. However, difficulties arise when a legal person (e.g., an association) takes legal action to protect the common interests of persons of a certain category, since one of the main principles of French civil law reads: "no one needs to act for another" (*Nul ne plaide par procureur*).

Therefore, at present, personal interests may not be protected and, even if they are accumulated in a single trial, each plaintiff must articulate his own claims, which should be assessed by the court separately. As a result, class actions *per se* are unenforceable in accordance with the standards of French law. Exceptions to this rule are class actions of consumer associations, who can file collective civil actions under specific conditions, as well as of trade unions and professional associations.

Paragraph 50.3 of the Concept sets out the structure of a claim (Art. 46 of the RF CPC concerning protection of rights, freedoms and legitimate interests of the general public, which is a type of a class action (opt-out) but does not provide protection of each person).

However, the concept of "general public" contained in Art. 46 of the RF CPC is not clarified or described and the issue of defining this category is being solved by court practice. For example, it was noted in some court decisions that the term "protection of the general public" in relation to the provisions of the current legislation refers to the protection of common interests of individuals when the number of potential plaintiffs (applicants) cannot be defined either before or after trial and there is identity of subject matter and reason of action for all plaintiffs, a common method of rights protection and a common defendant, i.e., the fact of mass violation of rights of the general public is established.

Civil legislation proposes both opt-in and opt-out models in the field of collective protection of intellectual property rights. Under the provisions of Art. 1242(3) of the RF CC, public organizations have the right to advocate for both definite and indefinite copyright holders.

Note that claims of public organizations *for the protection of unspecified right holders* may only be submitted by state-authorized associations. In Russia, there are several accredited "ideological plaintiffs," i.e., the Russian Authors Society, the Russian National Intellectual Property Organization and the Russian Union of Right Holders.

The position of researchers that class actions practiced by the authorized societies managing rights on a collective basis do not just have an opt-out nature but an absurd and cruel opt-out with the state turning blind eye to it, appears to be reasonable. However, even in this case a person has the possibility to withdraw from the collective claim, at least by withdrawal of rights from collective management, but not being deprived of these rights.

In such proceedings, NGOs do not protect their personal rights and interests, but the rights and interests of right holders that are their members. Court decisions on compensation redress shall be made in respect of the rights and obligations of other persons, and are not relevant for these organizations, subsequently, amounts are withheld from these rewards to cover the necessary costs for the collection, distribution and payment of such fees.

Organizations are entitled to enter into contracts with users in the interests of the right holders that granted them powers to manage rights, which means they are able to identify all persons concerned.

Some Russian scholars believe that the terms "class action" and "representative action" can be used to signify the same legal phenomenon: in both cases there is a group of individuals and, at the time of case initiation, it is not personalized. *At the same time, according to Art. 46(1) of the RF CPC, a non-profit association has the right to file a lawsuit in defense of persons with the material demands of the group, joined by at least 20 individuals (Art. 42(2) of the RF CACP says the same) on the basis of their written request, however, such a claim cannot be heard as an opt-in model class action.* Everyone seeking protection will be treated as a separate material plaintiff and the group as a whole will be treated as a plurality of persons on the part of the plaintiff (joinder).

The procedural legislation of Denmark[18] allows opt-in and opt-out class actions to be filed depending on the prices of individual material demands, the amount of which does not exceed 2,000 kroner (about 320$), i.e., up to 2,000 kroner – opt-out, more than 2,000 kroner – opt-in only.

In accordance with the UK Consumer Rights Act 2015, consumer associations and trade associations may initiate opt-in or opt-out style class actions. Proceedings on class actions may only be initiated with the approval of the tribunal, which will consider this class action, identify a group of participants of the claim (certification), approve a class (group) representative, and choose either an opt-in or opt-out model.

Currently, national legislation provides for both models of class action: opt-in, when an association takes legal action to protect violated rights of a group consisting

[18] Paul G. Karlsgodt, *World Class Actions: A Guide to Group and Representative Actions Around the Globe* 193 (New York: Oxford University Press, 2012).

of at least 20 (or more) persons, and opt-out (the Russian equivalent being a "claim in defense of general public"), which can be initiated by non-profit organizations empowered by the relevant sectoral legislation.

Note that the characteristic features of the considered models of class actions are far-removed from their traditional forms, creating obstacles to the development of collective protection in general.

The above mentioned problems refer to a claim on protection of the general public, since, according the opt-out model, everyone who falls within the group definition is automatically included in a group and will be bound by the outcome of the case if they do not resign from the group, which can be done by filing a petition to court or a group lawyer. The right to withdraw from the group is not provided by Art. 46 of the RF CPC.

