Collective redress and workers’ rights in Slovenia

Barbara Kresal
Associate Professor of Labour Law and Social Security, University of Ljubljana, Ljubljana, Slovenia

Abstract
In 2017, the Collective Actions Act introduced a new type of lawsuit – the collective action – into the Slovenian legal order. A collective action can be lodged in cases of instances of so-called ‘mass harm’, including mass violations of workers’ rights. This could improve the effectiveness of enforcement of workers’ rights in practice. Instead of a number of individual labour disputes concerning the same or similar violations of workers’ rights, a collective action can be lodged by trade unions or other representative collective actors in this field. Both opt-in and opt-out approaches are possible and the decision on this is left to the discretion of the court. Despite many positive aspects, only one collective action in the area of labour rights has been lodged to date. In this contribution I analyse legal regulation of the existing collective redress mechanism and possible reasons for deficiencies discerned in its functioning in practice.

Keywords
Collective redress, collective action, enforcement of workers’ rights, opt-in/opt-out system, labour disputes, labour rights, Slovenia

1. Introduction
In this contribution I analyse the relevant legal framework concerning collective access to courts and remedies in the area of workers’ rights in Slovenia and how this legal framework is used by litigants in practice. The focus is on the relevant procedural law, which offers possibilities for collective redress for workers in case of mass violations of their rights. Legal rules governing the collective action were introduced into the Slovenian legal order in 2017 and they also apply to labour disputes. Claims by workers whose rights would otherwise have to be enforced through individual lawsuits in individual labour disputes can now be resolved by a collective judgment in collective...
action proceedings. If prescribed conditions are met, a collective settlement is possible as well. It seems, however, that for labour law purposes the new law can best be described as a ‘Sleeping Beauty’: to date, only one labour rights collective action has been brought and even this was declared inadmissible by the court. This contribution explains the main features of the recently introduced collective redress mechanism and analyses its possible positive and negative characteristics, as well as possible reasons for deficiencies in its functioning in practice.

2. Main features of the Slovenian labour law and judicial protection of workers’ rights

The sedes materiae of individual labour law is contained in the Employment Relationships Act of 2013, as amended. Many other relevant statutes regulate either specific labour law issues or introduce special rules for particular sectors of activity or professions. For example, minimum wages are regulated by the Minimum Wage Act of 2010, as amended. Special rules apply in the public sector; the Public Employees Act of 2002, as amended, is among the most important. Where there are no special rules for public employees, the Employment Relationships Act applies to them, too. Slovenia has a well-functioning system of collective bargaining with important sectoral level collective bargaining and a fairly high coverage rate of around 65 per cent. However, trade union density is not very high, at around 30 per cent, and there are even lower estimates of around 20-23 per cent. Collective bargaining and collective agreements are regulated by the Collective Agreements Act of 2006, as amended, and trade union representativeness is regulated by the Representativeness of Trade Unions Act of 1993.

According to the Labour and Social Courts Act of 1994, as amended, labour disputes are dealt with by specialised labour courts. Labour courts have jurisdiction to decide on individual and collective labour disputes.

Individual labour disputes concern the following, among others:

1. Zakon o delovnih razmerjih (ZDR-1), Official Journal of the Republic of Slovenia (hereafter: Official Journal) No 21/13 et seq. (http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO7399).
2. Zakon o minimalni plači (ZMinP), Official Journal No 13/10 et seq. (http://pisrs.si/Pis.web/pregledPredpisa?id=ZAKOS861).
3. Zakon o javnih uslužbenih (ZJU), Official Journal No 52/02 et seq, available at http://pisrs.si/Pis.web/pregledPredpisa?id=ZAKO3177.
4. B. Kresal, ‘Posting of Workers before Slovenian Courts’, in Z. Rasnacija and M. Bernaciak M. (eds), Posting of workers before national courts (Brussels, ETUI, 2020), 220.
5. J. Visser, ‘What happened to collective bargaining during the great recession?’ (December 2016) IZA Journal of Labour Policy, available at https://doi.org/10.1186/s40173-016-0061-1.
6. ILO, Industrial Relations Data – IRData: Trade union density: Statistics on union membership (Geneva, 2018), available at: https://ilostat.ilo.org/topics/union-membership/ (accessed on 14 April 2020).
7. K. Kresal Šoltes, S. Bagari, V. Franca, D. Sencur Peček, Analiza stanja na področju razširjenosti in pokritosti kolektivnih pogodb v Sloveniji: končno poročilo (Ljubljana, Inštitut za delo pri Pravni fakulteti v Ljubljani, 2018), 12–13.
8. Zakon o kolektivnih pogodbah (ZKolP), Official Journal No 43/06 et seq, available at http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO4337.
9. Zakon o reprezentativnosti sindikatov (ZRSin), Official Journal No 13/93, available at http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO262.
10. Zakon o delovnih in socialnih sodiščih (ZDSS-1), Official Journal No 2/04 et seq., available at http://pisrs.si/Pis.web/pregledPredpisa?id=ZAKO3657.
11. Article 5 Labour and Social Courts Act.
● the conclusion, the existence, duration and termination of employment relationships;
● rights, obligations and responsibilities between an individual employee and the employer stemming from the employment relationship;
● rights and obligations between the employee and the user company (agency work); and
● rights and obligations in employment procedures between the employer and candidates for employment.

Collective labour disputes concern the following, among others:12

● the validity of collective agreements and their application between the parties to the collective agreement or between parties to the collective agreement and other persons;
● the competence to engage in collective bargaining;
● the conformity of collective agreements with the law, as well as conformity between collective agreements;
● the legality of strikes and other industrial actions;
● workers’ participation; and
● trade union representativeness.

