

The Collective Proceedings Act ('CP Act')

Introduction

The Collective Proceedings Act ('CP Act') introduces a legal novelty in Maltese procedural law by allowing judicial proceedings to be pursued by a representative plaintiff on behalf of multiple claimants. Through this procedural mechanism, the Maltese legislator sought to achieve three major aims, the first being the facilitation of access to justice to individual citizens and businesses. The second objective centres on increasing behaviour modification of businesses and enterprises in terms of deterrence, consequently encouraging them to honour their legal obligations knowing that victims are in a better position to seek reparation for harm suffered. Improving judicial efficiency and economy by allowing individuals to group their similar claims into one lawsuit is the third aim sought.

The institution of collective proceedings

The CP Act contemplates two forms of collective actions - group actions and representative actions. The representative plaintiff instituting a group action must have a personal claim that falls within the group of claims in the proposed collective action, supporting the argument that a self-interest plaintiff is likely to be a better plaintiff. On the other hand, a representative action could only be filed by a representative body which does not necessarily have a personal juridical interest in the case. Such body could be either a registered consumer association or a constituted body which is purposely set up to defend the interests of its members and any other body duly constituted under any law or in accordance with established administrative practice. This evidently strengthens the role of such bodies under Maltese law.

The CP Act allows collective proceedings to be commenced either as a standalone action or a follow-on action. The former has a relatively independent nature as the claim is brought where the alleged breach of law is not already the subject of an infringement decision. Conversely, a follow-on action is instituted where an infringement decision has already been delivered by the European Commission, the Office for Competition, the Office for Consumer Affairs, the Consumer and Competition Appeals Tribunal or the Courts. Furthermore, the applicability of the CP Act up until now has been restricted to three particular substantive laws

being the Consumer Affairs Act, the Product Safety Act and the Competition Act.

The application instituting the proceedings

Irrespective of the value of the claim in dispute, collective proceedings could only be initiated by means of a sworn application before the Civil Court, First Hall or the Court of Magistrates (Gozo) in its Superior Jurisdiction. The application is to be sworn merely by the class representative as the plaintiff pursuer of the action and not by all the class members participating in the suit. The rationale is that many formalities in this context should be avoided as these will further complicate and prolong the proceedings yet the defendant may freely request further proof of the claims presented if the need arises.

Additionally, a collective proceedings agreement, being a concept introduced solely for the purpose of these proceedings, must necessarily be submitted along with the sworn application. This agreement takes the form of a private writing and is entered into between the class member and the class representative indicating the former's consent to be included in the collective proceedings and to the appointment of the class representative.

The pre-trial phase

The pre-trial hearing is a novel concept under Maltese law and throughout such hearing, the court determines the adequacy, or otherwise, of the collective proceedings as a pre-condition for collective litigation, based on a set of defined criteria. As opposed to individual litigation, the sworn application does not automatically commence the judicial collective proceedings because inappropriate or weak cases are primarily filtered out. The court then proceeds to issue a decree certifying the proceedings as collective or alternatively dismiss the action altogether. Class members may attempt to institute collective proceedings afresh only if the claims are re-formulated. Certification will not be granted unless, the court: (i) declares the collective proceedings as being the appropriate means for resolving the dispute; (ii) approves the proposed class representative and (iii) is satisfied that the claims fall within the purview of those specifically allowed in terms of the CP Act.

The class members' claims must have 'common issues' which are defined in the CP Act as being issues of fact or law that are common, but not necessarily identical, among all the class members. This definition provides a flexible tool

for the courts when assessing the common aspect of the claims, suggesting that certification will be granted provided the plaintiff's claim typifies the claim of the class members. Notwithstanding, the CP Act envisages the possibility that 'individual issues' emanating from differing factual scenarios between class members may arise. Such 'individual issues' would require individual determination after the common issues pertaining to a class or a sub-class are heard collectively and resolved respectively.

Participation in collective proceedings

The mode of participation adopted in the CP Act is 'opt-in' thus requiring class members to actively inform the class representative of their intention to have their claim included in the action. The certification decree should be published as to inform and enable interested third parties to register their claim with the class representative thus join the action. The court has the discretion to determine, on a case-by-case basis, the exact period of time allowed to class members for opting-into the proceedings provided this period does not exceed five months. Notwithstanding the imposed time frame, in exceptional situations, class members are allowed to join the proceedings after the specified date provided the court grants leave for such purpose.

The nature and duty of class representatives

The class representative's role is of paramount importance as the outcome of the action is to a great extent dependent upon his ability. The class representative, whether instituting a group action or a representative action must necessarily satisfy a set of criteria. Primarily the court should be satisfied that such representative will act adequately and fairly in the interests of the class members, and secondly he must not have any material interest that is in conflict with the interests of the class members. A class representative instituting a group action must additionally prove that he has a personal claim that falls within the group of common claims pursued in the collective proceedings.

If pending the collective proceedings, the class representative no longer satisfies the above-mentioned criteria, or is no longer in a position to represent the interests of the class members, the court may order substitution thereof. Alternatively, if substitution does not take place, the court may make any order it considers appropriate, possibly decertifying the collective

proceedings and directing the class members to pursue their claims individually. The duties of the class representative include, inter alia, acting in the best interest of class members, explaining to them the nature of the proceedings and notifying them about the progress of the proceedings such as the delivery of court judgments or decrees that bind the class members in question.

Costs and funding issues

As in ordinary litigation, the CP Act adheres to the traditional 'loser pays' principle as to the allocation of judicial and legal costs. Under this rule the party cast must pay the successful party's costs, thus serving as a deterrent to abusive claims. However, the legislator departs from the general rule that expenses follow success by exempting registered consumer associations from paying the ordinary court registry fees upon the filing of collective proceedings. In terms of the CP Act, third party funding and contingency fees are prohibited as these funding mechanisms promote spurious litigation by encouraging plaintiffs to bring forward their claim on the basis of having adequate financial support to do so. The CP Act does provide for the possibility of an arrangement being made whereby the class members undertake to contribute towards the expenses incurred by the representative, pursuant to the collective proceedings agreement thus reducing the financial risk undertaken by the class representative under the 'loser pays' rule.

Conclusions

The enactment of the CP Act has sparked fervent reactions notably among legal practitioners and the judiciary, as to whether it will effectively achieve its stated aims, particularly judicial efficiency. However, such determination can only be made once this procedural mechanism is put to the test before Maltese courts. The latter may struggle in implementing this legal instrument as the CP Act leaves a number of fundamental issues, such as prescription, juridical interest and the calculation of damages, unaddressed.