It appears that the opt-out system for Russia will experience difficulties due to the size of the country and the spread of potential offenders in all regions. For example, in the US, class actions are mostly brought at the state level.

The provisions of Art. 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms will also render a complaint to protect an unascertained community impossible. Otherwise, it would be possible for enthusiasts to complain on behalf of unidentifiable forming, for example, a municipal community, social minority or even majority of citizens, passing them off as a group.[19] This position is reflected in the practice of the European Court of Human Rights.[20]

There are disputed academic opinions implying that applicants themselves will choose the model of a class action, however, with the change in group size and ability to define all its members, the plaintiff should have the opportunity to replace opt-out with opt-in and *vice versa* and use the resulting procedural options, including the possibility of changing an action for declaration of a right.

It appears that this freedom to choose the procedural actions (discretion) may lead to applicants' abuse, trial delays, and nullification of timely judicial protection.

In turn, the Concept determining the development of the Russian court system, establishes the possibility for a person to join the group proceedings (class action) only by filing a relevant claim (petition) following the opt-in model. The proposed wording

[19] Постановление Конституционного Суда Российской Федерации от 19 января 2017 г. № 1-П "По делу о разрешении вопроса о возможности исполнения в соответствии с Конституцией Российской Федерации постановления Европейского Суда по правам человека от 31 июля 2014 года по делу "ОАО "Нефтяная компания "ЮКОС" против России" в связи с запросом Министерства юстиции Российской Федерации" [Resolution of the Constitutional Court of the Russian Federation No. 1-P of 19 January 2017. On the Case of the Resolution of the Issue Concerning the Possibility to Enforce, in Accordance with the Constitution of the Russian Federation, the Decision of the European Court of Human Rights of 31 July 2014 in the Case of *OAO Neftyanaya Kompaniya Yukos v. Russia* in Connection with the Request of the Ministry of Justice of the Russian Federation] (Jan. 13, 2018), available at http://www.consultant.ru/document/cons_doc_LAW_211287/.

[20] *Yevdokimov and others v. Russia*, No. 27236/05, 16 February 2016, [2016] ECHR 187; *Cyprus v. Turkey*, No. 25781/94, 10 May 2001, ECHR 2001-IV.

of Chapter 38.1 of the RF CPC, in particular, Art. 319.1(3) of the RF CPC, stipulates that a person can only join a class by filing the relevant application or decision, i.e., the norm is constructed on the model of "opportunity to enter" (opt-in).

Therefore, in accordance with the provisions of Chapter 50 of the Concept, the legislators noticed the necessity to introduce a single model of a class action and class proceedings, which may be equally applied by all courts, taking into account peculiarities of jurisdictions. The authors also provided a mechanism for regulation when considering class actions and certification of the group, and noted the need to consider such claims, both as actions for declaration of a right and the award of compensation. The above demonstrates the beginning of development of a collective protection institute and mechanisms for its regulation.

3. Objective Reasons for Filing a Representative Action and Class Certification

The issue of whether it is possible to consider representative actions according to procedural legislation in Russia, is debatable.

The authors of the Concept say that one of the main criteria for the consideration of a class action (certification) is the possibility for the court to establish 1) a group of persons whose shared rights and interests have been violated by one defendant, and 2) that group members should have the same legal relations with the defendant.

In civil procedure theory there is a point of view[21] that a public association is not a member of a group but only its agent or representative body due to the absence of a material interest in the class action, therefore, it has no possibility of initiating group litigation.

A similar position was set out in the Resolutions of the Constitutional Court of the Russian Federation,[22] which stated that organizations empowered to apply to court seeking to protect rights, freedoms and legitimate interests of others in accordance with Art. 46(1) of the RF CPC, are not subjects of the alleged disputed material relationship that becomes the subject of judicial activities in a case, the NGO is not subject to the legal force of a court decision, the organizations are not awarded anything, and nothing is recovered from them, including legal expenses.

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[21] *Рожкова М.А., Глазкова М.Е., Савина М.А.* Актуальные проблемы унификации гражданского процессуального и арбитражного процессуального законодательства: Монография [Marina A. Rozhkova et al., *Current Issues of Civil Procedural and Commercial Procedural Law Unification: A Monograph*] (M.A. Rozhkova (ed.), Moscow: Institute of Legislation and Comparative Law under the Government of the Russian Federation; Infra-M, 2015); *Алиева И.Д.* Защита гражданских прав прокурором и иными уполномоченными органами [Irina D. Alieva, *Protection of Civil Rights by Prosecutor and Other Competent Authorities*] (Moscow: Wolters Kluwer, 2006).