The first instance labour court cases are heard by a panel comprising a judge (as the president of the panel) and two lay judges (as ordinary members), representing the employers’ and the employees’ side. If the sum at issue in an individual labour dispute or social dispute does not exceed the prescribed amount, and in certain other cases, a single judge shall decide the case. The Higher Labour and Social Court decides on appeals against decisions of the first instance labour and social courts (in a panel of three judges), while appeals against and reviews of decisions of the Higher Labour and Social Court are decided by the Supreme Court of the Republic of Slovenia, which has a specialised Labour and Social Division (the Supreme Court decides in a panel of three or five judges).

If there are no special procedural rules for labour disputes in the Labour and Social Courts Act, the rules regulating civil litigation, that is, the Contentious Civil Procedure Act,13 apply on a subsidiary basis.

In 2017, the Collective Actions Act14 introduced a new type of the lawsuit into the Slovenian legal order, a collective action, which is also available in labour disputes.

Apart from the collective action, there are a number of other legal instruments in Slovenian procedural law that can improve the efficiency of the enforcement of labour rights in cases of mass violation, and could at first sight be perceived as collective redress mechanisms. These are ‘classic’ civil litigation procedural law instruments, such as the joinder of claims and the joinder of proceedings, and a model procedure, introduced into the Slovenian legal order in 2008.15 The

12. Article 6 Labour and Social Courts Act.
13. Zakon o pravdnem postopku (ZPP), Official Journal Nos 26/1999 et seq, available at http://pisrs.si/Pis.web/pregledPredpisa?id=ZAKO1212.
14. Zakon o kolektivnih tožbah (ZKolT), Official Journal No 55/17, available at http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO7399
15. A. Galič and A. Vlahok, ‘Zakon o kolektivnih tožbah’ (2018) 39 Pravosodni bilten 2, 26; J. Kramberger, ‘Slovenia – report’, in E. Lein et al. (eds), State of collective redress in the EU in the context of the implementation of the Commission Recommendation (Brussels, European Commission, 2017), 888.
model procedure has been used by the Slovenian labour courts quite often in cases of mass violations of workers’ rights.

Nevertheless, these procedural options cannot change the fact that in the case of individual labour disputes, an individual action against the employer still has to be brought before the court by an individual worker or by several individual workers, holders of the rights that have been violated. In such cases, the trade unions can support the workers in their court litigation, represent them, offer them legal aid and so on, but they cannot replace their role as a party in the court proceedings: it is the holder of the right at stake, an individual worker, who has to bring an action before court and act as a party in the court proceedings.

In collective labour disputes, the holders of collective labour rights, among them also trade unions and other collective actors, can bring an action before court, but again, in their own name and on their behalf - not on behalf of the third parties, individual workers. Collective labour disputes can indeed often, or even as a rule, have implications also for individual workers. But here again, it is the holder of the right at stake that has to bring an action before court.

Therefore, these ‘classic’ procedural mechanisms and procedural law instruments cannot be described as genuine collective redress mechanisms. They do not – not even the model procedure or bringing an action before court in a collective labour dispute – provide for the ‘replacement’ of several individual claimants with a single representative collective actor. Rather, they just make it possible to coordinate, reorganise and economise the work of the courts in cases in which numerous same-type or similar and related actions have been brought before the court by various plaintiffs, but these (individual) actions must have already been lodged by individual workers.

Taking into account the fact that effective enforcement of workers’ rights in practice has been quite a problem in Slovenia, as in many other European countries, and that violations of workers’ rights are often related to mass harm situations, the introduction of a new type of action – a collective (representative) action – also in the field of labour law and labour disputes seems to be a good solution.

3. Collective action: a new legal instrument in the Slovenian legal order

The Collective Actions Act was passed in September 2017 and came into force on 21 April 2018. For the first time, a comprehensive legal regulation of collective redress has been enacted in Slovenia. As already noted, a new procedural instrument has been introduced into the Slovenian legal order, a new type of lawsuit, the collective action. Some authors even refer to collective redress mechanisms and their regulatory function as a ‘new model of civil litigation’.

A collective action provides for collective enforcement of rights in certain areas in which mass violations of individuals’ rights (in the same or similar situations) occur frequently and an individual enforcement of these rights faces numerous obstacles, is time-consuming and cost-inefficient, as a result of which many individuals, each alone, very often do not assert their rights individually in judicial proceedings. Thus, they do not bring actions before a court individually. One such area is labour law and employment relationships.

16. A. Galic and A. Vlahek, ‘Zakon o kolektivnih tožbah’ (2018) 39 Pravosodni bilten 2, 29.
17. See, for example, J. Sladić, ‘A New Model of Civil Litigation in Slovenia: Is the Slovenian Judiciary Prepared for the Changes Presented by the New Law on Collective Actions?’, in A. Uzelac and C.H. Van Rhee (eds), Transformation of Civil Justice (Cham, Springer, 2018), 216–218.
3.1 The potential to improve the effective enforcement of workers’ rights in practice?

As already pointed out, workers’ rights are often not respected in practice. Many workers experience non-fulfilment or inadequate fulfilment of employer obligations stemming from their employment relationship. Ineffective enforcement of workers’ rights in practice is a problem. And often such violations do not concern only an individual worker; rather, many workers are victims of the same or substantially similar types of violations.

Instances of mass violations of workers’ rights include the situations in which, for example, the employer does not pay a particular wage supplement to the employees of an entire enterprise, or when at a construction site a certain number of construction workers are engaged as self-employed, although all the elements of an employment relationship exist. In other words, this is an instance of a disguised employment relationship or bogus self-employment, and therefore these persons should be entitled to the same rights as other workers at the construction site. Irregularities in the case of collective redundancies, the misuse of insolvency proceedings to the detriment of the workers concerned or the introduction of a video surveillance system in a plant, contrary to the prescribed conditions, are further examples of situations in which a collective action might be a better, more efficient solution than numerous individual litigations.

There is an increasing number of cases in different legal fields in which numerous individuals are harmed in substantially similar ways; in particular, as regards consumer protection, investors’ rights, financial services, competition law, environmental protection and labour law. The effective enforcement of rights is lacking in the area of labour law and many workers decide not to enforce their rights in judicial proceedings.

There are many reasons why individual workers whose rights have been violated do not bring actions before a court. For example, they do not want to be individually exposed, they are afraid of losing their jobs in retaliation, they are in a vulnerable, dependent position in relation to their employer, and many do not have adequate knowledge or means of accessing courts. Such violations of workers’ rights may, in certain cases, concern relatively small amounts for each individual, but if they are accumulated, the total sum pertaining to a single employer may be quite high.

Although individual workers do have the right to bring actions before a court if their rights have been violated, their opportunity to protect the rights in judicial proceedings is often merely theoretical. Individual workers are formally the holders of the right to access to court, however, in practice, they face numerous obstacles that often make this right ineffective in practice. On one hand, there are workers whose rights have been violated (sometimes, a small amount is at stake for each individual worker, but even a small amount makes a big difference to those dependent on their income from employment), and on the other hand, an employer can benefit significantly in the aggregate from numerous small amounts. The ‘reduced labour costs’ of this kind due to mass violation of workers’ rights result in social dumping for workers and unfair competition in relation to other employers who (wish to) respect workers’ rights. If, in addition, effective supervision by labour inspectorates is lacking, many workers’ rights exist merely on paper.

18. A. Galič and A. Vlahek, ‘Zakon o kolektivnih tožbah’ (2018) 30 Pravosodni bilten 2, 25.
19. See, for example, B. Kresal, ‘Prikrita delovna razmerja – nevarno izigravanje zakonodaje’ (2014) 14 Delavci in delodajalci 2–3, 193–194; D. Senčur Peček and V. Franca, ‘From student work to false self-employment: how to combat precarious work in Slovenia?’ in J. Kenner et al. (eds) Precarious Work – The Challenge for Labour Law in Europe (Cheltenham, Edward Elgar, 2019), 132; B. Kresal, ‘Posting of Workers before Slovenian Courts’, in Z. Rasnača and M. Bernaciak, M. (eds), Posting of workers before national courts (Brussels, ETUI, 2020), 217, 224.
20. A. Galič and A. Vlahek, ‘Zakon o kolektivnih tožbah’ (2018) 39, Pravosodni bilten 2, 25.
It is not only in the interest of each individual worker whose rights have been violated, but also in
the public interest, to improve access to courts through various instruments, including the collective
action. This would strengthen the role of collective actors in this field, including the trade unions,
and ensure effective enforcement of workers’ rights in practice.

3.2 Main characteristics of the new regulation

The Collective Actions Act regulates collective actions as well as collective settlements. Collective
compensatory action and collective injunctive action are possible. The system is based on the repre-
sentative collective action, in which qualified legal entities - that is, representative organisations -
can lodge a collective action on behalf of the whole group rather than individual injured persons.
This is the so-called conservative approach. The Slovenian legislator decided to allow an opt-in as
well as an opt-out system. All collective actions must be registered in the registry of collective
actions, set up by the Supreme Court of the Republic of Slovenia, and all relevant information is
published there. The Collective Actions Act contains detailed rules on the funding of collective
actions and legal costs. Special attention is also paid to the rules on proper representation of all
members of the group and adequate protection of the interests of the whole group. The role of
the plaintiff and the role of the court are essential in this respect.

An important source of inspiration when preparing the draft of the new Collective Actions Act
was the EU Recommendation on common principles for injunctive and compensatory collective
redress mechanisms in the Member States concerning violation of rights granted under Union
law (2013/396/EU).

3.3 Scope of application: labour disputes included

The new Collective Actions Act’s scope of application is quite broad. The Slovenian legislator
decided to introduce the possibility to lodge a collective action in a number of different areas (hor-
zontal approach). Besides labour disputes, disputes in the area of consumer protection, competition,
market in financial instruments, environmental protection and discrimination may be resolved
through litigation initiated by a collective action. However, not all labour disputes are eligible;
only claims by workers whose rights would otherwise have to be enforced through individual
lawsuits in individual labour disputes are covered by the Collective Actions Act. This is under-
standable, because only individual labour disputes can be numerous.

Judicial enforcement of workers’ rights is now possible not only through actions by the holders
of those rights, but also through a collective action by a ‘third party’, such as trade unions and other
competent/certified not-for-profit organisations. They are acting on behalf, and in the interest of

21. A. Vlahek, ‘Kolektivne tožbe kot novo pravno sredstvo zoper množične kršitve pravic iz delovnopravnih razmerij’
(2018) 18 Delavci in delodajalci 2–3, 502.
22. C. I. Nagy, ‘Collective Actions in Europe – Chapter 5 European Models of Collective Action’, Springer Briefs in Law,
2019 (https://doi.org/10.1007/978-3-030-24222-0_5, 14. 4. 2020), 72.
23. In the area of protection against discrimination, only injunctive relief is available through a collective action.
24. Article 2, para 2 Collective Actions Act.
25. A. Vlahek, ‘Kolektivne tožbe kot novo pravno sredstvo zoper množične kršitve pravic iz delovnopravnih razmerij’
(2018) 18 Delavci in delodajalci 2–3, 498.
numerous individual workers whose rights have been violated and who on their own would probably not have decided to seek justice (assertion of their rights) through judicial litigation.