[22] Определение Конституционного Суда РФ от 29 января 2015 г. № 137-О [Resolution of the Constitutional Court of the Russian Federation No. 137-O of 29 January 2015]; Определение Конституционного Суда РФ от 25 февраля 2016 г. № 370-О [Resolution of the Constitutional Court of the Russian Federation No. 370-O of 25 February 2016] (Jan. 13, 2018), available at ConsultantPlus Legal Database.

That is, with this regulation, independent legal institutes, i.e., class actions, and representative actions, and rights and legal interests of other persons (Art. 46 of the RF CPC, Art. 53 of the Arbitration Procedure Code of the Russian Federation, and Art. 40 of the RF CACP) are mixed without justification.

However, as Victoria Kulakova[23] indicates, the interests of a public organization derive from the interests of its members and represent a generalized benefit, that consist of needs of members, and the statutory goals are the driving force that directs the organization to use the right provided for in Art. 46 of the RF CPC, in defense of public interest or the interests of its members.

For example, in the UK, Art. 716(1) of the Companies Act 1985 provides for compulsory registration as a legal body of any entity "consisting of more than 20 individuals and having the intention to carry out activities aimed at them receiving profits directly or via its members." Having introduced this requirement in 1862, the English legislator managed to solve the procedural problem of a lack, in English procedural law, of a practically efficient representative action or action that may be brought against a group of persons or to protect the interests of group of individuals. From the position the courts are maintaining, it follows that violation of the provisions of this Article leads to recognition of the association as illegal and, subsequently, it will be impossible to sue either the association itself or start an action on its behalf.[24]

It is, therefore, possible to expand the concept of a public class action on protection of rights and legal interests of a group of persons who are not members of a public association, and also other persons whose rights and legal interests were violated by the defendant in the field of public organization professional activity enshrined in an NGO's statute.

In turn, in the draft law "On Amendments to the Civil Procedure Code of the Russian Federation and Certain Legislative Acts of the Russian Federation," which, in 2012, was introduced in the State Duma of the Russian Federation (Chapter 22.2 "Cases to Protect the Rights and Legitimate Interests of a Group of Persons") and which was renewed in October 2016, it is proposed to legislate the right of public associations to go to court in defense of common rights, freedoms and legitimate interests of members and participants of a public association and establish a procedure for consideration of cases on protection of rights and legitimate interests of a group.

In addition, in Art. 244.11(1) of the RF CPC (draft version), it is stated that, in cases stipulated by federal law, agencies, organizations and citizens, can apply to court

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[23] *Кулакова В.Ю.* К вопросу о специальных основаниях обращения в суд в защиту чужих интересов государственных органов, органов местного самоуправления, граждан и организаций // Законы России: опыт, анализ, практика. 2012. № 9. С. 11–19 [Victoria Yu. Kulakova, *Revisiting the Special Grounds of Judicial Recourse in Defense of Someone Else's Interests of State Bodies, Local Authorities, Citizens and Organizations*, 9 Laws of Russia: Experience, Analysis, Practice 11 (2012)].

[24] Dan D. Prentice, *Veil Piercing and Successor Liability in the United Kingdom*, 10 Florida Journal of International Law 469 (1996).

to protect rights and legitimate interests of individuals *who are not members of the group*. Similar provisions are contained in the above mentioned draft law, which adds Chapter 38.1 "Consideration of Cases on Protection of Rights and Legitimate Interests of a Group of Persons" to the RF CPC.

That is, under the new concept of procedural legislation, a class action lawsuit may be filed by a public association both in the interests of its members and *in the interests of citizens who are not members of such an organization*.

It appears that this approach will allow representative bodies to overcome possible obstacles to the development of public class actions and will optimize the process of group certification.

It should be noted that in most foreign legal systems, the court takes the decision on the possibility of consideration of an action according to the rules of representative action proceedings and conducts certification of the group (class) and their representative at the stage of case preparation, that is, the conclusions obtained during this stage have a significant impact on the progress of the case and its result.

Russian scholars have pointed out the issue of pre-qualification of the claim at the stage of initiation of the case from the point of view of the criteria of Art. 42 of the RF CACP: who qualifies a claim as a group, being the subject of this Article, is unresolved in the RF CACP. By implication of Art. 130 of the RF CACP, a judge can only leave a claim on a class action suit without action in the absence of indicia, referred to in Art. 42 of the RF CACP.