The Collective Actions Act regulates not only collective actions, but also collective settlements.26 A collective settlement is possible in all disputes in which a collective action is allowed, except in cases concerning protection against discrimination. In discrimination cases only an injunctive collective action, but not a compensatory collective action (collective action for damages), is allowed. Further on, collective action is presented, but adequate similar regulation concerns also the collective settlement.

3.4 Standing (locus standi) and representativeness

Following the principles of EU Recommendation 2013/396, the standing required to bring a collective action is granted to non-profit private law entities, on condition that there is a direct relationship between their main objectives and the rights that are claimed to have been violated in respect of which the action is brought.27

In labour issues, taking into account their previous experience in representing the workers before courts, the trade unions are expected to be the most important collective actors who could make use of this new procedural instrument, but definitely not the only ones; other non-profit organisations are active in protecting workers’ rights as well.

In addition, the State Attorney has the legal standing to lodge a collective action, but not in cases in which the State is the defendant. That means that in labour disputes concerning public employees where the State is the employer, the State Attorney cannot lodge a collective action due to the conflict of interest (the State Attorney represents and protects the interests of the State as an employer).

There are special rules concerning the standing when bringing a collective action in consumer and discrimination disputes. In the latter, an injunctive collective action demanding cessation of discriminatory acts can be lodged only by the Advocate of the Principle of Equality (a State equality body) or by non-governmental organisations with special status (public interest status in the area of protection against discrimination or protection of human rights). There are no special provisions for labour disputes as regards standing and representativeness.

Entities that have standing according to Article 4 of the Collective Actions Act must show on behalf of whom they intend to lodge a collective action and that they are representative, that is, that they are able to represent the individuals whose rights have been violated.28 The court assesses whether the condition of representativeness has been met by the claimant, taking into account, in particular:

- the entity’s financial means, human resources and legal knowledge necessary for representing the group;
- its past activities in preparing the collective action, organising the injured individuals and communicating with them, as well as its media presence and information activities;
- the number of individuals who have already supported its activities in a concrete case related to a mass harm situation; and

26. Article 2, para 3 Collective Actions Act.
27. Article 4 Collective Actions Act.
28. Article 6 Collective Actions Act.
the claimant’s past experience in collective actions.

The court, taking into account all circumstances of the particular case, assesses whether the plaintiff, as a party in the collective court proceedings, is able to represent the whole group adequately, to act fairly and in the best interests of all members of the group.29

Trade union representativeness acquired under the Representativeness of Trade Unions Act does not, per se, equal representativeness for the purposes of bringing a collective action on behalf of workers. The court must assess the representativeness of the trade union wishing to lodge a collective action in each case. On the other hand, it is not only representative trade unions (according to the Representativeness of Trade Unions Act) that can be representative for the purposes of bringing a collective action.

It is also worth mentioning that trade unions as potential plaintiffs in collective actions are not representative only with regard to the workers who are their members (unionised workers); they can be considered representative for the purpose of lodging a collective action also on behalf of workers who are not trade union members.

To sum up, the representativeness of a particular trade union wishing to lodge a collective action has to be assessed by the court in each case according to the prescribed criteria in Article 6 of the Collective Actions Act, irrespective of whether the trade union is representative or not under the Representativeness of Trade Unions Act, and taking into account the characteristics of a concrete case of mass harm (autonomous concept of representativeness for the purposes of lodging a collective action).

### 3.5 Admissibility and certification of collective action

In the first phase, the court decides on the admissibility of a collective action. If

- the dispute concerned is not within the scope of application of the Collective Actions Act (within one of the areas covered by this Act); or
- the collective action has not been lodged by the entity which has a capacity to bring an action before the court (locus standi); or
- the lawsuit does not contain all prescribed elements (and the plaintiff does not, in the given period, amend the collective action as requested by the court),

the court declares the collective action inadmissible and dismisses it.30

If it does not dismiss the collective action at this first stage, then the court moves on to the certification phase. The collective action is served on the other party, the defendant, in order to grant an opportunity to submit written comments, i.e. the defendant’s answer as regards the certification of the collective action.

After receiving the defendant’s response or after the expiry of the period for providing such an answer, the court sets the date for a hearing to which both parties are invited with the aim of

---

29. A. Galić and A. Vlahek, ‘Zakon o kolektivnih tožbah’ (2018) 39 Pravosodni bilten 2, 32; J. Kramberger, ‘Slovenia – report’, in E. Lein et al. (eds), State of collective redress in the EU in the context of the implementation of the Commission Recommendation (Brussels, European Commission, 2017), 889–890; A. Vlahek, ‘Kolektivne tožbe kot novo pravno sredstvo zoper množične kršitve pravic iz delovnopravnih razmerij’ (2018) 18 Delavci in delodajalci 2–3, 503.

30. Article 27 Collective Actions Act.
establishing whether the collective action is to be certified or not.\textsuperscript{31} According to this provision, all members of the group, as well as other qualified entities that have standing to lodge a collective action can send their observations if they wish so and they can be invited to the hearing to present their views if the court deems it useful.

That means that individual workers whose rights have been violated do have an opportunity to express their views on the matter in collective action proceedings already at this early (certification) stage. Taking into account their dependent and vulnerable position in relation to their employer, the defendant, it is quite common that workers do not wish to expose themselves individually and therefore it is beneficial to them that their active participation is not necessary.

The court’s decision whether to certify/allow the collective action or not is taken on the basis of the assessment of prescribed criteria, in particular:\textsuperscript{32}

- whether the qualified entity which lodged a collective action fulfils the conditions of representativeness;
- whether a mass harm situation is suitable for being dealt with in collective proceedings (the claims of the members of the group, which is identifiable as a group, are of the same kind and concern the same, similar or related factual or legal issues; they relate to the same case of mass harm situation; common legal and factual issues for the whole group outweigh the issues that concern only individual members of the group; bringing individual actions before court or joining individuals by other procedural instruments, such as the joinder of claims or joinder of actions, would be – due to the size of the group – less efficient than lodging a collective action);
- whether prescribed conditions are met with regard to agreements on legal costs and funding; and
- whether collective action is not manifestly ill-founded.

Galič and Vlahek emphasise that this ensures that a collective action, in terms of both its content and the entity that lodges it, is such as to ensure, on the one hand, effective collective protection of individuals in a mass harm situation, and on the other hand, adequate protection of the defendant from manifestly ill-founded and speculative lawsuits.\textsuperscript{33} Only duly certified collective actions will be processed further.

If the prescribed conditions for the certification of the collective action are not met, the court dismisses the collective action.

If the court certifies/allows a collective action, it issues a decision on certification which contains many important elements for the later stages of proceedings and necessary information for both parties and members of the group. Besides the identification of the parties and the mass harm situation, the most important part is a detailed description of the group and the decision on whether the opt-in or opt-out system is to be applied.\textsuperscript{34} The court also determines the time-limit (30-90 days) in which concerned individuals – members of the group – must inform the court of their decision to opt-in or opt-out. Time limits for submitting written observations on the merits by the members and

\begin{itemize}
  \item Article 28 Collective Actions Act.
  \item Article 28 Collective Actions Act.
  \item A. Galič and A. Vlahek, ‘Zakon o kolektivnih tožbah’ (2018) 39 Pravosodni bilten 2, 33.
  \item Article 29 Collective Actions Act.
\end{itemize}
other qualified entities and for the defendant’s answer, as well as methods for informing the members of the group are set by the court in the decision on certification as well.

3.6 Registry of collective actions and dissemination of information on a collective action

The Supreme Court has set up a registry of collective actions, in accordance with Article 10 of the Collective Actions Act. This provision contains general principles on the registry of collective actions and basic rules as regards content and form; more detailed rules on the registry of collective actions have been issued by the Minister of Justice.35 All collective actions have to be registered at the registry in which all relevant information concerning the lodged collective actions are published.36 There is one centralised registry of collective actions for the entire territory of Slovenia. The electronic version of the registry is accessible on the website of the Judiciary of the Republic of Slovenia;37 it is publicly accessible and free of charge.

Access to the data and documents of the lodged collective actions is made available in the registry from the day on which a collective action is filed and up to five years after the conclusion/resolution of court proceedings (either by the decision on the merits or by the decision to dismiss a collective action or to stop the proceedings).

The Dissemination of information on collective actions and the publicly accessible registry is very important.38 It is primarily the obligation of the qualified entity that organizes and files a collective action to adequately inform all relevant interested persons and the public. Nevertheless, the court has important duties in this respect as well.

The court has to inform the identified members of the group of the certified collective action by regular mail and, if possible, also by e-mail notifications. If this would cause disproportionate costs, the court may decide that the notification should be provided in another appropriate manner, taking into account the size and composition of the group and their geographical distribution, for example, by publishing information once or repeatedly in daily newspapers, through electronic media or through existing websites or websites set up by the entity that lodged the collective action.39

When assessing whether the dissemination of information is sufficient, the court takes into account the media coverage and profile of the dispute, as well as the plaintiff’s information and dissemination activities.40

3.7 Opt-in or opt-out: the position of individual members of the group

According to the Slovenian legislation, both systems, opt-in and opt-out, are possible. The decision as to which one will be applied in collective proceedings is left to the discretion of the court, which has to take into account all relevant circumstances of the given mass harm situation and choose the

35. Pravilnik o registru kolektivnih tožb (Rules on the registry of collective actions), Official Journal 26/18 (http://www.pisrs.si/Pis.web/pregledPredpisa?id=PRAV13331).
36. Articles 10 and 27 Collective Actions Act.
37. http://www.sodisce.si/sodni_postopki/javne_obravnave/kolektivne_tozbe/
38. R. Amaro et al, Collective Redress in the Member States of the European Union (Strasbourg, European Parliament, 2018), 31–33, 87; A. Galić and A. Vlah, ‘Zakon o kolektivnih tožbah’ (2018) 39 Pravosodni bilten 2, 35; A. Vlah, ‘Kolektivne tožbe kot novo pravno sredstvo zoper množične kršitve pravic iz delovnopravnih razmerij’ (2018) 18 Delavci in delodajalci 2–3, 504.
39. Article 31 Collective Actions Act.
40. Articles 31 and 32 Collective Actions Act.
system that best serves the aims of collective litigation and is justified by reason of sound administration of justice. The court makes this decision in the certification phase.