The equivalent of the stage of case preparation for a representative action in England, where this institute originated, is the stage of case management. Case management allows the judge to manage the process more accurately, determining procedural steps that must be completed by the court and the parties for hearing on the merits.[25]

The guidance provided by the court administration may contain provisions for variation and determination of resolution of the disputed matters under a Group Litigation Order that were included in the group's demands after the statement of action was accepted by the court, on cooperation with each other during the proceedings, and on the appointment of a solicitor for one or more parties as the leading solicitor for all the plaintiffs or all the defendants. After the claim is submitted, the court must, as soon as possible, identify controversial issues of GLO, specify the date after which no claim can be included in the group register without the consent of the court, and decide the issues of disclosure of evidence and pre-trial review.

However, according to Art. 150.1 of the RF CPC (Draft Law) when preparing, the court determines the nature of legal relationship under Art. 40.1 of this Code,

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[25] *Вафин Я.* Особенности судопроизводства по групповым искам в Англии // Арбитражный и гражданский процесс. 2009. № 8. С. 25–30; № 9. С. 33–35 [Ya. Vafin, *Distinctions of Proceedings in Class Actions in England*, 8 Arbitration and Civil Procedure 25 (2009); 9 Arbitration and Civil Procedure 33 (2009)].

the compliance with the conditions and circumstances relevant to the proper consideration and resolution of the case, and the applicable laws.

Given that the legislator currently concedes to public associations the right to bring class actions in sectoral legislation, it is possible to face a situation when a mass violation may occur in a field where class actions are impossible. For example, the activities of debt collection agencies, unfair competition or false advertising, and protection of cultural heritage.

Supporting the need to protect the legitimate interests of persons by professional public associations, the author agrees with Dmitry Tumanov,[26] who believes that, if faced with a public interest violation, one can discover the absence of the necessary organization.

In those jurisdictions where it is theoretically possible to use a class action, having objective criteria for collective proceedings could not be considered as abuse on the part of the appellants and denial of the right to judicial protection.

Conclusion

Needless to say that the potential capacity of the class action in general, and public (representative) class actions in particular, as a modern procedural form of collective judicial protection is considerable. One need only look at comparative studies on this matter and successful foreign practices of application of opt-in and opt-out models of group proceedings.

In turn, the practice of the use of class actions in Russia points to the fact that this institute is understudied, inconclusively regulated by the state (the legal aspect) and that public organizations are reluctant to initiate court proceedings in defense of infringed rights (the financial aspect).

Having examined the Western experience of regulatory mechanisms for class actions, we propose a legal instrument of state accreditation of public associations to initiate and represent the interests of persons whose rights were violated in court in a particular area of legal relations (protection of rights of consumers, goods and services, environmental protection, etc.). Despite the large number of registered public associations, established to protect citizens' rights, the situation regarding protection of citizens from unfair acts of commercial organizations has not improved.

In order to maintain the independence of public associations, it is important to fund the procedure of trying of class actions with membership dues from the members of the class action that will cover the operating expenses of public association in the course of the proceedings before the court decision goes into effect. These changes will encourage participation of nonprofit organizations in the cases of massive violation of citizens' and organizations' rights due to the current inability to recover court fees for the services of representation.

[26] Tumanov 2012.

However, over the last five years, the domestic procedural system is developing a collective defense system and mechanisms for its regulation, as evidenced by the adoption of the Concept, as well as the active participation of public institutions and NGOs in the protection of civilians from mass violations of rights and legitimate interests (the invalidation of unfair contracts, a ban on the release of products, harmful to the health of consumers, the recognition of false advertising, etc.).

At the same time, concerns grow in the academic community over the extensive use of class actions in Russia, because the mechanisms for determination by the court of objective criteria for initiation of class actions, group certification, and the active role of the court in collective proceedings are still being established, which can give rise to mass violation of applicants' rights either when applying or at the stage of hearing.

Furthermore, academic literature notes[27] that the issue concerning extension of the scope of rights to persons who joined the class action later, including an independent appeal of the court act, is similarly important. While the Concept says nothing about the rights of persons who joined the claim for protection of violated rights.

The introduction of class actions in civil proceedings is also a serious challenge to the system of courts of general jurisdiction. Some scholars compared the representative actions with the insolvency (bankruptcy) cases that are heard by specialized commercial courts, whereas class actions in courts of general jurisdiction require the same level of expertise of federal judges entrusted with the right to try such cases.

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