The discretion of the court is, however, limited by certain mandatory rules that have to be respected without exception and which seem to be relevant also in labour disputes. If at least 10 per cent of the members of the group are claiming an amount higher than EUR 2,000 or if one of the claims included in the collective action is seeking compensation for non-pecuniary damages, the opt-in system is mandatory.\(^{41}\) In addition, the opt-in system is mandatory for those individuals who do not have permanent residence in Slovenia.\(^{42}\)

If the court decides to use the opt-in system, the final judgment will be binding only on those individuals who, after certification of the collective action, within the time limit set by the court, declare that they want to join the group and take part in the collective proceedings. In the case of the opt-out system, the final judgment is binding on all members of the group related to the particular mass harm situation except those who declare that they do not want to be part of the group and covered by the respective collective litigation. Amaro and others emphasise that procedural rules governing how affected individuals may join the group is a particularly sensitive and difficult issue and that the opt-in system is generally perceived as more consistent with the EU Member States’ legal and constitutional traditions. On the other hand, an opt-out system seems to be a more powerful tool, taking into account the fact that people tend not to actively choose to join in. It can thus be considered the most efficient solution to deal with widespread and dispersed damages.\(^{43}\)

In an opt-out model, members of the group are bound by the outcome unless they opt out. In an opt-in model, members of the group are bound only if they opt in. This principle can be found in Article 41 of the Collective Actions Act. Individuals that are not covered by the collective litigation are free to bring their own, separate individual action before court. Those who have opted in (in the opt-in system) and those who have not opted out (in the opt-out system) are bound by the final judgment delivered by the court in collective proceedings and cannot lodge a separate individual action afterwards on the same issue (res iudicata).

Individuals cannot change their decision as regards opt-in or opt-out after the expiry of the time-limit set by the court.\(^{44}\) They cannot later withdraw their statement on opt-in or opt-out.

Members of the group are not the party in the court proceedings. It is the duty of the collective plaintiff to protect the interests of the members of the group and to proceed with the collective action in the best interests of all members of the group. Individual members are not expected to be active participants in the proceedings. It is the organisation that lodged a collective action that has to act as a party and be active in the court proceedings. Although they are not the party, individual members of the group (individual workers in the case of a labour dispute) are given the opportunity to participate. They can express their views, present observations and so on.\(^{45}\)

---

41. Article 31, para 2 Collective Actions Act.
42. Article 31, para 3 Collective Actions Act.
43. R. Amaro et al, *Collective Redress in the Member States of the European Union* (Strasbourg, European Parliament, 2018), 23, 85–86.
44. Article 34 Collective Actions Act.
45. Article 37 Collective Actions Act.
3.8 The role of the court

Although the plaintiff is primarily responsible for representing and protecting the interests of all members of the group, the role of the court is nevertheless quite important as well. In the collective proceedings initiated by a collective action, the court has an active role to play. Kramberger notes that in comparison with regular civil proceedings, the court has a much stronger role in actively managing the collective proceedings.

Because individual members of the group are not parties in the proceedings, the court has a duty to check whether the interests of all members are adequately protected by the plaintiff. For example, the plaintiff is allowed to withdraw, modify or renounce a claim only, if according to the court, this is not contrary to the interests of the members of the group.

In addition, if the court deems that the plaintiff seriously breaches the interests of the group or that the plaintiff can no longer be considered representative, it may, at the proposal of a member of the group or another qualified entity with the standing to lodge a collective action, order that the plaintiff is replaced by another qualified entity willing to enter the proceedings as a new plaintiff.

If such replacement is not possible, the court notifies its intention to end the collective proceedings, whereby this notification is published in the registry of collective actions. The court also sets the time limit within which a replacement of the plaintiff by another qualified entity can be proposed.

3.9 Decision on the merits: collective judgment and its execution

The court decides on the merits by delivering the collective judgment. It is served on the parties to the proceedings and published in the registry of collective actions. The collective judgment has to be quite specific, in particular, in terms of how compensation is determined and how the payment (or any other type of fulfilment) to individual members of the group is regulated.

If all members of the group are known and it is possible to decide on their individual claims without disproportionately prolonging the proceedings, all members of the group will be identified in the operative part of the judgment, together with the amounts that the defendant has to pay to them or other obligations that have to be fulfilled by the defendant. Such situations are expected to be rare, however. In this case the collective judgment is an enforceable title and each member of the group covered by the collective judgment can initiate enforcement proceedings regarding the amount that is owed to them.

More often, it is not possible to determine damages individually and such situations are regulated in Article 40 of the Collective Actions Act. Two options are possible:

46. A. Vlahek, ‘Kolektivne tožbe kot novo pravno sredstvo zoper množične kršitve pravic iz delovnopravnih razmerij’ (2018) 18 Delavci in delodajalci 2–3, 508; A. Galič and A. Vlahek, ‘Zakon o kolektivnih tožbah’ (2018) 39 Pravosodni bilten 2, 34–35, 38, 42.
47. J. Kramberger, ‘Slovenia – report’, in E. Lein et al (eds), State of collective redress in the EU in the context of the implementation of the Commission Recommendation (Brussels, European Commission, 2017), 894.
48. Article 35, para 3 Collective Actions Act.
49. Article 35, para 4 Collective Actions Act.
50. Article 38, para 2 Collective Actions Act.
51. Article 39 Collective Actions Act.
52. J. Kramberger, ‘Slovenia – report’, in E. Lein et al (eds), State of collective redress in the EU in the context of the implementation of the Commission Recommendation (Brussels, European Commission, 2017), 896.
(i) the total amount of the damages or other compensation (aggregate damages) is determined in the operative part of the collective judgment, as well as the detailed criteria for determining the exact amount to be paid to individual members of the group or subgroups and how each individual member of the (sub)group can demand the payment of the corresponding amount and prove that they fulfil the criteria for being entitled to the payment;

(ii) only the amount (or the formula for calculating the amount) to be paid to each individual member of the group (or different amounts to be paid to members of different subgroups), or other obligation to be fulfilled to each member of the (sub)group is determined in the operative part of the collective judgment, but not the exact total amount of the damages or other compensation to be paid by the defendant; nevertheless, the estimated value of the total amount has to be mentioned in the judgment as well.

In such cases an administrator of the collective judgment must be appointed by the court. Only a notary can be nominated as the administrator.

The total aggregated or estimated amount is then transferred to the fiduciary account of the notary. The notary/administrator has to prepare a draft list of the members of the group, divided into subgroups, who are entitled to the compensation or another type of fulfilment. This list is prepared either on the basis of the opt-in declarations of the members of the group in the collective action or, in case of an opt-out system, on the basis of written notifications submitted to the notary by individuals claiming that they are members of the group and entitled to the payment of their share.

The draft list is sent to the court, to the parties and to those individuals for whom the notary/administrator deems that they do not fulfil criteria of the judgment and are not entitled to the respective fulfilment by the defendant on the basis of the collective judgment. After the hearing, the court issues a decision on the final list of the entitled individuals, members of the group and subgroups, and corresponding amounts to be paid to them or other obligations to be fulfilled to them. After the execution of the collective judgment according to the approved final list of the entitled individuals, the administrator has to prepare the report for the court. When the court approves the administrator’s report, the collective redress procedure is concluded.

4. Collective actions concerning workers’ rights in practice

To date, only one collective action (Pk 1/2018) in the area of protection of workers’ rights has been brought before court. It was lodged soon after the entry into force of the new law, in July 2018. The plaintiff was a trade union, more precisely the trade union at the Ministry of Defence,
representing the public employees at that Ministry. The trade union brought the collective action before court against the State, the Republic of Slovenia, with Ministry of Defence as the defendant. The competent court was the Labour and Social Court in Ljubljana.

In this collective action, the trade union alleged that the right to a break during daily working time was not guaranteed to all workers. Due to the long-standing lack of sufficient employees at the Ministry and inadequate organisation of work and working time, many workers were unable to exercise their right to a daily break in practice. Because shifts were organised in such a way that often only one person was present at a given time at a particular post and not allowed to leave the workplace even temporarily, the employees concerned were denied the right to a daily break.

It is interesting to note that the trade union lodged a compensatory collective action, claiming compensation for workers who were not able to take a daily break for the period of the past five years, and not an injunctive collective action seeking prohibition of such violations in the future, that is, cessation of the employer’s acts that prevented the employees from taking their daily break. The opt-in system was proposed by the trade union. The estimated total amount of compensation claimed was EUR 500,000 and the approximate number of the members of the group was around 250 Ministry of Defence employees. The trade union alleged that violations were all of the same type and similar and that, due to the large number of workers concerned, collective redress would be more efficient than individual litigation; according to the plaintiff, around 250 employees decided to opt in and demand compensation.

The trade union decided to lodge this collective action after a successful individual action of one of the employees on the same issue.59

The court dismissed the collective action on the ground that in this case, the alleged mass harm at stake was not suitable to be dealt with in a collective litigation, because common legal and factual issues did not outweigh the individual aspects of each individual worker concerned. Taking into account all the circumstances of the case, the court ruled that it would be necessary to assess for each individual worker separately whether, on what days in the period of the past five years and to what extent the right to a daily break had been violated, and that this would cause much higher costs and consume much more time than assessing these questions in separate individual labour disputes.

The first instance judgment was upheld by the appeal court.60

This judgment was quite a disappointment for the trade union which lodged the collective action and a major disincentive for trade unions in general. This is problematic, because trade unions were seen as the most important qualified entities that would use the collective action mechanism. It is difficult to assess the extent to which this failure will influence future trade union litigation strategies. There is a risk that it might add to their doubts as regards the usefulness of collective actions as a specific litigation tool for the protection and effective enforcement of workers’ rights.

59. Judgment of the Labour and Social Court Ljubljana No I Pd 564/2017, 29. 3. 2018 (not available in the online accessible database of Slovenian case law).

60. Judgment of the Higher Labour and Social Court Ljubljana No XXX Pdp 185/2019, 4. 7. 2019 (http://www.sodnapraksa.si/?q=kolektivna%20to%C5%BEba&database[SOVS]=SOVS&database[VDSS]=VDSS&_submit=i%C5%A1%C4%8Dl&rowsPerPage=20&page=0&id=2015081111432920).
5. Conclusion: is the Slovenian model of collective action well designed and will it function properly in practice?

What are the positive and negative characteristics of the new legal regulation of collective action and what are the deficiencies in the practical functioning of the existing model? It seems that the trade unions in general are not very interested in this new collective redress mechanism, and that recent negative experiences with the first collective action lodged by a trade union after the new law’s entry into force may even weaken their interest further. Neither has any other collective actor or qualified entity in the area of the protection of workers’ rights showed any interest in using the collective action as a litigation strategy. The fact that only one collective action concerning workers’ rights has been lodged to date, in the two years since the introduction of the collective action into the Slovenian legal order, cannot be described as a big success.

According to Vlahek, the existing procedural framework for labour disputes already offers reasonably good and effective protection of workers’ rights in individual labour disputes. This, in her opinion, may be why new mechanisms foreseen by the Collective Actions Act will not be particularly attractive in this area in comparison with other areas.61 It has to be noted, however, that not much collective action activity can be detected in other areas either (as already mentioned, apart from one labour law collective action, only two other collective actions have been lodged so far).

The new legislation on collective actions is a step in the right direction, but every novelty needs time. A positive aspect of the new regulation on collective actions is its broad scope of application. Although, to date, there have been few collective actions, the possibility of filing a collective action has now been opened also for labour disputes.62 But more effort should be put into raising awareness, spreading knowledge and empowering trade unions and other potential collective actors in this field; specialised training is also needed, not only for potential collective plaintiffs, but also for the judiciary.

Another positive aspect of the new Slovenian model of collective redress is the decision of the legislator to allow for both opt-in and opt-out systems. Galic and Vlahek point out that the opt-out system is much more effective, whereas the opt-in approach often weakens the power and potential of collective action, in terms of compensatory as well as preventive effects.63 In particular, if the amounts of individual compensation are small, many potential injured persons do not notify their inclusion in the opt-in system and are thus not covered and bound by the collective judgment. An opt-out system takes into account behavioural patterns in society; according to Amaro and others, an opt-out solution would more easily overcome victims’ rational apathy and provide for a better deterrent effect.64 It is difficult to say, however, what approach the Slovenian courts will favour and whether the courts will choose the opt-out option in cases where this is possible and acceptable from the point of view of the relevant principles and criteria to be used, or if they will play it safe and prefer the conservative opt-in model.

In labour disputes, it is even more important to avoid situations in which individual workers are expected to explicitly express their views as regards the employer’s acts, and by doing so, to expose

---

61. A. Vlahek, ‘Kolektivne tožbe kot novo pravno sredstvo zoper množične kršitve pravic iz delovnopravnih razmerij’ (2018) 18 Delavci in delodajalci 2–3, 511.
62. In the first drafts of this Act, labour disputes were not included in the scope of application.
63. A. Galič and A. Vlahek, ‘Zakon o kolektivnih tožbah’ (2018) 39 Pravosodni bilten 2, 39.
64. R. Amaro et al., Collective Redress in the Member States of the European Union (Strasbourg, European Parliament, 2018), 23.
themselves to the risk of possible retaliation. In labour disputes, opt-out schemes strengthen the legitimacy of trade union litigation, on the one hand, and offer the workers necessary protection of their rights without being expected to expose themselves individually, on the other. In order to support trade union action in a concrete situation of mass harm involving the violation of workers’ rights, individual workers do not need to do anything. This corresponds to the prevailing situation in practice. Individual workers who experience mass violations of their rights by their employer, and therefore potential members of the group in collective action proceedings, are considered to have tacitly agreed to join the group and support the action of the actor who decided to trigger the judicial protection of workers’ rights. Those who do not agree have the right to opt out.

Besides these positive aspects, there are also some major deficiencies in the existing model of collective redress as introduced by the new Collective Actions Act. From a labour law perspective, it seems that a major deficiency is the lack of special provisions for labour disputes in the Collective Actions Act; such provisions could address specific problems of labour relations and labour disputes in particular, as well as better take into account the characteristics of the employment relationship and typical violations of workers’ rights. One might also mention workers’ dependent position in relation to the employer; the complexity and duration of the relationship between the employer and the worker; the fact that for the majority of workers their employment is the main, or even the only, source of subsistence for them and their families; and the fact that the employer collects a lot of relevant data on workers and their rights. Special rules for labour disputes in the Collective Actions Act are needed also as regards collective settlements, because the predominantly mandatory nature of labour law provisions raises particularly sensitive questions of whether, when and under what conditions a settlement is possible in the area of labour rights. Another delicate issue from a labour law perspective is whether declaratory claims are possible within the collective action mechanism. The Collective Actions Act is silent on this.65 In the field of labour law, however, declaratory claims and declaratory judgments are important. To mention one example: bogus self-employment and disguised employment relationships are one of the major concerns in Slovenia, and it is not clear whether a collective action is possible in which the main issue at stake is the existence or non-existence of employment relationships.

It is worth mentioning that, from the first drafts on, the scope of application was gradually broadened. Initially, it was not foreseen that labour disputes would be covered by the collective action mechanism. Only at the later stages of preparation of the new legislation was it decided to use the horizontal approach with a broad scope of application in different areas of law, and consequently labour disputes were also included. Vlahek explains that the new Act was not drafted with labour disputes in mind, because initially, labour disputes were not meant to be covered by it.66 Therefore, there are uncertainties and open questions as regards labour disputes and lack of special provisions for them in the new Collective Actions Act.

Case law could fill in these gaps. But these very gaps and dilemmas might be reasons for not using the collective action mechanism more often to resolve labour disputes in mass violations of workers’ rights. It remains to be seen whether more collective actions concerning workers’

---

65. A. Vlahek, ‘Kolektivne tožbe kot novo pravno sredstvo zoper množične kršitve pravic iz delovnopravnih razmerij’ (2018) 18 Delavci in delodajalci 2–3, 498.
66. Ibid.
rights (as well as other collective actions) will be lodged in the future, thus enabling possible further improvements of the existing system through case law, or whether legislative intervention will be necessary in order to ensure better functioning of the collective redress mechanism in practice.

Declaration of conflicting interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author(s) disclosed receipt of the following financial support for the research, authorship, and/or publication of this article: The author received support from the European Trade Union Institute.